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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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~~⁵⁵-DSS-P-90

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APPLICATION FOR REVIEW

Satellite Policy Branch
International Bureau

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April 15, 1996

Summary

In this Application for Review, Norris Satellite Communications, Inc. ("Norris") seeks review of the decision of the Chief, International Bureau ("Bureau") cancelling its Ka-band authorization. See Order, DA 96-363, released March 14, 1996 ("Norris Order"). For the reasons described herein, the Commission should reinstate the authorization and grant Norris' request for extension of its construction and launch milestones.

The Bureau's decision is based on an incorrect interpretation of material facts. The Bureau mischaracterized Norris' February 15, 1996 agreement ("OSC Contract") with Orbital Sciences Corporation ("OSC") as a replacement to its earlier contract ("Harris Contract") with Harris Corp. ("Harris"), executed in July, 1993, well in advance of the construction commencement milestone. In fact, the OSC Contract was in addition to the Harris Contract. Harris and OSC will be proceeding in tandem to complete construction of the payload and bus necessary for the satellite system.

Properly construed, both factually and consistent with Commission precedent, the Harris Contract is a "non-contingent" contract and thus demonstrates compliance with the construction commencement milestone. The Harris Contract sets forth specific payment terms and construction timetables, and describes in detail the payload and related components Harris is obligated to construct or subcontract. Norris has made a substantial down payment, and Harris has proceeded with its activities under the Harris Contract. Under Commission precedent, the Harris Contract constitutes a non-

contingent construction contract.

If the Commission somehow arrives at a contrary conclusion, it should grant Norris' request for waiver of the milestone schedule. Here again, the Bureau's denial of the waiver request is premised on a mistaken factual belief, namely, that Section 316 of the Communications Act of 1934, as amended, affords Norris protection from regulatory changes. Since receiving its authorization in 1992, Norris has faced the possibility that spectrum allocation and technical standards under consideration in rule making proceedings will undermine or, perhaps, render useless its authorization. The Commission has the discretion to modify existing licenses, a risk that is unusually prevalent in light of rule making proceedings that go to the heart of Norris' authorization. In these circumstances, it is understandable why Norris has been unable to finalize system construction, has faced difficulties in securing financial commitments and has been unwilling to take unnecessary risks that it will lose substantially more of its capital commitment.

Further, upholding the Bureau's decision would contravene Commission policies designed to encourage innovation. Norris has launched a new generation of satellites, the Ka-band. For the Commission to strip Norris of its authorization would have a chilling effect on innovation, investment and competition, policies that surely are contrary to the public interest.

Upon reinstatement, the Commission should, consistent with precedent, grant Norris' request for extension of the construction milestones.

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To: The Commission

APPLICATION FOR REVIEW

Norris Satellite Communications, Inc. ("Norris"), by counsel and pursuant to Section 1.115 of the Commission's Rules, hereby seeks review of the Order of the Chief, International Bureau ("Bureau") in Norris Satellite Communications, Inc., DA 96-363, released March 14, 1996 ("Norris Order"), deeming null and void Norris' authorization to construct, launch and operate a satellite communications service in the Ka-band, denying Norris' contingent request for waiver of its milestone schedule and dismissing as moot its request for extension of time to construct and launch.¹ As demonstrated herein, the Bureau erroneously determined that Norris did not have a non-contingent contract for constructing its satellites and thus incorrectly held that Norris did not satisfy its construction commencement milestone. Further, to the extent

¹ Section 1.115 permits Norris to file an Application for Review of the Norris Order within 30 days of its release. The deadline for filing an Application for Review of the Norris Order falls on Saturday April 13, 1996. Section 1.4 extends the deadline until the next business day, April 15, 1996. Thus, this Application for Review is timely filed.

that Norris may not have met its milestones, its requests for waiver thereof and for an extension of time to complete construction and launch demonstrated that regulatory delays beyond Norris' control comprise the basis for any such non-compliance, and the Bureau's denial of the waiver request and the extension request constituted reversible error.² In support thereof, the following is respectfully shown:

I. QUESTIONS PRESENTED FOR REVIEW

Pursuant to Section 1.115(b), the following questions are presented for review by the Commission:

- A. Whether the Bureau Made Erroneous Findings of Important or Material Questions of Fact in Deeming Norris' Authorization Null and Void and Dismissing Its Waiver and Extension Requests.
- B. Whether the Bureau's Actions Violated Established Commission Precedent or Policy, or Alternatively, Whether the Commission's Actions Involve a Commission Precedent or Policy Which Should be Overturned.

II. INTRODUCTION

A. The Norris Authorization.

On July 16, 1990, Norris filed its application to construct,

² In the Norris Order, the Bureau was acting on Norris' Response to Request for Information and Contingent Request for Waiver ("Response") and its Request for Extension of Time ("Extension Request"), both of which were filed with the Commission on February 16, 1996. Statements of fact and documents referred to herein are discussed and included in those filings, and are hereby incorporated herein by reference.

launch and operate the first domestic satellite service in the Ka-band. Norris proposed to provide video distribution, high-speed data networking and governmental services. The application proposed to construct two satellites (NorStar I and NorStar II), launch and operate NorStar I and retain Norstar II as a ground spare.

On July 7, 1992, the Commission granted Norris an authorization to construct, launch and operate NorStar I, and construct NorStar II as a ground spare. See Norris Satellite Communications, Inc., 7 FCC Rcd 4289 (1992), recon. denied, 9 FCC Rcd 7370 (1993) ("NorSat I"). The Commission authorized Norris to operate its satellite downlinks in the 20/30 GHz frequency bands and ordered Norris to meet certain milestones prior to launching NorStar I.³ Norris filed a petition for reconsideration of NorSat I with regard to its request for an additional 200 MHz of spectrum.

On July 2, 1993, while the petition for reconsideration was pending before the Commission, Norstar I Corporation ("Norstar")⁴

³ NorSat I established the following milestone schedule:

| | <u>Construction Commenced</u> | <u>Construction Completed</u> | <u>Launch</u> |
|------------|-----------------------------------|-----------------------------------|---------------|
| NorStar I | July 1993 | September 1996 | January 1997 |
| NorStar II | July 1994 | September 1997 | --- |

This schedule was subsequently modified. See note 7, infra.

⁴ Norstar is an affiliate of Norris, and is authorized to enter into agreements for the benefit of Norris. Both Norris and Norstar are controlled by John Norris.

entered into a Purchase Contract with Harris Corporation ("Harris Contract") under which Harris agreed to design, develop and construct the payload and related hardware.⁵ Norstar and Harris subsequently amended the contract to require the down payment to be paid in two installments. Upon receipt of the first installment of \$200,000, Harris commenced fulfilling its contractual obligations to Norris, to-wit:

- ▶ construct the satellite communications payload consisting of a transaction processing subsystem and direct broadcast television communications subsystem;
- ▶ conduct analyses and trade studies to address cost/affordability, productivity and reliability;
- ▶ develop system specifications for the payload;
- ▶ develop and implement configuration management plan, integration plan and test plan;
- ▶ design and analyze the payload; and
- ▶ subcontract any necessary work.

Consistent with these obligations, Harris began constructing Norstar I and Norstar II. See Exhibit 4 to the Response.

On July 20, 1993, the Commission denied Norris' petition for reconsideration for the additional 200 MHz of spectrum. See Norris Satellite Communications, Inc., 9 FCC Rcd 7370 (1993) ("NorSat II"). The Commission concluded that Norris' proposal would conflict with a request to allocate spectrum for local multipoint distribution service ("LMDS") and that its request would be

⁵ See Article II of the Harris Contract, attached as Exhibit 8 to the Response.

considered in the ongoing 28 GHz proceeding. Id. at 7371.⁶

On November 5, 1993, Norris requested an extension of the milestone schedule because circumstances beyond its control had compromised its efforts to further construction of the satellites. As described in the extension request, finalizing construction and securing financial commitments were dependent upon whether the Commission would grant Norris' request for an additional 200 MHz of spectrum and resolution of the pending rule making proceeding for the Ka-band. The Commission granted Norris' extension request, acknowledging Norris' status as the first and only licensee in the Ka-band and noting that an extension would further the Commission's policies of promoting the use of new frequency bands by commercial satellite venturers.⁷

From November, 1993 through May, 1994, Harris assisted with market analyses, briefings to potential investors and further

⁶ The Commission also denied Norris' request because according to the Commission, Norris did not clearly articulate and justify its need for the additional spectrum. However, the Commission specifically stated that Norris' request for the additional spectrum would be considered in the ongoing 28 GHz proceeding. See Rule Making to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 9 FCC Rcd 1394, n.5 (1994) ("Second NPRM"). See Section II.B, infra.

⁷ The Commission revised the milestone schedule as follows:

| | <u>Construction Commenced</u> | <u>Construction Completed</u> | <u>Launch</u> |
|------------|-----------------------------------|-----------------------------------|---------------|
| NorStar I | June 1994 | March 1997 | July 1997 |
| NorStar II | January 1995 | March 1998 | --- |

technical efforts in payload definition. By June, 1994, Harris' efforts towards continuing construction of the satellites, developing antenna requirements, completing antenna trade studies and concept designs, updating the system requirements for the payload and providing other concept design and technical support series were well underway.⁸ See Exhibit 4 to the Response.

On July 12, 1994, Norris entered into a contract with Motorola, Inc. ("Motorola Contract") under which Motorola would provide services supplemental to Harris' construction services. See Exhibit 14 to the Response. Motorola was responsible for designing the ground system requirements, including refining the ground terminal requirements to comport with the technical requirements of NASA's ACTS terminal development and validating the total system specifications. Norris made an initial payment of \$100,000 to Motorola for such services. The Harris Contract remained in effect and Harris continued to construct the satellite system, with Motorola as its construction partner.⁹

On February 15, 1996, Norris and Orbital Sciences Corporation ("OSC") entered into a Spacecraft and Associated Services Purchase Agreement ("OSC Agreement") under which OSC agreed to construct and

⁸ The Harris Contract was amended on June 21, 1994 to modify the payment terms. As stated in Exhibit 4 to the Response, Harris has not insisted that Norris make the second installment payment because of "the difficulties associated with securing financing." Harris has continued to work under the Harris Contract.

⁹ The Motorola Contract remained in force until December 31, 1995.

develop the satellite bus.¹⁰ Contrary to the Bureau's conclusion in the Norris Order, the OSC Agreement did not supersede the Harris Contract. Rather, Harris continues to remain obligated under the Harris Contract to complete construction of the payload and related hardware, and is continuing its construction efforts. Harris has completed the payload design, which is intended to provide a 20-beam system in order to accommodate maximum capacity for the various bandwidth-on-demand users, and has further designed the subsystems to provide ATM-like interfaces and services. Harris also has completed design work on the user/subscriber ground terminals, and has coordinated with manufacturers to ensure that the receivers can be mass produced. Harris also coordinated with component suppliers for the payload to ensure that the design and performance of the components are acceptable. See Exhibit 4 to the Response.

Norris' financial commitment to constructing its satellite system exceeds \$3,810,000. Norris itself has expended approximately \$1,225,000 and has incurred additional potential obligations of approximately \$1,600,000.

On February 16, 1996, in response to the Bureau's request for information, Norris filed its Response and therein provided a detailed description of its construction activities and demonstrated compliance with the revised milestone schedule.

¹⁰ See Article 3 to the OSC Contract, attached as Exhibit 18 to the Response.

Norris also filed the Extension Request seeking additional time to construct and launch its satellite system. Both the Response and the Extension Request were unopposed. In the Norris Order, the Bureau held that Norris had not satisfied its milestones, denied Norris' waiver request and dismissed as moot the Extension Request.

B. The 28 GHz Rule Making Proceedings.

Over the last six years, two significant FCC proceedings have directly and adversely affected Norris' ability to complete its satellite system. First, on the same day that Norris filed its Ka-band application, Norris also filed a petition for rule making with the Commission, requesting that the 20/30 GHz bands be reallocated for a General Satellite Service ("GSS") that would include fixed, mobile and broadcast applications. Norris proposed that GSS share the 20/30 GHz bands with Fixed Satellite Service ("FSS") on a primary basis. On September 4, 1992, the Commission issued a Notice of Proposed Rule Making in response to Norris' petition.¹¹ That rule making proceeding remains pending before the Commission.

Second, on January 11, 1993, just seven months after granting Norris' authorization, the Commission released a Notice of Proposed Rule Making in which the Commission proposed to segment the 28 GHz

¹¹ See Amendment of Section 2.106 of the Commission's Rules to Upgrade to Primary Status the Secondary Mobile-Satellite Service Allocation at 19.7-20.2 GHz and 29.5-30.0 GHz, 7 FCC Rcd 5626 (1992) ("20/30 GHz Proceeding").

band to include LMDS.¹² The Commission proposed to allocate two blocks of 1000 MHz each for LMDS to be co-primary with FSS uplinks. The comments filed in this proceeding did not reflect a consensus among the satellite, feeder link and LMDS interests. As is the case with the 20/30 GHz Proceeding, this rule making also is unresolved.

III. DISCUSSION

A. The Bureau Made Erroneous Factual Determinations.

1. The Bureau Erroneously Determined That Norris' Construction Agreements Were Not "Non-Contingent".

In deeming Norris' authorization null and void, the Bureau premised its decision on the erroneous conclusion that the Harris Contract was a contingent contract. See Norris Order at p.2. Specifically, the Bureau found that the subsequent modification of the Harris Contract to defer certain payments, Norris' selection of OSC as "a different satellite manufacturer" and that "only preliminary developmental work" had commenced rendered the Harris Contract "contingent." Id. As will be shown, however, the deferral of payments did not alter Harris' obligations, the selection of OSC

¹² Rule Making to Amend Part 1 and Part 21 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band and to Establish Rules and Policies for Local Multipoint Distribution Service, 8 FCC Rcd 557 (1993) ("First NPRM"). On February 14, 1994, the Commission released the Second NPRM. On July 28, 1995, the Commission released its Third Notice of Proposed Rule Making and Supplemental Tentative Decision, FCC 95-287, released July 28, 1995 ("Third NPRM").

supplemented the Harris Contract and did not, as the Bureau stated, replace that agreement, and Harris' developmental and construction efforts were much more than preliminary (to the extent such efforts are even required under the Commission's standard). Properly and accurately considered, Norris had a "non-contingent" contract in place in July, 1993 and construction commenced thereunder. Norris has thus fully satisfied its construction commencement milestone.

Commission precedent has consistently held that the execution of a "non-contingent" construction contract fulfills the construction commencement milestone¹³ for satellite licensees.¹⁴ An executed construction agreement generally qualifies as a non-contingent contract where:

- ▶ there is an executed contract that contains no unresolved contingencies that could preclude substantial construction of the satellites;
- ▶ specific satellites and their design characteristics have been identified; and

¹³ The milestone schedule, which is included in the authorization of every space station, is designed to ensure that Commission licensees are proceeding with the implementation of their systems. See GE American Communications, Inc., 7 FCC Rcd 5169, 5170 (Com. Car. Bur. 1992).

¹⁴ See AMSC Subsidiary Corporation, 8 FCC Rcd 4040, 4042 n.27 (1993) ("AMSC"); See also Letter from Chief, Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990); Letter from Chief, Domestic Facilities Division to Alascom, Inc. and National Exchange Satellite, Inc. (Feb. 16, 1990); and Letter from Chief, Domestic Facilities Division to Ford Aerospace Satellite Services Corp. and Satellite Transponder Leasing Corp. (Jan. 21, 1987).

- ▶ payment terms and schedules are described sufficiently to demonstrate the parties' investment/commitment to completion of the system.¹⁵

Further, the contract must include regular specific construction progress milestones in the construction timetable and payment schedules with sufficient specificity for the Commission to determine that the permittee is making a financial commitment to the construction of the satellite and that the milestones listed for the early stages of construction constitute meaningful progress.¹⁶

Applying this standard, it is clear that the Harris Contract is a non-contingent contract. Both Norris and Harris executed the Harris Contract and the subsequent amendment. The Harris Contract requires Harris to construct a payload consisting of communications subsystems and bandwidth-on-demand, which is designed to operate with 20 spot beams. Harris must comply with specific technical requirements in constructing the payload.¹⁷ The Harris Contract

¹⁵ See Dominion Video Satellite, Inc., 10 FCC Rcd 10840 (1995); Tempo Enterprises, 1 FCC Rcd 20, 21 (1986). Tempo Satellite, Inc., 7 FCC Rcd 6597, 6600 (1992); Echostar Satellite Corp., 70 RR2d 1160, 1164 (1992); Advanced Communications Corp., 6 FCC Rcd 2269, 2271 (1991), recon. denied, 6 FCC Rcd 6977; United States Satellite Broadcasting Company, 5 FCC Rcd 7576 (1990); United States Satellite Broadcasting Company, Inc., 3 FCC Rcd 6858, 6862 n.20 (1988).

¹⁶ United States Satellite Broadcasting, 3 FCC Rcd at 6861-62 (1988).

¹⁷ Harris must satisfy the technical requirements specified in the following protocols: (1) SPEC-#TBD Norstar I Communications Payload Technical Requirements Document; (2) MIL-STD-1521B Technical Reviews and Audits for Systems; (3) MIL-STD-1367

specifies the feeder frequencies, spectrum, bandwidth and orbital location for the satellites, describes the payment amounts and terms and establishes a construction and delivery schedule along with periodic progress reports.¹⁸ Similarly, the Motorola Contract describes the scope of Motorola's responsibilities and sets forth specific payment terms.

The OSC Contract supplements the Harris Contract by specifying services related to the construction of the satellite bus. Both Norris and OSC have executed the OSC Contract. Pursuant to the terms of the OSC Contract, OSC is required to construct two satellite buses for Norris. The OSC Contract establishes a payment schedule with approximately 65 percent of the payments required to be made within one year of execution. The OSC Contract requires OSC to work with Harris in its role as designer of the communications payload, thereby specifically acknowledging Harris' continuing role in the process.

In Dominion Video Satellite, Inc., 10 FCC Rcd 10840 (1995), the Commission reinstated a construction permit for a DBS system initially granted in 1982, even though the permittee allowed its construction contract to lapse for more than four years. After

Packaging, Handling, Storage and Transportability; and (4) MIL-STD-882B and MIL-STD-1574.

¹⁸ For example, Harris is required to conduct Systems Requirements Review, Preliminary Design Review, Critical Design Review, Final Design Review, Mission and Launch Readiness Reviews and conduct regular meetings of the Technical Interexchange Working Group.

receiving its DBS authorization, Dominion Video terminated its initial construction contract and claimed to have entered into a new contract with a different vendor. However, Dominion Video failed to provide the Commission with an executed, non-contingent construction contract. Accordingly, the Commission cancelled Dominion Video's authorization.

On reconsideration, the Commission reinstated Dominion Video's authorization, holding that the initial executed contract, along with a down payment of \$250,000, rendered that contract non-contingent and thus compliant with the construction commencement milestone, notwithstanding the subsequent termination of the contract. The Commission cited with approval the initial payments made by Dominion Video to the contractor, a construction schedule with specific target dates and a payment schedule.

Applying this standard, Norris has, a fortiori, satisfied the milestone schedule. Unlike Dominion Video, which permitted its construction contract to lapse for more than four years, Norris executed non-contingent construction contracts with Harris and Motorola and made appropriate down payments prior to the construction commencement milestone. Moreover, unlike Dominion Video, which terminated its agreement without having a replacement, the Harris Contract has remained in full force and effect, with Motorola and OSC subsequently joining as construction partners.

The Bureau made an erroneous factual determination that the Harris Contract was contingent. To the contrary, as shown in the

Response and herein, the Harris Contract satisfies the Commission's standards for non-contingent contracts. Both parties executed the contract, payment and construction schedules were established, payments were made under the contract, and specific satellite design was completed. Consequently, and contrary to the Bureau's factual findings, the Harris Contract is non-contingent, Norris timely commenced construction, and the Norris Order must be overturned.

2. **Assuming Arguendo that Norris Did Not Satisfy Its Milestone Schedule, the Bureau Erroneously Determined That Regulatory Delays Do Not Justify Granting Norris' Waiver Request.**

Assuming arguendo that Norris did not satisfy its construction commencement milestone, the Bureau erroneously determined that regulatory delays are not the proper basis for a waiver. The Bureau also erroneously determined that Section 316 of the Communications Act of 1934, as amended (the "Act"), conferred upon Norris certain rights sufficient for Norris to satisfy its milestone schedule. As described in the Response and herein, two pending rule making proceedings involving the Ka-band must be resolved before Norris is able to finalize construction of its system. Commission precedent holds that regulatory uncertainties involving orbital assignments and spectrum allocation provide ample justification for waiver of construction milestones. Moreover, this lack of certainty has rendered Norris' Section 316 rights virtually meaningless.

Norris has described elsewhere the protracted rule making proceedings that have presented Norris with difficulties in furthering its construction efforts.¹⁹ Despite initiation of a rule making proceeding for sharing spectrum in the 28 GHz band, the filing of numerous comments and unsuccessful attempts to negotiate a band segmentation plan, rules have not been adopted for the 28 GHz band. The Commission also has not adopted final technical rules for operation of commercial Ka-band satellites. As set forth in its Response, resolution of technical issues, such as orbital spacing, is required before Norris can finalize its proposed communications satellite service.²⁰

Norris' authorization specifies operation in the 29.5-30.0 GHz portion of the band. As proposed in the Third NPRM, this segment would remain authorized to Ka-band satellite on a "primary" basis. However, as with any Commission proposal, this is not a final resolution, and given the difficulties that the satellite, feeder link and LMDS interests have had over the last several years, is far from being a certainty. Indeed, if the Commission were to allocate a different portion of the 28 GHz band for satellites -- leaving Norris as the only permittee in the 29.5-30.0 GHz band --

¹⁹ See Section II.B., supra.

²⁰ In Exhibit 4 of the Response, Harris described in great detail the effect of these delays on its construction efforts. Notwithstanding this statement and other information set out in the Response and Norris' milestone notices, the Bureau gave such evidence no consideration.

the result would be chaotic for feeder links and LMDS, which must then protect Norris in one portion of the band and the remaining satellite interests in a different portion of the band.

Alternatively, notwithstanding the provisions of Section 316 of the Act, the Commission could, as it has in the past, modify Norris' authorization through notice and comment rule making proceedings. The Commission has authority to promulgate rules of general applicability that may result in modification of licenses through notice and comment rule making proceedings.²¹ For instance, the Commission routinely modifies the authorizations of specific FM radio broadcast stations through notice and comment rule making proceedings over the objections of the license holder.²² In Cellular Service Areas, the Commission modified the licenses of cellular carriers by extending the contours of their cellular geographic service areas. The Commission rejected arguments from potential applicants for unserved areas that it lacked authority to modify existing licenses. Instead, the Commission held that it may modify licenses through rule making proceedings without affording parties an adjudicatory hearing, if the rules are otherwise procedurally and substantially valid.

The wide range of discretionary authority the Commission

²¹ See, e.g., Amendment of Part 22 of the Commission's Rules to Provide For Filing and Processing of Applications for Unserved Areas in the Cellular Service and to Modify Other Cellular Rules, 71 RR 2d 1416, 1418 (1993) ("Cellular Service Areas").

²² See Section 1.420.

enjoys to modify a license without consent of the licensee undercuts the Bureau's cavalier assertion that Section 316 confers upon Norris certain inviolable rights. To the contrary, the pending rule making proceedings to establish technical and sharing rules for commercial satellites operating in the Ka-band creates substantial uncertainty over whether Norris' authorization will be useful or, if so, effective. That uncertainty is especially great here, where the Commission would find it easier to modify the authorization of one party -- Norris -- rather than imposing wholesale changes on feeder links, LMDS and pending Ka-band proposals.

Even assuming Norris' authorization is not rendered obsolete by rules to be adopted in the pending proceedings, the mere pendency of these rule makings prejudices Norris in at least two respects: first, without spectrum allocation and interference rules in place, Norris cannot order system parts and finalize its design to ensure interference-free operation with LMDS and ensure that system performance does not suffer; and second, potential investors are reluctant to commit to financing construction of a satellite system that may be rendered obsolete or require substantial and costly technical modifications. See Exhibits 4 and 5 to the Response.

As the first and only Ka-band satellite licensee, Norris inherently faced (and the Commission acknowledged) the difficulties of being a new entrant in the satellite industry. See NorSat I, 7

FCC Rcd at 4290. Further, the design and construction is extremely costly and, because of the necessity to integrate the bus, payload, ground system and other subsystem components, cannot be funded piecemeal without unnecessarily risking the loss of time and money to retrofit these elements. When these factors are combined with the slow pace of the spectrum allocation process, it is clear that raising substantial capital and finalizing system design becomes impossible.

In Advanced Communications Corporation, FCC 95-428, released October 18, 1995 ("Advanced"), the Commission stated that:

We recognize that a DBS permittee could encounter significant difficulty in proceeding with the construction of its system prior to receiving its specific orbital/channel assignments. Such information enables satellite contractors to order parts that are available only on several months' notice, complete satellite designs, and begin construction based on a particular satellite configuration. Until a permittee receives its orbital/channel assignments, there is a practical limitation on the progress it can make toward construction of its satellites. Moreover, a permittee without specific assignments is in no position to negotiate with other permittees for joint or coordinated development of their systems. Thus, we draw a distinction between the progress we expect from permittees who have received orbital/channel assignments and those who are awaiting such assignments.

Id. at 23 (footnote omitted) (emphases added).

Similarly, in Dominion Video the Commission did not view suspension of a construction contract as rendering the contract as contingent. The Commission held that, pending assignment of

orbital locations, the contractor could not complete payload design or procure long lead items. See Dominion Video at 10481.

This rationale applies with equal force to Norris. Although Norris has received its orbital and channel assignments and has made substantial progress in system planning and design, the uncertainty over whether its channel assignments will remain or be useful once the spectrum allocation and interference issues are resolved and renders its authorization functionally useless. Moreover, Norris is in no position to coordinate with other users in entirely different services, such as LMDS, a situation identified by Norris as an obstacle in its November, 1993 extension request. Norris has indeed "encounter[ed] significant difficulty in proceeding with the construction of its system" which, as the Commission acknowledged, is a necessary predicate to ordering parts and completing design and construction.

In sum, the delays and uncertainties attendant to the FCC's consideration of spectrum allocation and interference issues -- events beyond Norris' control -- have compromised Norris' ability to finalize design and construction plans. Without final plans, construction activities cannot realistically be completed. The provisions of Section 316 of the Act offer no assurances to Norris that subsequent actions in adopting final rules in the pending proceeding will not render useless its efforts and prior commitments of time and human and capital resources. Indeed, it may even be easier for the Commission to adopt rules nullifying

Norris' efforts to date than disrupt the balance it hopes to create in accommodating satellite, feeder link and LMDS interests. In these circumstances, to the extent necessary, waiver of any past non-compliance with the milestone schedule is more than justified.

3. **The Bureau Improperly Characterizes
Norris' Contingent Waiver Request as Untimely.**

Norris voluntarily submitted regular reports to the Commission describing its progress in constructing its satellites during 1993 and 1994.²³ Although the Commission requested supplemental information in response to the first report submitted by Norris, the Commission gave no indication that it believed Norris had failed to meet the milestone schedule. More importantly, the Commission did not make any further requests regarding subsequent reports filed by Norris during 1993 and 1994. The Commission's request of December 11, 1995 that Norris provide further information concerning its compliance with the milestones was the first time Norris had any reason to believe that the Commission might question whether it is in compliance with its milestone schedule. Submission of the contingent waiver request on February 16, 1996 was in direct response to the Commission's request. It is disingenuous for the Bureau to now cast the waiver request as untimely, when its own actions prior to December, 1995 reasonably suggested that Norris was in compliance with the milestones.

²³ Norris filed progress reports on July 2, 1993; November 5, 1993; June 28, 1994; and July 28, 1994.

B. Circumstances Beyond Norris' Control Warrant Extension of the Milestone Schedule.

In the Norris Order, the Bureau dismissed as moot Norris' Extension Request. Upon reinstatement of its authorization, the Commission should grant the Extension Request. The Commission has granted extensions of milestone schedules where, as here, delays are caused by circumstances beyond the applicant's control.²⁴ In granting such requests, the Commission considers the totality of the circumstances, including efforts made to timely construct, difficulties encountered and those overcome, the rights of all parties and the ultimate goal of providing service to the public.²⁵ Norris submits that it has satisfied these standards.

Grant of the requested 18-month extension would be consistent with Commission precedent. In Dominion Video, the Commission granted Dominion Video an extension of four years to construct its DBS system, holding that regulatory changes in assigning orbital channels for DBS alone were sufficient to warrant granting Dominion Video's extension request. Dominion Video, 8 FCC Rcd at 6687, 6688.²⁶

Norris' efforts to provide commercial satellite service in the

²⁴ See Direct Broadcasting Satellite Corporation, DA 95-2439, released December 8, 1995; GE American, 7 FCC Rcd at 5170.

²⁵ See Dominion Video, 8 FCC Rcd at 6688; United States Satellite Broadcasting, 3 FCC Rcd at 6861.

²⁶ The Commission also cited with approval Dominion Video's efforts to complete contracting for construction of its satellites, efforts to develop a financing plan and its undertaking of a marketing plan, facts of which are in evidence here. See Dominion Video, 8 FCC Rcd at 6689; Exhibits 4 and 5 to the Response.

Ka-band far exceed those undertaken by Dominion Video. Norris filed the first petition for rule making and the first application proposing to provide commercial satellite service in the Ka-band. Norris has contracted with Harris and OSC to construct its satellites, formalized plans for marketing of service and satellite design and implementation and expended substantial sums of money to develop its satellite system. Events beyond Norris' control, namely the uncertainty surrounding final rules for technical operations of satellites in the Ka-band and the 28 GHz proceeding for spectrum for GSS satellites, have delayed its progress. The circumstances underlying Norris' Extension Request represent a clearer case for grant of a milestone extension than was so in Dominion Video.

C. The Bureau's Cancellation of Norris' Authorization Should Be Overturned in View of Overriding Public Interest Concerns.

Pursuant to Section 1.115(b), an application for review can be granted if the underlying decision reflects a policy that should be changed in light of overriding interest concerns. This is such a case.

Norris' status as the pioneer of commercial satellite service in the Ka-band and the first potential provider of that service are overriding concerns warranting reinstatement of its authorization. Norris was in 1992 and is in 1996 the one and only Ka-band licensee. Inherent in the status of any pioneering licensee is the increased likelihood of design and construction snags, regulatory changes, rapid improvement in technology and the need to educate

and overcome the objections of potential financing sources. These burdens, all of which Norris has encountered, sufficiently distinguish an industry pioneer like Norris from a mere "new entrant" in an existing industry. In such circumstances, the Commission has traditionally been more willing to grant extensions as an incentive to other innovators that may well develop the next generation of communications technology. Holding industry pioneers to the rigid standards only serves to chill innovation, investment and, ultimately, competition.

Moreover, failure to extend the milestones would be patently unfair because it would penalize a permittee that has diligently and in good faith sought to comply with the requirements of its authorization. As stated above, the added complications brought on by the long and unanticipated delays in resolving spectrum allocation and interference issues were beyond Norris' control and created substantial obstacles to the finalization of design and construction plans. It is patently unfair and an abuse of discretion for the Commission to grant extensions to DBS permittees, but not to Norris -- the first and only Ka-band permittee. Such an arbitrary and capricious change in policy cannot be countenanced.

IV. CONCLUSION

Norris has pioneered the development of commercial satellite service in the Ka-band. Its initiatives have prompted the Commission to initiate rule making proceedings to allot frequencies

for a new generation of commercial satellites as well as resolving necessary technical issues. Despite unanticipated delays in resolution of the technical and sharing issues in the Ka-band, Norris has commenced construction milestone by executing not one but several non-contingent construction contracts and making payments for construction services.

WHEREFORE, for the foregoing reasons, Norris Satellite Communications, Inc. respectfully requests that the Commission reverse the Norris Order, reinstate its authorization and grant the Extension Request.

Respectfully submitted,

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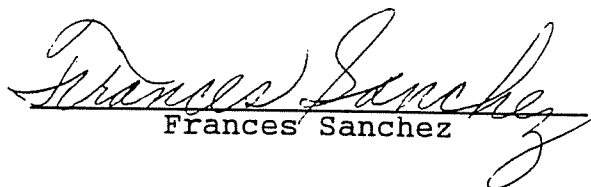
CERTIFICATE OF SERVICE

I, Frances Sanchez, with the law firm of Rini, Coran & Lancellotta, P.C., do hereby certify that the foregoing "Application for Review" was served on the below-listed parties by hand delivery this 15th day of April, 1996.

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