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

In the Matter of	)	
	)	
TMI Communications and Company, Limited Partnership	)	File No. 189-SAT-LOI-97
	)	
	)	IBFS Nos. SAT-LOI-19970926-00161
Request for Modification of Spectrum Reservation for a Mobile-Satellite Service in the 2 GHz Bands	)	SAT-AMD-20001103-00158
	)	SAT-MOD-20021114-00237
	)	
TMI Communications and Company, Limited Partnership, Assignor	)	SAT-ASG-20021211-00238
	)	
And	)	
	)	
TerreStar Networks Inc., Assignee	)	
	)	
Request to Assign Spectrum Reservation	)	

To: The Commission

APPLICATION FOR REVIEW

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SUMMARY

The International Bureau's February 10, 2003 Order is deeply flawed on substantive and procedural grounds. It declared TMI's July 2001 Letter of Intent ("LOI") authorization reserving 2 GHz MSS spectrum in the U.S. for service over TMI's Canadian licensed satellite system as "null and void" because of a supposed failure to meet a construction milestone. But, in an apparent rush to reclaim MSS spectrum, the Bureau ignored its own factual findings and in a highly unusual move, issued its decision before the pleading cycle was completed. The asserted basis for the decision unjustifiably elevated form over substance and focused myopically on one set of legal arrangements while turning a blind eye to evidence showing that the construction milestone had been met and that the public interest goal underpinning the milestone was satisfied.

The Bureau found that TMI had failed to meet the construction milestone, but this conclusion is problematic considering the facts reflected in its Order:

- "[A]n affiliate of TMI had entered into a satellite manufacturing contract," Order at 1.
- That affiliate, TerreStar, entered into the manufacturing contract because it was obligated to do so "pursuant to an agreement with TMI." *Id.*
- TMI has an enforceable right to the benefits of that satellite manufacturing contract. *Id.* at 12.
- "[T]hat work is progressing under the contract, and that all scheduled payments had been made up to that date . . . ." *Id.* at 5.

It is also significant what the Order did not say, namely that the affiliate's non-contingent satellite manufacturing contract, in which TMI retained control over the design, specifications, construction and delivery of the satellite, otherwise failed to satisfy the Commission's construction milestone requirement and was not *bona fide*.

This evidence, which is compelling if the public interest goal is to ensure that milestones are actually met, failed to persuade the Bureau, however. The reason is that it focused exclusively on its newly-created strict privity requirement. The Bureau held that because a TMI affiliate's name was on the manufacturing contract instead of TMI's, the milestone obligation was not satisfied since there was no "commonality of interest" among the parties. Id. at 10. This finding should be rejected because, as the Commission itself pointed out in the *ATC Order* released the same day: "Due to the substantial commonality of interests among Motient, TMI and MSV [parent of TerreStar], we will refer to the three parties collectively as MSV [parent of TerreStar] . . . ."

The Bureau's analysis also fails because it focused exclusively on just one set of legal arrangements, those involving TMI directly, and not the interrelated contracts involving TerreStar. The Bureau's creation of a strict privity requirement — with no notice and no opportunity for comment — is contrary to Commission acceptance of a two-step legal arrangement in other settings. In the satellite area, the Commission found in 1997 that a license holder could meet its first satellite contract milestone on the basis of a contract that the license holder had with a third party, which in turn had entered into a satellite construction contract. In the CMRS area, it is not uncommon for a license holder to contract with a third party to construct and operate the system, and for that third party to enter into construction contracts with cell-site vendors to build the system. In the broadcast area, it is commonplace for the company that enters into station construction contracts to be an affiliate of the license holder, but not wholly-owned or controlled by it.

The reason why companies organize their operations in this manner involve financial, tax, bankruptcy, management, and other considerations. In these various other contexts, the

Commission routinely determines whether construction milestones have been met without focusing exclusively on the legal arrangements between the license holder and the construction company.

In addition to getting the privity analysis wrong, the Bureau's Order suffers from another fundamental defect: it imposes a duplicative license requirement and thus runs afoul of the national comity policy articulated in the FCC's *DISCO II* market entry policy for foreign licensed satellite operators. In making the milestone determination, the *DISCO II* policy required the Bureau to give deference to the terms and conditions imposed by the non-U.S. administration, in this case, Canada. But despite the fact that Industry Canada has raised no objection with TMI's July 2002 contract milestone submission, the Bureau looked at the question *de novo* and essentially imposed a separate, duplicative, brand new and more severe licensing regime. The purpose of the *DISCO II* policy was to remove barriers to entry, but the Bureau's actions create new hurdles for a non-U.S. party and are particularly inappropriate where Canada has a milestone requirement similar to the Commission's.

The Bureau's decision also suffers several procedural flaws that warrant Commission review of the Order. Specifically:

- The Bureau issued its decision without fully considering new information which the Bureau itself had requested. The Order contains no explanation for this highly irregular step.
- The Bureau dismissed the TMI/TerreStar assignment application, even though the Bureau had encouraged the parties to file it and the pleading cycle for it had not run the course.
- It had not given prior notice that it would apply a strict privity requirement to the initial milestone. In fact, it has found other satellite authorization holders to satisfy construction milestones with third-party contracts.
- It failed to consider the special circumstances that justify a waiver of the privity requirement and otherwise support assignment of the LOI.

Even though the Commission had recently decided to reallocate some 2 GHz MSS spectrum — and this implicitly required the Bureau to cancel some existing 2 GHz MSS licenses — the Commission's action did not provide a legal justification for the Bureau to run roughshod over the procedural rights of any existing MSS grantee by applying a new and unannounced milestone enforcement policy in order to cancel outstanding authorizations. Had the Bureau followed standard practice in this matter, the LOI would not have been declared null and void and the assignment application would have been approved.

The Bureau has also cancelled other 2 GHz MSS authorizations, but TMI's situation is decisionally different from those other situations, both in terms of the facts (a valid construction contract exists here) and the law (the new privity principle was not at issue in the other cases).

For all the above reasons, the Commission should reject the conclusions of the Bureau's Order and reinstate TMI's LOI authorization and assignment application forthwith.

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To: The Commission

APPLICATION FOR REVIEW

TMI Communications and Company, Limited Partnership ("TMI") and TerreStar Networks Inc. ("TerreStar") (collectively the "Applicants"), pursuant to Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, hereby request that the Commission promptly review the International Bureau's February 10, 2003 *Memorandum Opinion and Order* in the above-captioned proceeding ("*IB Order*")[1] and reinstate TMI's mobile satellite authorization.[2] Thereupon, the FCC also should reinstate TMI's related application to assign the authorization to TerreStar and direct the Bureau to process the application expeditiously.

[1] *Memorandum Opinion and Order*, DA 03-385 (Int'l Bur., released Feb. 10, 2003) ("*IB Order*").

[2] To permit the Applicants to preserve their competitive position in the marketplace, TMI and TerreStar are simultaneously filing a Request for Stay pending Commission action on this Application for Review.

The *IB Order* declared "null and void" TMI's July 2001 Letter of Intent (LOI) authorization[3] reserving 2 GHz spectrum in the United States for the provision of Mobile Satellite Services (MSS) using TMI's Canadian licensed satellite system because TMI had not itself executed a non-contingent satellite manufacturing contract as allegedly required by the first (July 2002) construction milestone contained in TMI's authorization. However, the requisite manufacturing contract was executed by TMI's affiliate, TerreStar, which the Bureau found had done so pursuant to a contract binding TerreStar to timely deliver the satellite to TMI. Having nullified TMI's LOI authorization, the *IB Order* also dismissed, as moot, TMI's pending application to assign that authorization to TerreStar.

TMI has effectively complied with the applicable construction milestone, and the Bureau's technical insistence on strict privity has elevated form over substance without any public interest justification. The *IB Order* is also defective because it: (1) adopts a new, anti-competitive construction of the agency's milestone polices which has not previously been reviewed, let alone endorsed, by the Commission; (2) is at odds with the Commission's prior market-opening policies under the WTO Basic Telecommunications Agreement; (3) contains erroneous findings as to material questions of fact (e.g., regarding the commonality of interest between TMI and TerreStar); and (4) fails to take into account powerful public interest considerations, including substantial procedural flaws in the Bureau's analysis, which warrant confirmation that the milestone requirement has been met and grant of the assignment application. *See* 47 C.F.R. §§ 115(b)(i), (ii), (iv) and (v) respectively.

[3] *TMI Communications and Company, Limited Partnership*, 16 FCC Rcd 13808 (Int'l Bur.) ("*TMI Authorization*").

I. Background

A. History of TMI's Authorization

TMI is one of the most experienced providers of mobile satellite services in North America, having launched its first L-band MSS system in1996 and obtained authorization to serve the U.S. in 1999.[4] TMI's commitment to provide next-generation MSS to U.S. consumers dates from 1997 when it filed an application for the reservation of spectrum in the 2 GHz band.[5] As a Canadian business, TMI advised the FCC that its proposed 2 GHz MSS system, CANSAT-M3, would be licensed by Industry Canada and use a Canadian orbital position.

In 2000, while TMI's LOI application was pending, TMI decided to form a joint venture to combine TMI's various MSS assets with those of Motient Corporation, the principal provider of L-band MSS services in the United States. In connection with the new venture, then organized as Mobile Satellite Ventures LLC and now Mobile Satellite Ventures, LP ("MSV"), TMI and Mobile Satellite Ventures LLC entered into an Asset Sale Agreement on January 8, 2001. The Agreement provided, *inter alia*, for the transfer to MSV (or, at MSV's election, to an MSV subsidiary) of "TMI's rights in the Application made by it to the FCC relating to the 2 GHz frequency band."[6] TMI and Motient Services Inc. (a Motient Corp. subsidiary) filed applications with the FCC to assign their L-band authorizations to the new joint venture and the Commission approved the parties' applications in November 2001.[7]

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[4] *SatCom Systems, Inc., et al.*, 14 FCC Rcd 20, 798 (1999), *aff'd sub nom. AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154 (D.C. Cir. 2000).

[5] *See* File No. 189-SAT-LOI-97; Public Notice, Report No. SPB-119 (rel. March 19, 1998).

[6] *See* TMI Communications and Company Limited Partnership, File No. SAT-ASG-2002 1211-00238, Form 312, Exhibit 2, Attachment A.

[7] *See Motient Services Inc. et al., Order and Authorization*, 16 FCC Rcd 13808 (Int'l Bur. 2001). In its 2001 assignment application, TMI advised the FCC that it might also assign its pending LOI application to the joint venture when it transferred its pending application for the underlying 2 GHz Canadian satellite license to a Canadian registered company eligible to obtain an MSS authorization in Canada. *See* Application, File No. SES-ASG-20010117-00203, filed Jan. 17, 2003, at 6. The application also advised that License Co., since renamed MSV

On July 17, 2001, the International Bureau granted TMI's LOI Authorization. Citing the Commission's 2 GHz MSS service rules,[8] the LOI grant stated that "TMI must observe the following milestone requirements: Enter Non-Contingent Satellite Manufacturing Contract . . ."[9] 12 months after grant of the authorization (i.e., July 17, 2003). The LOI order also required TMI to file a certification with the Commission within ten days following each of the milestones.[10]

On May 6, 2002, Industry Canada notified TMI that it had approved TMI's 2 GHz MSS license application in principle (the precondition to issuance of a license), subject to TMI's acceptance of certain conditions and specified implementation milestones. The first milestone requires the submission of final design specifications by June 15, 2002 (later extended to June 30, 2002). "Milestone 2" requires "signature of contract for the construction of the first of two satellites,"[11] by July 15, 2002, and further states that "within 15 days of final signature of the Milestone 2 contract TMI must provide evidence satisfactory to the Department that TMI is bound to a contractual agreement with a satellite manufacturer for the construction of the proposed satellite."[12]

In anticipation of the Canadian Government's action, and consistent with the prior MSV related Asset Sale Agreement, in February 2002 TMI and MSV incorporated TerreStar as a wholly owned subsidiary of MSV to develop a 2 GHz MSS business. TMI then held an

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Canada, had been established to continue the Canadian ownership and operation of TMI's L-band space segment following transfer of its L-band satellite, MSAT-1, to MSV.

[8] *See Service Rules For the Mobile Satellite Service in the 2 GHz Band,* IB Docket No. 99-81, *Report and Order*, 15 FCC Rcd 16127, 16177-78 (2000) (*2 GHz MSS Order*).

[9] *TMI Authorization*, 16 FCC Rcd at 13813, ¶ 10.

[10] *Id.* ¶ 11 (citing 47 C.F.R. § 25.143(e)(3)).

[11] *See* Letter from Jan Skora, Director General, Radio Communications and Broadcasting Regulatory Branch, Industry Canada, to Ted H. Ignacy, Vice-President, Finance, TMI Communications Inc. (May 6, 2002), Attachment. A copy of this letter was previously furnished to the Commission. *See* Letter from Gregory C. Staple, Counsel to TMI, to Marlene H. Dortch, Secretary FCC, re File No. 129-SAT-LOI-97 *et al.* (Aug. 27, 2002).

[12] Attachment to Skora Letter, *supra* note 11, at Section 6.5.

approximate 40% ownership interest in MSV and an approximate 26% interest in MSV's general partner, which controls the joint venture.[13] Hence, pursuant to the FCC's rules, TerreStar was an "affiliate" of TMI and any ownership interest of TMI would be attributed to TerreStar and vice versa.[14] The president and CEO of TMI's managing partner, TMI Communications Inc., agreed to serve as the founding chairman and a director of TerreStar.[15] Another officer and the company's counsel also became members of TerreStar's initial Board.[16] Thus, from the outset, though a subsidiary of MSV, TerreStar also functioned as a close affiliate of TMI in fact as well as in law.

Pursuant to the first milestone requirement in the Canadian satellite authorization, TMI submitted its final design specifications to Industry Canada on June 27, 2002.[17] The specifications were approved by the Canadian Government on July 8, 2002. TMI then entered into an agreement with TerreStar on July 12, 2002 to obligate TerreStar, as the presumptive assignee of TMI's LOI authorization, to conclude a satellite construction contract that satisfied the terms and conditions contained in both the Canadian and U.S. satellite authorizations, including the milestone requirements. The Agreement between TMI and TerreStar also provided for "delivery to TMI" of the satellite and stated that "TMI shall retain control over the content of the satellite specifications and the design, construction and delivery of the satellite so long as it

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[13] The current ownership of MSV and its general partner is detailed at Exhibit 3 to the TMI-TerreStar assignment application, File No. SAT-ASG-20021211-00238.

[14] Under the FCC's foreign affiliation rules, "[t]wo entities are affiliated with each other if one of them . . . directly or indirectly owns more than 25 percent of the capital stock of . . . the other one." 47 C.F.R. § 63.09(e). Note 1 to this rule provides: "'Capital stock' includes all forms of equity ownership, including partnership interests."

[15] *See* TMI's Opposition to Petition to Deny, File No. SAT-ASG-20021211-00238, Exhibit 1, Affidavit of Ted H. Ignacy, Vice-President, Finance, TMI Communications Inc., ¶ 7 (Feb. 6, 2003).

[16] *Id.*

[17] Following issuance of the approval-in-principle, Industry Canada granted TMI's request to amend the Milestone date to June 30, 2002 to coincide with the first interim report.

holds [its] Canadian . . . and the FCC Authorization[s] . . . ."[18] On July 14, 2002, TerreStar, in turn, executed a non-contingent satellite construction contract with Space Systems/Loral Inc. ("Loral") for the satellite system covered by TMI's two sets of regulatory authorizations.

The interrelated contracts between TMI, TerreStar and Loral were expressly approved by TMI Communications Inc.'s principal officers, once on behalf of TMI, and again in their capacity as directors of TerreStar.[19] Consistent with TMI's July 12 contract with TerreStar, the Loral construction contract provided that the terms thereof would be confidential to TMI as well as to TerreStar, thus affording TMI full access to the documentation necessary to control the satellite's future design specifications.

On July 26, 2002, TMI timely filed its FCC certification regarding the initial construction milestone and provided the Commission with copies of the contracts between TerreStar and Loral, on the one hand, and TMI and TerreStar, on the other.[20] On October 4, 2002, the Bureau wrote to TMI asking for further information concerning TMI's obligation to Loral or TerreStar and asked "whether there are any agreements or other arrangements by which TMI is legally obligated to pursue the construction of [the] proposed system or is in any way liable in the event the satellite system is not implemented."[21]

TMI responded on October 15, 2002 that it had both a legal and economic interest in the performance of the satellite manufacturing contract through its substantial ownership interest in

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[18] TMI/TerreStar Letter Agreement, July 12, 2002, ¶ 1 (appended as Exhibit 1 hereto). The preface to the letter agreement confirmed that TMI planned to transfer its FCC authorization to an entity in which TerreStar and/or TMI or affiliates will have an interest, and its Canadian authorizations to a separate entity eligible under Canadian law to hold the Canadian authorization in which TerreStar and/or TMI or affiliates will have an interest.

[19] *See* Ignacy Affidavit, *supra* note 15.

[20] *See* Letter of Gregory C. Staple, Counsel for TMI, to Marlene H. Dortch, Secretary FCC, July 26, 2002.

[21] *See* Letter from Thomas S. Tycz Chief, Satellite Division to Gregory C. Staple, Counsel for TMI, Oct. 4, 2002.

MSV and its seats on TerreStar's board of directors.[22] TMI also said that the procurement agreements it had entered into with TerreStar and Loral must be viewed in the context of TMI's prior obligation to transfer the 2 GHz LOI to MSV (or an affiliate, which TerreStar is) and that the satellite procurement contracts questioned by the Bureau had been submitted to Industry Canada in satisfaction of an identical milestone requirement. TMI said that, to its knowledge, no FCC rule or policy precluded a party holding a satellite authorization from contracting with an affiliate for the timely delivery of a satellite pursuant to a milestone requirement.

On November 14, 2002, at the request of the Bureau, TMI and TerreStar, accompanied by counsel, met with the Bureau's staff to discuss TMI's October 15, 2002 response.[23] During the meeting, the Applicants reiterated that TMI had relied upon TerreStar to procure its satellite given the pre-existing contractual obligation of TMI to transfer its FCC authorization to an MSV affiliate and offered to provide relevant parts of the joint venture agreement documenting TMI's obligation. The Applicants also explained their plans to transfer TMI's existing LOI authorization to TerreStar, subject to various regulatory considerations. The Bureau's staff said they had been unaware of the terms of the 2001 joint venture between TMI and Motient Corp. and wished to review relevant documents. The staff also encouraged TMI to file the proposed assignment application so that, as in the recent *Echostar* case[24] which the staff mentioned, the application and any other new information could be taken into account in the Bureau's ongoing

[22] *See* Letter from Gregory C. Staple, Counsel for TMI, to Marlene H. Dortch, Secretary of FCC, dated October 15, 2002. Recall that the CEO of TMI's controlling partner, was the Chairman of TerreStar's Board.

[23] *See* Exhibit 2 hereto (Affidavit of Wharton B. Rivers, Jr., CEO and President of TerreStar, Mar. 12, 2003).

[24] *EchoStar Satellite Corporation*, DA 02-3085 (Int'l Bur., released Nov. 8, 2002) (reinstating license following consideration of new information on manufacturing contract that had existed at the time of the milestone deadline).

review of TMI's milestone certification. TMI and TerreStar subsequently filed their LOI assignment application on December 11, 2002.[25]

On December 27, 2002, the FCC placed TMI's assignment application on Public Notice. A Petition to Deny was filed by AT&T Wireless Services, Inc., Verizon Wireless and Cingular Wireless LLC ("Wireless Carriers") on January 27, 2003.[26] TMI timely filed an Opposition to Petition to Deny on February 6, 2003, arguing that the carriers' petition was meritless.

B. The International Bureau's Order

On February 7, 2003, notwithstanding the un-completed pleading cycle regarding the assignment application which had been expressly encouraged by the Bureau's staff, the Bureau adopted an order declaring TMI's LOI authorization null and void; TMI's assignment application was simultaneously dismissed as moot. The Wireless Carriers' Petition to Deny is referenced in the *IB Order*, but no mention is made of TMI's timely filed Opposition.

The *IB Order* provides four reasons for canceling TMI's authorization: First, the Bureau concludes that TMI "failed to comply with the plain terms of the authorization" which, according to the Bureau, requires TMI itself to enter into a manufacturing contract. Second, the Bureau

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[25] On December 11, 2002, AT&T Wireless Services, Inc., Cingular Wireless LCC, and Verizon Wireless (jointly, the "Wireless Carriers") also filed a letter alleging that TMI had failed to meet the initial milestone condition because it had not directly entered into a manufacturing contract with Loral. The Carriers asked the FCC to void TMI's authorization and reallocate TMI's 2 GHz MSS spectrum to Advanced Wireless Services in connection with the FCC's pending rulemaking proceeding in ET Docket No. 00-258. *See New Advanced Wireless Services, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd, 16043 (2001). The *IB Order* (at ¶ 7) wrongly implies that TMI's December 11, 2002 filing intentionally ignored the Wireless Carrier's allegations. Based on the Applicants' November 14 meeting with the Bureau's staff, it was reasonable for TMI to conclude that the assignment of TMI's authorization to TerreStar might cure any defect in privity regarding the manufacturing contract and thus answer the Wireless Carriers' concerns.

[26] The Wireless Carriers have persistently tried to block competition from 2 GHz MSS operators by, *inter alia*, urging the FCC to reallocate spectrum allocated to the 2 GHz MSS. However, prior to adoption of the *IB Order*, the Commission granted the Wireless Carriers' significant relief by canceling the 2 GHz MSS authorizations of three 2 GHz MSS licensees and reallocating 30 MHz of MSS spectrum for Advanced Wireless Service (AWS). *See Third Report and Order, Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, FCC 01316 (rel. Feb. 10, 2003). When the *IB Order* was adopted, therefore, the Commission had already decided that it did not need to reallocate any more 2 GHz MSS spectrum, a public interest factor that is not considered in the *IB Order*.

found that TMI's arrangements with TerreStar and Loral did not "satisfy the intent of our milestone requirement by demonstrating an investment and commitment to completion of the satellite system."[27] This is so, the Bureau claimed, because unlike other cases which "typically involve an affiliated company wholly owned or controlled by the licensee," in TMI's case, there was an insufficient "commonality of interest" between TMI and TerreStar to make the obligations of the affiliated company under the manufacturing contract obligations of the licensee.[28]

Third, the *IB Order* states that TMI's contract with TerreStar for the delivery of the MSS system "is subject to Canadian regulatory approval, and the current ownership of TerreStar would not appear to meet Canadian ownership requirements."[29] Thus, the Bureau concludes that "the TMI/Terrestar agreement provides no basis whatsoever for viewing the Terrestar/Loral contract as sufficient to meet TMI's milestone conditions."[30]

Finally, the *IB Order* holds that, for purposes of milestone compliance, the fact that TMI had an enforceable right to the benefits of a *bona fide* satellite contract is not as important as the "question of whether TMI has undertaken concrete obligations that demonstrate a commitment to and investment in the project."[31] TMI has not incurred such obligations, according to the Bureau, by, for example, guaranteeing TerreStar's payments to Loral or accepting other obligations "that would allow us to conclude that TMI effectively stands in the shoes of Terrestar in connection with obligations under the satellite manufacturing agreement."[32]

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[27] *IB Order*, ¶ 9.

[28] *Id.* ¶ 10.

[29] *Id.* ¶ 11.

[30] *Id.*

[31] *Id.* ¶ 12

[32] *Id.*

The Bureau's conclusions are factually and legally incorrect. At bottom, the FCC will find that the milestone contracts submitted by TMI are valid.

II. The Strict Privity Requirement Applied to TMI's Contract Milestone Departed From Past FCC and Bureau Policies and Did Not Give Due Weight to Other Relevant Factors, Including Canadian Regulation.

A. Strict Privity Was Not Mandated by the Plain Meaning of TMI's Authorization, the FCC's 2 GHz MSS Service Rules or Precedent.

Contrary to the Bureau's assertion, the "plain terms" of the LOI Authorization do not expressly require TMI to sign a satellite manufacturing contract itself. The pertinent text merely states that "TMI must observe" certain milestones including: "Enter Non-contingent Satellite Manufacturing Contract."[33] The term "enter" has multiple meanings[34] and the authorization does not specifically state that the LOI holder must execute the manufacturing contract. The Bureau's reading of the LOI Authorization is also contradicted in its own analysis in the next paragraph. There the Bureau acknowledges that "the Commission has in some instances viewed a satellite manufacturing contract as sufficient to meet milestones, even though it is not entered into by the company that holds the Commission authorization."[35]

The Bureau asserts "those cases typically involve" an affiliated company "which is actually owned or controlled by the licensee,"[36] though no such cases are cited by the Bureau. In any event, the Bureau's insistence on strict privity or, alternatively, on a parent-subsidiary standard to qualify the counterparty to a valid satellite manufacturing contract, cannot be squared with the Commission's milestone policies or prior precedent.

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[33] *TMI Authorization*, ¶ 10.

[34] The definitions of "enter" include: "to become . . . an active participant in," "to put formally on record . . . ," and "to make report of . . ." — all of which TMI satisfied. *See Merriam-Webster's Collegiate Dictionary*, 10th Edition (Merriam-Webster, Inc., Springfield, MA), at 386.

[35] *IB Order*, ¶ 10.

[36] *Id.*

The FCC first adopted construction milestones for the 2 GHz MSS in August 2000 to "ensure speedy delivery of service to the public and prevent warehousing of valuable orbital locations and spectrum."[37] The initial implementation milestones for geostationary satellite systems, such as TMI's, included requirements for systems to "enter into a non-contingent satellite manufacturing contract within one year, complete CDR [Critical Design Review] within two years [etc.]." However, the *2 GHz MSS Order* does not elaborate on how a geostationary satellite system must enter into a non-contingent manufacturing contract — that is, whether this can be done only by the grantee or a wholly-owned subsidiary, or whether an affiliate or third party agreement is sufficient.[38]

The silence of the *2 GHz MSS Order* on the manner in which a grantee may enter into a satellite manufacturing contract is confirmed by Commission precedent. Prior cases simply do not address, let alone consider decisionally significant, the corporate structure which a satellite licensee may use to conclude a non-contingent contract.[39] In these circumstances, the Bureau's position that only a wholly-owned subsidiary of TMI or a company having a "similar commonality of interest" to TMI (which, incidentally, TMI and TerreStar had — *see* Part III.A. *infra*) reflected the Bureau's own ad hoc policy.

Moreover, the Bureau itself has permitted a licensee to rely upon satellite procurement contracts executed by a wholly unaffiliated party to meet a manufacturing contract milestone. In 1997, the Bureau held that Volunteers in Technical Assistance ("VITA") could meet its first

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[37] *2 GHz MSS Order*, 15 FCC Rcd at 16177, ¶ 106.

[38] The prior rulemaking notice proposing the adoption of a one year construction milestone does not address the privity issue either. *See Notice of Proposed Rulemaking*, 14 FCC Rcd 4842, 4881-83 (1999).

[39] The FCC has only resolved a handful of cases involving contract milestones: *PanAmSat Licensee Corp.*, 16 FCC Rcd 11534 (2001) (absence of any construction contract); *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299 (1997) (contract became contingent due to licensee's failure to make timely performance payments); *TEMPO Enterprises, Inc.*, 1 FCC Rcd 20 (1986) (no construction contract).

satellite contract milestone by securing capacity on a satellite to be constructed and launched by a third party, Final Analysis, Inc. ("FAI").[40] VITA was not in privity with FAI's satellite manufacturer or related to FAI. But the Bureau accepted this arrangement and only concerned itself that the construction and launch schedule for VITA's satellite payload remained in place.

Similarly, in 1992, the Mass Media Bureau held that a DBS licensee had met the applicable contract milestone by executing a contract for the lease of transponders on a satellite to be constructed for another DBS operator.[41] The DBS licensee thus was not in privity with the satellite manufacturer and the contract did not even cover a complete satellite. Yet, given the non-contingent nature of the contract, the FCC found that the milestone had been met.

B. The Bureau's Interpretation of the Contract Milestone Violates the FCC's *DISCO II* Market Entry Policy.

The *IB Order* must also be reversed because it is contrary to the market entry policy adopted by the Commission in its *DISCO II* proceeding to implement the WTO Basic Telecommunications Agreement.[42] Under *DISCO II*, the FCC said that a qualified non-U.S. party could obtain non-discriminatory access to the U.S. market either (a) by obtaining a U.S. license or (b) by seeking a reservation of U.S. spectrum at the same time license applications are due in a satellite system processing round and submitting proof that it was pursuing a foreign license. In providing the second option — a letter of intent filing to reserve spectrum — the FCC stated that it did not wish to "issue a separate, and duplicative U.S. license for a non-U.S. space station" because doing so "would raise issues of national comity."[43]

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[40] *Volunteers in Technical Assistance*, 12 FCC Rcd 3094, 3107-3108 (Int'l Bur. 1997).

[41] *See United States Satellite Broadcasting Company, Inc.*, 7 FCC Rcd 7247, 7250 (Mass Media Bur. 1992).

[42] *See Report and Order*, 12 FCC Rcd 2409x (1999) ("*DISCO II*"). *See also* Fourth Protocol to the General Agreement on Trade in Services (GATS)(April 30, 1996), 36 I.C.M. 336 (1997) (entered into force Jan. 1, 1998).

[43] *DISCO II*, 12 FCC Rcd at 24174.

The *IB Order* flies in the face of the Commission's *DISCO II* policy. When an MSS operator is licensed by a foreign administration, *DISCO II* requires the Commission to give appropriate deference to the conditions imposed by the non-U.S. administration, so that any U.S. spectrum authorization does not function as a barrier to entry (i.e., a duplicative licensing regime). This is especially so when it comes to the core obligations typically imposed by a foreign satellite license (i.e., timely manufacture and launch) and where, as in TMI's case, the non-U.S. authorization contains performance milestones that are identical to those in the U.S. authorization.

To comply with the contract milestone in its Canadian license (a "signature of contract for the first of two satellites by July 14, 2002"), TMI submitted to Industry Canada the same interrelated contracts between TMI, TerreStar and Loral that were submitted to the FCC. However, unlike the FCC, it is not the practice of Industry Canada to issue a notice advising the public that a satellite grantee has met an applicable milestone.[44] In Canada, satellite grantees are typically assumed to have met their milestones, unless they are notified to the contrary by Industry Canada. TMI has not received any such notice from Industry Canada. In fact, to TMI's knowledge, Industry Canada is fully satisfied with the submissions that TMI has filed in connection with its Canadian authorization in principle and it has not advised TMI of any concerns or defects with TMI's filings to date.

As noted above, TMI's 2 GHz satellite system will be launched into a Canadian orbital position. Given the primacy of Canada as the licensing administration for TMI's satellite, national comity required the Bureau to give reasonable deference to Industry Canada's oversight

[44] *Cf.*, Public Notice, Report No. SAT-00135, DA-03-386, released Feb. 10, 2003 (advising that Celsat America, Inc., Iridium LLC and ICO Services Limited had complied with the initial FCC construction milestone).

of the construction milestone in TMI's license.[45] Indeed, given that there are no "Limitations on Market Access" that have been inscribed by the United States in its Schedule of Specific Commitments to the General Agreement on Trade in Services ("GATS") in relation to MSS,[46] the Bureau should have given more than reasonable deference to the primacy of Canada as the relevant licensing administration for TMI's satellite. The Bureau's failure to do that and, indeed, even to discuss TMI's compliance with the Canadian milestone, constitutes reversible error.[47]

C. The Bureau's Focus on a Particular Business Structure Is Inconsistent with the Commission's General Practice.

The brand new strict privity requirement that the Bureau applied to TMI's manufacturing contract is also at odds with Commission policy in mobile wireless and broadcasting. In the CMRS industry, it is common for the Commission to grant PCS licenses, understanding that the license holder will enter into a management agreement with another company that would construct and operate the PCS system.[48] Under such arrangements, the license holder meets the Commission's build-out requirements, but neither the licensee nor a wholly-owned affiliate enters into a construction contract. Moreover, the management company generally lacks the ability to physically construct the PCS system, and it will therefore contract with a major equipment vendor for the construction of the system.[49] The license holder thus meets its build-

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[45] *See, e.g., Centennial Communications Corp.,* 17 FCC Rcd 10794 (2002) (dismissing a complaint, for reasons of international comity, where the issues raised therein were being addressed by a foreign regulatory authority); *U.S. Electrodynamics, Inc.*, 14 FCC Rcd 9809 (Int'l Bur. 1999) (granting, for reasons of international comity, authority to provide TT&C in the United States to a satellite constellation not yet licensed in the United States).

[46] *See* Schedule of Specific Commitments to the GATS of the United States of America (GATS/SC/90/Suppl.2).

[47] Given that TMI only held an LOI authorization to facilitate marketing, not a U.S. license, the Bureau also had an obligation to explain why it sought to impose a higher and plainly discriminatory contract standard than it had previously imposed on U.S. licensees.

[48] *See Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 15 FCC Rcd 24203, 24208-09 (2000) (describing various agreements between licensees and non-licensed third parties).

[49] *See Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7123, 7129 (1994) (equipment contracts do not give rise to an attributable interest); *see also Amendment of Parts 2 and 90 of the*

out obligations with two sets of legal arrangements, which cause the construction to be completed even though the license holder is not a direct party to the construction contracts.

Broadcasters often use a similar arrangement in which the party responsible for the physical assets of the station (including construction requirements such as digital television) is separate and distinct from the party holding the FCC license. As one example, the Commission described the Chris-Craft/Fox transaction as follows:

> Chris-Craft will be merged into . . . an acquisition subsidiary of News Corp. . . . [The] assets will be held by a newly formed subsidiary . . . Newco. The station licenses will be assigned to FTS. Newco will perform the day-to-day operations of the station pursuant to an operating agreement. . . . Newco will purchase all equipment, subject to the FTS approved budget, and will pay all expenses and capital costs.[50]

Newco, the company that will purchase all equipment, is an affiliate of FTS, the license holder, but Newco is not wholly owned by the licensee FTS. The Commission treats such arrangements as commonplace, so much so that they are mentioned only in passing.[51]

Licensees create these business structures for financial, tax, bankruptcy, management, and other reasons. As in these cases, the Commission should focus here on whether the construction milestones have been met, not on whether a particular legal arrangement exists. If the Bureau determines that a license holder has an enforceable right to the benefits of a *bona fide* construction contract — as TMI did here — and that the underlying construction contract will result in timely construction (i.e., non-contingent)—as it did here—then the milestone should be considered met, and the public interest objective underpinning those requirements satisfied.

Commission's Rules, 10 FCC Rcd 6884 (1995) (noting contracts for construction and management of an SMR service).

[50] *Applications of UTV of San Francisco, Inc.,* 16 FCC Rcd 14975, 14976-77 (2001).

[51] As another example, a broadcast licensee in a time brokerage agreement complies with the Commission's rules even though not operating the station. *See, e.g., WGPR, Inc.,* 10 FCC Rcd 8141 (1995); *Southwest Texas Public Broadcasting Council,* 85 FCC 2d 713, 715 (1981).

III. The Bureau's Order Is Based on Erroneous Findings as to Important and Material Questions of Fact.

A. There Has Always Been a Substantial Commonality of Interest Between TMI and TerreStar.

The Bureau held that TMI could not rely upon the satellite manufacturing contract executed by Loral because the two companies lacked sufficient "commonality of interest."[52] The Bureau reached this conclusion solely because TerreStar is not a wholly owned TMI subsidiary. A more complete review of the facts, however, would have demonstrated that the interests of TMI and TerreStar were aligned in meeting the construction milestone.

In February 2002, when TerreStar was incorporated, TMI's CEO became the founding Chairman of TerreStar's board.[53] Subsequently, the TMI and TerreStar boards each reviewed and approved the July 2002 interrelated contracts for the timely construction of TMI's MSS system by Loral.[54] Further, TMI's contract with TerreStar expressly grants TMI control over the "design, construction and delivery of the satellite" by Loral so long as TMI held the regulatory authorizations. For that purpose, the satellite manufacturing contract also provided that that contract was confidential to TMI as well as TerreStar and Loral.

Beyond that, TMI's substantial investment interest in TerreStar's parent, MSV, gives it a strong and continuing interest in TerreStar's successful performance.[55] Indeed, on the same day the *IB Order* was released, the close economic ties between TMI and its co-investor in MSV, Motient Corporation, led the Commission to consider the three parties as one in discussing their

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[52] *IB Order*, ¶ 10.

[53] *See* Affidavit of Ted Ignacy, *supra* note 15, ¶ 7.

[54] *Id.* ¶ 9.

[55] As noted, under Section 63.09(e) of the FCC's Rules TMI's greater than 25% indirect interest in TerreStar makes it an "affiliate." The FCC has previously held that an investment interest as small as 5% may give a company sufficient economic interest to influence a company's behavior. *See, e.g., Corporate Ownership Reporting and Disclosure by Broadcast Licensees, Report and Order*, 97 FCC 2d, 997, 1003-07 (1984).

future satellite plans: "Due to the substantial commonality of interests among Motient, TMI and MSV," the FCC wrote, "we will refer to the three parties collectively as MSV in this [ATC] Order unless otherwise indicated."[56]

The foregoing economic, corporate and contractual relationships evidence a substantial commonality of interest between TMI and TerreStar regarding the conclusion of a valid satellite manufacturing contract. The *IB Order* provides no evidence that the commitment of TMI and TerreStar to meet the construction milestone was any the less because TerreStar is an affiliate rather than a subsidiary of TMI.

B. The Bureau Misunderstood The Canadian Regulatory Condition In TMI's Contract With TerreStar.

The Bureau was similarly mistaken in its analysis of the alleged regulatory condition in TMI's contract with TerreStar. *See* Exhibit 1 hereto. That contract provides for TerreStar's delivery to TMI of a satellite system which complies with TMI's FCC and Canadian authorizations. It also commits TMI, at TerreStar's election, to transfer (1) the FCC authorization to "a suitable entity" in which TerreStar and/or TMI or affiliates will have an interest, and (2) the Canadian authorization to "an entity which is eligible under both the Radio Communication Act (Canada) and Telecommunications Act (Canada) to hold the Canadian Authorizations," and in which TerreStar and/or TMI or affiliates will have an interest. Both assignments are "subject to any necessary Canadian and United States regulatory approvals."

The *IB Order* concluded (at ¶ 11) that TMI's potential obligation to transfer its 2 GHz Canadian authorizations to an entity in which TerreStar might have an interest creates a "material unresolved contingency" in the TMI-TerreStar contract because "TerreStar would not appear to

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[56] *Flexibility For Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Band, and the 1.6/2.4 GHz Bands,* IB Docket No. 01-185 et al., *Report and Order and Notice of Proposed Rulemaking,* FCC 03-151 (released Feb. 10, 2003), ¶ 6 n.10.

meet Canadian ownership requirements" and this contingency also impaired the TerreStar-Loral contract. The Bureau has misread the TMI-TerreStar contract and created a hypothetical contingency where there is none.

First, read as a whole, the TMI-TerreStar contract makes it clear that, at TerreStar's election, TMI would be obligated to transfer its FCC authorization to an eligible U.S. entity, such as TerreStar, and its Canadian authorization to an eligible Canadian entity. Whether or not TerreStar's current ownership interest meets Canadian ownership rules thus is irrelevant; the contract expressly takes into account the different eligibility requirements for satellite licensees in the U.S. and Canada so as to mitigate any regulatory contingencies arising from future assignments by TMI. Moreover, Canadian law does not require the holder of TMI's U.S. 2 GHz LOI to satisfy Canadian foreign ownership rules.[57]

Second, any regulatory contingency related to the future assignment of TMI's satellite authorizations will not affect TMI's right to receive delivery of the MSS system to which TMI is entitled under the TerreStar-Loral contract. So long as TMI holds the relevant authorizations, TerreStar must deliver the satellite to TMI; if the authorizations are transferred — which requires regulatory approval by the FCC and in Canada — then the TMI-TerreStar contract expressly requires TMI to assign to the eligible Canadian entity its rights to delivery of the satellite by TerreStar. Any Canadian assignee will thus succeed to TMI's contractual rights.

Properly understood, therefore, the TMI-TerreStar contract does not make the TerreStar-Loral contract contingent in any respect. The contingency the Bureau alleges is based on a false assumption that TMI will be assigning its U.S. and Canadian regulatory authorizations to TerreStar when the contract makes it clear that separate ownership is contemplated for the U.S.

[57] Beyond that, Canadian law permits TMI to contract with non-Canadian companies for the construction and delivery of its satellite.

and Canadian authorizations and that TMI will be required to deliver the satellite to the Canadian entity which succeeds to TMI's authorization.[58]

IV. The Bureau's Order Is Procedurally Flawed.

A. TMI Did Not Have Prior Notice That The Bureau Would Apply A Strict Privity Standard To The Initial Milestone.

We have shown above that, prior to adoption of the *IB Order*, neither the Commission nor the Bureau had provided MSS parties reasonable notice that the initial contract milestone would be considered breached if the party holding a satellite authorization was not in direct privity with the satellite manufacturer. Nor had the FCC or the Bureau ever cancelled an authorization for want of privity. Even though the Commission had recently decided to reallocate some 2 GHz MSS spectrum — and this implicitly required the Bureau to cancel some existing 2 GHz MSS licenses — the Commission's action did not provide a legal justification for the Bureau to run roughshod over the procedural rights of any existing MSS grantee by applying a new and unannounced milestone enforcement policy in order to cancel outstanding authorizations.[59]

The courts have made it clear that "[t]raditional notions of due process incorporated into administrative law preclude an agency," such as the FCC, "from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."[60] Thus, a party may not be penalized where, as here, the Commission has failed to give adequate notice by

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[58] Recall that in January 2001 TMI had advised the FCC that it might assign its 2 GHz authorization to separate U.S. and Canadian entities. *See supra* note 7. In connection with the formation of the TMI-Motient joint venture, Industry Canada approved the transfer of TMI's L-band MSS space segment license to MSV Canada, a Canadian entity. MSV, a U.S. entity, holds authority to provide MSS via the same Canadian license satellite system in the United States. The foregoing regulatory actions provide a precedent for the subsequent transfer of TMI's 2 GHz MSS authorizations to separate U.S. and Canadian entities.

[59] Hence, the summary cancellation of TMI's authorization based on an unannounced privity standard also violated TMI's hearing rights under Section 312 of the Communications Act because the milestone standard upon which the Bureau based its action was not written into the original grant.

[60] *Satellite Broadcasting Co. v. FCC*, 824 F.2d 1, 3 (D.C. Cir 1987).

defining a key regulatory term.[61] The courts have also advised that "[t]he more exacting the standard — the greater the Commission's obligation to be explicit about any prerequisites . . . ."[62]

The *IB Order* violated these basic tenets of due process by applying a strict privity policy to the first construction milestone. Given the draconian consequences for non-compliance (i.e., cancellation), the FCC had a legal obligation to advise MSS parties with precision either in the terms of their satellite authorizations or in a separate written policy statement that, to comply with the first milestone, the party holding the satellite authorization must have privity with the satellite manufacturer.[63] Given that the Commission and the Bureau had permitted third party contracts in the past, the Bureau could not reasonably rely upon the broad language in TMI's authorization: "Enter non-contingent Satellite Manufacturing Contract." Basic notions of fair play required something more.

B. The Bureau Compounded The Lack Of Notice By Cutting Off Its Consideration Of TMI's Assignment Application In Mid-Course.

The Bureau's procedural flaws also include its summary adoption of the cancellation order only weeks after the Bureau had specifically encouraged TMI to cure the alleged defect by assigning its LOI authorization to TerreStar, the direct party to the Loral contract, and docketing new information pursuant to the *Echostar* precedent.

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[61] *Trinity Broadcasting of Florida, Inc. v. FCC*, 211 F.3d 618, 629 (D.C. Cir. 2000) (vacating the agency's decision to deny a renewal application of a broadcast licensee which failed to satisfy "minority control" standard because FCC "failed to provide a relevant definition for the key regulatory term 'minority controlled'").

[62] *Salzer v. FCC*, 778 F.2d 869, 877 (D.C. Cir. 1975) (reinstating license application where applicant was not provided sufficient notice of application requirements).

[63] *Cf. Morning Star Satellite Company LLC*, 15 FCC Rcd at 11554 (where the FCC had previously established an unambiguous "minimum threshold" regarding the terms for a non-contingent contract and, hence, the licensee could not claim prejudice).

Having failed to notify TMI that strict privity was required, the Bureau was required by administrative due process to give TMI an opportunity to cure this alleged defect — a legal obligation the Bureau implicitly acknowledged by meeting with TMI and then encouraging TMI to file the assignment application and other new information.[64] As noted above, at the November 14, 2002 meeting with the Bureau, TMI and TerreStar were told that the Bureau would consider their assignment application in connection with the ongoing milestone review. On December 27, 2002, the Bureau placed TMI's assignment application on public notice. The Bureau was thus well aware that TMI and other parties would likely file additional information regarding the assignment application and the related milestone issue based on the schedule provided in the FCC's Rules.[65] Yet, despite the Bureau's prior representations to the Applicants that milestone review would consider their related assignment application, the Bureau arbitrarily and capriciously halted that process while the pleading period for the assignment was in mid-cycle, thus depriving TMI of the equitable opportunity to which it was entitled (given the prior lack of notice) to cure any defect in privity.

The prejudice to TMI was further aggravated by cutting off the pleading cycle in midstream because the Bureau only heard from the Wireless Carriers, which had long sought to cancel TMI's authorization. As noted, TMI's assignment application appeared on Public Notice on December 27, 2002. That made comments and other pleadings by interested parties due on January 27, 2003, with the TMI/TerreStar response due by TMI due by February 11, 2003.[66] The Bureau was aware of this comment period; indeed the Wireless Carriers' Petition to Deny is

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[64] Relevant portions of the January 8, 2001 Asset Sale Agreement documenting TMI's pre-existing obligation to transfer its 2 GHz authorization to an MSV entity were appended to the assignment application and, as noted earlier (see Exhibit 2), the Applicants had been led to believe that this "new" information would be considered by the Bureau in its milestone review pursuant to *Echostar*, *supra* note 24.

[65] *See generally* 47 C.F.R. §§ 1.45, 1.939.

[66] *See* 47 C.F.R. §§ 1.4, 1.45. This assumes pleadings are served by mail.

referenced at ¶7 of the *IB Order*. Yet, without explanation, the Bureau chose to rush to judgment by adopting its order on February 7, 2003 giving it time to review the Wireless Carriers' Petition but not to consider TMI's timely filed Opposition.

C. Even if TMI and TerreStar Were in Technical Violation of the Milestone, the Bureau Should Have Considered Either a Waiver or an Assignment to Cure the Defect.

If the Commission concludes that TMI was in technical violation of the milestone requirement, the Bureau should have considered whether a waiver or an assignment to cure the defect would have better served the public interest than voiding the license. The FCC has a long practice of supporting transactions that enable a licensee to help finance the cost of a new satellite system.[67] Moreover, the Bureau never fully explained why the milestone policy would still be served by requiring strict privity even when the licensee was unquestionably entitled to the benefits of a *bona fide* manufacturing contract.

1. A Waiver Is Warranted by the Special Circumstances of the Corporate Structure and the Public Interest in Competitive MSS.

TMI expressly asked the Bureau to grant such a wavier in its February 6, 2003 Opposition pleading, but the Bureau terminated the pleading cycle on TMI's assignment application and thus did not take into account TMI's pleading. Consequently, the Applicants request that the Commission grant the waiver, if necessary, in passing on the instant Application.[68] A waiver is appropriate if: (1) special circumstances warrant a deviation from the

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[67] *See, e.g., ICO-Teledesic Global Limited*, 16 FCC Rcd 6403, 6408 (¶ 13) (Int'l Bur. 2001) (transaction involving reorganization and infusion of capital to help finance "enormous cost" of satellite system serves a legitimate business purpose); *Loral/Qualcomm Partnership, L.P.*, 10 FCC Rcd 2333, 2334 (¶ 12) (Int'l Bur. 1995) (changes in ownership structure "to take advantage of new financing possibilities" is in the public interest and will not jeopardize status of application in processing round).

[68] *See* 47 C.F.R. §1.3 ("Any provision of the rules may be waived by the Commission on its own motion"). *See also NetSat 28 Company L.L.C. v. FCC*, 16 FCC Rcd 11025 (Int'l Bur. 2001) (waiving milestone deadline 18 months later based on additional information).

general rule; and (2) a deviation would not disserve the rule's underlying purpose and would better serve the public interest than would strict enforcement.[69]

First, the fact that TerreStar (rather than TMI) executed the satellite procurement contract stemmed from the unique circumstances of a pre-existing asset purchase agreement. That contract obligated TMI to assign its MSS authorization to MSV or a subsidiary, such as TerreStar. Thus, pursuant to the *Echostar* precedent, based on new facts which existed at the time of the milestone deadline (but were not fully documented until the December 2002 assignment application was filed), the Bureau should have found that special circumstances justified the contract arrangements which TMI tendered to meet the initial construction milestone.

Other circumstances also warrant a waiver: TerreStar was not an unrelated third party but an affiliate of TMI with a shared officer and two shared directors. A waiver would not undermine the purpose of the milestone policy because, under its contract with TerreStar, TMI "retain[ed] control over the content of the satellite specifications and the design, construction and delivery" of the satellite. Moreover, construction is ongoing (indeed it will be stopped if the Bureau's action is allowed to stand).[70] And TMI has procured its own satellite pursuant to the terms of its application.[71]

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[69] *See generally WAIT Radio v. FCC*, 418 F.2ed 1153, 1157 (D.C. Cir. 1960); *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[70] *See Globalstar, L.P.*, DA 03-328 (released Jan. 30, 2003) (where the licensee sought a milestone waiver to extend by over two years the date for completing construction and additional time to reform its underlying manufacturing contract, in the event the waiver was denied).

[71] In distinction, the Bureau recently denied two waiver requests where the licensees contended that sharing agreements for use of a third party's system, if and when that satellite was ready for operation, was legally equivalent to a manufacturing contract for their own satellite systems. *See Mobile Communications Holdings, Inc., et al.*, DA 03-285 (released Jan. 30, 2003).

The Applicants' situation is also distinguishable from that in *Columbia Communications Corporation*, 15 FCC Rcd 16496 (Int. Bureau 2000) and *Motorola, Inc. et al.*, 17 FCC Rcd 16496 (Int'l Bur. 2002) — both cases where a licensee failed to enter into any manufacturing contract in view of a pending assignment.

A waiver is further warranted because, upon receiving notice of the Bureau's questions, TMI worked with the Bureau in an attempt to cure the defect.[72] Finally, a waiver will provide for the timely construction and launch of a competitive MSS system and increase intramodal competition.[73] A waiver, therefore, is warranted by the special circumstances of the TMI and TerreStar corporate transaction and the public interest in competitive MSS services.

2. Commission Precedents Support Approval of the Assignment Application to Enable TMI and TerreStar to Cure the Bureau's Finding of a Technical Violation.

The Commission has permitted the assignment of broadcast licenses where fundamental qualifications were at issue or where technical violations would invalidate the license being assigned.[74] Because the Commission has permitted such assignments, even in the broadcast arena where it applies the highest standards, the Bureau erred in not analyzing whether the public interest would be served by approving the TMI and TerreStar assignment, particularly in light of the technical nature of the violation.

Notably, in *Spanish International*, a broadcast licensee that had been found in violation of the alien ownership limitation — a critical rule — was permitted to assign its license. In approving the transfer, the Commission stated that the non-conforming structure resulted in "only a technical violation of the law based primarily on the interlocking relationships" between the owners. According to the Commission, "there is no indication that these licensees concealed

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[72] *See, e.g., GE American Communications, Inc.*, 16 FCC 11038, ¶¶ 9-10 (waiver granted, in part, based on good faith discussion with FCC staff regarding milestone compliance); *Tempo Enterprises, Inc.*, 1 FCC Rcd 20 (1986) (accepting an untimely construction contract because the licensee was unaware of FCC staffs view that contingencies regarding future design changes could be accommodated by a construction contract and shall not delay contract execution); *see also NetSat 28 Company. L.L.C.*, 16 FCC Rcd 11025 (Int'l Bur. 2001)

[73] The spectrum at issue here could not easily be used by another MSS provider because TMI will continue to be authorized for operation pursuant to the Canadian license.

[74] *RKO General, Inc.*, 3 FCC Rcd 5057 (1988) (licensee lacked qualifications because of misconduct); *Spanish International*, 2 FCC Rcd 3336 (1987) (licensee in technical violation of alien control requirement). These assignments were permitted even though the Commission views broadcast license qualifications as the most inviolable of the rules. *See Cablecom-General. Inc.*, 87 FCC 2d 784, 788-89 (1981).

their activities from the Commission"; "there are no adjudicated character violations that relate to the licensees' truthfulness and reliability";[75] and the planned reorganization would also "ensur[e] immediate compliance with the statute."[76]

In light of these Commission precedents, the Bureau should have considered whether the public interest required the maintenance of TMI's license and grant of its proposed assignment despite any technical violation of an unannounced milestone policy.

V. Conclusion

For all the above reasons, the Commission should reject the conclusions of the *IB Order* and reinstate TMI's LOI authorization and assignment application forthwith.

Respectfully submitted,

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Counsel for TerreStar Networks Inc.

March 12, 2003

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[75] *Spanish International*, 2 FCC Rcd at 3339.

[76] *Id.*

Exhibit 1

Execution Copy

July 12, 2002

TMI Communications and Company, Limited Partnership
1601 Telesat Court
Gloucester, Ontario K1B 1B9
Canada

AND

TerreStar Networks Inc.
7925 Jones Branch Drive
McLean, VA 22102

Dear Ladies and Gentlemen:

WHEREAS TMI Communications and Company, Limited Partnership ("TMI") holds an Approval in Principle issued by Industry Canada on May 6, 2002 for a 2GHz space station authorization and related spectrum licenses for the provision of Mobile Satellite Service ("MSS") in the 2 GHz frequency band (the "Canadian Authorizations") as well as an authorization from the Federal Communications Commission ("FCC") for the provision of MSS in the 2 GHz frequency band (the "FCC Authorization" as well as and, collectively with the Canadian Authorizations, the "2 GHz Assets");

AND WHEREAS TMI has a long range plan of transferring the Canadian Authorizations to an entity which is eligible under both the *Radiocommunication Act* (Canada) and *Telecommunications Act* (Canada) to hold the Canadian Authorizations and in which TerreStar Networks Inc. ("TerreStar") and/or TMI or affiliates thereof will have an interest, subject to obtaining the necessary Canadian regulatory approvals;

AND WHEREAS TMI has a long-range plan of transferring the FCC Authorization to a suitable entity in which TerreStar Networks Inc. ("TerreStar") and/or TMI or affiliates thereof will have an interest, subject to obtaining the necessary United States regulatory approvals;

AND WHEREAS prior to TMI's transfer of the 2 GHz Assets to the entities noted above, the parties desire to commence satellite construction in a timely manner and thereby satisfy certain milestone requirements included within the FCC Authorization and the Canadian Authorizations;

AND WHEREAS TMI has exercised oversight and direction in the development of a proposed satellite procurement contract with Space Systems/Loral, Inc. ("Loral") and is satisfied with such contract.

NOW THEREFORE the parties hereto hereby agree as follows:

1. TerreStar shall execute, within the milestones stated in the Canadian Authorizations and the FCC Authorization, a non-contingent satellite procurement contract with Loral that is satisfactory to TMI providing for the construction and delivery to TMI of a satellite that is consistent with (a) the terms of the Canadian Authorizations; and (b) the terms of the FCC Authorization. TMI shall retain control over the content of the satellite specifications and the design, construction and delivery of the satellite so long as it holds the Canadian Authorizations and the FCC Authorization, and TerreStar's contract with Loral shall be wholly consistent with said regulatory authorizations.

2. In consideration for TerreStar's undertakings set forth above with respect to the Loral contract, TMI agrees that at TerreStar's election, TMI shall expeditiously transfer the 2 GHz Assets, free and clear of all encumbrances, to the entities noted above (in which TerreStar and/or TMI or affiliates thereof will have an interest), subject to any necessary Canadian and United States regulatory approvals.

3. The parties further agree that upon, and in connection with, the transfer described in paragraph 2, TMI shall immediately transfer all of its right, title and interest in and under the Loral contract, the satellite, and all work in progress under the Loral contract, to the appropriate eligible Canadian entity in which TerreStar and/or TMI or affiliates thereof will have an interest.

[Signature page to follow]

If the above reflects your understanding of the parties' agreement, please acknowledge your acceptance of the foregoing by executing the countersignature below.

ACKNOWLEDGED AND AGREED:

TMI COMMUNICATIONS INC., for and on behalf of
TMI COMMUNICATIONS AND COMPANY LIMITED PARTNERSHIP

By: _____
Name: Larry Boisvert
Title: President

By: _____
Name: Ted Ignacy
Title: V.P. Finance

TERRESTAR NETWORKS INC.

By: _____
Name: Wharton B. Rivers, Jr.
Title: Chief Executive Officer

Exhibit 2

AFFIDAVIT OF WHARTON B. RIVERS, JR.

1. My name is Wharton B. Rivers, Jr. and I am President and CEO of TerreStar Networks Inc. (TerreStar).

2. On November 14, 2002, Robert Power, regulatory advisor to TMI Communications and Company Limited Partnership (TMI), Gregory Staple of Vinson & Elkins L.L.P., counsel for TMI and TerreStar, and I met with members of the FCC's staff to discuss the July 25, 2002 milestone certification for TMI's 2 GHz MSS system. The FCC's staff was represented by Karl Kensinger and Alexandra (Sasha) Field of the International Bureau, Neil Dellar of the Office of the General Counsel and Rosemary Cabral of the Wireless Bureau.

3. During the meeting, Mr. Staple explained that in 2001 TMI had reorganized its North American mobile satellite services business by forming a joint venture with Motient, now known as Mobile Satellite Ventures (MSV) and that TMI was obligated as part of the joint venture to transfer the 2GHz authorization to MSV or to an MSV subsidiary. Mr. Staple said that TMI was willing to provide relevant contract documents if not previously filed with the FCC in connection with the assignment of the TMI and Motient L-band MSS authorizations to MSV.

4. FCC staff members noted that TMI had indicated in an earlier communication, that it intended to request transfer of its authorization to TerreStar by the end of 2002 and asked why the transfer request had not been made earlier. Mr. Staple and I both said that we were awaiting clarity in the regulatory arena regarding the pending MSS Flexibility docket before seeking transfer approval. We further indicated that the FCC's action in

this docket would have a significant effect on potential investors' willingness to invest in TerreStar.

5. Ms. Field said that our explanation regarding TMI's MSS business had provided new information. She said such information must be placed on the public record, however, in order for the staff to consider it. She further stated that the staff, when given the pertinent facts regarding TMI's obligation to transfer the authorization and the business reasons for not doing so earlier, could be "sympathetic." She indicated there was some similarity to the *EchoStar* case decided earlier that month [EchoStar Satellite Corporation, DA02-3085, released November 2, 2002] where EchoStar had its authorization reinstated after it provided the FCC with additional information on the record. Mr. Dellar then indicated that a transfer application was a potential remedy for the current legal sufficiency issue regarding the manufacturing contract because the transfer would align the holder of the FCC authorization with the signatory to the satellite construction contract.

6. Just before the meeting adjourned, I summarized the actions that I planned to take at a TerreStar board of directors meeting scheduled the next day: I would advise the TerreStar board of the FCC meeting and the desirability of applying soon to transfer the authorization from TMI to TerreStar, and request MSV's Board of Directors to authorize release of the Asset Sale Agreement between TMI and Motient Corporation to attest to TMI's pre-existing obligation to transfer the 2GHz authorization. After I made the summary, Ms. Field said that these actions would be "helpful" to the staff in their milestone review.

7. On November 15, 2002, I made such report to the Board and received the requested approvals. I then instructed TerreStar's counsel to advise the International Bureau that we could file the transfer application as soon as we determined from Industry Canada that TMI could bifurcate the transfer process without jeopardizing its Canadian authorization. Once we determined Industry Canada officials had no problem with TMI's planned approach, we moved forward to prepare and file the transfer application on December 11, 2002.

8. The foregoing statements in this Affidavit are true and correct to my knowledge.

Wharton B. Rivers, Jr.
President and CEO
TerreStar Networks, Inc.

Sworn to me this 12th day of March, 2003:

Notary Public

KATHRYN J. MEREIGH
My Commission Expires January 14, 2007

CERTIFICATE OF SERVICE

I, Ana Maria Ablaza, hereby certify that a copy of the foregoing "APPLICATION FOR REVIEW" has been served this 12th day of March, 2003, by first class United States mail, postage prepaid, or by hand delivery (*), on the following:

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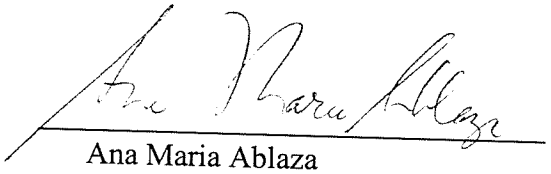

Ana Maria Ablaza