

December 11, 2002

VIA HAND DELIVERY
Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *TMI Communications and Company, Limited Partnership*; DA 01-1638;
File No. 189-SAT-LOI-97; IBFS Nos. SAT-LOI-19970926-00161,
SAT-AMD-20001103-00158

Dear Ms. Dortch:

On behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (jointly, the "Carriers"), we hereby submit the following objections to the claim of TMI Communications and Company, Limited Partnership ("TMI") that it has timely met its initial milestone requirement to have entered a non-contingent satellite manufacturing contract by July 17, 2002.¹ As demonstrated below, TMI's reliance on a contract to which it is not a party, not a beneficiary, and not a guarantor or otherwise liable, does not satisfy the Commission's requirements. As a result, the Commission should declare the TMI authorization null and void.

In contrast to other satellite services in which the Commission attempts to make a predictive judgment, based on the financial resources of an applicant, as to whether the applicant will promptly construct, launch and operate its satellite system, for the 2 GHz MSS licenses granted to TMI and others the Commission decided to forego financial qualifications and instead rely upon strict enforcement of the milestones to ensure timely deployment.² This policy is

¹ See *TMI Communications and Company, Limited Partnership*, Order, 16 F.C.C.R. 13808, 13812 and 13816 (IB 2001). Although the Commission's rules do not have specific procedures to address milestone compliance challenges, the Commission in the past has treated objections to milestone compliance as informal complaints. See *Morning Star Satellite Company LLC*, Memorandum Opinion and Order, 15 F.C.C.R. 11350, 11351, n.6 (IB 2000), *aff'd*, 16 F.C.C.R. 11550 (2001).

² See *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, Report and Order, 15 F.C.C.R. 16127, 16150 (2000).

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intended to ensure that the licensee commences service to the public as promised in the application, and spectrum does not lie fallow for years while an insincere or unfinanced company decides whether or not to proceed with construction, launch and operation of its satellite system. The initial milestone deadline for TMI was July 17, 2002, and on July 18, 2002, the Commission sent a letter to TMI reminding it of the obligation to have entered a non-contingent contract, which “contemplates that there will be neither significant delays between the execution of the construction contract and the actual commencement of construction, nor conditions precedent to construction.”³ The Commission requested that TMI submit a copy of the signed, executed contract that satisfies TMI’s obligation under the initial milestone, including the Statement of Work as well as the technical specifications.

On July 26, 2002, TMI submitted a certification that “it is TMI’s view that TMI has met the initial milestone in the FCC authorization.”⁴ In addition, TMI submitted a letter agreement between TMI and TerreStar Networks Inc. (“TerreStar,” a “proposed investor” in TMI’s 2 GHz MSS system), and a contract between TerreStar and Space Systems/Loral, Inc. for the TerreStar 1 Satellite Program. TMI requested confidential treatment of several portions of the submission. Based on the publicly available information contained in that submission, TMI has failed to meet the initial milestone.

The contract on its face provides no evidence that TMI has entered into a non-contingent contract to construct, launch and operate a proposed satellite system. The contract is between TerreStar and Space Systems/Loral for construction of the TerreStar 1 satellite, and Section 37.15 of that contract explicitly states that:

This contract is entered into solely between, and may be enforced only by, Purchaser [defined as TerreStar] and Contractor and their permitted assigns, and this contract shall not be deemed to create any rights in third parties, including suppliers, customers and owners (*including TMI*) of a Party, or to create any obligations of a Party to any such third parties.⁵

³ Letter from Cassandra C. Thomas, Deputy Chief, Satellite Division, FCC to R. Edward Price, Vinson & Elkins, Counsel for TMI, re: File No. 189-SAT-LOI-97, *et al.* (July 18, 2002).

⁴ Certification of Ted H. Ignacy, Vice President, Finance, TMI, included in the Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI to Marlene H. Dortch, Secretary, FCC, re: File No. 189-SAT-LOI-97, *et al.* (July 26, 2002).

⁵ See Contract between TerreStar Networks Inc. and Space Systems/Loral, Inc. for The TerreStar 1 Satellite Program (Acceptance On-Orbit), at Section 37.15 (July 14, 2002) (TerreStar/Loral Contract) (emphasis added).

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There is nothing in the contract to indicate that TMI will be able to timely launch and operate its proposed satellite as a result of this agreement. The terse agreement between TMI and TerreStar, entered into two days before execution of the contract between TerreStar and Space Systems/Loral, merely provides that in return for TerreStar executing the contract, TMI intends to transfer its FCC and Canadian authorizations (subject to any necessary approvals) to a suitable entity.⁶ Thus, in theory at some future point in time there may be an effort to align the licensee and the entity that has contracted for the construction and launch of a satellite. Without a satellite manufacturing contract to assign, however, the transfer of the 2 GHz MSS license would raise questions as to whether (i) there is any license to assign, or (ii) the transaction complies with the anti-trafficking rule.⁷

In the meantime, TMI has no rights under the satellite construction agreement. Equally important, TMI has no liability with regard to payment for satellite construction under the TMI-TerreStar agreement or the TerreStar-Space Systems/Loral contract, either directly or as a guarantor of the obligations of TerreStar. Thus, TMI is seemingly free to walk away from its proposed 2 GHz MSS system without penalty, and apparently without having spent any money constructing the satellite. It is to avoid such a possibility that the Commission imposed (and has long applied) an initial milestone requirement to enter into a binding, non-contingent contract. The proffered TerreStar-Space Systems/Loral contract, however, is not binding on TMI.

Subsequent to TMI's submission of the satellite construction contract and certification, the Carriers submitted a letter to the FCC noting that "there is a serious question whether TMI . . . has entered into a non-contingent contract, as it is relying not upon its own contract with a manufacturer, but rather upon a contract between a proposed investor, TerreStar Networks Inc., and Loral."⁸ Thereafter, TMI met with Commission Staff, who raised questions concerning the relationship between TMI and TerreStar.⁹ TMI indicated in response that it presently "only has

⁶ See Agreement between TMI Communications and Company, Limited Partnership and TerreStar Networks Inc. (July 12, 2002). That agreement also provides that TMI further agrees to transfer to TerreStar "all of its right, title and interest in and under the Loral contract, the satellite, and all work in progress under the Loral contract," *id.*, but as noted above, TMI has no rights or interest under the Loral contract. See TerreStar/Loral Contract at Section 37.15

⁷ 47 C.F.R. § 25.143(g)(1).

⁸ Letter from Kathryn A. Zachem, Esq. and L. Andrew Tollin, Esq., Wilkinson Barker Knauer, LLP, on behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless to Marlene H. Dortch, Secretary, FCC in IB Docket No. 01-185 *et al.*, at 4-5 (Aug. 15, 2002) (footnote omitted).

⁹ See Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, to Marlene H. Dortch, Secretary, FCC re: File No. 189-SAT-LOI-97, *et al.* (Aug. 27, 2002).

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an indirect [minority] interest in TerreStar through its ownership interest in” the parent company of TerreStar.¹⁰ The Commission apparently was not satisfied by TMI’s response, because on October 4, 2002, the Commission sent a letter to Counsel for TMI requesting additional information “to assist in our review of whether TMI entered into a ‘non-contingent satellite manufacturing contract’ by July 17, 2002,” and observing that:

Specifically, we note that TMI is not a party to the Terrestar/Loral contract, and that the TMI/Terrestar agreement does not appear to bind TMI in any way to pay for satellite construction under the Terrestar/Loral contract. Please indicate whether there are any agreements or other arrangements by which TMI is legally obligated to pursue the construction of proposed system, or is in any way liable in the event the satellite system is not implemented.¹¹

TMI purported to answer the Commission’s inquiry in a letter from Gregory C. Staple to Marlene H. Dortch, dated October 15, 2002. That letter, however, dodged the Commission’s request to identify any agreements or other arrangements that would bind TMI, so presumably there is no such obligation. Instead, TMI merely claimed that TerreStar has rights to a satellite and explained that the contract was undertaken by TerreStar because TMI expects to assign its FCC authorization to TerreStar in the near future.¹² TMI’s “response” begs the question – why did TMI not simply execute the contract in its own name and provide for the subsequent assignment of the contract to TerreStar?¹³ The only logical explanation for the chosen arrangement is that TMI wanted to avoid exposing itself to any liability so as preserve its option to walk away from its 2 GHz MSS proposal (while maintaining its authorization in case the right

¹⁰ *Id.* at 2.

¹¹ Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Gregory C. Staple, Vinson & Elkins, Counsel for TMI, re: File No. 189-SAT-LOI-97, *et al.* (Oct. 4, 2002). The Commission also asked TMI to explain the discrepancy between the orbital location in the FCC authorization and the orbital location specified in the TerreStar/Loral contract and the Canadian authorization.

¹² In that response, TMI also asserts that TMI has an “indirect interest” in performance of the Loral contract. *See* Letter from Gregory C. Staple, Vinson & Elkins, Counsel to TMI, to Marlene H. Dortch, Secretary, FCC re: File No. 189-SAT-LOI-97, *et al.* (October 15, 2002). As noted above, however, the TerreStar/Loral contract explicitly disclaims any interest of TMI in the contract. *See* TerreStar/Loral Contract at Section 37.15.

¹³ TMI clearly could have done so, as Loral was willing to accept such a term and subsequent assignment. *See* TerreStar/Loral Contract at Section 37.1.2 (providing TerreStar with rights to assign or transfer the contract).

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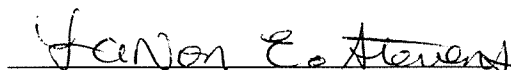
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