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

APR - 7 2003

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
TMI Communications and Company, )  
Limited Partnership )  
Request for Modification of Spectrum )  
Reservation for a Mobile-Satellite Service )  
in the 2 GHz Bands )  
)  
TMI Communications and Company, )  
Limited Partnership, Assignor and )  
TerreStar Networks Inc., Assignee )  
Request to Assign Spectrum Reservation )

File No. 189-SAT-LOI-97  
IBFS Nos. SAT-LOI-19970926-00161  
SAT-AMD-20001103-00158  
SAT-MOD-20021114-00237

RECEIVED  
ASSG-20021211-00238

APR 08 2003  
Policy Branch  
International Bureau

To: The Commission

**REPLY TO OPPOSITION TO APPLICATION FOR REVIEW**

The Opposition filed by AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (“Carriers”) in response to TMI and TerreStar’s Application for Review in the above captioned proceedings simply repeats the Bureau’s flawed analysis. The Commission should grant the Application and reinstate TMI’s authorization and the assignment application because the Bureau’s Order asked the wrong questions, erroneously concluded that the milestone had not been met, misread Commission precedent, ignored contract law, and contravened U.S. trade commitments under the WTO.

*Defining the issue:* The Bureau and the Carriers’ formulation of the critical question—whether TMI signed the satellite contract—was incorrect. Once the wrong question was asked, the draconian result became foreordained. In this Application for Review, however, the Commission must focus on the proper issue. The correct test—supported by precedent, good sense, and sound policy—is whether design and construction of the authorized satellite had begun pursuant to a non-contingent contract. The interrelated TMI/TerreStar and

TerreStar/Loral contracts bound Loral to construct the TMI satellite under TMI's control and direction. And as the attached declarations demonstrate convincingly, the required work is being done.<sup>1</sup> Loral has already received \$750,000 (by June it will be \$1 million) for this work, and neither the Carriers nor the Bureau denies those facts. The proper milestone test has been met.

*Concrete obligations and a demonstrated commitment; no warehousing:* The interrelated contracts among TMI, TerreStar, and Loral provide exactly the "concrete" obligations that the construction milestone is designed to test and preclude the "warehousing" of 2 GHz spectrum. Contrary to the assertions of the Bureau and the Carriers, these contracts ensure that TMI has incurred substantial obligations. TMI cannot freely relinquish its LOI authorization without breaching both its contract with TerreStar and the underlying January 2001 asset purchase agreement with MSV. Further, TerreStar cannot "walk away" from its contract with Loral without giving rise to a breach of its contracts with TMI and Loral. Moreover, TMI will not profit from any future transfer of the authorization to TerreStar because TMI has already been paid for all of the assets in the TMI asset purchase agreement (including the authorization).<sup>2</sup>

*Entering into a contract:* Even using the Bureau's rigid interpretation of the *TMI Authorization*, the requirement was met because TMI did enter a non-contingent contract to have a satellite manufactured—a contract with TerreStar. As required by that contract's terms, TerreStar then entered into a contract with Loral. The TMI/TerreStar contract explicitly provides for TMI's control of the design, construction, and delivery of the satellite. More importantly, TMI can enforce its contract with TerreStar, including that contract's requirement that TerreStar execute, within the applicable FCC milestones, a satellite construction contract with Loral.

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<sup>1</sup> Declaration of Wharton B. Rivers, Jr.; Declaration of Eric Butte; Affidavit of Ted Ignacy.

<sup>2</sup> See Opposition to Petition to Deny at 16-18.

TerreStar, meanwhile, can enforce Loral's performance under the construction contract, and it can enforce TMI's obligation under the TMI/TerreStar contract—precluding TMI from being able to “walk away” from the contract, as the Carriers contend.

*Meaning of the requirement:* The TMI authorization order states that “TMI must observe the following milestone requirements . . . Enter [into a] Non-contingent Satellite Manufacturing Contract.”<sup>3</sup> The Bureau interpreted this language to mean that only TMI (or an entity controlled by TMI) is able to “enter a non-contingent satellite manufacturing contract,”<sup>4</sup> or, as stated by the Carriers, “TMI must . . . Enter” the contract.<sup>5</sup> But this interpretation proves too much. If accepted, this interpretation would mean that “TMI must . . . Design,” “TMI must . . . Begin Physical Construction,” and “TMI must . . . Launch.” Of course, no one expects TMI (or any other licensee) itself to design, physically construct, and launch the satellite. Instead, under the *TMI Authorization*, TMI is expected to have contractual relationships with parties that perform each of these milestones. As shown below, this is exactly what TMI accomplished.<sup>6</sup>

*Commission practice and precedent:* The Bureau and the Carriers can cite no case of a license being revoked or withdrawn where satellite construction was being satisfactorily performed, though by a third party. But we cited numerous precedents in the CMRS and broadcast services where third parties routinely perform the work necessary to meet the required milestones and that were regarded by the Commission as being sufficient. Imposing

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<sup>3</sup> *TMI Communications and Company, LP*, 16 FCC Rcd 13,808, 13,812 (2001) (“*TMI Authorization*”).

<sup>4</sup> *TMI Communications and Company, LP*, DA 03-385, ¶ 9 (rel. Feb. 10, 2003).

<sup>5</sup> Opposition to Application for Review at 4.

<sup>6</sup> The FSS decisions cited by the Carriers are likewise unavailing. In those decisions, “licensee” refers to all actions taken at the licensee’s direction. A contrary interpretation would require licensees to create their own satellite manufacturing plants and space launch centers. *E.g.*, *PanAmSat Licensee Corp.*, 16 FCC Rcd 11,534, 11,539 (2001) (“licensees can begin constructing”); *id.* at 11,545 (“licensees . . . will launch”).

a different test here would be a wholly novel departure from existing law and practice.

*Strict enforcement, not strict interpretation:* The Carriers' reliance on the Commission's commitment to "strictly enforce milestone requirements" is misplaced. The Carriers conflate strict enforcement of a milestone with strict interpretation of the text of the requirement. Strict enforcement of the milestone, a sound spectrum-management policy, means that contracts must be *bona fide* and non-contingent.<sup>7</sup> Strict enforcement does not, however, mean that the Bureau must adopt a wooden interpretation of the *TMI Authorization* that ignores the reality of a satellite being designed, and that is both contrary to previous precedent and raised for the first time in the Order. Indeed, where the penalty is the most extreme, such as declaring null and void TMI's LOI authorization and causing a large forfeiture (\$750,000 has already been paid to Loral), the violation of the Commission's rules must be the most clear.<sup>8</sup> In any event, reinstatement of the LOI would be entirely consistent with the policy of strict enforcement because the required design and construction is being promptly performed.

*Inconsistency with WTO Commitments:* The Bureau's revocation is inconsistent with the United States market access commitments under the WTO Basic Telecommunications Agreement. The United States cannot introduce a barrier to market entry unless it expressly reserved the right to do so in its schedule of WTO commitments, and the U.S. commitments on access to the domestic voice and data markets do not make an exception for the milestone criteria upon which the Bureau relied. Hence, DISCO II notwithstanding, the Bureau's application of its milestone criteria in these circumstances has resulted in a barrier to market entry that is inconsistent with the principles and requirements of the U.S. WTO commitments.

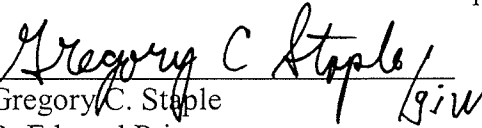
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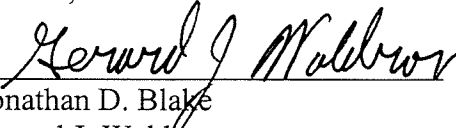
<sup>7</sup> *Morning Star Satellite Co.*, 16 FCC Rcd 11,550, 11,552 (2001).

<sup>8</sup> *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3-4 (D.C. Cir. 1987) (reversing FCC revocation of a licensee selection where there was ambiguity in FCC requirement).

*Appropriateness of a waiver:* Even if the Commission were to accept the Bureau's new test for milestone compliance, ignore binding contractual relationships, discount the ongoing satellite manufacturing, dismiss past precedent and practice, and fail to heed the WTO restrictions, and on that basis find that the milestone has not been met, it should grant a waiver based on the cumulative effect of these considerations and on the prospective assignment of the authorization to TerreStar, which no one denies would bring the situation into full compliance with even the Bureau's standards. The Bureau had factual information justifying a waiver from TMI's October 2002 letter, the November 2002 *ex parte* meeting, and the December 2002 assignment application.<sup>9</sup> Accordingly, the Bureau should have granted a waiver and the assignment as serving the public interest.<sup>10</sup>

Respectfully submitted,

  
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April 7, 2003

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<sup>9</sup> See TMI-TerreStar Assignment Application, Exhibit 2. These submissions included new facts bearing on the grounds for a waiver that existed as of the milestone date (e.g., excerpts from a January 2001 contract obligating TMI to assign its LOI to MSV or an affiliate, such as TerreStar; the close relationship between TMI and TerreStar including details of the overlapping TMI and TerreStar corporate boards and the express approval of the Loral contract by the boards of both TMI and TerreStar). TMI's multiple 2002 presentations, along with the information in the Opposition to the Petition to Deny, distinguish this case from *Richard Duncan*, 16 FCC Rcd 4312 (2001), where the waiver request was made only in the Application for Review.

<sup>10</sup> See Application for Review at 22-25 (discussing cases granting waivers where licensee had some defect); see also *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969) (when public interest waiver requests are "stated with clarity and accompanied by supporting data, [they] are not subject to perfunctory treatment, but must be given a 'hard look'").

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TMI Communications and Company, Limited Partnership	)	File No.	189-SAT-LOI-97
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	)		
TMI Communications and Company, Limited Partnership, Assignor	)		SAT-ASG-20021211-00238
	)		
And	)		
	)		
TerreStar Networks Inc., Assignee	)		
	)		
Request to Assign Spectrum Reservation	)		

To: The Commission

**DECLARATION OF WHARTON B. RIVERS, JR.,  
TERRESTAR NETWORKS INC.**

1. My name is Wharton B. Rivers, Jr., President and Chief Executive Officer of TerreStar Networks Inc. ("TerreStar"). I have over 13 years of senior management experience in the telecommunications industry, including serving as President of Ameritech Network Services, President of Cable and Wireless, North America, and Chief Executive Officer of Advanced Radio Telecom. Additionally, I completed 20 years of service as an officer in the U.S. Army, having had a variety of command and staff assignments, including combat service.

2. TerreStar was formed by its parent, Mobile Satellite Ventures LP (“MSV”), as a Delaware corporation and a 100% owned subsidiary of MSV in February 2002, to pursue the 2 GHz MSS opportunity.
3. I was hired by TerreStar as President and Chief Executive Officer in March, 2002. I was hired by TerreStar to devote all of my professional time and energy to the business of TerreStar (i.e., I am a “full time” employee with no other business interests or ventures).
4. As President and CEO of TerreStar, I have directed TerreStar’s activities and operations to put the company in a position to operate and compete in the 2 GHz MSS business once the TMI/TerreStar transaction is completed.
5. In the spring of 2002, TMI and TerreStar commenced discussions with several potential satellite manufacturers regarding the procurement of a satellite to meet the 2 GHz license milestones in TMI’s authorization. As a result of these discussions, TMI and TerreStar decided to pursue the negotiation of a definitive satellite procurement contract with Space Systems/Loral, Inc. (“Loral”).
6. From March 2002 to June 2002, TMI and TerreStar worked closely with Loral to refine the satellite design specifications in order to satisfy specific technical requirements contained in TMI’s Industry Canada 2 GHz authorization with regard to satellite design. During this process, personnel of both TMI and TerreStar were extensively involved in the development and refinement of the satellite design specifications.

7. By approximately June 1, 2002, Loral had provided a draft manufacturing contract to TMI and TerreStar for review. TMI and TerreStar reviewed successive drafts of the Loral satellite procurement contract prior to the execution of the agreement.
8. In July 2002, TMI and TerreStar signed a binding agreement in which TerreStar agreed to execute, for TMI's benefit, a non-contingent satellite procurement contract with Loral, calling for the delivery of the satellite to TMI on terms consistent with the FCC and Industry Canada authorizations. This agreement also stated that TMI would retain control over the content of the satellite specifications for so long as TMI holds the licenses, and that TMI would transfer the licenses to TerreStar (or its designee) upon TerreStar's election.
9. At the same time that it entered into the agreement described in #8 above in July 2002, TerreStar entered into a satellite procurement contract with Loral, on terms designed to satisfy the 2 GHz license milestones contained in TMI's license. Prior to its execution, the agreement with Loral was reviewed and approved by TMI.
10. Since the signing of the contract with Loral, a total of \$750,000 has been paid to Loral under the contract. TerreStar is in full compliance with its obligations under the contract. The contract is in full force and effect. By June 2003, an additional \$250,000 is required to be paid to Loral.
11. Work has progressed as planned under the Loral contract, i.e., satellite specifications are being designed and construction timetable is being refined. During the period July-December 2002, Loral accomplished many key technical tasks, including determination of the size of the satellite segment, as well as defining some ground systems requirements. Further, during the first quarter of 2003, gateway designs were finalized, initial antenna

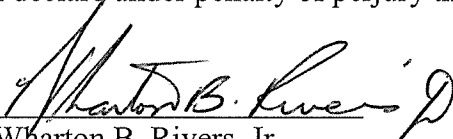


design was completed and design of key on-board processor capability is nearing completion.

These accomplishments resulted from several planning sessions at Loral, and have involved the coordinated efforts of personnel of TerreStar, TMI and Loral.

12. In my professional opinion, and based on my many years of experience in the telecommunications industry, TerreStar is proceeding diligently and in good faith to take the necessary steps to pursue its 2 GHz MSS business opportunity once the transfer transaction with TMI is completed.

I declare under penalty of perjury that the foregoing is true and correct.

  
Wharton B. Rivers, Jr.

Executed on April 7, 2003

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TerreStar Networks Inc., Assignee	)		
	)		
Request to Assign Spectrum Reservation	)		

To: The Commission

**DECLARATION OF ERIC BUTTE,  
SPACE SYSTEMS/LORAL**

1. My name is Eric Butte, Executive Director, Government Systems and Programs, and Executive Director, TerreStar Program, for Space Systems/Loral ("Loral"). I have over six years of senior program management experience in the satellite industry, and have served in my present capacity with Loral for the past two years.
2. Loral is a premier designer, manufacturer, and integrator of high power commercial telecommunications satellites and satellite systems. Loral designs unique satellites and provides related services to customers such as TerreStar.

3. Loral also provides a range of related services that includes mission control operations and procurement of launch services. Based in Palo Alto, CA, Loral has an international base of commercial and governmental customers whose applications include broadband digital communications, direct-to-home broadcast, governmental communications and environmental monitoring.
4. From March 2002 to June 2002, Loral worked closely with TMI and TerreStar to refine preliminary satellite design specifications in order to satisfy specific technical requirements contained in TMI's Industry Canada 2 GHz authorization with regard to satellite design. During this process, personnel of both TMI and TerreStar were extensively involved with Loral in the development and refinement of the satellite design specifications.
5. Shortly after the execution of the satellite procurement contract in July 2002, Loral met with Wharton B. Rivers, Jr., president and CEO of TerreStar Networks Inc. ("TerreStar"), and others affiliated with TerreStar and TerreStar's parent, Mobile Satellite Ventures LP ("MSV"), to present Loral's proposals for the architecture of the satellite. At that meeting, the parties agreed on a 90-day timetable for finalizing system architecture, identifying key program items, and identifying and documenting program milestones.
6. In September 2002, Loral's program team met with TerreStar executives at Loral's offices in Palo Alto, CA to further develop and agree on the key steps in the implementation of the design and construction program for the satellite. Among the matters addressed were: top level payload budget, top level design systems to provide coverage consistent with Industry Canada and FCC license requirements, analysis of number of feeds for U.S. coverage,

incorporating requirements for coverage in Mexico, Puerto Rico, Alaska and Hawaii, and constructing development schedules for appropriate hardware and subsystems.

7. Throughout the remainder of 2002, Loral continued to develop and refine various aspects of the satellite construction program. The topics and tasks covered included the following: refining scope of work requirements and schedule, establishing a baseline for link budgets (margins), designing the on-board digital processor, antenna, payload, orbital debris mitigation, and fuel requirements.
8. Loral continued working in earnest on the satellite program during the first quarter of 2003 (i.e., January - March 2003). Among other things, the program team made substantial progress on the design parameters for the on-board digital processor. During February and March 2003, Loral also developed designs for the RF input and output subsystems on the payload.
9. Loral estimates that the design specifications for the on-board digital processor, one of the most important and complex system components, are now about 95% complete. All other subcontractor RFP documents are being developed, and Loral is ready to submit RFP's for the on-board digital processor to potential vendors. In my opinion, this represents attainment of a key objective in the satellite construction program.
10. Overall, excellent progress is being made by the Loral program team on the satellite construction contract. Working in conjunction with our customer, the design and construction of the satellite is generally meeting the schedule requirements stated in the original satellite procurement contract.

11. All required payments under the satellite procurement contract have been made on time. In addition to its payment obligations, TerreStar is performing and is current on all of its other obligations under the satellite procurement contract and the contract is in full force and effect. Work continues under the contract.
12. When the TerreStar satellite program moves into the manufacturing phase, it will involve substantial numbers of Loral employees (probably numbering a hundred or more) and will include employment for many subcontractors providing key components in the United States. Loral sees the program as challenging and exciting, as it will provide a unique satellite solution for voice and data customers in the United States.
13. The contract to build the TerreStar satellite comes at a good time for Loral. Currently, the commercial satellite industry is experiencing a historically severe depressed market. Start-ups, a key market niche for Loral in the last few years, have been struggling to move forward as it is very difficult to obtain financing. The U.S. satellite manufacturers are competing against foreign competition for a very small number of prospective customers. The industry has seen thousands of job cuts in the United States and worldwide, which has resulted in weaker than expected performances for both satellite manufacturers and satellite operators.
14. The TerreStar program provides Loral the opportunity for maintaining and achieving higher levels of technological excellence, deliver new services to consumers, make U.S. communication markets more competitive and provide employment to U.S. workers.

I declare under penalty of perjury that the foregoing is true and correct.

  
Eric Butte

Executed on April 4, 2003

TMI Communications and Company  
Limited Partnership

Opposition to Petition to Deny

File No. SAT-ASG-2002 1211-00238

Exhibit 1

**Affidavit of**

**Ted H. Ignacy**

**Vice President, Finance**

**TMI Communications Inc.,**

## Affidavit of Ted H. Ignacy

1. My name is Ted H. Ignacy and since 1997 I have served as Vice President, Finance, of TMI Communications Inc. (TMI Inc.), General Partner of TMI Communications and Company, Limited Partnership (TMI) and I continue to hold this position as of the date hereof.
2. As an officer of TMI Inc., I am familiar with the business affairs of TMI and, in particular, with the terms and conditions of the 2001 joint venture between TMI and Motient Corporation, including a certain Asset Sale Agreement between Mobile Satellite Ventures LLC and TMI, dated as of January 8, 2001, which I executed on behalf of TMI as did Mr. Larry Boisvert, President and CEO of TMI Inc.
3. The joint venture between TMI and Motient Corporation, Mobile Satellite Ventures L.P. (MSVLP) (formerly Mobile Satellite Ventures LLC) and Mobile Satellite Ventures (Canada) Inc., was formed for the purpose of pooling the North American Mobile Satellite Service (MSS) assets of TMI and Motient Corporation. As detailed in the aforementioned Asset Sale Agreement, the principal assets contributed by TMI were its in-orbit L-band satellite system, the Ottawa, Ontario ground station and network control facility, and TMI's customer base. TMI also agreed to contribute its 2 GHz letter of intent (LOI) application (then pending) before the Federal Communications Commission (FCC) for a reservation of spectrum to provide MSS in the 2 GHz band, and the underlying license application with Industry Canada to construct and operate a 2 GHz MSS system.
4. As of January 2001, TMI had expended in excess of \$450 million in the construction and operation of its existing L-band MSS system. However, the purchase consideration for the assets transferred to MSV was substantially less than that.
5. The Asset Sale Agreement closed on November 26, 2001 whereupon TMI was paid the stated purchase consideration for all of the TMI assets contributed to the MSV joint venture. Given the uncertain value of TMI's then pending application to the FCC and outstanding application to Industry Canada, no value was attributed to TMI's LOI authorization;

the consideration received by TMI was attributed to the other assets, namely the L-band MSS assets.

6. No additional consideration is due TMI for the assignment of its LOI interest to MSVLP or its designate under the Asset Sale Agreement or otherwise. MSVLP has agreed to reimburse TMI for reasonable legal fees and expenses incurred in connection with said assignment, however.

7. Upon the formation of MSVLP, I was elected a Director of Mobile Satellite Ventures, GP, Inc. (MSVGP), which manages MSVLP. Mr. Boisvert and Mr. Rory McCormick, a Senior Counsel to TMI, were also elected Directors. In my capacity as a Director of MSVGP, I attended Board meetings in January and February 2002. During those meetings the Board discussed and unanimously agreed upon the formation of a subsidiary to MSVLP (later named TerreStar Networks Inc.) to assume TMI's LOI authorization. A separate subsidiary was created to facilitate funding of the planned 2 GHz MSS system because it would permit Motient Corporation and TMI, principal owners of MSVLP, to hold lesser or greater interests in TerreStar than in MSVLP. A subsidiary also provides an independent vehicle for new investors to fund the 2 GHz MSS system separate from MSVLP's other businesses. The Board of MSVGP asked TMI Inc.'s CEO, Mr. Boisvert, to be TerreStar's founding Chairman; Mr. McCormick and I were also nominated to be founding Directors of TerreStar.


8. The Minutes of MSVGP indicate that TerreStar Networks Inc., (TerreStar) was incorporated as a wholly owned subsidiary of MSVLP on February 20, 2002. Messrs. Boisvert, McCormick and myself were confirmed as Directors.

9. Beginning in approximately March 2002, TMI and TerreStar commenced discussions with Loral/Space Systems, Inc. (Loral) and other potential manufacturers regarding the construction of a 2 GHz MSS system that would satisfy the terms and conditions of the LOI authorization and the expected grant of an approval-in-principle from Industry Canada. By approximately June 1, 2002, Loral had provided a draft manufacturing contract to TMI and TerreStar for review. Based upon this draft and further discussions, Mr. Boisvert and I executed a contract with TerreStar, on behalf of TMI, for the procurement of a 2 GHz MSS satellite from Loral which would meet the terms of the FCC and Canadian authorizations. On or about



July 12, 2002 the Boards of MSVGP and TerreStar also authorized TerreStar to enter into contracts with TMI and Loral to procure the requisite 2 GHz MSS system on TMI's behalf.

10. As Directors of TerreStar, Messrs. Boisvert, McCormick and I receive regular briefings from TerreStar's CEO, Mr. Wharton B. Rivers, Jr., regarding the activities and progress of Loral pursuant to the satellite manufacturing contract.

  
\_\_\_\_\_  
Ted H. Ignacy  
Vice President, Finance  
TMI Communications, Inc.

Sworn to me this 5th day of February, 2003.

  
\_\_\_\_\_  
Notary Public

**CERTIFICATE OF SERVICE**

I, Brian D. Smith, hereby certify that I caused true and correct copies of the foregoing "Reply to Opposition to Application for Review" to be served this 7th day of April, 2003, by hand delivery or First Class U.S. Mail (\*), upon the following:

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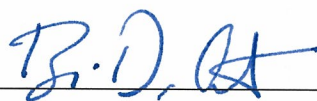
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