

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

<p>In the Matter of</p> <p><b>Norris Satellite Communications, Inc.</b></p> <p>Application for Review of Order Denying Extension of Time to Construct and Launch Ka-Band Satellite System</p>	<p>File Nos.</p> <p style="text-align: right;">54-DSS-P/LA-90 55-DSS-P-9062-SAT-MP/ML-96 60/61-SAT-MISC-96 62-SAT-MP/ML-96 63-SAT-MP-96</p>
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**MEMORANDUM OPINION AND ORDER**

**Adopted:** October 9, 1997

**Released:** October 10, 1997

By the Commission:

**I. INTRODUCTION**

1. With this Memorandum Opinion and Order, we affirm the International Bureau's Order: (1) nullifying and voiding orbital assignments granted to Norris Satellite Communications, Inc. ("Norris"); (2) denying Norris's requests for waiver of its milestone schedule; and (3) dismissing as moot Norris's applications for an extension of time to construct and launch its satellite system.<sup>1</sup> In 1992, the Commission assigned to Norris orbital positions and frequency spectrum in the Ka-band (19.7-20.2 GHz downlink and 29.5-30.0 GHz uplink), requiring that Norris commence satellite construction (after one extension) by June 1994.<sup>2</sup> On March 14, 1996, almost two years after this construction deadline and more than three years after its extension was granted, the Bureau found that Norris had still not begun construction. For the reasons stated below, we affirm the Bureau's decision to cancel Norris's authorization.

**II. BACKGROUND**

2. On July 7, 1992, Norris received Commission authorization for domestic geostationary fixed-satellite service ("GSO/FSS") satellites to operate in the 19.7-20.2 GHz

<sup>1</sup> *Norris Satellite Communications, Inc.*, 11 FCC Rcd 5402 (1996)("Nullification").

<sup>2</sup> *Norris Satellite Communications, Inc.*, 7 FCC Rcd 4289 (1992)("Authorization").



(space-to-Earth) and 29.5-30.0 GHz (Earth-to-space) frequency bands.<sup>3</sup> Norris's authorization was conditioned on it meeting specific construction milestones. Specifically, it was required to commence construction on NorStar I by July 1993 with completion by September 1996 for launch by January 1997.<sup>4</sup> On December 10, 1993, the Commission granted Norris an extension to June 1994 to comply with these construction milestones.<sup>5</sup>

3. After receiving its authorization, Norris filed a petition for reconsideration requesting authority to use an additional 200 MHz of spectrum in both the uplink and downlink bands.<sup>6</sup> On July 20, 1993, the Commission denied Norris's petition because Norris had not requested the additional spectrum in its application and there was a potential conflict with proposed terrestrial uses.<sup>7</sup> In the Reconsideration, the Commission indicated that the appropriate place for Norris to make a case for an additional 200 MHz of spectrum was in the Commission's 28 GHz rulemaking,<sup>8</sup> not in its satellite authorization process.<sup>9</sup>

4. On September 15, 1994, shortly after the June 1994 construction commencement deadline, Teledesic Corporation filed comments with the Commission questioning Norris's compliance with its construction milestone schedule.<sup>10</sup> Norris did not respond to Teledesic's comments. On December 11, 1995, the Commission requested that Norris provide

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.* ¶ 25. At the same time, Norris was authorized to construct NorStar II on a later, but similar, milestone schedule.

<sup>5</sup> Letter from James R. Keegan, Chief, Domestic Facilities Division, Common Carrier Bureau, to Wayne Hartke, Counsel for Norris, (Dec. 10, 1993) The Commission granted Norris's milestone extension request in light of the fact that Norris was the first and only licensee in the Ka-band, and in the interest of promoting the use of the Ka-band for commercial satellite ventures.

<sup>6</sup> Norris asserted that it had initially requested a total of 1,400 MHz, not the 1,000 MHz the Commission authorized.

<sup>7</sup> *Norris Satellite Communications, Inc.*, 9 FCC Rcd 7370 (1993)("Reconsideration").

<sup>8</sup> See discussion, *infra* note 20.

<sup>9</sup> Reconsideration at 7371, ¶ 4. The Commission also stated that, contrary to Norris's assertions, its original application did not request authorization for this additional spectrum. *Id.*

<sup>10</sup> Teledesic Corporation is a non-geostationary fixed-satellite service Ka-band licensee ("Teledesic Comments").



information demonstrating compliance with its construction milestones.<sup>11</sup> At Norris's request, the deadline for responding to this request for compliance information was extended to February 16, 1996.<sup>12</sup> On that date, Norris requested that its satellite construction milestones be extended an additional two years and a finding that it was in compliance with the extended construction milestones or, in the alternative, that the Commission grant it a waiver of the milestones for good cause. Norris argued that a waiver should be granted on several grounds: regulatory delays prevented financing, a waiver would not frustrate Commission policies to prevent warehousing and expedite service to the public, Norris should be held to a lower standard as the first and only Ka-band licensee, and the existence of a strategic alliance with Orbital Sciences Corporation ensured timely system deployment.<sup>13</sup>

5. On March 14, 1996, the International Bureau denied Norris's request for a finding that it was in compliance with its construction milestones. It also denied Norris's request for a waiver of its milestone schedule, and dismissed its application for extension of time as moot.<sup>14</sup> The Bureau found that Norris did not support its claim of milestone compliance or that good cause existed to grant an extension.<sup>15</sup> The Bureau determined that Norris's failure to make a \$2,800,000 satellite construction down payment to its satellite manufacturer to begin construction created a contract contingency, which was directly responsible for its failure to satisfy the relevant milestone requirements.<sup>16</sup> The record showed that only preliminary developmental construction work had commenced. In addition, the Bureau found that Norris had enjoyed a "clear and unambiguous grant of spectrum and orbital locations for more than three and one-half years,"<sup>17</sup> and, therefore, had no grounds to claim that regulatory uncertainty caused by pending rulemakings had delayed its satellite construction.<sup>18</sup>

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<sup>11</sup> Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, to Wayne Hartke, Counsel for Norris, (Dec. 11, 1995).

<sup>12</sup> Letter from Thomas S. Tycz, Chief, Satellite and Radiocommunication Division, International Bureau, to Wayne Hartke, Counsel for Norris, (Jan. 22, 1996).

<sup>13</sup> Request for Extension of Time and a Response to Request for Information and Contingent Request for Waiver ("Request for Extension of Time") (Feb. 16, 1996).

<sup>14</sup> Nullification, 11 FCC Rcd 5402.

<sup>15</sup> *Id.* ¶¶ 4, 5.

<sup>16</sup> *Id.* ¶ 4.

<sup>17</sup> *Id.* ¶ 6.

<sup>18</sup> *Id.*



6. Norris's Application for Review seeks reversal of the Nullification, reinstatement of its Authorization, and extension of its construction milestones.<sup>19</sup> Norris asserts three main grounds for reversal of the Bureau's decisions. First, Norris argues that the International Bureau made erroneous factual determinations regarding satellite construction contract contingencies in the satellite construction contract between Norris and the satellite manufacturer, the Harris Corporation. Second, Norris asserts that the uncertainty created by the Commission's ongoing 28 GHz rulemaking<sup>20</sup> about future use of the frequency bands in which Norris would operate made it impossible to meet the Commission's milestone construction schedule. For this reason (*i.e.*, circumstances beyond the company's control), Norris contends that an extension of its milestones is warranted. Finally, Norris contends that the Nullification should be reversed as a matter of equity because Norris has been an industry pioneer. No comments were filed in opposition to Norris's application for review.<sup>21</sup>

7. After submission of its Application for Review, Norris filed three supplements accompanied by requests for waivers to file supplemental pleadings.<sup>22</sup> The first supplement attempts to distinguish the May 8, 1996 decision of the Court of Appeals for the District of Columbia in Advanced Communications Corporation v. F.C.C.<sup>23</sup> The second supplement

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<sup>19</sup> Filed April 15, 1996.

<sup>20</sup> The 28 GHz rulemaking designates band segments in the 28 GHz band for several wireless services, including fixed-satellite service and mobile-satellite services. The rulemaking designates the additional 200 MHz of spectrum that Norris sought (29.3-29.5 GHz) in the Reconsideration for use by mobile-satellite feeder links and GSO/FSS. To date, one non-geostationary fixed-satellite service provider has been licensed to construct a system in the Ka-Band, *Teledesic Corporation*, DA 97-527 (rel. Mar. 14, 1997)(Teledesic has been authorized for use of the 28.6-29.1 GHz and 27.6-28.4 GHz band segments for its service and gateway terminal uplinks, respectively), and thirteen geostationary fixed-satellite Ka-Band applicants have been licensed as a result of recently concluded negotiations among the pending 28 GHz GSO/FSS system applicants. *Assignment of Orbital Locations to Space Stations in the Ka-Band*, DA 97-967 (rel., May 9, 1997).

<sup>21</sup> As noted above, however, on September 15, 1994, Teledesic Corporation did file comments questioning Norris's compliance with the June 1994 satellite construction commencement milestones.

<sup>22</sup> We find good cause under 47 C.F.R. § 1.3 to grant Norris's requested waiver of § 1.115 and consider these supplemental filings because there is no prejudice to other parties.

<sup>23</sup> *Unpub.*, 84 F.3d 1452 (D.C. Cir. 1996), *cert. denied*, 65 USLW 3466 (U.S. Jan. 6, 1997)(No. 96-479)("Advanced").



discusses the relevance of the Commission's 28 GHz Order<sup>24</sup> to Norris's licensing concerns. The third supplement, filed recently, requests Norris's reinstatement to 90°W.L., its previously authorized orbital position, or, in the alternative, assignment of the 71° W.L. and 129° W.L. orbital positions.<sup>25</sup>

### III. DISCUSSION

8. After carefully considering Norris's petition, we affirm the Bureau's decisions. Norris contends that the International Bureau made several erroneous factual determinations in its decision to nullify Norris's authorization. Norris argues that the Bureau incorrectly determined that it did not meet the Commission's satellite contracting commencement deadline. In fact, as noted above, the Bureau made this determination because Norris's satellite manufacturing contract was contingent, under applicable Commission construction commencement standards because construction could not begin until a large down payment was made to the satellite manufacturer, Harris Corporation, as discussed more fully below. Accordingly, we find that Norris has presented insufficient evidence to support its contention that the Bureau erred on this issue.

9. The Commission has consistently required GSO/FSS licensees to execute non-contingent satellite construction contracts in order to meet construction commencement milestones.<sup>26</sup> This non-contingent requirement has been strictly construed and only waived when delay in implementation is due to circumstances beyond a licensee's control.<sup>27</sup> Upon authorization by the Commission, licensees are usually given several months to meet the construction commencement milestone in order to finalize arrangements and execute a non-contingent construction contract.<sup>28</sup> The non-contingent requirement contemplates that there

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<sup>24</sup> *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 11 FCC Rcd 19005 (1996) ("28 GHz Order").

<sup>25</sup> Filed on or about March 28, 1997. Norris requests that the record be revised to reflect that its new counsel is the law firm of Booth, Freret, Imlay & Tepper, P.C.

<sup>26</sup> *AMSC Subsidiary Corporation*, 8 FCC Rcd 4040, 4042 n.27 (1993); see e.g., Letters from Chief Domestic Facilities Division to Hughes Communications Galaxy, Inc. (June 7, 1990), to Ford Aerospace Satellite Services Corp. and Satellite Transponder Leasing Corp. (Jan. 21, 1987), and to Alascom, Inc. and National Exchange Satellite, Inc. (Feb. 16, 1990); see also *National Exchange Satellite, Inc.*, 8 FCC Rcd 636 (1993).

<sup>27</sup> *MCI Communications Corporation*, 2 FCC Rcd 233 ¶ 5 (1987).

<sup>28</sup> See letters cited *supra* note 26.



will be neither significant delays between the execution of the construction contract and the actual commencement of construction, nor conditions precedent to construction. The purpose of this requirement is "to provide a uniform standard for all licensees and tangible evidence that implementation is proceeding."<sup>29</sup>

10. In this case, Norris received its authorization on July 7, 1992. The original construction commencement milestone was July 1993. As noted, Norris entered into a satellite construction contract with Harris on July 2, 1993. The contract called for an advance payment of \$3,000,000 prior to the commencement of any work under the contract. On September 23, 1993, the contract was amended in two significant ways. The first was to allow Norris to make the \$3 million payment in two separate installments of \$200,000 and \$ 2.8 million, and to amend the effective date of the contract to coincide with Norris's payment of the \$200,000 installment. Norris paid \$200,000 on or around September 23, 1993. The second installment payment of \$ 2.8 million was due 45 days later, on November 7, 1993.

11. A second amendment concerned the contract definition of the "receipt of order date." Every aspect of Harris's performance under the contract was to be determined with respect to the "receipt of order date," not the date of receipt of the first installment. Under the original contract, the "receipt of order date" was defined as the date on which Harris received the \$3 million payment. This definition was amended to be the date on which Harris received the second installment payment. Thus, although the initial payment of \$200,000 rendered the contract effective, any substantive performance by Harris was conditioned upon payment of the second installment. For example, the contract requires that a "Systems Requirement Review" be completed "2 months after receipt of order," and that "Payload Delivery" be completed "27 months after receipt of order." Norris's failure to make the second payment on November 7, 1993 led Harris to suspend its performance under the contract, although Harris agreed to perform technical and marketing activities at its own expense in order to help Norris secure additional financing. Although the contract remains in effect, no evidence has been submitted to indicate that any additional payments have been made or that construction has commenced.

12. On February 15, 1996, Norris entered into a Spacecraft and Associated Services Purchase Agreement with Orbital Sciences Corporation for construction and development of its satellite bus.<sup>30</sup> Norris asserts that the Bureau misunderstood the payload bus agreement, which was in addition to and not a substitute for its satellite construction contract with Harris.

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<sup>29</sup> Letter from Chief, Domestic Facilities Division, to Hughes Communications Galaxy, Inc. (June 7, 1990) ("Hughes Letter").

<sup>30</sup> Application for Review at 6-7.



Norris relies on this alleged misunderstanding to refute the Bureau's finding that it had not made the necessary \$2,800,000 million construction commencement payment to Harris.

13. Despite Norris's assertions to the contrary, we find that the Bureau correctly determined that Norris failed to make the critical construction commencement payment to Harris Corporation that would have rendered the Harris contract non-contingent. Norris's failure to make this payment prevented satellite construction from commencing prior to the June 1994 extended Authorization deadline. As the terms of the contract indicate, execution of the contract and payment of the first installment are not dispositive of whether the construction commencement milestone was met because construction was contingent upon receipt of the second installment. The fact that Harris performed ancillary tasks at its own expense in order to help Norris secure additional financing is insufficient. As stated above, the purpose of requiring licensees to submit a non-contingent contract is to ensure that the contract itself is being implemented.<sup>31</sup>

14. As a fixed-satellite service licensee, Norris was required to demonstrate compliance with the milestone schedule set forth in its Authorization. A contract with unresolved contingencies, such as further payments required to commence construction, does not meet our fixed-satellite construction commencement standard.<sup>32</sup> Norris places heavy reliance on *Dominion Video Satellite, Inc.*,<sup>33</sup> and related direct broadcast satellite ("DBS") service due diligence cases,<sup>34</sup> in an effort to demonstrate compliance with DBS due diligence implementation standards and case law. However, Norris's assertion that it has complied with DBS due diligence standards is irrelevant to this inquiry. Application of a DBS due diligence standard to Norris, a fixed-satellite licensee, was specifically rejected in Norris's Authorization.<sup>35</sup> Therefore, Norris's reliance on DBS due diligence case authority is misplaced.

15. As a result of its first entrant status in the Ka-band field, we specifically waived the fixed-satellite financial qualification requirements for Norris in its Authorization. At the same time, we stated that we would closely monitor its compliance with the Authorization

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<sup>31</sup> See Hughes Letter, *supra* note 29.

<sup>32</sup> *Supra* note 26.

<sup>33</sup> 10 FCC Rcd 10480 (1995). In this case, the International Bureau reinstated Dominion as a DBS permittee, found that its satellite construction contract demonstrated due diligence compliance, as a result of regulatory delay, and granted it orbital/channel assignments.

<sup>34</sup> Application for Review at 11 n. 15.

<sup>35</sup> Authorization, 7 FCC Rcd 4289 at n. 11.



construction milestones.<sup>36</sup> Thereafter, for almost four years Norris held exclusive authorization to use the spectrum and orbit.<sup>37</sup> We agree with the Bureau's determination that "twenty months after construction was to have begun, the record indicates that only preliminary development work [had] commenced."<sup>38</sup> We therefore affirm the Bureau's decision to enforce the milestone deadlines contained in Norris's Authorization.

16. Alternatively, Norris contends that in its nullification order the Bureau erroneously found that regulatory delays were not a proper basis for waiving its milestone requirements. Norris also challenges the Bureau's finding that grant of a license provided sufficient rights under Section 316 of the Communications Act to provide enough certainty to commence construction of its satellites by the milestone deadline. Moreover, Norris asserts that the pending 28 GHz rulemaking, which involved Norris's authorized spectrum, rendered its authorization "functionally useless" because the Commission had the discretionary authority to modify its license to accommodate the band segmentation plan in the 28 GHz proceeding. The record here, however, does not support Norris's contention.

17. Norris was given clear and unambiguous authority for almost four years, as the first Ka-band licensee, to construct, launch, and operate a Ka-Band GSO/FSS system. Norris's Authorization provided all the authority the Commission could confer and the additional safeguard of Section 316 protections from involuntary license modifications.<sup>39</sup> Norris's attempt to use its concerns about the 28 GHz proceeding segmentation plan and potential sharing requirements to support its request for reversal of the Bureau's decision and reinstatement of its authorization is misplaced. Had Norris demonstrated a commitment to proceed with its proposed system, by commencing satellite construction or filing an extension request, within the extended deadline, the Commission would have been required to take Norris's actions into account in the 28 GHz band segmentation plan and provide it an opportunity to object to any interference implications, pursuant to Section 316.<sup>40</sup> Unfortunately for Norris, these steps were not taken. Norris's failure to progress with satellite construction was, in reality, due to Norris's nonpayment to Harris, as reflected in Norris's own filings, and not a result of regulatory uncertainty or delay. Under these circumstances, Norris

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<sup>36</sup> Authorization, 7 FCC Rcd 4289 at n. 20.

<sup>37</sup> Application for Review at 19.

<sup>38</sup> Nullification, 11 FCC Rcd 5402 ¶ 4.

<sup>39</sup> Section 316 of the Communications Act permits licensees 30 days in which to challenge modifications to their licenses. 47 U.S.C. § 316.

<sup>40</sup> In fact, the Commission had already taken Norris into account by giving licensing priority to GSO/FSS in the 29.5-30.0 GHz and 19.7-20.2 GHz bands.



cannot now blame the Commission's processes for its failure to meet the construction milestone requirements.

18. Norris next argues that, assuming its authorization was not rendered obsolete by the rules adopted in the 28 GHz rulemaking, it could not finalize its system design or attract investors due to the pendency of the 28 GHz proceeding. Norris relies on language in the Commission's *Advanced Order*<sup>41</sup> and the *Dominion Video Satellite, Inc.* case<sup>42</sup> to support its position that, without assured orbital and spectrum assignments, a licensee cannot implement its system. In rejecting this argument, we reiterate that Norris had all the authority, including protected orbital and spectrum assignments, it could expect from the Commission at the time of its original Authorization.

19. Norris also argues that the Bureau erroneously determined that its request for a waiver of the construction milestones was untimely filed. As described above, the extended construction commencement deadline was June 1994. The Commission's rules require that a request for an extension of time for taking an action required by a licensee's authorization be filed prior to the date requiring the action.<sup>43</sup> However, Norris did not file its Request for Extension of Time until February 1996, almost two years later.<sup>44</sup>

20. In its defense, Norris contends that the first time it had any idea the Commission might question its milestone compliance was when the Bureau sent a letter requesting construction commencement information in December 1995. We conclude, for the reasons stated in paragraphs 10 through 13, that Norris reasonably could not have believed on June 1994 that it was in compliance with the extended construction deadline to commence construction on NorStar I by June 1994. Therefore, Norris was required to file a request for an extension of the milestones prior to the June 1994 commencement deadline.

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<sup>41</sup> *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995)(Commission recognized DBS permittee's difficulty in proceeding with construction of its system before receiving orbital/channel assignments but found DBS permittee had failed to comply with relevant due diligence standards).

<sup>42</sup> *Supra* note 33.

<sup>43</sup> "A station authorization shall be automatically terminated in whole or in part without further notice to the licensee upon: (a)[t]he expiration of the required date of completion of construction or other required action specified in the authorization, or after any additional time authorized by the Commission, if a certification of completion of the required action has not been filed with the Commission unless a request for an extension of time has been filed with the Commission but has not been acted on..." [emphasis added] 47 C.F.R. § 25.161.

<sup>44</sup> *Supra* note 13.



21. Norris asserts that if the Commission reinstates its Authorization, an extension of its milestones is warranted because of delays beyond its control.<sup>45</sup> Because we decline to reinstate Norris's Authorization, we need not address this issue. However, even if we had decided to reinstate Norris's Authorization, we would reject its argument that an extension of the milestones is warranted due to alleged regulatory uncertainty resulting from the 28 GHz proceeding and its satellite licensing for the same reasons we decline to reinstate its Authorization, as discussed above.

22. Finally, Norris requests that the Commission overturn the Bureau's Order because the underlying policy toward Ka-band permittees should favor reinstatement and extension similar to the treatment of DBS permittees. Norris cites the difficulties it faced as an innovator in the developing Ka-band satellite field and the regulatory delays it encountered as grounds for reinstatement. While we are mindful of the obstacles innovators may encounter when developing new technologies, these are not justifications for failure to meet explicit milestone commencement standards or to make a timely request for an extension. Norris was given an opportunity to be an industry leader in the Ka-band field, but failed to act on that opportunity.

23. As previously stated, Norris has filed three separate supplements to its Application for Review. Despite the late filing dates, we grant Norris's request that these supplements be considered with the Application. However, based on our determination that the Bureau correctly voided and nullified Norris's Authorization for failing to meet its construction commencement deadline and the fact that no novel claims have been raised, we do not find persuasive the arguments presented by Norris in the supplemental pleadings.

#### IV. ORDERING CLAUSES

24. Accordingly, IT IS ORDERED that the Application for Review filed by Norris Satellite Communications, Inc. is DENIED.

25. IT IS FURTHER ORDERED that Norris's request for waivers of 47 C.F.R. § 1.115 are granted and its supplemental filings have been considered in this Order.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton  
Acting Secretary

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<sup>45</sup> Application for Review at 21-22.