

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

AUG 13 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Petition of)
)
)

R/L DBS Company, L.L.C.)
For Extension of the R/L DBS Direct)
Broadcast Satellite Construction Permit)
_____)

File Nos. DBS 87-01,
94-SAT-AL-96, 94-SAT-TC-96
49-SAT-TC-95, 130-SAT-EXT-95

DBS8701 SAT-MOD-19990813-00083
R/L DBS COMPANY, L.L.C.
DBS8701

To: Chief, International Bureau

PETITION FOR EXTENSION OF THE R/L DBS
DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT

Received

AUG 13 1999

Satellite Policy Branch
International Bureau

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Federal Communications Commission
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In re Petition of _____)
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R/L DBS Company, L.L.C.)
For Extension of Time to Complete Construction)
of its Direct Broadcast Satellite)
_____)

File Nos. DBS 87-01,
94-SAT-AL-96, 94-SAT-TC-96
49-SAT-TC-95, 130-SAT-EXT-95

To: Chief, International Bureau

**PETITION FOR EXTENSION OF THE R/L DBS
DIRECT BROADCAST SATELLITE CONSTRUCTION PERMIT**

R/L DBS Company, L.L.C. ("R/L DBS"), a joint venture between Rainbow, the programming subsidiary of Cablevision Systems Corporation,^{1/} and Loral SpaceCom DBS Holdings, Inc., holds a construction permit with respect to eleven direct broadcast satellite ("DBS") frequencies at the 61.5 W.L. orbital slot. R/L DBS' construction permit milestones currently call for the delivery of a satellite to that location by August 15, 1999. For the reasons discussed below, R/L DBS requests an extension of the R/L DBS construction permit for an additional two years, to allow it sufficient time to launch its own satellites or, in the alternative, to pursue a transponder lease and channel use arrangement. This request is supported by R/L DBS' diligent efforts and substantial financial commitment to exploit its permit under very difficult business and other circumstances. Grant of the extension would afford R/L DBS the opportunity to receive the benefit of these efforts, and to complete and launch an innovative,

^{1/} Rainbow DBS Holdings, Inc., a subsidiary of Rainbow Media Holdings, Inc., holds the Rainbow interest in R/L DBS.

competitive package of local and regional programming to the public, taking advantage of recent favorable technological and business developments.

INTRODUCTION AND SUMMARY

R/L DBS' 61.5 degree construction permit was first granted to Continental Satellite Corporation ("Continental") in 1989. Pursuant to an agreement entered into in 1992, Rainbow acquired the option to lease all capacity on Continental's DBS satellites or acquire Continental's DBS authorization. In April 1993, Rainbow exercised the lease option, which led to a series of disputes with various persons holding, or claiming to hold, interests in Continental. These disputes resulted in a challenge at the FCC to the legality of Continental's agreement with Rainbow, in which Continental asked the Commission for a declaratory ruling that the agreement was void. This dispute remained pending until February 1996, when the Commission ruled, without opinion, that implementation of the Rainbow lease agreement without prior Commission approval would constitute an unauthorized transfer of control.

As reflected in the voluminous FCC docket associated with the Continental authorization, from 1993 to 1996, there was a constant stream of disputes over the authorization at the FCC, and in the California and Oregon state courts. In each of these fora, Continental sought to revoke or avoid the effect of its agreement to allow Rainbow to lease capacity or acquire the DBS permit, and to deprive Loral of an ownership interest in Continental. These disputes, and the pendency of the declaratory ruling proceeding at the FCC, created a cloud of uncertainty that made moving forward with the financing and construction of a satellite extremely difficult.

In March 1996, in order to maximize the chances of successfully exploiting the DBS opportunity, Loral and Rainbow formed R/L DBS as a 50/50 limited liability company. At that

time, R/L DBS believed that the bulk of the disputes surrounding Continental and its DBS authorization had been resolved. Rainbow transferred its rights in its Continental agreement, including its option to acquire the Continental DBS permit, to R/L DBS. Pursuant to the Commission's decision that the lease agreement could not be implemented without prior Commission approval, the parties exercised the purchase option and sought FCC approval of assignment of the Continental DBS permit. In May 1997, over the objections of Jim Dixon, a former Continental executive, and DBSI, a company claiming to be a shareholder of Continental, the Commission approved the assignment of the permit to R/L DBS.^{2/}

R/L DBS and its members have spent more than \$30 million in order to develop a DBS business. These expenditures include more than \$14 million in payments in connection with the design and construction of its DBS satellite, which included payments for extensive design work on an innovative satellite using spot beam technology, as well as orders for long lead time parts. R/L DBS also paid out \$15 million for the acquisition by Loral of the shares of Continental capital stock held by certain Continental shareholders and former managers in order to resolve the disputes which had blocked exploitation of the Continental permit prior to 1996. Rainbow and Loral also have devoted considerable effort to develop a business plan to profitably exploit the 61.5 degree frequencies.

R/L DBS and its members have made this substantial financial commitment in the face of competitive developments and business circumstances that have rendered development of a successful business plan with the limited DBS authorization acquired from Continental

^{2/} In Re Application of R/L DBS Company For Assignment of Continental Satellite Corporation's Direct Broadcast Satellite Construction Permit, DA 97-725, Memorandum Opinion and Order (rel. May 14, 1997) ("Transfer Approval Order").

extremely difficult. The consolidation of other DBS frequencies that occurred during the period when Continental's construction permit was bogged down in litigation has resulted in the emergence of two dominant players in the DBS market, DirectTV and Echostar. Each of these entities has substantially greater channel capacity than that afforded by the 11 frequencies held by R/L DBS and much more valuable orbital slots (full-CONUS slots as opposed to R/L DBS' half-CONUS slot), and each is thus able to offer a far greater selection of programming to subscribers. It became apparent that R/L DBS would not be able to compete on a head to head basis with Echostar and DirectTV, but would need to identify a niche in the DBS market not being served by the current DBS providers.

These competitive factors magnified the inherent difficulties associated with exploiting an orbital slot that provides reliable coverage only to the eastern United States. This limited geographic coverage, combined with the relatively small number of channels available to R/L DBS under its authorization, and limitations on the total number of video programming channels that could be provided with available compression technologies, all combined to make it extraordinarily difficult to identify a business plan which could justify the construction and launch of a DBS satellite costing \$250 million or more.

Recently, Rainbow and Loral have identified what they believe to be a viable niche in the market for a compelling slate of local and regional programming channels tailored to individual major markets in the Eastern United States that can be served by using spot beams from the 61.5 degree slot. This business plan, which may also include business television services, is viable today due to recent advancements in spot beam and digital compression technology.

Grant of the requested extension by the Commission would enhance competition and diversity by facilitating the introduction of a third DBS voice in addition to Echostar and

DirectTV, and by encouraging the development of a unique, and innovative, DBS product offering. R/L DBS is uniquely suited to develop this niche, since Rainbow has been a pioneer in developing and bringing successful local regional programming to market and Loral is an established satellite manufacturer.

Alternatively, if the Commission determines that the requested extension to construct a new satellite is not appropriate, R/L DBS should be afforded the opportunity to pursue and finalize a transaction to lease capacity on an existing satellite. R/L DBS has had extensive discussions and negotiations concerning the possibility of such an arrangement, similar to the arrangement the Commission recently approved in Dominion.^{3/} Consummation of such an arrangement would support a waiver of R/L DBS' satellite construction requirements. See id.

R/L DBS is fully committed to using its DBS permit productively and should be afforded the opportunity to do so.

ARGUMENT

I. AN EXTENSION OF THE DBS PERMIT IS WARRANTED BECAUSE R/L DBS HAS MADE A SIGNIFICANT AND CONTINUING COMMITMENT TO THE CONSTRUCTION AND IMPLEMENTATION OF ITS DBS SYSTEM

Established Commission precedent supports the grant of R/L DBS' request for extension. Over the last few years, in considering requests for extension, the Commission has established a stringent standard requiring that DBS permittees show that they have made "significant progress toward the realization of a DBS system, including substantial monetary investment," and reasonable attempts to overcome the difficulties confronted by permittees, including difficulties associated with permits granting limited channels at half-CONUS locations. Advanced

^{3/} Dominion Video Satellite, Inc., DA 99-915 (rel. May 14, 1999).

Communications Corporation, 11 FCC Rcd. 3399, 3412 (1995); United States Satellite Broadcasting Co., 1999 FCC LEXIS 1386 (April 1, 1999) (“USSB II”). R/L DBS meets the Commission’s standard for granting an extension.

R/L DBS has demonstrated a substantial commitment to the exploitation of its DBS authorization under very difficult circumstances. It has expended more than \$14 million towards the construction of a satellite, and substantially met its milestones under its satellite construction contract during 1996 and 1997. R/L DBS has also spent \$15 million in out-of-pocket outlays pursuant to transactions entered into when R/L DBS was formed, and its members have borne significant additional expenses in pursuit of the DBS business. R/L DBS and its members have put this capital at risk in the face of persistent, burdensome, and distracting litigation which challenged even R/L DBS’ right to hold its DBS authorization, as well as daunting competitive and business conditions.

First, R/L DBS has confronted an array of disputes, litigations, and conflicting claims which is unique among the various parties who have held DBS authorizations, and which have placed a cloud of uncertainty over R/L DBS’ legal rights and made development and financing of a DBS business very difficult. Even after resolving many of the disputes surrounding Continental’s DBS permit as part of the transactions entered into when R/L DBS was formed, R/L DBS, and its members, Loral and Rainbow, have faced legal challenges from Intraspace Corporation, a satellite contractor hired by Continental’s former management; DBSI, a third party who purchased certain improperly issued Continental shares from Intraspace; and James Dixon, a former Continental executive and minority shareholder in Continental. Relying in large part on various state law and commercial law claims, both DBSI and Dixon filed petitions to deny the assignment of the Continental DBS permit to R/L DBS filed in March 1996. These

challenges delayed the approval of the assignment for a full year. As a result, R/L DBS was not permitted to consummate the assignment of the Continental permit to R/L DBS until May 1997, when the Commission rejected the Dixon and DBSI challenges. Two of these parties, Dixon and Intraspace, have pursued concerted attacks, again under state and commercial law theories, against the validity of that assignment,^{4/} and Dixon has sought rescission of the assignment of permit from Continental to R/L DBS in civil claims pending in California state court. These and other claims pursued in California by DBSI, Intraspace, and Dixon have resulted in one judge trial and one arbitration, in addition to extensive discovery, innumerable motions and other procedural wranglings.

Under these circumstances, R/L DBS should not be penalized for its delay in constructing its satellite through loss of its DBS authorization. The constant litigation surrounding R/L DBS' DBS permit has created an uncertain business climate and impeded the parties' ability to develop or pursue opportunities. Such delays and uncertainties are precisely the types of circumstances beyond the permittee's control that the Commission has recognized merit the grant of an extension of the construction permit. See Advanced Communications Corp., 6 FCC Rcd. 2269, 2274 (granting extension of time where delay was due to factors outside permittee's control and "the efforts expended by [permittee] and the impediments and delays it has experienced are sufficient to demonstrate that it has pursued DBS system with due diligence in the ordinary sense of the term.") (internal citations omitted); Advanced Communications Corp., 11 FCC Rcd. 3399, 3414 (1995) (upholding eventual denial of additional request where permittee failed to make

^{4/} Loral Aerospace Holdings, Inc. v. Continental Satellite Corp., et al., and Related Actions, Motion of Intraspace to add various Loral Entities as the Real Defendants, Case No. CV 755366 (April 8, 1999).

progress yet “cited no factors outside its control to explain its lack of significant progress toward construction and launch of its satellites”).

The difficulties created by the constant state of uncertainty regarding the license have been amplified by the fact that R/L DBS holds a permit for only a limited number of channels at a half-CONUS slot. As the Commission has recognized, a workable business plan for a small number of channels is difficult under the best of circumstances, see USSB II, ¶ 22 (“an assignment of a small number of channels can be a serious difficulty”), especially when the channels are assigned to a half-CONUS slot. See id.; Dominion Satellite, ¶ 8. The difficulty inherent in creating a viable business plan for a smaller service is magnified by Echostar and DirectTV’s commanding position in the market for direct broadcast satellite services. Throughout the period in which R/L DBS has held its authorization, however, it has expended substantial efforts to overcome the barriers imposed by its limited authorization.

The bulk of R/L DBS’ satellite development work conducted during 1996 and 1997, at a cost of over \$14 million, involved design of a unique satellite which would use spot beam technology to provide local broadcast and other local and regional video programming within the footprint reachable from the 61.5 degrees W.L. slot. At that point in time, however, the prospects for such a business plan appeared far less favorable. This resulted from the fact that economically and technically feasible compression technology then available produced a yield of channels from each DBS frequency too small in number to support such a business. In addition, at that time, the prospects for changes in copyright laws that would permit satellite transmission of broadcast signals on a local-into-local basis were much more uncertain than today. R/L DBS’ satellite design, however, was inextricably tied to the local and regional business model, since this business plan required the use of spot beam technology on the satellite. R/L DBS therefore

explored alternative approaches which might be economically viable under then prevailing technical and business conditions.

Considering several important recent developments, R/L DBS is confident that the launch of a dedicated satellite can now be supported by offering a slate of regional and local programming that would be distinct from that available from either Echostar or DirectTV. R/L DBS is fully committed to pursuing the business plan it has formulated to survive in an environment with two strong and established competitors with a full slate of general video programming, and to provide service in the shortest possible time frame.

One critically important development is that significant improvements in compression technology has enabled DBS operators to push 8 to 10 channels of competitive quality through one transponder without noticeable compression artifacts, while previously, technology allowed only 4 to 6 channels on each transponder. Also, emerging technologies such as statistical multiplexing may expand this capacity to as much as 15 channels per transponder. The more powerful tubes current DBS satellites use also result in greater channel capacity per transponder. These two technological advances mean that R/L DBS could use greater capacity to provide more services to consumers, with a much higher likelihood of financial viability.

R/L DBS proposes to offer an unprecedented slate of locally-originated channels, including local news, traffic, weather, education opportunities, and entertainment, as well as a full complement of local broadcast stations. In fact, R/L DBS believes that it will be able to support satellite carriage of all local signals eligible for must-carry in the applicable local market, in contrast to the currently available DBS complement of four local stations per market. Recent legislative developments strongly support R/L DBS' current view that delivery of local broadcast signals will be permitted within a time frame consistent with R/L DBS' plans. R/L DBS will add

local business coverage, local classified advertisements, local web scan, and interactive products and services. Because the power of the satellite would not be used for full CONUS operation, but rather would be focused regionally through spot beams, the satellite dish size for consumers could be reduced to 12 inches. The economy and esthetics of these small dishes should enhance the services' popularity.

Given the positioning of its frequencies over the east coast, and the continuing development of the technologies involved, R/L DBS believes it will be able to offer up to 40 channels in the markets of Boston, New York, Philadelphia, Washington D.C.-Baltimore, Atlanta, Miami, Cleveland, Dallas-Houston, Detroit and Chicago, a total of 30 million homes. The maps attached as Exhibit 1 demonstrate one possible way of configuring markets for which R/L DBS could tailor regionalized programming. Because the frequencies are reused from market to market, they can be allocated to specific regional programming as well as to the local broadcast stations operating in those markets.

R/L DBS believes that there will be a high demand for its programming. Currently, there is a significant lack of local programming in the video marketplace generally. The vacuum in local programming is due to a variety of factors, including decreased local coverage by television network affiliates, and more independent television stations becoming network affiliates. Cablevision's experience and history demonstrates that there is a strong consumer appetite for local programming.

In short, by offering a regionally focused slate of programming, R/L DBS would not only introduce competition into the market in the form of a new provider, but also offer an exciting new product that is currently unavailable. The Commission has recognized that the promotion of unique product offerings is a primary purpose of the DBS service. See USSB II, ¶ 25 ("a

primary goal in initiating DBS services is to ... encourage innovative new programming”). R/L DBS can develop and bring this exciting new product to market within two years of being granted an extension of its permit. The Commission should advance the goals of the DBS program by allowing this potential competitive product to mature. See USSB, 7 FCC Rcd. at 7251 (granting extension where permittee had expended substantial effort and money to establish its DBS system); Direct Broadcasting Satellite Corp., 11 FCC Rcd. 9681, 9685 (1995) (granting extension of DBS permit where permittee demonstrated “a continuing capability of and commitment to implementing the DBS system”); Directsat Corp., 11 FCC Rcd. 1775, 1776 (1996) (granting extension where permittee’s actions “demonstrate its intent to ensure the swift implementation and operation of a viable DBS system”).

II. THE PUBLIC INTEREST IS BEST SERVED BY A GRANT OF THE REQUESTED EXTENSION

The Commission will best serve its goals of increasing competition and diversity in the provision of DBS services and bringing DBS services quickly to the public by granting R/L DBS an extension of its construction permit.

First, R/L DBS is uniquely positioned to create the regional programming slate to compete with Echostar and DirectTV’s established programming options. Local and regional programming has always been a cornerstone of Rainbow’s operating strategies. Rainbow’s Emmy Award winning News 12 has been serving Long Island since 1986 and is an important reason more than 700,000 homes subscribe to Cablevision’s service in Nassau and Suffolk counties. Additional News 12 services have been launched in Connecticut, New Jersey, the Bronx and Westchester, each repeating the Long Island experience. Rainbow recently launched

the Metro Channels, a trio of complementary regional cable channels providing an unprecedented menu of quality local programming for the greater New York metropolitan area.

Loral's extensive experience manufacturing and launching satellites further confirms R/L DBS' ability to deliver on its technically ambitious plan. Indeed, the Commission recognized the benefits that Rainbow and Loral could offer when it approved the transfer of the DBS permit to R/L DBS, stating that "[g]iven the depth of experience and involvement of R/L DBS' principals in the U.S. communications marketplace, we believe that its control of DBS facilities, and its subsequent competitive offering of DBS service should yield considerable procompetitive benefits for consumers." Transfer Approval Order, ¶ 17.

Second, R/L DBS is the entity best situated to bring the DBS product quickly to the market. Substantial progress has been made in the design of the satellite, and the satellite quickly can be built pursuant to existing design plans if the extension is granted. In contrast, if the DBS permit is cancelled, no new permittee could so quickly design, build and launch a satellite as R/L DBS.

R/L DBS' efforts present a clear contrast with those permittees where the Commission determined that revocation of the permit was appropriate. In Advanced Communications Corp., 10 FCC Rcd. 13337 (1995), for example, the International Bureau denied Advanced Communications' request for an extension because Advanced had not demonstrated that it had invested significantly or taken steps such as procuring a launch contract, and had "failed to show its progress constitutes sufficient justification for a further extension of time." Id. at 13342. On appeal, the full Commission upheld the denial, finding that the permittee had "not achieved any concrete progress toward the actual construction and operation of its DBS system," and could not cite to any factors outside its control justifying the delay. 11 FCC Rcd. at 3414.

Unlike Advanced Communications, R/L DBS has invested substantial money and technical and other resources in the DBS project, has achieved concrete progress toward satellite construction, and has encountered substantial difficulties outside its control that account for the delay in meeting its construction schedule. Under these circumstances, Commission precedent dictates that an extension is warranted and in the public interest. Fundamental fairness also dictates that R/L DBS be permitted to pursue further, and realize the benefits of, its substantial investment to date.

If the Commission determines that a two-year extension is not warranted, R/L DBS should be afforded a reasonable period of time (not exceeding six months) to enter into a lease agreement with an existing satellite provider in order to provide service expeditiously to the public. Such a transaction should be approved pursuant to the Commission's decision in Dominion Video Satellite, Inc., DA 99-915 (rel. May 17, 1999). In Dominion, Dominion and Echostar entered into a transponder lease and channel use agreement, and requested that the Commission grant a waiver of the DBS due diligence rules. The Commission granted Dominion's request, finding that a waiver would serve the public interest by facilitating service to the public and making efficient use of transponder space, and that authorizing Dominion to commence service would expand programming choices for DBS subscribers. *Id.*, ¶¶ 9-11. Further, the policy objectives of the rules would not be undermined by grant of a waiver, since the Commission's goal was to enhance the availability of service, which could be accomplished by combining facilities if necessary. *Id.*, ¶ 12; see also USSB II, ¶ 24 (policy objectives of rules not undermined by waiving due diligence requirements since primary purpose of requirements is "to prevent warehousing of 'substantial blocks of spectrum and valuable orbital positions,'" and USSB had neither, but rather had limited channels in a bad position).

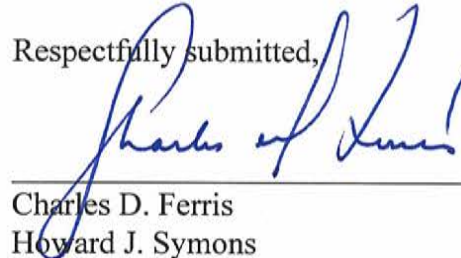
The same considerations the Commission applied in Dominion and USSB II should lead it to extend R/L DBS' DBS construction permit so that it may pursue a similar lease arrangement. Further, the policy objectives of the Commission's due diligence requirements would not be undermined since like USSB, R/L DBS has not been warehousing a valuable block of spectrum, but rather is attempting to make the best use of a limited orbital position and channel allocation.

R/L DBS understands the Commission's reluctance to extend DBS construction permits where progress has not been made at the pace the Commission desires. For these reasons, R/L DBS will commence service no later than two years after the effective date of the extension. Thus, the Commission can be assured that valuable orbital positions will not sit idle due to the grant of R/L DBS' requested extension.

CONCLUSION

For the reasons set forth above, the Commission should extend R/L DBS' DBS construction permit for a period of two years, to allow R/L DBS to construct its own satellite and develop localized programming.

Respectfully submitted,



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Attorneys for R/L DBS Company, L.L.C.

August 13, 1999

DCDOCS: 155062.3 (3bn@031.doc)

DECLARATION OF DAVID O. WICKS, JR.

I am Vice President, New Media Cablevision Systems Corporation. My management responsibilities include new media efforts at Cablevision Systems Corporation and its subsidiaries, including the participation of Rainbow DBS Holdings, Inc. in R/L DBS, LLC. I have reviewed the foregoing Petition for Extension of the R/L DBS Direct Broadcast Satellite Construction Permit, and declare under penalty of perjury that the facts contained therein are true and correct to the best of my knowledge, information, and belief.



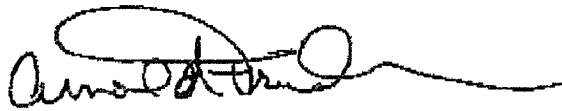
w

David O. Wicks, Jr.
Vice President, New Media
Cablevision Systems Corporation

Dated this 13th day of August, 1999

DECLARATION OF ARNOLD FRIEDMAN

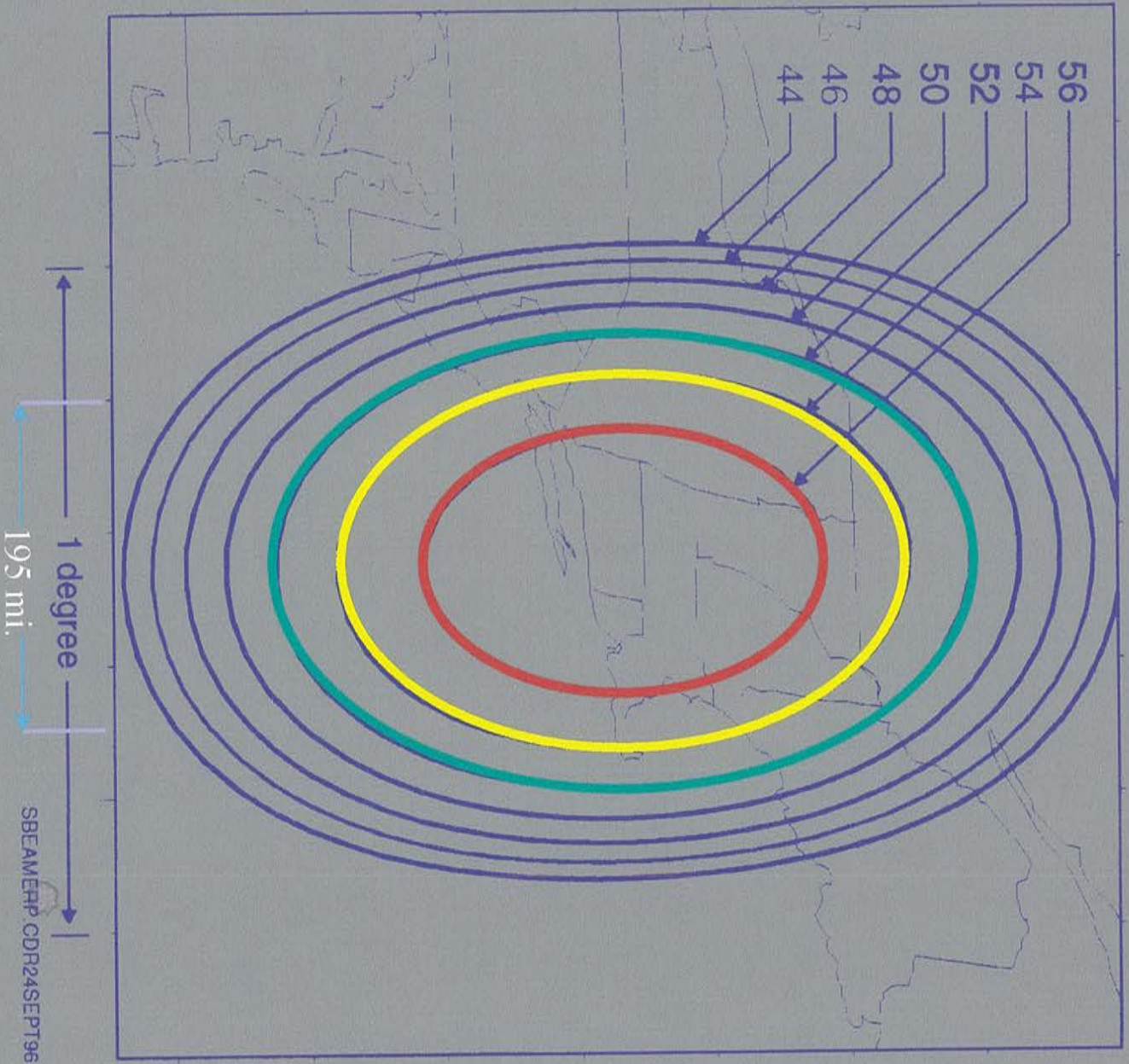
I am Vice President, Marketing Space System/Loral. My management responsibilities include new DBS satellite efforts at Space System/Loral, including the participation in R/L DBS, LLC. I have reviewed the foregoing Petition for Extension of the R/L DBS Direct Broadcast Satellite Construction Permit, and declare under penalty of perjury that the facts contained therein are true and correct to the best of my knowledge, information, and belief.



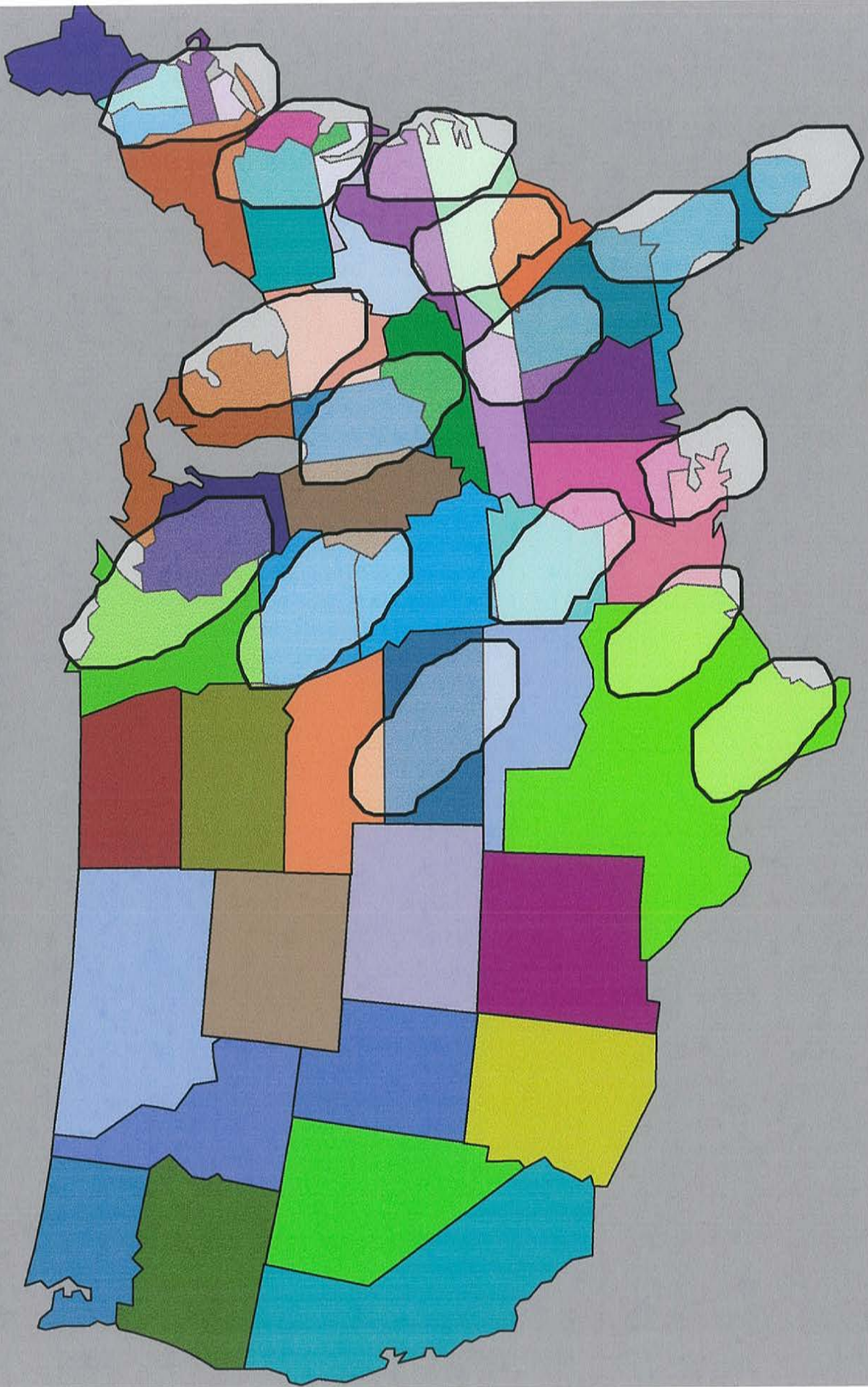
Arnold Friedman
Vice President, Marketing
Space Systems/Loral

Dated this 13th day of August, 1999

EXHIBIT 1



City Direct Coverage



CERTIFICATE OF SERVICE

I hereby certify that the foregoing Petition For Extension of the R/L DBS Direct Broadcast Satellite Construction Permit was served this 13th day of August, 1999 by hand on the following:

Chairman William Kennard*
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Commissioner Susan Ness*
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