

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

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SEP 15 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:)
)
Norris Satellite Communications, Inc.)
)
Authorization to Construct, Launch and)
Operate Satellites in the Ka-Band)

File Nos. 54-DSS-P/L-90
54-DSS-P-90

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DOMESTIC FACILITIES DIVISION
SATELLITE REGISTRY BRANCH

COMMENTS OF TELEDESIC CORPORATION

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SUMMARY

Teledesic Corporation ("Teledesic"), by its attorneys, hereby comments on the letter, dated July 28, 1994, filed by Norris Satellite Communications, Inc. ("Norris") with the Federal Communication Commission ("FCC or Commission") concerning its compliance with its June 1994 construction commencement milestone deadline. As Teledesic demonstrates herein, the material that Norris filed with the Commission is insufficient to establish its compliance with the June 1994 construction commencement milestone. Additional information from Norris is needed to determine whether Norris has met its first milestone. Additional information also is needed for the FCC to evaluate whether Norris has been less than forthright with the Commission in prior filings addressing its compliance with the milestone requirements.

Norris' present showing is not sufficient for the Commission to determine whether Norris has complied with the June 1994 construction commencement milestone. While Norris has represented on at least three occasions since July 1993 that it has met its first construction milestone, Norris still has failed to supply information adequate to demonstrate that construction has commenced. Before the FCC addresses the question of Norris' **compliance**, Norris should be required to supply additional information. To date, other than unsupported statements regarding the status of construction contracts with Harris Corporation and Motorola, Inc., the only information that Norris has filed with the FCC that is available for public review to support its claim of compliance is a two page amendment to the agreement with Harris Corporation. That amendment is insufficient to demonstrate that construction has commenced under any standard that the Commission decides to employ.

Based on a review of existing publicly available information, it appears that Norris has been less than forthright with the FCC concerning its compliance with its construction commencement milestone. It is not clear from the existing FCC record whether Norris' certifications of compliance with the milestone represent careless behavior, mere puffery, overly aggressive advocacy or a lack of candor.

Accurate and complete representations to the FCC are of critical importance to the FCC's regulatory process. In light of the foregoing, Teledesic believes that there are important issues of material fact and law regarding Norris' conduct before the FCC that must be examined by the Commission. Therefore, the FCC should require Norris to supplement the public record with information sufficient to determine whether Norris has lacked candor in any of its activities before the FCC.

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COMMENTS OF TELEDESIC CORPORATION

I. INTRODUCTION

Teledesic Corporation ("Teledesic"), by its attorneys, hereby comments on the letter, dated July 28, 1994, filed by Norris Satellite Communications, Inc. ("Norris") with the Federal Communication Commission ("FCC or Commission") concerning its compliance with its June 1994 construction commencement milestone deadline.¹ Letter to William F. Caton, Acting Secretary, FCC, from Wayne Hartke (July 28, 1994). As Teledesic will demonstrate below, the information that Norris filed with the Commission is insufficient to establish its compliance with the June 1994 construction commencement milestone. Teledesic also submits that additional information from Norris is needed to determine whether Norris has lacked candor with the Commission in prior filings addressing its compliance with the milestone requirements.

II. BACKGROUND

On July 7, 1992, the Commission granted Norris an authorization to construct, launch and operate a domestic satellite system (consisting of the NorStar I and II satellites) in the 27.5 GHz - 30.0 GHz band ("Ka band") to provide fixed satellite service. Norris Satellite

¹ The letter filed by Norris appeared on FCC Public Notice on August 17, 1994. Public Notice, Report No. D5-1449 (released Aug. 17, 1994).

Communications, Inc., 7 FCC Rcd 4289 (1992) ("Norris Authorization"). The Commission imposes construction milestones on each domestic space station authorization it issues to ensure that satellite permittees/licensees proceed with the construction and launch of their systems in a timely manner. Norris Authorization, 7 FCC Rcd at 4291. See, e.g., GE American Communications, Inc., 7 FCC Rcd 5169, 5170 (1992); National Exchange Satellite, Inc., 7 FCC Rcd 1990, 1991 (1992); Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423, 3424 (1990); MCI Communications Corp., 2 FCC Rcd 233, 233 (1987). In 1992, the Commission established the following construction milestones for Norris to ensure that its domestic satellite system was implemented in a timely manner:

	<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	

At the time that these construction milestones were adopted, the Commission committed to closely monitor Norris' compliance with the milestones and to seek information to ascertain whether the milestones were being met. Norris Authorization, 7 FCC Rcd at 4291 n.20. The Commission made it clear then that the authorization would become null and void if the milestones were not met. Norris Authorization, 7 FCC Rcd at 4292.

On July 7, 1993, Norris filed a "Notice and Submission of Milestone Compliance ("Notice")", accompanied by an agreement with Harris Corporation ("Harris") purporting to be a construction contract for the payload for the NorStar I satellite. In the filing, Norris represented that the agreement with Harris established that Norris was in full compliance with the FCC's July 1993 construction commencement milestone. Notice, at 2. Because the

contract was submitted on a confidential basis, Teledesic and other members of the public were unable to ascertain the accuracy of Norris' representation of compliance with the milestone requirement.

In response to the Norris filing, in a letter dated August 20, 1993, the FCC directed Norris to submit additional information within 30 days to demonstrate its compliance with the construction commencement milestone. Letter to Wayne Hartke from Cecily C. Holiday, Chief, FCC Satellite Radio Branch (August 20, 1993). According to the FCC letter, a failure to respond within the 30 day time period would result in the automatic termination of Norris' fixed satellite service authorization pursuant to Section 25.161(a) of the Commission's rules. 47 C.F.R. §25.161(a) (1993).

On September 23, 1993, more than 30 days after the FCC letter,² Norris filed an amendment to the Harris contract and stated in the filing that the construction contract with Harris was being implemented on September 23, 1993, by the initial payment to Harris of \$200,000. Letter to Cecily C. Holiday, Chief, FCC Satellite Radio Branch, from Wayne Hartke (September 23, 1993). Norris claimed that the initial \$200,000 payment made the construction contract irrevocable and in full force and effect. *Id.* at 1-2. As a result, Norris represented to the FCC in the September 23 submission that "[c]onstruction has begun." *Id.* at 2. Norris also disclosed to the FCC that the agreement with Harris obligated Norris to make a \$2.8 million payment in 45 days and to make periodic payments thereafter. *Id.* at 1. The amendment provided that the date of the receipt of the order under the contract occurred

² Because Norris failed to respond within the thirty day limit established by the FCC and did not seek the required extension within that time period, it appears that the Norris authorization automatically terminated on September 21, 1993.

when the \$2.8 million cash payment was received. Id. at Attachment, Amendment No. 1, Art 1. While claiming it was in compliance with the July 1993 construction commencement milestone, Norris requested a six month extension of time in the event the FCC determined an extension was necessary.³ Id. at 4.

On November 5, 1993, Norris filed with the FCC another pleading styled "Licensee's Statement of Compliance and Request for Extension of Milestone Dates", which included an unconditional request for extension of its milestone dates. Licensee's Statement of Compliance and Request for Extension of Milestone Dates (Nov. 5, 1993). In this filing, Norris abandoned its earlier representation that it had met the Commission's construction commencement milestone and instead requested a six month extension of all milestone dates. Id. at 6, 10. Norris acknowledged for the first time that it had not been able to obtain guaranteed assurances of the financial commitment for the full funding of its first satellite. Id. at 5-6.

On December 10, 1993, in response to Norris' November 5 request, the Commission granted Norris an extension of its construction commencement milestones and established the following new milestones:

	<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	

Letter to Wayne Hartke, from James R. Keegan, Chief, FCC Domestic Facilities Division (December 10, 1993).

³ At that time, Norris also stated that it had not yet contracted for the construction of the bus for NorStar I. To date, Norris has not provided any additional information to the FCC on the status of construction of the bus.

On July 28, 1994, one month after the June 1994 construction commencement deadline, Norris filed a letter with the FCC attempting to establish compliance with the extended milestone. Letter to William F. Caton, Secretary, FCC, from Wayne Hartke (July 28, 1994). In this letter, Norris represented that it had written construction contracts with Harris and Motorola, Inc. ("Motorola"), who were both engaged in active satellite construction activities on its behalf. Id. According to Norris, Harris is proceeding with the construction of NorStar I on a time-line performance which will meet the Commission's requirement that the first satellite be launched by July 1997. Id. Norris states that the written letter contract with Motorola extends until November 15, 1994. Id. Norris indicates that additional written terms with Motorola will be finalized prior to the expiration of the existing written contract. Id. In any event, Norris contends that the launch milestone will be met with or without the participation of Motorola beyond November 1994. Id. Based on the existence of these agreements, Norris represents that it is in compliance with the FCC milestone requirement. Id.

III. ADDITIONAL INFORMATION MUST BE SUBMITTED TO THE FCC BY NORRIS BEFORE THE FCC CAN DETERMINE WHETHER NORRIS HAS MET THE JUNE 1994 CONSTRUCTION MILESTONE

The importance the FCC places on requiring licensees of satellite systems to adhere to construction milestones is well established. Thus, the FCC has stated that:

Requiring licensees to adhere strictly to a milestone schedule based upon the representations in their applications prevents orbital locations from being "warehoused" by licensees who have not yet decided whether to proceed with their plans. Such warehousing would hinder the availability of services and could possibly block entry by other entities willing and able to proceed immediately with construction and launch of satellite systems.

MCI Communications Corp., 2 FCC Rcd 223 (1987). See also National Exchange Satellite, Inc., 7 FCC Rcd 1990, 1991 (1992); Hughes Communications Galaxy, Inc., 5 FCC Rcd 3423, 3424 (1990). Clearly, the general rationale relied on by the FCC to require licensees to strictly adhere to a milestone schedule applies to Norris.

In this case, the FCC has expressly stated its intention to carefully evaluate Norris' compliance with the milestone requirements and to insist on adherence to the requirements. Norris Authorization, 7 FCC Rcd at 4291 n. 20. Warehousing concerns which could block entry by other companies willing and able to proceed with construction and operation of communications facilities using the spectrum authorized to Norris mandate strict adherence by Norris to its milestone deadlines. Since Norris received its authorization, there has been intense demand for Ka band spectrum. Earlier this year, Teledesic filed an application with the FCC for authority to construct, launch and operate a domestic and international satellite system in the Ka band. In addition to Teledesic, Hughes Communications Galaxy, Inc. proposes to operate a domestic and international satellite service system in the Ka band. Motorola and TRW also propose to use a portion of the Ka band for the feeder links of their international mobile satellite service systems. National Aeronautics and Space Administration presently is operating the Advanced Communications Technology Satellite system in a portion of the Ka band. To complicate matters further, the FCC is considering the possible use of the Ka band for the feederlinks of all of the mobile satellite service low earth orbit satellite applicants. It also appears that other domestic and foreign satellite systems may be planned for Ka band operations. Finally, in January of 1993, the FCC proposed to allocate spectrum in the Ka band to a terrestrial microwave service called local multipoint distribution service

("LMDS"), a form of wireless cable. Given conflicting views on whether LMDS and satellite services can coexist in the Ka band, the Commission is in the midst of a negotiated rulemaking proceeding to address technical sharing issues between the LMDS and satellite services. Given the congestion that will exist in the Ka band, and in order to ensure that such scarce spectrum is being utilized to its utmost capacity, Norris should be required to fully demonstrate that it has met its June 1994 milestone requirement.

The present showing is not sufficient for the Commission to determine whether Norris has complied with the June 1994 construction commencement milestone. While Norris has represented on at least three occasions since July 1993 that it has met its first milestone, Norris has failed to supply information adequate to demonstrate that construction has commenced. Before the FCC addresses the question of Norris' compliance, Norris should be required to supply additional information. To date, other than unsupported statements regarding the status of construction contracts with Harris and Motorola, the only information that Norris has filed with the FCC that is available for public review to support its claim that it has met its first milestone is a two page amendment to the agreement with Harris.⁴ That amendment is insufficient to demonstrate that construction has commenced under any definition that the Commission decides to employ.

Applying the standard for evaluating compliance with construction milestones recently derived by certain applicants for nongeostationary systems for the "Above 1 GHz Mobile Satellite Service" ("Big LEO Applicants"), it is clear that Norris has not supplied sufficient

⁴ Apparently the agreement with Motorola is not on file with the FCC and the initial agreement with Harris was filed with the FCC on a confidential basis.

information to establish compliance with its first milestone.⁵ That standard requires that the commencement of construction by a permittee/licensee entails more than the signing of a binding contract with a satellite manufacturer. Settlement Agreement, at 9 n. 2. In order to establish that construction has commenced, the permittee/licensee must include a certification of compliance and specific information on the progress of satellite design, ordering of system parts, and financial expenditures directed toward satellite construction. *Id.* When this standard is applied to Norris, it is clear that the Norris showing is deficient. To date, as stated above, the only support for its representations of compliance with its June 1994 milestone are references to "agreements" with Harris and Motorola purporting to cover some aspects of the construction of NorStar I. Even assuming these confidential documents constitute irrevocable binding construction agreements, they are insufficient to establish compliance with the first milestone.

At a minimum, before the FCC can determine whether Norris has complied with its first milestone, the FCC should require Norris to submit specific information on the progress of its satellite design, ordering of system parts, and financial expenditures directed toward satellite construction. In addition, Norris should be requested to supply documentation from Harris and Motorola certifying that each has initiated construction of the NorStar I satellite. These certifications should specify all activities that form the basis for the certification. Additionally, Norris should be instructed to state whether and to whom a bus contract has

⁵ On September 8, 1994, all but one of the Big LEO applicants entered into a Joint Proposal and Settlement Agreement ("Settlement Agreement") pursuant to which they reached agreement on milestone requirements to govern non-geostationary satellite systems for the Above 1 GHz Mobile Satellite Service. At the same time, the parties to the Settlement Agreement requested the FCC to adopt their approach for establishing compliance with milestone requirements specified in the Settlement Agreement.

been awarded, and the effect of this activity on Norris' ability to meet its future milestone dates. Furthermore, if a contract for the bus has been awarded, the FCC should request Norris to certify that the contractor is constructing the bus described in Norris' FCC application.

Once the supplemental information has been filed with the FCC, the Commission should provide the public with 30 days to comment on the submission before it evaluates whether Norris has met its June 1994 construction commencement milestone. See 47 C.F.R. §25.151(a)(6) and (7). This will ensure that the FCC has a complete record to determine whether Norris has complied with the milestone.

As discussed previously, Norris' contract with Harris was filed on a confidential basis and presently is not available for public inspection. The written agreement between Motorola and Norris apparently was not filed with the FCC. Since Norris relies on both contracts to show that it has met its first milestone, Norris should be required to make both contracts available for public review.⁶ Otherwise, it is not possible for Teledesic and others to ascertain the actual status of the contractual arrangements and Norris' construction activities. Requiring public disclosure of these two documents will ensure that a complete record exists for public comment.

⁶ To the extent that there is a concern that the release of portions of these contracts not relating to commencement of construction will potentially cause competitive harm to Norris, the FCC has the discretion to grant confidentiality to those portions.

IV. EXISTING INFORMATION SUPPLIED BY NORRIS INDICATES THAT AN APPROPRIATE INQUIRY IS WARRANTED TO DETERMINE WHETHER NORRIS HAS ENGAGED IN A PATTERN OF CONDUCT THAT CONSTITUTES A LACK OF CANDOR BEFORE THE FCC

Based on a review of existing publicly available information, it appears that Norris has been less than forthright with the FCC concerning its compliance with its construction commencement milestone. In several filings with the FCC, Norris summarily certified its compliance with its first milestone without providing sufficient detail for the FCC or the public to ascertain its compliance with the milestone. Only after several inquiries from the FCC requesting additional information did Norris belatedly concede that it had not yet met its first construction milestone.⁷ It is not at all clear from the existing FCC record whether Norris' purported certifications of compliance with the FCC's construction milestone represents careless behavior, mere puffery, overly aggressive advocacy or a lack of candor.

A review of Norris' representations with regard to its compliance with the first construction milestone suggests a pattern of conduct reflecting a lack of candor. Several examples illustrate this concern. In its July 7, 1993 certification of compliance with the construction milestone, for example, Norris did not disclose to the Commission that the Harris contract that it was relying on to establish the basis for its certification was not binding because Norris had not provided Harris with any consideration. Only after the Commission's inquiry on August 20, 1993 did Norris implicitly admit this deficiency in a belated response. This is especially troubling given that the public did not have access to the Harris contract and could not independently verify the accuracy of the Norris claim.

⁷ As demonstrated in the preceding section, even the additional information supplied in response to the FCC inquiries is insufficient to establish that Norris has met its first milestone.

This pattern of behavior before the FCC has persisted. Norris represented to the FCC on September 23, 1993 that on that date it made a \$200,000 cash downpayment to Harris. At that time, Norris also stated that the agreement with Harris was irrevocable, in full force and effect, and sufficient to establish its compliance with the FCC's timetable. However, Norris conveniently failed to specifically address the critical question -- whether and to what extent construction had commenced. It appears from the available information that construction could not have been commenced by Harris without at least a \$2.8 million cash payment by Norris. Specifically, the amended Harris contract provides that the receipt of the order date of the contract is the date that the \$2.8 million payment is actually received. Thus, the construction contract could not be placed in "cue" in Harris' manufacturing plant before receipt of the \$2.8 million payment. At the time of the Norris response on September 23, 1993, the \$2.8 million payment had not been made and apparently construction had not commenced because on that date Norris had contracted to make the payment in 45 days.

To date, Norris has never informed the Commission whether the \$2.8 million payment has been made. The status of the \$2.8 million payment is relevant to Norris' subsequent representation on July 28, 1994, of compliance with the construction commencement milestone.

More than one year after Norris began representing its compliance with the construction milestone requirement, Norris still has not described the construction activities it is relying on to certify compliance with the milestone requirements. Such omissions in a vacuum may have no significance. However, such conduct may be relevant when coupled with the omissions previously described. Thus, in Norris' July 28, 1994 letter, Norris states

that it has a current and active construction contract with Harris for the payload but fails to state whether or not construction has commenced under the contract or any other contract. This statement is potentially misleading and the FCC should make an appropriate inquiry to obtain specific information about the status of the Harris contract and payments and construction activities thereunder. Finally, equally mysterious is Norris' failure to provide any details about the short term arrangement through November 1994 it claims to have with Motorola and apparently is relying on to establish its present compliance with the milestone requirement.

Accurate and complete representations to the FCC are of critical importance to the FCC's regulatory process. See 47 U.S.C. § 312(a)(1); 47 C.F.R. § 1.17; see also, Application of KOED, Inc., 5 FCC Rcd 1784 (1990); Application of Nornar Vizcarrado, 4 FCC Rcd 1432 (1989). In light of the foregoing, Teledesic believes that there are important issues of material fact and law regarding Norris' candor with the FCC that should be examined by the Commission. Accordingly, the FCC should require Norris to supplement the public record with information sufficient to determine whether Norris has lacked candor in any of its activities before the FCC.

V. CONCLUSION

For the foregoing reasons, Teledesic respectfully requests the Commission to require Norris to provide, as part of the public record, information documenting that construction has actually begun on the NorStar I satellite as required by the June 1994 construction commencement milestone. The Commission then should provide the public with an

opportunity to comment on whether Norris has complied with its first milestone requirement before addressing the question. The FCC also should require Norris to provide additional information detailing the status of its construction activities from July 1993 to the present so that the Commission and the public have an opportunity to determine whether Norris has been fully candid in its representations to and conduct before the FCC with regard to the status of its compliance with its first milestone.

Respectfully submitted,

TELEDESIC CORPORATION



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September 15, 1994

CERTIFICATE OF SERVICE

I, Dayle Jones, an employee of Akin, Gump, Strauss, Hauer & Feld, L.L.P., certify that copies of the foregoing COMMENTS OF TELEDESIC CORPORATION were sent via Hand Delivery or by First Class U.S. Mail postage pre-paid on this 15th day of September, 1994, to the following parties:


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