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Policy Branch
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The Honorable Michael K. Powell
Chairman
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

Re: TMI Letter of Intent Authorization and Assignment to TerreStar
File No. 189-SAT-LOI-97; IBFS Nos. SAT-LOI-19970926-00161, SAT-AMD-20001103-00158, SAT-MOD-20021114-00237, SAT-ASG-20021211-00238

Dear Mr. Chairman:

TerreStar and TMI here respond to the Carriers' June 20, 2003 letter in four respects. *First*, this response provides an explanation for the structure of the July 2002 arrangements among TerreStar, TMI and Loral, which the Carriers have attacked but, more importantly, about which the Bureau continues to make inquiries. *Second*, in order to be responsive to the Bureau's concerns, this factual explanation is then lined up against paragraphs 12 through 14 of the Bureau's February 10, 2003 Order. *Third*, this letter addresses the Carriers' claim that TMI and TerreStar have not made an adequate case for waiver. *Fourth*, TerreStar and TMI briefly rebut various other points raised by the Carriers.

I. THE NATURE OF TMI'S COMMITMENT

The Carriers' June 20, 2003 letter asserts: "TMI has still never explained why the transaction was structured in such a convoluted fashion." Recently, a Bureau representative asked why TMI did not guarantee TerreStar's performance under its construction contract with Loral. The Bureau's February 10 Order (para. 12) concludes: "TMI has not undertaken obligations, other than its agreement to transfer its authorization."

The TMI/TerreStar/Loral transactions were, in fact, quite straightforward. In July 2002 TMI contractually obligated TerreStar to enter into a non-contingent, satellite construction agreement with Loral, which it did. The consideration for that agreement was TMI's obligation to transfer its 2 GHz authorization to TerreStar at a time to be determined by TerreStar. In addition, as was appropriate for the existing authorization holder, TMI retained control of the 2 GHz authorization and of the satellite construction process, and was obligated to keep the authorization in good standing until it could be transferred to TerreStar. Such arrangements are quite commonplace in other services regulated by the FCC and raise concerns only if the licensee abdicates control over the license, which is not alleged here.

But a fuller response to the Bureau's questions about the TMI/TerreStar and TerreStar/Loral contracts of July 2002 goes back to January 2001 (prior to the FCC's and

Canada's granting the 2 GHz authorization and license to TMI -- which occurred in July 2001 and May 2002, respectively). In January 2001 TMI and Motient signed definitive agreements to contribute their respective mobile satellite services businesses into a new joint venture called Mobile Satellite Ventures ("MSV"). The joint venture combined (i) TMI's existing L-band and (nascent) 2 GHz satellite communications business with (ii) Motient's L-band license and operational satellite communications business. (TMI is a Canadian company affiliated with a Canadian national communications carrier and Motient is a U.S. public company.) In addition, certain private equity investors -- Telcom Ventures, Columbia Capital, and Spectrum Equity -- contributed $50 million in new capital to the joint venture and a track record of entrepreneurial innovation in various fields of communications. The Commission approved the TMI/Motient/new investors deal in November 2001, holding that it would benefit the North American public, and the transactions were promptly consummated.

As a result of TMI's entering into this joint venture, TMI was to remain a major (26%) stakeholder in all of its previous businesses and assets including eventually the 2 GHz opportunity (with respect to which TMI as the holder of the Canadian and U.S. authorizations was to and has continued to meet its regulatory obligations). By entering into the joint venture, TMI also gained a new, large stake in the additional businesses contributed to the joint venture by Motient. TMI's interests in 2 GHz were not contributed to the joint venture at that time, however, because when TMI and Motient agreed to form MSV, TMI's 2 GHz licenses and authorizations had not been issued by the Canadian and U.S. regulatory agencies. Instead, TMI's 2 GHz interests were left in their then present posture, subject to TMI's commitment to transfer the U.S. authorization to an MSV subsidiary (TerreStar) at such time as MSV or its subsidiary should elect. (See the January 2001 TMI/MSV Asset Sale Agreement, Exhibit 2, Att. A of the TMI/TerreStar December 11, 2002 transfer application.) After this future transfer to TerreStar, TMI would continue to have a substantial, though indirect, equity ownership interest in the 2 GHz authorization.

In short, it was in the 2001 transactions that TMI made its major contributions to the new entity, MSV, including a commitment to transfer to an MSV subsidiary its 2 GHz U.S. authorization at a future time to be determined by MSV. It was also the assets that TMI contributed in 2001 which constituted consideration for TerreStar's *subsequently* entering into the Loral contract on the expectation that the authorization itself would soon be transferred to TerreStar. In addition, it was in 2001 that the equity investors contributed capital to the joint venture in exchange for a share in the resources contributed and to be contributed by TMI, including the 2 GHz authorizations. Their capital, in turn, helped fund TerreStar's following through with its construction contract responsibilities to Loral and to TMI. Ironically, the Bureau's termination of TMI's 2 GHz authorization would deprive Motient and the equity investors of a part of the value that they bargained and paid for in 2001. Industry Canada's understanding of the relationship between the 2001 TMI/Motient/equity investors transactions and the July 2002 TerreStar/TMI/Loral arrangements helps to explain why on August 23, 2002, it concluded that TMI had "demonstrated that TMI is bound to a contractual agreement for the construction of the proposed satellite" and had met its milestone requirement.

With this background, the steps taken by the parties through July 2002 are perfectly understandable. Subsequent to the joint venture's being formed, MSV set up TerreStar

to carry out those portions of the 2001 joint venture plan relating to the 2 GHz band. The "terse" TMI/TerreStar/Loral arrangements set forth in the two July 2002 contracts were, therefore, not stand-alone transactions. Instead, they were the next (not the first and not the final) step in carrying out the business plan agreed to by the parties in January 2001 and subsequently approved by the FCC and Industry Canada in the same year. Because TMI was still (temporarily) the authorization holder, the July 2002 contract obligated TerreStar, and TerreStar readily agreed, to enter into the non-contingent construction contract with Loral that nevertheless preserved TMI's control over the construction process. It was sufficient to Loral that TerreStar was the party that was obligated to it. After all, TerreStar was to be the future authorization holder and operator of the 2 GHz service, and TMI had a 26% indirect interest in TerreStar through MSV.

To no one -- not TMI, not MSV, not TerreStar, not Loral -- did it occur that something more would be required by the FCC beyond what was being required by Loral which was committing itself to perform approximately $300 million worth of satellite construction work and had powerful incentives to obtain adequate assurances of a sufficient "commitment" or "obligation." And from a business perspective, it made no sense for TMI to contract with Loral or guarantee TerreStar's performance because TMI had already made contributions to the merger -- contributions that were premised on TerreStar, as MSV's subsidiary, taking over front-line responsibility for the 2 GHz business after the transfer of the FCC authorization to TerreStar.

II. HOW THIS FULLER EXPLANATION OF THE FACTS RESPONDS TO THE BUREAU'S CONCERNS

Here we analyze the critical paragraphs (12-14) of the Bureau's February 10 Order in light of the above facts.

Paragraph 12 -- The Order does not dispute that "TMI has an enforceable right to the benefits of a *bono fide* satellite manufacturing contract." But it contends: "equally if not more important than the issue of benefits under the [manufacturing] contract is the question whether TMI has undertaken concrete obligations that demonstrate a commitment to and investment in the project." And the Order proceeds: "TMI has not undertaken obligations other than its agreement to transfer the authorizations . . . TMI has not guaranteed TerreStar's payments to Loral, nor has it in any way provided information about obligations it has undertaken that would allow us to conclude that TMI effectively stands in the shoes of TerreStar in connection with obligations under the satellite manufacturing agreement."

The facts summarized above show that, at the time TMI entered into the construction contract binding TerreStar to manufacture and deliver an MSS system, TMI had already contributed into MSV most of its assets -- assets for which it had expended in excess of $450 million. Thus, TMI had already "demonstrate[d] a commitment" and "undertaken obligations" by transferring these multimillion dollar assets to MSV in consideration (in part) for MSV's implementing the 2 GHz MSS system for which TMI continued to hold the U.S. authorization until it could be transferred to TerreStar. Since in 2001 TMI had provided MSV substantial consideration to continue the joint venture's MSS businesses, it was entirely reasonable that in 2002 TerreStar, as MSV's subsidiary and as the future transferee of TMI's 2 GHz MSS authorization, would be the party that directly contracted with Loral. Moreover,

once the 2 GHz U.S. authorization was transferred to TerreStar, it was entirely reasonable that TMI should have no continuing obligation to fund the future construction of the 2 GHz MSS system. Prior to the next milestone (the July 2003 Critical Design Review (CDR)), all parties expected TerreStar to have assumed the authorization.

These facts also respond to the Order's concern about TMI's "stand[ing] in TerreStar's shoes" and the Bureau's question about TMI's guaranteeing TerreStar's performance of the Loral contract. There was no legal or other obligation that TMI "stand in TerreStar's shoes," and TMI had already made substantial contributions to the 2 GHz business. As for a TMI guarantee, that was also obviated by TMI's prior contributions and commitments, and in any event Loral did not request such a guarantee.

Paragraph 13 -- The Order also says that "TMI's situation is, in many respects, analogous to" that presented in the milestone case involving *Columbia Communications Corporation* (DA 00-702, 15 FCC Rcd 16496, Int'l Bur. 2000). There the Bureau declined to extend Columbia's initial construction milestone "because the licensee had not adequately explained why it could not enter into a contract with a satellite vendor, under terms permitting the assignment of the contract to the proposed transferee at a later date." The Order suggests that TMI had a like obligation and states that TMI's only explanation as to why it did not pursue a similar option with Loral was that "TMI wanted to ensure continuity in the relationship with its satellite manufacturer and TerreStar provided an appropriate vehicle for that."

This case is very different from that of Columbia, because here a binding manufacturing contract was executed, it is being fully performed in timely fashion and payments on that contract in the amount of $850,000 have been made. But in Columbia, despite the licensee's being granted an initial seven-month extension of the first construction milestone, no manufacturing contract was ever signed. Columbia sought a waiver to excuse that deficiency, whereas here no such deficiency exists. In turn, this decisional difference is explained by the fact that in Columbia the merger was never put together; here, of course, the joint venture had been formed in the previous year and had been described to the Commission in the parties' 2001 application.

Columbia had argued that financial uncertainties arising from a possible merger had made it difficult to enter into a satellite construction contract. The Order responded that Columbia "does not explain why it and the satellite vendor could not agree to a contingent contract . . . that would transfer to GE Americom if the merger is approved." The Order made this point to underscore the fact that Columbia had a reasonable means to assure that construction would go forward, notwithstanding the merger possibility. Here, TerreStar/TMI assured that there would be a non-contingent construction contract by a different but even more effective arrangement. The Bureau acknowledges that the contract with Loral is a non-contingent construction contract. TMI had already paid consideration into the joint venture that is TerreStar's parent, and TMI then obligated TerreStar to enter into the required manufacturing contract with Loral. This plus the promise to transfer the 2 GHz authorization to TerreStar, "at its election," explains why the TerreStar/TMI/Loral contractual arrangements would "ensure continuity" for the satellite manufacturing process, consistent with the milestone obligation.

Paragraph 14 -- The Order concludes by saying that Bureau review of milestone compliance should "focus[] on the legal arrangements for the construction of a satellite" . . . [and] "[o]ur review of those legal arrangements and of TMI's response to our inquiries indicates no basis whatsoever for concluding that TMI is obligated to fund future steps in the construction process or is in any way otherwise obligated to proceed with construction." But well prior to the first milestone TMI had already contributed very valuable assets to TerreStar's parent, and as part of the "legal arrangements" constituting the joint venture, TerreStar was to be responsible for future steps in the construction process (i.e., critical design review, completion of construction). Again, pursuant to those same "legal arrangements," TMI's obligation was to end upon transfer of its authorization to TerreStar. The Order fails to take into account that TMI incurred multiple obligations (i) beginning in 2001 with the transfer of valuable assets to the joint venture, (ii) followed in 2002 by execution of a contract that required it to transfer the 2 GHz authorization to TerreStar in exchange for TerreStar's being bound to deliver a completed satellite in compliance with the FCC's milestones and on an ongoing basis, the substantial efforts necessary to maintain the 2 GHz regulatory authorizations until they could be transferred.

III. CARRIERS' CRITICISM OF THE CASE FOR WAIVER HERE

The Carriers' first assertion (p. 5) under this heading is that TerreStar/TMI's case for waiver is "grossly untimely and inappropriate." This is so because, in the Carriers' too artful words, the "International Bureau was never presented with any showing related to a waiver *during the course of the milestone proceeding*" (emphasis added). This ignores that TMI/TerreStar expressly asked for a waiver in its February 6, 2003 Opposition to the Carriers' Petition to Deny the parties' 2 GHz transfer application. The Carriers ignore that pleading apparently on the ground that it related to the transfer application, not to the milestone requirement. But, of course, the filing of the transfer application grew out of questions raised by the Bureau about milestone compliance, and since 2001 the transfer had been part of the TMI/MSV business plan as disclosed to the Commission. If there were any doubt about the inextricable relationship between the milestone and the transfer, the Carriers should look at the caption of their June 20 letter, which specifies both proceedings. And this reflects the fact that the Bureau's February 10 Order also captioned the two issues together. See also paragraph 7 of the Order which specifically incorporates the TMI/TerreStar transfer application with the milestone issue. Even before then, going back to TMI/TerreStar's October 15, 2002 response to the Bureau and to their November 14, 2002 meeting with the Bureau, TMI/TerreStar had provided the information that is the basis for grant of the waiver. The Carriers' quibble, once exposed for what it is, does not remotely provide an appropriate basis for forfeiting an FCC authorization on which $850,000 has been spent on the construction contract alone.

The Carriers' second complaint (pp. 4-5) is that TerreStar/TMI's waiver request does not "satisfy (or acknowledge) the waiver standards." This is merely conclusory. The Carriers assert that to satisfy the Commission's waiver standards a waiver applicant must cite "special circumstances." The most outstanding special circumstance here, of course, is that the steps required under the first milestone were taken and payment was made. *That fact alone is sufficiently special because it distinguishes this case from every other milestone case where an authorization has been forfeited.* (For example, less than a month ago, the Bureau waived the milestone requirement for a 2 GHz grantee where a bona fide construction contract had been

entered into, even thought the construction was non-conforming in that it was for a GSO satellite while the Commission's authorization had specified a non-GSO satellite. *The Boeing Company,* DA 03-2073, June 24, 2003.) The Carriers also assert that a waiver "would undermine the strict enforcement of the initial construction milestone." That assertion is also conclusory and could be said of any waiver. In any event, reinstatement of the authorization "would not undermine the policy objective of the rule." The milestone policy is intended to prevent warehousing. But that did not occur here because the required milestone steps had been performed and paid for and because TerreStar seeks to acquire the authorization in order to proceed with construction, not to let the authorization remain idle. Finally, the public interest would be served because reinstatement of the authorization and grant of the transfer application would enable the remaining step in the Motient/TMI transaction to be carried out, which the Commission held in 2001 will "forward . . . important goals." Order and Authorization, DA 01-2732, para. 35, Nov. 21, 2001.

IV. THE CARRIERS' OTHER ERRONEOUS ARGUMENTS

1. *The Carriers' assertion that the milestone requirement was "clear" and "unambiguous" is false (p. 2).* First, the list of milestone requirements includes several that the license holder would have to rely on a third party to perform (e.g., "Complete Critical Design Review," "Begin Physical Construction" and "Complete Construction . . . and Launch It"). Therefore, it is not at all clear that a third party's performance of the first milestone obligation to "enter into" a satellite construction contract is inconsistent with the plain language of the milestone requirements. Second, TMI did enter into a "non-contingent Satellite Manufacturing Contract" (not a defined term). It did so with TerreStar, and TerreStar in turn entered into a non-contingent contract with Loral.

2. *The Carriers (p. 2) seek to dismiss numerous broadcast and CMRS decisions that are contrary to the Order here, because satellites are "different."* That the CMRS and broadcast cases lead to a different result is a helpful concession, and leaves it to the Commission to decide whether the difference justifies the death penalty in these circumstances -- an issue that we have addressed previously. Letter from Greg Staple, Counsel for TMI, and Gerard Waldron, Counsel for TerreStar, to Chairman Powell, at 1-2, 189-SAT-LOI-97 (June 3, 2003); TMI-TerreStar Reply to Opposition to Application for Review, at 3-4, 189-SAT-LOI-97 (Apr. 7, 2003); TMI-TerreStar Application for Review, at 14-15, 189-SAT-LOI-97 (Mar. 12, 2003)

3. *The Carriers (p. 3) erroneously characterize TMI/TerreStar's argument as asserting that "the Commission's milestone policy is misguided."* To the contrary, TMI/TerreStar support the Commission's milestone requirement policy. In good faith they believed they had complied with it; after all, the steps necessary to comply were undertaken in timely fashion and paid for. TerreStar and TMI's conviction that they were in compliance explains why they did not ask the Bureau about the appropriateness of an arrangement that Industry Canada held to comply with a similar milestone requirement. The Carriers continue to label this arrangement as "unprecedented." What is unprecedented is that the Bureau forfeited the authorization when all the required steps under the first milestone were undertaken. Neither the Order nor the Carriers cite any case where an authorization has been forfeited under these circumstances.

4. *The Carriers' (p. 3) also complain that TMI/TerreStar's discussion in its June 3 letter of the FCC's "control" cases was "an 'apples to oranges' comparison."* But the Carriers overlook that TerreStar/TMI discussed the "control" cases specifically in response to a direct inquiry from the Bureau. The Carriers then seize on one of six factors for evaluating control issues under the Commission's *Intermountain* case apparently to quibble about TMI's control over the 2 GHz authorization. But the TMI/TerreStar contract is replete with sufficient protections of TMI's control until the transfer takes place, and the Carriers do not seriously challenge that fact.

5. *The Carriers' reliance (p. 4) on the language in the Loral/TerreStar contract precluding third party beneficiaries is much ado about nothing.* Contractors routinely preclude third party beneficiaries in their contracts because otherwise they would face additional contingent liabilities beyond the liabilities contracted for by the direct parties to the agreement. Moreover, in its contract with TerreStar, TMI had preserved all the rights it needed to assure construction in accordance with the milestone requirements and to assure its control until the authorization could be transferred to TerreStar.

* * *

TerreStar and TMI continue to believe that they met the first milestone. But if the full Commission is uncertain that this is the case, a waiver would be justified because of the special circumstances here, because the purpose of the rule would be served by a waiver and because a waiver would serve the public interest.

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