

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In re)
)
NORRIS SATELLITE COMMUNICATIONS, INC.)
)
Authorization to Construct, Launch)
and Operate Satellites in the Ka-Band)
To: The Commission)

File No. 54-DSS-P/L-90
File No. 54-DSS-P-90

MAY 28 1996
60/61-SAT-NAISC-96
62-SAT-MPL-96
63-SAT-MP-96

SUPPLEMENT TO
APPLICATION FOR REVIEW

Norris Satellite Communications, Inc. ("Norris"), by counsel, hereby supplements its pending Application for Review ("Application"), filed April 15, 1996, seeking reinstatement of the above-referenced Ka-band satellite authorization.¹ As demonstrated herein, this Supplement discusses the relevance of new and important facts critical to the Commission's consideration of the Application, which facts were not present when Norris filed its pleading.²

On May 8, 1996, the United States Court of Appeals for the District of Columbia Circuit issued its Judgment and accompanying Memorandum in Advanced Communications Corporation v. FCC, No. 95-1551 (May 8, 1996) ("Advanced"). Therein, the Court affirmed the

¹ The Application seeks review of the International Bureau's action in Norris Satellite Communications, Inc., DA 96-363 (released March 14, 1996) ("Norris Order"). The Norris Order acted on Norris' February 16, 1996 filings captioned as: (a) Response to Request for Information and Contingent Request for Waiver; and (b) Request for Extension of Time (collectively, the "Requests").

² Concurrently herewith, Norris is filing a separate request for waiver to file this Supplement.

1551 (May 8, 1996) ("Advanced"). Therein, the Court affirmed the Commission's holding that Advanced, a DBS permittee, had not satisfied its post-grant "due diligence" obligations and that, accordingly, Advanced's permit should be deemed null and void.³

The Court's decision illustrates several significant legal and factual distinctions between Advanced and the Norris case. First, the Court acknowledged that DBS permittees must comply with a two-pronged "due diligence" test following grant of a permit. Under this standard, a DBS permittee must demonstrate "concrete progress toward the construction and operation of a DBS system." Id. at p.5. By contrast, Norris had only to show that it had executed a "non-contingent" construction contract. See Norris Order at p.2.

Second, as an important factual distinction, the Commission already had granted Advanced a four-year extension of time to construct and launch its DBS satellite. In the instant case, Norris has only been granted a brief, six-month extension of time based on regulatory delays and uncertainty associated with its use of the Ka-band spectrum. See Application at p.5. Notwithstanding this disparity, the Bureau nonetheless cancelled Norris' authorization, an action that is patently arbitrary, capricious and unfair.

Third, despite the extra construction time afforded Advanced, Advanced did not demonstrate the required "concrete progress." The Court found that:

³ See Advanced Communications Corporation, FCC 95-428 (released October 18, 1995).

[t]he only efforts to develop a DBS system during the first extension period that appellants were able to cite were [Advanced's] failed negotiations with EchoStar and its successful negotiation of the [Capacity Purchase Agreement ("CPA")]. . . . It is readily apparent that [Advanced's] only real contribution to the CPA was its DBS permit and that it would have a trivial involvement, if any at all, with the resulting system.

Advanced at p.5. Here, as demonstrated in Norris' Application, Norris has executed construction contracts with each of Harris Corp., Motorola, Inc. and Orbital Sciences Corporation, completed design of subsystems and subscriber terminals, performed market demand studies and developed antenna specifications, among other things. See Application at pp.4-8.⁴ Moreover, in the four years since the Commission granted Norris its permit, Norris has attempted to raise financing sufficient to complete system construction and launch its satellite system. Id. Further, unlike Advanced and its relationship with TCI, Norris has not "signed away" its transponder capacity rights. Clearly, Norris' activities demonstrate that: (1) substantial construction progress was made (even before the grant of the first six-month extension); (2) Norris is not "warehousing" spectrum; and (3) Norris has retained control over use of satellite capacity. No doubt, these facts manifest substantially more than "trivial involvement," as was the case in Advanced.

Fourth, Advanced was one of several DBS permittees authorized

⁴ Norris' Application demonstrated the factual similarities with Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993), recon. den., FCC 95-421 (Oct. 5, 1995), a case the Court distinguished. See Advanced at p.6.

by the Commission.⁵ By contrast, Norris is the first-ever (and only) Ka-band permittee. As such, there are strong public interest reasons for grant of a further extension of time to complete construction and launch Norris' satellite system. Id. at p.22.

Finally, the Court rejected Advanced's claim that the Commission was improperly motivated by the expectation that it would derive substantial revenue from auctioning Advanced's orbital slot. According to the Court, there was no evidence in the record of the Commission's "alleged illicit motivation." Advanced at p.9. Without commenting on the circumstances of Advanced, the orbital location granted to Norris is not at this time an approved slot for allocation by the FCC.⁶ Hence, the Commission cannot auction Norris' orbital location without undoing the entire international orbital location scheme adopted by ITU. For all intents and purposes, Norris' slot is not available for re-assignment.

⁵ DirectTV, United States Satellite Broadcasting Co., Primestar, EchoStar and AphaStar currently are offering DBS service.

⁶ Norris was authorized at 90° W.L. At the 1995 World Radio Conference, the International Telecommunications Union ("ITU") allocated 89° W.L. and 91° W.L. to the United States. Norris' authorized location was not allocated to the U.S. It is generally believed that a minimum of 2° spacing is required between each orbital location in order to avoid unacceptable interference. See Norris Satellite Communications, Inc., 7 FCC Rcd 4289 (1992). Cf. Order, DA 96-708 (rel. May 6, 1996) (approving 1° spacing for specific proposal).

WHEREFORE, in view of the foregoing, Norris Satellite Communications, Inc. respectfully requests reinstatement of its above-captioned authorization and an extension of time to construct its satellite system, as described in its Requests and Application.

Respectfully submitted,

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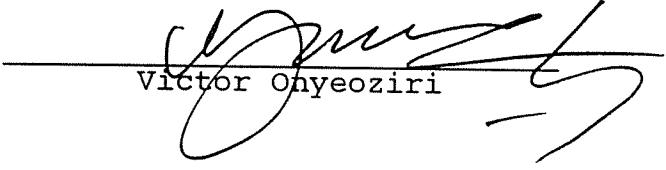
CERTIFICATE OF SERVICE

I, Victor Onyeoziri, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Supplement To Application For Review" was served on the below-listed parties by hand delivery this 23rd day of May, 1996.

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