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Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: 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 Legal Advisors:

The Wireless Carriers' December 22, 2003, ex parte submission cites various cases for language they contain that is at most dicta but whose *holdings* do not support and often undercut the positions they advocate. Fortunately, the Commission has the opportunity on review to redress the injustice that resulted from the reliance the International Bureau placed on many of these cases when it canceled the TMI/TerreStar 2 GHz satellite authorization on February 10, 2003.

First, the threshold question is what standard of notice had to be met before the Bureau could impose the death penalty on TMI/TerreStar. TMI/TerreStar cited five appellate cases that *held* that the agency's notice (usually the FCC's) was inadequate. Letter to Mr. Paul Margie (Dec. 18, 2003). These cases explained that in these circumstances the Commission must provide "full and explicit notice of all prerequisites," *Salzer* v. *FCC*, 778 F.2d 869, 871-72 (D.C. Cir. 1985), and must do so to an "ascertainable certainty," *Trinity Broad. of Fla., Inc.*, v. *FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000). The Wireless Carriers' December 22, 2003, letter cited two cases in response: *Lakeshore Broad., Inc.*, v. *FCC*, 199 F.3d 468 (D.C. Cir. 1999); *McElroy Elecs. Corp.* v. *FCC*, 990 F.2d 1351 (D.C. Cir. 1993). The holding in *Lakeshore* was on a different issue: whether the applicant was entitled to *personal* notice of a required fee payment; the court found that *public* notice sufficed. The holding in *McElroy* was that the Commission had *not* provided sufficient notice. Moreover, *McElroy* exactly tracked the distinction TMI and TerreStar have drawn between whether the Bureau's reading of the first

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milestone requirement was reasonable[1] and whether the Commission had given sufficiently clear notice of the Bureau's interpretation so as to support the death penalty.

Second, the next question is what notice was, in fact, provided. The statute and the FCC regulations provide no indication that TMI itself had to enter directly into the construction contract with Loral. The *2 GHz MSS Order*, which is the most authoritative statement of the milestone requirements absent notice in the Act or the FCC's rules, twice refers to the obligations of "prospective operators," (not to the licensee's obligations), which TerreStar clearly is. *2 GHz MSS Order*, 15 FCC Rcd. 16,127, 16,179 (2000). Moreover, it articulates the requirement as "the satellite *system* must enter into a construction contract," which clearly occurred here. *Id.* at 16,177 (emphasis added). TMI's authorization, in turn, specifically referenced the *2 GHz MSS Order*. 16 FCC Rcd. 13,808 (2001).

Third, a further place to look for guidance is the case law, although the language of the *2 GHz MSS Order* could well be regarded as determinative. TMI/TerreStar's September 26, 2003, letter documented that the critical issue in the case law, on which each holding turns, is whether a non-contingent construction contract, conforming to the license, existed. Letter to Mr. Don Abelson (Sept. 26, 2003). In each of the eight cases where satellite licenses have been canceled, the opinion makes clear that the absence of a contract was the pivotal fact. In five cases, milestones were extended or licenses maintained because the Commission held that other circumstances excused or counterbalanced the absence of a contract. Since TMI had arranged for such a contract to be entered into through its agreement with TerreStar, which the Wireless Carriers concede was binding, it had every reason to believe it had complied with the milestone requirement. The letter to Mr. Abelson also demonstrated that none of the cases cited by the Bureau *held* that a satellite authorization would be canceled where a conforming, non-contingent construction contract was in existence by the milestone deadline.

In contrast, the Wireless Carriers' December 22 letter cites six cases, not because of their holdings, none of which supports the Wireless Carriers' position, but because they contain language that refers to *licensees'* obligations. Attachment A shows that this language is not integral to the holdings of any of those cases. In fact, the holdings of those cases often rebut the inferences the Wireless Carriers seek to draw from them. Also, the language relied upon by the Wireless Carriers does *not* address whether the licensee can meet the requirements by obligating the prospective operator to take those steps, as is shown to be permissible by the *2 GHz MSS Order*, a careful reading of the language of the TMI authorization, and the Commission's acceptance of third-party arrangements in other cases. In fact, the cases cited by the Wireless Carriers use the term "licensee" to reference actions the Commission knows that

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[1] We continue to believe that the Bureau's interpretation was unreasonable because it was inconsistent with the August 25, 2000, *2 GHz MSS Order*, prior satellite cases, practice in other services regulated by the FCC, and sound policy whose objective is to expedite service implementation and prevent spectrum warehousing.

some other entity will have to undertake.[2] Instead, these and other cases emphasize that the critical fact is whether the construction contract arrangements prevent warehousing, avoid delay, and assure that progress is being made toward system implementation[3] -- all of which objectives were satisfied in this instance.

Fourth, the Wireless Carriers' December 22, 2003, letter refers to differences between the third-party relationships at issue in *USSB*, *AMSC*, and *VITA* and the TMI/TerreStar relationship here (they ignore *KaStarCom,* which in all significant respects is similar to TMI/TerreStar). Yet those cases are completely silent, and give *no* guidance, as to why those third-party relationships were deemed sufficient to achieve milestone compliance. Indeed, *none* of those three cases even addressed the third-party nature of the relationships. The holdings of those cases were on entirely different issues. *USSB* and *AMSC* were extension-of-milestone cases (no extension was sought or needed here). And *VITA* was a *de facto* control case (TMI retained control here). The reason those cases are significant -- and the reason that the decisive paragraph 10 of the Bureau's February 10, 2003, *Order* is not supported by any citations -- is that the Commission has not treated third-party contract cases differently. In all cases -- first-party or third-party contracts -- the critical question has been whether there was a construction contract, whether it was non-contingent,[4] and whether it conformed to the authorization -- all conditions that were met here.

Fifth, the Wireless Carriers' December 11, 2003, submission (at n.20) and their presentation at the "moot court" on December 17 dwelled pejoratively on the amount of money that has been expended under the Loral contract. But the $850,000 paid to Loral was what Loral contracted for in arms' length negotiations, and TMI and TerreStar have expended *seven* times that much on the 2 GHz project to date. In any event, the holdings of the two cases cited by the Wireless Carriers are completely beside the point at issue here. *Advanced Communications Corp.*, 10 FCC Rcd. 13,337 (1995), was an extension-of-deadline case, and *Mobile Communications Holdings, Inc.*, 18 FCC Rcd. 1094 (2003), was a non-conforming contract case. Additionally, in the first case the 1% payment made by the licensee was on a nine-year-old contract, and in the second case the 0.5% payment was combined with a provision for *no* future

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[2] *E.g.*, *Morning Star Satellite Co.*, 16 FCC Rcd. 11,550, 11,553 (2001) ("licensees are building their systems"); *Columbia Communications Corp.*, 16 FCC Rcd. 10,867, 10,872 (2001) ("licensees have built and launched").

[3] *E.g.*, *Morning Star Satellite Co.*, 15 FCC Rcd. 11,350, 11,352 (2000) ("Requiring licensees to adhere strictly to a milestone schedule prevents orbital locations from being 'warehoused' by licensees to the exclusion of qualified entities that are prepared to implement systems immediately."); *accord PanAmSat Licensee Corp.*, 16 FCC Rcd. 11,534, 11,538 (2001); *Columbia Communications Corp.*, 15 FCC Rcd. 16,496, 16,497 (2000).

[4] "[N]either significant delays . . . nor conditions precedent to construction." *PanAmSat Licensee Corp.*, 16 FCC Rcd. 11,534, 11,539 (2001); *accord Mobile Communications Holdings, Inc.*, 18 FCC Rcd. 1094, 1099 (2003).

payments until 30 days *after* the satellite was to be launched and capacity made available. Here, TMI/TerreStar had paid $850,000 within six months after the Loral contract was entered into, and they are obligated to pay a total of $380 million in installments by the time of the satellite launch. Here too, reading the *holdings* of the cases leads to the opposite result from the one urged by the Wireless Carriers.

Sixth, at the December 17 "moot court," the Wireless Carriers dismissed as irrelevant the Commission's routine practice in other services of allowing third-party contracts for required construction of licensed facilities. (Yet, the *2 GHz MSS Order* expressly stated that the Commission would administer its satellite milestone requirements "[c]onsistent with our practice in other services." *2 GHz MSS Order*, 15 FCC Rcd. at 16,178.) The Wireless Carriers did so on two grounds. (1) They said that these other services were different because the authorizations were obtained in auctions while satellite authorizations are obtained for free. But TerreStar and TMI cited seven services -- ITFS, MMDS, MDS, SMRS, cellular, PCS, and broadcast -- the majority of which did not use auctions to select licensees, and in all of which third-party construction contracts are routine. (2) The Wireless Carriers also said that the Commission's practice in these other services did not provide guidance because the cases concerned questions of *de facto* control -- clearly not an issue in our case because of the explicit protections in the TerreStar/TMI contract. But that is exactly the point. For the Commission to even consider whether a third-party contract delegated too much control away from the licensee, it must be true that third-party contracts are acceptable if the licensee retains sufficient control. In none of the other licensed services has the Commission challenged or even raised an issue with the third-party nature of the construction contracts.

* * *

We are grateful for the attention that you and the Commissioners have given to this matter. The licensing authority here, Industry Canada, had approved the satellite design, it had held that the relevant milestone requirement had been met, design and construction were moving forward in a timely manner and consistent with the specifications of the authorization, the strong joint venture entity in which TMI has a substantial continuing interest was conscientiously prosecuting the construction contract, and needed new competitive satellite services were to be provided. The Wireless Carriers successfully obscured these facts below.

But these are the facts that should control and call for the Commission, on review, promptly to reinstate the authorization.

Respectfully submitted,

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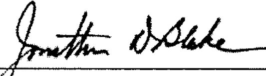

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Attachment

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ATTACHMENT A

CASES CITED IN WIRELESS CARRIERS' DEC. 22, 2003, EX PARTE SUBMISSION

Case Name	Holding of Case	Was the Authorization Upheld	Was there a Conforming Non-Contingent Construction Contract
PanAmSat Licensee Corp., 16 FCC Rcd. 11534 (2001)	Pendency of merger held not to excuse failure to enter into a construction contract.	No	No
Columbia Communications Corp., 15 FCC Rcd. 16496 (IB 2000)	Pendency of transfer held not to excuse failure to enter into a construction contract.	No	No
Tempo Satellite Inc., 7 FCC Rcd. 6597 (1992)	Construction contract held to be sufficiently specific to conform to authorization.	Yes	Yes
Columbia Communications Corp., 16 FCC Rcd. 10867 (IB 2001)	Construction contract held to be sufficiently specific to conform to authorization.	Yes	Yes
Morning Star Satellite Company, L.L.C., 16 FCC Rcd. 11550 (2001)	Construction contract held to be insufficiently specific to meet requirements of non-contingent contract.	No	No
DirectSat Corporation, 10 FCC Rcd. 88 (1995)	Licensee held to be able to sell its satellite authorization for a profit during the course of construction because construction is proceeding in timely fashion.	Yes	Yes