**Before the**
**Federal Communications Commission**
**Washington, DC 20554**

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| In the Matter of | ) | DA 03-385 |
| | ) | |
| **TMI Communications and Company, Limited Partnership** | ) | File No.: 189-SAT-LOI-97 |
| | ) | |
| Request for Modification of Spectrum Reservation for a Mobile-Satellite Service in the 2 GHz Bands | ) | IBFS Nos.: SAT-LOI-19970926-00161<br>SAT-AMD-20001103-00158<br>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 | ) | |



# OPPOSITION TO APPLICATION FOR REVIEW

Kathryn A. Zachem
L. Andrew Tollin
Craig E. Gilmore
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037-1128
(202) 783-4141

**AT&T WIRELESS SERVICES, INC.**
Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, NW
Washington, DC 20036
(202) 223-9222

**VERIZON WIRELESS**
John T. Scott, III
Charla M. Rath
Cellco Partnership
d/b/a Verizon Wireless
1300 I Street, NW
Suite 400-W
Washington, DC 20005
(202) 589-3760

**CINGULAR WIRELESS LLC**
J. R. Carbonell
Carol L. Tacker
David G. Richards
Cingular Wireless LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

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To: The Commission

## OPPOSITION TO APPLICATION FOR REVIEW

Pursuant to Section 1.115(d) of the Commission's Rules, 47 C.F.R. § 1.115(d), AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (the "Carriers") hereby oppose the March 12, 2003 Application for Review filed by TMI Communications and Company, Limited Partnership ("TMI") and TerreStar Networks Inc. ("TerreStar") in the above-referenced proceedings. For the reasons set forth below, the Commission should deny the Application for Review and affirm the decision of the International Bureau (the "Bureau") finding that TMI failed to satisfy the initial MSS milestone upon which its authorization was

conditioned, thus rendering its 2 GHz MSS authorization null and void, and dismissing as moot its related applications for license modification and assignment to TerreStar.[1]

## INTRODUCTION AND SUMMARY

As a general matter, the Carriers observe that TMI quibbles with specific aspects of the *Bureau Order* without ever addressing its own failure to satisfy the initial contract milestone. The Application for Review provides TMI's version of the background surrounding the nullification order. TMI leaves out several important points, however. For example, TMI frequently refers to its "affiliation" with TerreStar, but fails to rebut the Bureau's finding that TMI did not control TerreStar, or otherwise demonstrate how TMI was committed to the construction of the satellites. In a similar vein, TMI suggests that the Commission's approval of the combination of TMI's L-Band MSS business with that of Motient is decisionally significant, but neglects to mention that decision explicitly indicated TMI's authorization to launch and operate a new 2 GHz MSS system was "not germane to th[e] proceeding."[2]

As demonstrated below, the *Bureau Order* was well reasoned, consistent with precedent and fully considered the arguments made by TMI. The Commission previously made clear that TMI must enter into a non-contingent contract for the construction of its satellite system by July 17, 2002, and also made clear that it would strictly enforce the 2 GHz MSS milestones. The precedent cited by TMI does not introduce any ambiguity into these obligations, as those cases are readily distinguishable. Given that TMI sought to satisfy the milestone through a novel approach, it should have sought advance guidance from the Commission instead of simply

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[1] *TMI Communications and Company, Limited Partnership,* 18 F.C.C.R. 1725, ¶¶ 1, 14 (2003) ("*Bureau Order*").

[2] *See Motient Services Inc. and TMI Communications and Company, LP, Order and Authorization*, 16 F.C.C.R. 20469, 20472 & n.23 (IB 2001).

waiting until the last minute to create the non-compliant arrangement whereby a company in which TMI had only a minority interest executed the satellite manufacturing contract.

The only logical explanation for the arrangement with TerreStar is that TMI wanted to avoid exposing itself to any liability so as preserve its option to walk away from its 2 GHz MSS proposal, while maintaining its authorization in case the right to use the spectrum developed any significant independent value. TMI initially claimed that the contract was executed by TerreStar because it was the entity to which the authorization would be assigned.[3] In the latest pleadings TMI now asserts that the identity of the assignee(s) is unknown, and could vary for the U.S. and Canadian authorizations.[4] Neither claim, however, explains why it did not simply enter into a contract with the satellite manufacturer that allowed the contract to be assigned if the licensee changed.

In addition, the *Bureau Order* did not violate the precepts of *DISCO II.* In that decision the Commission specifically indicated it would enforce milestones against foreign-licensed satellite systems. Finally, TMI has not demonstrated that it should receive a waiver or retroactive cure of the defective milestone compliance.

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[3] In its October 15, 2002 letter, TMI indicated that: "TMI reasonably expected TerreStar (rather than TMI) would probably be the licensee at the time the satellite system was completed and ready for launch. Similarly, in light of the ongoing restructuring of its business, TMI wanted to ensure continuity in the relationship with its satellite manufacturer and TerreStar also provided an appropriate vehicle for that." Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, to Marlene H. Dortch, Secretary, FCC, re: File No. 189-SAT-LOI-97 *et al.*, at 3 (Oct. 15, 2002) ("October 15th Letter").

[4] Application for Review at 18.

## DISCUSSION

### I. THE *BUREAU ORDER* CORRECTLY HELD THAT TMI DID NOT SATISFY THE INITIAL MILESTONE

TMI's authorization expressly stated that "TMI must . . . Enter [a] Non-contingent Satellite Manufacturing Contract" within 12 months after authorization, or by July 17, 2002.[5] Rather than executing its own contract with a manufacturer, TMI relied upon a contract between TerreStar, an affiliate over which TMI lacks control, and Space Systems/Loral, Inc. ("Loral"). The Bureau correctly held that "TMI did not enter into a satellite manufacturing agreement" and therefore "failed to comply with the plain terms of its authorization."[6]

Contrary to TMI's claims, the Bureau did not elevate form over substance, but rather examined the substance of the TerreStar-Loral contract and found that it was inadequate to demonstrate that TMI had fulfilled not only the letter of the initial milestone, but also the intent of the milestone to demonstrate an investment and commitment to completion of the satellite system.[7] TMI asserts that the plain language of its authorization did "not expressly require TMI to sign a satellite manufacturing contract itself," because the word "enter" has multiple meanings other than execution.[8] Commission precedent makes clear, however, that the requirement to

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[5] *TMI Communications and Company, Limited Partnership, Order*, 16 F.C.C.R. 13808, 13812, 13816 (IB 2001) ("*TMI Authorization Order*").

[6] *Bureau Order* at ¶ 9.

[7] *See Bureau Order* at ¶¶ 8-14.

[8] *See* Application for Review at 10. As a preliminary matter, this issue must be raised for the first time at the Bureau level. *See* 47 C.F.R. § 1.115(c) & note; *Richard Duncan d/b/a Anderson Communications*, FCC 03-52, at ¶ 7 (rel. Mar. 12, 2003) ("*Duncan*").

"enter" into a non-contingent contract requires the *licensee* to *execute* the contract, and not some third party over which the licensee lacks control.[9] As the Commission recently explained:

> We also disagree with Morning Star's contention that the Bureau erred in the application of the commencement of construction milestone. Morning Star seems to be arguing that the necessity of *entering* into a construction contract . . . was not clear. To the contrary, . . . . [t]he Commission has consistently held that, at a minimum, an FSS *licensee must execute* a non-contingent satellite construction contract to satisfy the commencement of construction milestone."[10]

As discussed below, the Commission has placed even greater emphasis on strict compliance with the non-contingent contract milestone by 2 GHz MSS licensees.

Nor did the *Bureau Order* create any new standard of "strict privity," as TMI contends.[11] Instead, the Bureau found that the satellite contract relied on by TMI was inadequate because TMI merely had a minority, non-controlling ownership interest in TerreStar, the entity that executed the contract with the satellite manufacturer. TMI, therefore, did not demonstrate a commitment to construction of the satellites by guaranteeing the obligations.[12] Moreover, while

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[9] *See, e.g., PanAmSat Licensee Corp.*, 16 F.C.C.R. 11534, 11539 (2001) ("*PanAmSat*"); *NetSat 28 Company, L.L.C.*, 15 F.C.C.R. 11321, 11322-23 (IB 2000); *Morning Star Satellite Company LLC*, 15 F.C.C.R. 11350, 11351-53 (IB 2000), *aff'd*, 16 F.C.C.R. 11550 (2001); *Norris Satellite Communications, Inc*, 12 F.C.C.R. 22299, 22303 (1997).

[10] *Morning Star Satellite Company LLC*, 16 F.C.C.R. 11550, 11553-54 (2001) ("*Morning Star*").

[11] *See* Application for Review at ii.

[12] TMI has no liability with regard to payment for satellite construction under the TMI/TerreStar agreement or the TerreStar/Loral contract, either directly or as a guarantor of the obligations of TerreStar. Thus, TMI has been and is free to walk away from its proposed 2 GHz MSS system without penalty, and apparently without having spent any money constructing the satellite. *Compare PanAmSat*, 16 F.C.C.R. at 11539 (contract "that does not create a financial obligation for *the licensee* to proceed" does not satisfy the non-contingent contract milestone) (emphasis added) *with Tempo Satellite Inc. and DirecTV Enterprises, Inc.*, 7 F.C.C.R. 6597, 6600 (IB 1992) (contract in which the "payment terms and schedule demonstrate *the applicant's* investment and commitment to completion of the system" satisfies non-contingent requirement) (emphasis added).

TMI claims certain contractual rights as a result of its letter agreement with TerreStar, the satellite manufacturing contract expressly indicated that TMI had no rights under the contract. Section 37.15 of that contract explicitly states that:

> This contract is entered into solely between, and may be enforced only by, Purchaser [defined as TerreStar] and Contractor [defined as Loral] and their permitted assigns, *and this contract shall not be deemed to create any rights in third parties*, including suppliers, customers and owners (*including TMI*) of a Party, or to create any obligations of a Party to any such third parties.[13]

TMI's attempts to take snippets of language from the order and construct a claim that it had met its milestone also fail.[14] Although the *Bureau Order* acknowledged that TerreStar was an "affiliate" of TMI, the Bureau also looked beyond that label and determined that the minority ownership interest did not amount to control by TMI over TerreStar. TMI does not dispute this finding. Likewise, TMI's quotes from the *Bureau Order* that merely described TMI's arguments about the reason for the contract being executed by TerreStar, the rights of TMI to benefits of the contract, or the extent of progress under the contract, all ignore the fact that the Bureau assessed TMI's obligations and commitments and found them to be inadequate.

The Commission can also dismiss TMI's claim that the *Bureau Order* is inconsistent with the *ATC Order*.[15] Although the *ATC Order* does refer to the "commonality of interests" among TMI, Motient and MSV, that is irrelevant to the analysis in the *Bureau Order* as to whether the commonality of interest between TMI and TerreStar was sufficient to satisfy the initial

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[13] *See* Contract between TerreStar Networks Inc. and Space Systems/Loral, Inc. for the TerreStar 1 Satellite Program (Acceptance On-Orbit), at § 37.15 (July 14, 2002) ("TerreStar/Loral Contract") (emphasis added).

[14] *See* Application for Review at i.

[15] *See* Application for Review at 17 n.56 (citing *Flexibility for the Delivery of Communications by Mobile Satellite Service Providers*, 18 F.C.C.R. 1962, ¶ 6 n.10 (2003) ("*ATC Order*")).

milestone. In the L-band, TMI has combined its MSS business with Motient (into MSV), a transaction that was approved by the Commission. That decision, however, explicitly excluded TMI's 2 GHz MSS authorization.[16] Thus, the fact that there is, in some general respects, a relationship among TMI, Motient and MSV is not inconsistent with the finding by the Bureau that *for purposes of milestone compliance* there is not the requisite commonality between TMI and TerreStar, or control by TMI over TerreStar, or any other demonstration by TMI of a commitment to the satellite manufacturing contract.

If anything, it is TMI that seeks to establish a new interpretation of the milestone. In essence, TMI argues that it satisfies the milestone because a company over which it lacks control has entered into a satellite manufacturing contract. That contract expressly states that TMI has no rights under the contract and the manufacturer has no obligations to TMI. TMI's position is unfounded and unreasonable. In sum, the *Bureau Order* was not based on a mere technicality – the absence of privity – but instead was based on the conclusion that TMI had not, through execution of a contract, financial guarantees, or any other manner, demonstrated a commitment to construction of the satellite as required by the initial contract milestone condition in its authorization.

## II. THE *BUREAU ORDER* WAS PROCEDURALLY PROPER AND CONSISTENT WITH PRECEDENT

### A. Failure to Give TMI the Opportunity to Cure Was Not Error

TMI claims that it was unfair and improper for the Bureau to declare the authorization null and void because TMI was misled by Commission Staff at a post-milestone meeting into believing it could retroactively cure the defective milestone compliance by filing an assignment

[16] *See supra* note 2.

application.[17] TMI also complains that the Bureau should have waited until the end of the pleading cycle on the assignment application (*i.e.,* waiting for the Carriers to respond to its Opposition to the Petition to Deny) to address the infirmities in the milestone compliance. As a preliminary matter, these cure arguments erroneously link TMI's milestone compliance with the TerreStar assignment application. The two are separate proceedings related only insofar as a finding of milestone noncompliance and license nullification necessarily rendered the assignment application moot as there was nothing to assign, as the Bureau correctly found.[18]

More fundamentally, there exists no right to cure milestone non-compliance after the deadline has passed. To the contrary, the Commission has stated that it will "strictly enforce" the 2 GHz MSS milestones, including the requirement to enter into a non-contingent satellite manufacturing contract within one year of licensing, and that non-compliant licenses are null and void.[19] To permit TMI to correct its failure to execute a non-contingent satellite manufacturing contract by assigning its authorization to TerreStar *after* the milestone has come and gone would render meaningless strict enforcement of the milestones. TMI cites to no satellite precedent to support its claimed "right to cure." It offers only a broadcast case, *Spanish International*, which is inapposite. The case does not involve automatic cancellation for failure to meet a license condition, let alone strict milestone enforcement.[20]

Moreover, the Bureau conducted a careful investigation in which TMI was a full and active participant prior to concluding TMI failed to satisfy the initial milestone. TMI was

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[17] Application for Review at 20.

[18] *See Bureau Order* at ¶ 15.

[19] *Service Rules for MSS in the 2 GHz Band*, 15 F.C.C.R. 16127, 16150, 16177-78 (2000) ("*2 GHz MSS Order*"); *TMI Authorization Order,* 16 F.C.C.R. at 13816.

[20] *Spanish International Communications Corp.*, 2 F.C.C.R. 3336 (1987).

afforded ample opportunity to submit new factual information that existed at the time of the milestone deadline (but was unknown by the Commission) to augment the record in the milestone proceeding.[21] Specifically, following receipt of a letter from the Carriers in August 2000 questioning TMI's compliance with the initial milestone,[22] Commission Staff met with TMI and raised questions concerning the relationship between TMI and TerreStar.[23] TMI indicated in response that it presently "only has an indirect [minority] interest in TerreStar through its ownership interest in" the parent company of TerreStar.[24] On October 4, 2002, the Commission sent a letter to Counsel for TMI explicitly requesting additional information as part of its review of whether TMI entered into a non-contingent satellite manufacturing contract. The letter stated:

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

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[21] *Cf. EchoStar Satellite Corporation*, DA 02-3085 (IB rel. Nov. 8, 2002) ("*EchoStar*").

[22] Letter from Kathryn A. Zachem and L. Andrew Tollin, Wilkinson Barker Knauer, LLP, Counsel for AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless to Marlene H. Dortch, Secretary, FCC, in IB Docket No. 01-185 *et al.*, at 4-5 (Aug. 15, 2002) (noting that "there is a serious question whether TMI . . . has entered into a non-contingent contract, as it is relying not upon its own contract with a manufacturer, but rather upon a contract between a proposed investor, TerreStar Networks Inc., and Loral") (footnote omitted).

[23] *See* Letter from Gregory C. Staple, Vinson & Elkins, Counsel for TMI, to Marlene H. Dortch, Secretary, FCC, re: File No. 189-SAT-LOI-97 *et al.* (Aug. 27, 2002) ("August 27th TMI Letter"). Apparently there was also at least one later meeting between TMI and the Commission Staff, although there had been no notice of that meeting in the record of Docket No. 01-185, notwithstanding the fact that TMI apparently addressed that proceeding in the meeting. *See* Application for Review, Exh. 2 at ¶ 4.

[24] August 27th TMI Letter at 2.

> any way liable in the event the satellite system is not implemented.[25]

The letter also advised TMI to provide all "potentially relevant information," as the failure to do so "may result in an adverse inference concerning milestone compliance."[26]

TMI purported to answer the Commission's inquiry in a letter dated October 15, 2002. That letter, however, dodged the Commission's request to identify any agreements or other arrangements that would bind TMI, so presumably there is no such obligation. Instead, TMI merely claimed that TerreStar has rights to a satellite and explained that the contract was undertaken by TerreStar because TMI expects to assign its FCC authorization to TerreStar in the near future.[27] The Carriers subsequently filed a more detailed challenge to the TMI milestone compliance demonstration on December 11, 2002.[28]

Rather than respond directly to those concerns about its initial milestone compliance, TMI now asserts that it sought to "cure" the milestone compliance concerns by filing the assignment application.[29] TMI cannot cure milestone noncompliance after-the-fact, and has not

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[25] Letter from Thomas S. Tycz, Chief, Satellite Division, FCC to Gregory C. Staple, Vinson & Elkins, Counsel for TMI, re: File No. 189-SAT-LOI-97 *et al.*, at 1 (Oct. 4, 2002). The Commission also asked TMI to explain the discrepancy between the orbital location in the FCC authorization and the orbital location specified in the TerreStar/Loral contract and the Canadian authorization. *Id.*

[26] *Id.* at 2.

[27] In that response, TMI also asserts that TMI has an "indirect interest" in performance of the Loral contract. *See* October 15th Letter. As noted above, however, the TerreStar/Loral contract explicitly disclaims any interest of TMI in the contract. *See* TerreStar/Loral Contract at § 37.15.

[28] Letter from Kathryn A. Zachem and L. Andrew Tollin, Wilkinson Barker Knauer, LLP, Counsel for AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless to Marlene H. Dortch, Secretary, FCC, re: File No. 189-SAT-LOI-97 *et al.* (Dec. 11, 2002).

[29] *See* Application for Review at n.25; Opposition to Petition to Deny, File No. SAT-ASG-20021211-00238, at 14-16 (Feb. 6, 2003) ("February 6th Opposition"). In the assignment application itself, however, TMI explained that the timing of the assignment was driven initially

submitted any new evidence that existed prior to the milestone deadline to demonstrate compliance,[30] even after multiple opportunities to do so. TMI's decision to rely on purported statements by staff that it could cure its milestone defect by filing the assignment application was made at its own risk. Even had such informal staff advice been provided,[31] it is not binding.[32] Indeed, TMI's decision to enter into a non-compliant arrangement rather than an assignable contract[33] indicates that TMI knowingly sought to avoid exposing itself to any liability so as preserve its option to walk away from its 2 GHz MSS proposal.

### B. There Is No Validity to TMI's Claim It Lacked Adequate Notice

There is no validity to TMI's claim that it did not have adequate notice of the standards the Bureau would apply in evaluating the initial contract milestone, and the consequences for non-compliance. The *TMI Authorization Order* was clear on its face: "TMI must . . . Enter Non-contingent Satellite Manufacturing Contract" by July 17, 2002.[34] In addition, TMI (and the other

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by the need to await Canadian licensing, and then by a desire to await the outcome of the Commission's ATC proceeding. *See* Application of TMI Communications and Company, Limited Partnership, File No. SAT-ASG-20021211-00238, Exh. 2 at 3-4 (filed Dec. 11, 2002).

[30] *Cf. EchoStar*, DA 02-3085 at ¶ 5. The February 6th Opposition was not filed in the milestone proceeding, and in any event offered only legal argument and not any new facts. *See* February 6th Opposition at 3 (acknowledging that "[t]he key facts are not in dispute").

[31] The Carriers are skeptical of TMI's characterizations of what the Staff suggested or encouraged, although the Carriers were not invited to attend the meeting.

[32] The Commission has specifically held that "parties who rely on staff advice or interpretations do so at their own risk." *Hinton Telephone Company*, 10 F.C.C.R. 11625, 11637 (1995); *see Malkan FM Associates v. FCC*, 935 F.2d 1313, 1319 (D.C. Cir. 1991) (citing *Schweiker v. Hansen*, 450 U.S. 785, 788-89 (1981)); *P&R Temmer v. FCC*, 743 F.2d 918, 931 (D.C. Cir. 1984).

[33] TMI clearly could have done so, as Loral was willing to accept such a term and subsequent assignment. *See* TerreStar/Loral Contract at Section 37.1.2 (providing TerreStar with rights to assign or transfer the contract); *see also infra note* 39.

[34] *TMI Authorization Order*, 16 F.C.C.R. at 13812.

2 GHz MSS licensees) were all on notice that the Commission would be applying a "strict enforcement" standard to 2 GHz MSS milestone compliance. In adopting the 2 GHz MSS service rules, the Commission concluded that it would "*impose and strictly enforce milestone requirements*" instead of financial qualifications.[35] The Commission emphasized that strict milestone enforcement would be "especially important" in lieu of "financial qualifications as an entry criterion,"[36] and specifically anticipated that spectrum would be "returned to the Commission as a result of missed milestones."[37] In fact, the *TMI Authorization Order* expressly stated that it "shall become NULL and VOID with no further action required on the Commission's part" if any of the milestones were not met.[38]

TMI's claim that ambiguity as to the standards for the initial milestone was created by precedent rings hollow. First, TMI ignores relevant precedent. In a milestone case involving the absence of a contract because of a pending assignment application, the Commission indicated that the licensee could have entered into a contract with the manufacturer and provided for assignment of that contract in the event that the satellite license was subsequently assigned.[39]

Moreover, the two satellite decisions now relied on by TMI did not involve an initial contract milestone and are otherwise readily distinguishable. The *VITA* decision cited by TMI (i)

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[35] *2 GHz MSS Order*, 15 F.C.C.R. at 16150 (emphasis added).

[36] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Notice of Proposed Rulemaking*, 14 F.C.C.R. 4843, 4881 (1999).

[37] *2 GHz MSS Order*, 15 F.C.C.R. at 16150.

[38] *TMI Authorization Order*, 16 F.C.C.R. at 13816.

[39] *See Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16500 (IB 2000); *see also Motorola, Inc. and Teledesic, Inc.*, 17 F.C.C.R. 16543, 16550 (IB 2002) ("*Motorola/Teledesic*") ("Motorola could have satisfied the construction-commencement requirement by entering into a construction contract providing for a shift of payment obligations to Teledesic upon consummation of the proposed license assignment.").

addressed a construction and launch milestone for a replacement satellite; (ii) was not decided under a "strict enforcement" standard; (iii) concerned a direct contract between VITA and the satellite manufacturer (FAI);[40] and (iv) relied in part on the humanitarian nature of VITA's proposed offerings.[41] The other satellite decision cited by TMI – *USSB* – did not involve milestones at all, let alone the current strictly enforced 2 GHz MSS milestones, but rather addressed compliance with the then-flexible DBS due diligence standards.[42] *USSB* stands only for the proposition that under the unique circumstances present in that case in 1992, the sharing arrangement at issue therein satisfied the initial due diligence DBS requirement – not, as TMI

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[40] *Volunteers in Technical Assistance, Order*, 12 F.C.C.R. 3094, 3100 (IB 1997) ("*VITA*") ("The agreement provides that FAI will build the satellite . . . .").

[41] *VITA*, 12 F.C.C.R. at 3105-06 ("VITA has struggled for years to launch and operate a Little LEO satellite system to further its humanitarian mission of providing essential educational, health, environmental, disaster relief and technical communication services in developing countries. Its non-profit status, coupled with the unfortunate loss of its first satellite in a launch failure, has presented VITA with peculiar roadblocks to the initiation of its planned services. VITA is, however, now prepared to move forward expeditiously with the provision of its service. Consequently, we find that these are sufficient public interest reasons to justify the grant of VITA's replacement satellite.").

[42] *Cf. United States Broadcasting Company, Inc.*, 7 F.C.C.R. 7247 (MMB 1992) ("*USSB*"). While the due diligence requirements for DBS are somewhat analogous to the milestones for MSS and fixed satellite services insofar as they represent benchmarks for measuring system progress, the rigidity with which the DBS requirements have been enforced has varied over time. At the time of the *USSB* decision and earlier, the Commission took a flexible approach to enforcement during the infancy of DBS. *See Advanced Communications Corp.*, 11 F.C.C.R. 3399, 3409-10 (1995) ("*ACC*"); *see also id.* at 3442 (Separate Statement of Commissioner Rachelle Chong). When it later became clear that flexible enforcement was leading to delays in construction and operation, the Commission called for stricter enforcement. *Id.* at 3404-05, 3409; *see also Policies and Rules for the Direct Broadcast Service*, 17 F.C.C.R. 11331, 11353-54 n.166 (2002) ("The Commission may in a future proceeding consider the issue of whether to continue to apply the traditional DBS "totality of the circumstances" test in determining whether licensees have met their due diligence requirement. . . . Alternatively, the Commission could decide to hold DBS licensees to the strict milestone requirements applicable to FSS licenses."). By contrast, in the case of 2 GHz MSS, the Commission has stated since before licensing that it will strictly enforce the milestones, particularly given the absence of financial qualifications.

suggests, that the absence of privity as a general matter does not undercut the initial contract milestone.[43] Notably, the case arose after USSB had already been found to have satisfied the initial due diligence requirement when it signed a contract for the construction of three satellites.[44]

Likewise, TMI's attempt to rely on broadcast or CMRS cases to create ambiguity as to the applicable standard for review of 2 GHz MSS initial milestone compliance is unavailing. The fact that in a broadcast decision different subsidiaries of News Corp. would hold the license and run the operations hardly creates supporting precedent for TMI.[45] That case did not involve the "strict enforcement" of an initial contract milestone, and there is a significant difference between the "not wholly owned" subsidiary there and the non-controlling minority ownership interest in this case. Nor do the various terrestrial CMRS business arrangements discussed by TMI provide any support for its claim that the satellite contract between TerreStar and the satellite manufacturer should suffice, notwithstanding the absence of a contractual obligation (or controlling ownership in TerreStar). Those cases obviously do not involve satellite milestones, let alone the "strict enforcement" of an initial contract milestone. In the terrestrial context, there is also not the same concern of spectrum warehousing, because the terrestrial CMRS licenses were usually acquired at an auction.

Given the clear requirement that TMI enter into a non-contingent satellite manufacturing contract and notice that the requirement would be strictly enforced, the knowledge that failure to meet the milestone would render its authorization null and void, and the absence of any

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[43] *See* Application for Review at 12.

[44] *See USSB*, 7 F.C.C.R. at 7249.

[45] Application for Review at 15 (citing *Applications of UTV of San Francisco, Inc.*, 16 F.C.C.R. 14975 (2001)).

precedent suggesting that a contract entered into by a non-controlled affiliate would suffice, the burden was on TMI to approach the Commission in advance of the deadline to seek formal guidance as to whether the contemplated arrangement would satisfy the milestone.[46] TMI never took this basic step. The Commission can hardly be faulted for failure to anticipate all of the potential ways in which licensees might attempt to skirt the strict enforcement of the milestone compliance and address each of these in the 2 GHz MSS rulemaking.[47] By structuring the arrangements as it did at the last minute, TMI assured its fate and cannot now complain that it had no notice and was denied due process when the FCC correctly found that the absence of a commitment by TMI undercut its initial contract milestone compliance. As the FCC has previously instructed:

> At no point did Morning Star request a clarification, extension or waiver of its construction contract. . . . [W]hen satellite licensees do not pursue procedural avenues available to them to address concerns surrounding their authorizations, but rather wait until their authorizations are null and void due to their failure to act, their inaction ensures the result that the milestone concept is designed to prevent.[48]

### C. The Hearing Provision of Section 312 Is Inapplicable and In Any Event Has Been Satisfied

TMI also claims in a footnote that it was entitled to a hearing under Section 312 before the Bureau could "cancel" its license, without indicating what type of hearing (evidentiary or

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[46] *See Morning Star,* 16 F.C.C.R. at 11554 (2001); *see also Motorola/Teledesic,* 17 F.C.C.R. at 16550 ("Not even having taken the basic step of apprising us of the alleged difficulty prior to expiration of the time allowed for compliance, the Applicants must accept the consequences of their failure to satisfy the milestone requirement within that time-period.").

[47] *Cf.* Application for Review at 11 (criticizing the *2 GHz MSS Order* for being silent on how a licensee may enter into a satellite manufacturing contract).

[48] *Morning Star,* 16 F.C.C.R. at 11554.

otherwise) it was entitled to.[49] As a threshold point, TMI's argument that the "summary cancellation" of its authorization violates Section 312's hearing provisions is a question upon which the Bureau has been afforded no opportunity to pass. This argument, therefore, cannot be raised before the Commission for the first time.[50]

Notwithstanding this procedural error, Section 312 is inapplicable to this case. Section 312 applies to license revocation, but that is not what happened to TMI's authorization. The *Bureau Order* held that TMI's 2 GHz MSS authorization "is null and void by its own terms" for failure "to satisfy the initial implementation milestone set forth in its Letter of Intent ("LOI") authorization."[51] TMI's authorization was therefore not revoked.[52] Rather, the non-contingent contract milestone was a condition on its authorization, which was valid only as long as the condition was satisfied. Its authorization was rendered null and void by operation of law and automatically cancelled when TMI failed to satisfy the license condition.[53]

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[49] Application for Review at n.59.

[50] *See* 47 C.F.R. § 1.115(c) & note; *see also Duncan*, FCC 03-52 at ¶ 7.

[51] *Bureau Order* at ¶ 24.

[52] *See, e.g., Glendale Electronics, Inc.*, 17 F.C.C.R. 22189, 22194 (CWD/WTB 2002); *Revision of Part 21 of the Commission's Rules*, 2 F.C.C.R. 5713, 5718 (1987). The *NextWave* D.C. Circuit decision is inapposite. There, it was undisputed that the case involved revocation of licenses under Section 525 of the Bankruptcy Code. *See NextWave Personal Communications, Inc. v. FCC*, 254 F.3d 130, 149 (D.C. Cir. 2001), *aff'd* 123 S. Ct. 832 (2003); *see also, e.g., United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990) (judicial decisions do not serve as precedent for points that were not raised and analyzed). In fact, the Court expressly ruled that it was unclear whether the FCC's automatic cancellation policy even applied under the facts of that case. 254 F.3d at 142. Finally, the discussion in *NextWave* concerning the "effect" of license cancellation occurred in the context of determining whether jurisdiction existed under 47 U.S.C. § 402(a) or (b), *see* 254 F.3d at 140, and not whether Section 312(c) hearing rights had been triggered.

[53] *See, e.g., Richard Duncan d/b/a Anderson Communications*, 16 F.C.C.R. 4312, 4312-13 (2001), *aff'd in part, Morris Communications, Inc. v. FCC*, No. 01-1123 (D.C. Cir. Apr. 17, 2002), *on remand*, FCC 03-52, at ¶ 6 (rel. Mar. 12, 2003).

Moreover, under the D.C. Circuit's *Temmer* precedent, TMI has no hearing rights because its authorization was never perfected.[54] *Temmer* makes clear that an applicant who accepts a license that is conditioned on future performance accedes to such condition(s), which renders the applicant's rights contingent.[55] Only after satisfaction of the condition(s) do the contingent rights vest and the hearing protections of the Act come into play. In other words, where an entity fails to satisfy a requirement on which its authorization is conditioned, its rights under the license remain unperfected and it is not entitled to a hearing prior to cancellation for failure to meet that condition.[56] TMI's failure to satisfy the initial milestone upon which its license was conditioned meant that its rights under the authorization, including the right to a hearing, never vested. The FCC was fully empowered to cancel the license for failure to satisfy the condition.

In any event, all Section 312 requires is notice and opportunity to be heard. TMI received both. No purpose would be served in holding an evidentiary hearing because it is not disputable that TMI failed to enter into a non-contingent satellite manufacturing contract, and thus failed to satisfy the condition that was a prerequisite to holding its license.[57] Where there

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[54] *P & R Temmer v. FCC*, 743 F.2d 918 (D.C. Cir. 1984) ("*Temmer*").

[55] *See id.* at 928.

[56] *See id.* Although Temmer arose in the context of Section 316 hearing rights, the case has been applied in the context of Section 312. *See Peninsula Communications, Inc.*, 17 F.C.C.R. 2838, ¶ 4 (2002) (citing *Temmer*, 743 F.2d at 928); *Revision of Part 21 of the Commission's Rules*, 2 F.C.C.R. at 5718 (citing *Temmer; Music Broadcasting Co. v. FCC*, 217 F.2d 339, 342 (D.C. Cir. 1954)). The term revocation is loosely used in *Temmer* in all probability because failure to meet the condition did not result in automatic cancellation. *See* 743 F.2d at 925-26. Nevertheless, the Court recognized no hearing rights were triggered.

[57] *See Bureau Order* at ¶ 9 ("TMI did not enter into a satellite manufacturing agreement" and therefore "failed to comply with the plain terms of its authorization"); Application for Review at 24 (arguing that the Commission should have approved assignment of the TMI

are no material questions of fact to be resolved, only questions of law,[58] the FCC is not required to hold a purposeless evidentiary hearing.[59] Through the Bureau's October 4, 2002 letter and meetings with staff, TMI received notice that its compliance with the initial milestone was in question, and was given multiple opportunities to respond to the questions raised.[60] TMI is entitled to nothing more.[61]

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authorization to TerreStar to "cure the defect," particularly "in light of the technical nature of the [milestone] violation").

[58] TMI has previously admitted that "[t]he key facts are not in dispute." February 6th Opposition at 3. Thus, there is no factual question as to what TMI did. There is only a pure question of law as to whether what it did satisfied the initial milestone

[59] *See, e.g., U.S. v. Storer Broadcasting Co.*, 351 U.S. 192, 2002-05 (1956); *Alabama Power Company v. FCC*, 311 F.3d 1357, 1372 (11th Cir. 2002) ("APCo must therefore identify a material question of fact that warrants a hearing. But its dispute is only over . . . a legal issue that hardly warrants an evidentiary hearing since no material facts are disputed."); *RKO General, Inc. v. FCC*, 670 F.2d 215, 231 (D.C. Cir. 1981) ("*RKO*") (where the Commission needs only to "draw legal conclusions from 'facts already known,'" it is "not required to . . . reopen the proceeding for an evidentiary hearing that would have served no purpose") (quoting *Lakewood Broadcasting Service, Inc. v. FCC*, 478 F.2d 919, 924 (D.C. Cir. 1973)); *Network Project v. FCC*, 511 F.2d 786, 796 (D.C. Cir. 1975) (a hearing is not necessary where the Commission's decision is based on "inferences and conclusions drawn from undisputed facts"); *Citizens for Allegan County, Inc. v. Fed. Power Comm'n*, 414 F.2d 1125, 1128 & n.5 (D.C. Cir. 1969) ("The right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing."); *Anti-Defamation League of B'nai B'rith v. FCC*, 403 F.2d 169, 171 (D.C. Cir. 1968) ("inferences to be drawn from facts already known and the legal conclusions to be derived from those facts" may be made by the Commission without an evidentiary hearing); *TelePrompTer Cable Systems, Inc.*, 52 F.C.C.2d 1263, 1264 & n.2 (1975) ("[E]ven if Section 312 were applicable, it is difficult to see what there would be to hear, given our view of the case. . . . It seems to us beyond question that 'once evidentiary facts are undisputed, a hearing serves no purpose.'") (quoting Gellhorn & Robinson, Summary Judgment in Administrative Adjudication, 84 Harv. L. Rev. 612, 630 (1971)), *remanded on other grounds*, 543 F.2d 1379 (D.C. Cir. 1976).

[60] *See supra* Sections II.A and II.B.

[61] *Cf. RKO*, 670 F.2d at 235-36 (right to a hearing satisfied as long as the party has "actual notice of the conduct said to be at issue" and has been given the opportunity to speak on its own behalf).

## III. THE *BUREAU ORDER* DOES NOT VIOLATE INTERNATIONAL COMITY

TMI also claims that the Bureau erred in seeking to enforce the initial contract milestone because it was duplicative of Canadian regulatory requirements, citing the national comity policies articulated in *DISCO II*.[62] TMI's argument is both procedurally and substantively flawed.

As an initial matter, TMI's argument that the Commission cannot independently evaluate milestone compliance is an untimely attack on the milestone conditions in its license. Rather than challenge the imposition of the milestone conditions in a timely petition for reconsideration of its licensing order, TMI now asserts that the Commission cannot independently enforce the deadlines in its authorization.[63] As the Court of Appeals indicated in the *Capital Telephone* decision,[64] the Commission's Rules logically require the licensee to accept the privileges along with the obligations, or to follow the procedures to seek reconsideration of the conditions. Here, TMI accepted the 2 GHz MSS authorization, despite the fact that the Commission imposed milestone deadlines that would result in the automatic cancellation of the license if the deadlines

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[62] Application for Review at 12-14 (citing *Amendment of the Commission's Regulatory Policies to allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order*, 12 F.C.C.R. 24094 (1997) ("*DISCO II*")).

[63] A conditioned license becomes final if the licensee fails to timely challenge the conditions on its license. *See* 47 U.S.C. §§ 402(b), 405(a); 47 C.F.R. §§ 1.110, 25.156(b); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 224, 225-27 (1995); *see also Morning Star*, 16 F.C.C.R. at 11553 ("Failure to challenge the conditions imposed is tantamount to accepting its license as conditioned.").

[64] *Capital Telephone Company, Inc. v. FCC*, 498 F.2d 734 (D.C. Cir. 1974); *see also Temmer*, 743 F.2d 918.

were not met. Its belated attempt to challenge the Commission's ability to enforce that condition is therefore an impermissible collateral attack on a final decision that must be rejected.[65]

Even putting aside the fatal procedural infirmity in TMI's challenge, the argument fails because *DISCO II* does not immunize a foreign-licensed satellite system from enforcement of the Commission's requirements. In adopting the WTO non-discrimination obligations into its satellite licensing rules in the *DISCO II* decision, the Commission made clear that foreign-licensed satellite systems would be treated the same as U.S.-licensed satellite systems – they would not be disadvantaged, nor would they be exempted from the various qualification standards and operating requirements.[66] Indeed, the Commission indicated in *DISCO II* that it retained authority to enforce license conditions, including milestones, against foreign-licensed carriers.[67] In sum, the Commission is not bound by the fact that Industry Canada has not notified TMI that it has failed to comply with the Canadian satellite construction requirements.

## IV. THE BUREAU DID NOT ERR BY FAILING TO GRANT A WAIVER

TMI also asserts that the Bureau should have granted TMI a waiver of the milestone.[68] Yet, this request was not made until February 6, 2003 – the day before the *Bureau Order* was adopted and more than six months *after* the milestone deadline – and was submitted in the

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[65] *See e.g., MCI Telecommunications Corp. v. Pacific Northwest Bell Telephone Co.*, 5 F.C.C.R. 216, 227-28 n.38 (1990), *recon. denied*, 5 F.C.C.R. 3463 (1990), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[66] *E.g., DISCO II*, 12 F.C.C.R. at 24100, 24168-69, 24174 n.359.

[67] *Id.* at 24183 ("We agree that it is paramount that all operators providing satellite service in the United States comply with Commission rules and policies applicable to that particular satellite service. In addition, *we often attach specific conditions to licenses relating to* operating requirements, *system implementation requirements,* and technical parameters. Entities violating the terms of their license are subject to administrative penalties, including monetary forfeitures and license revocation.") (emphasis added).

[68] Application for Review at 22-24.

assignment proceeding *not* the milestone proceeding.[69] TMI makes this argument for the first time in the milestone proceeding in its Application for Review, and the argument is one upon which the Bureau has not been afforded an opportunity to pass. TMI's request is thus procedurally improper, as the Commission has recently made clear:

> [W]e find the waiver request to be procedurally improper because Morris raised the argument for the first time in its Application for Review. Section 1.115(c) provides that no application for review will be granted if it relies on questions of fact or law upon which the designated authority, subject to Commission review, has been afforded no opportunity to pass. Morris could have requested from the Bureau a waiver of the construction requirement and an extension of the deadline on many occasions prior to the filing of its Application for Review, dating back to the period before its construction authority expired.[70]

In any event, TMI fails to present any valid basis for granting such relief. TMI made no attempt to satisfy (or acknowledge) the "high hurdle" to justify a waiver[71] – a hurdle that is even higher here where waiver runs counter to the notion of strict milestone enforcement.[72] Rules may be waived only for good cause upon a showing of special circumstances if the relief requested would not undermine the policy objective of the rule and would otherwise serve the public interest.[73] In this case, TMI failed to provide any reasonable explanation as to why it did

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[69] *See* February 6th Opposition at 14.

[70] *Duncan*, FCC 03-52 at ¶ 7 (citing 47 C.F.R. § 1.115(c)).

[71] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (D.C. Cir. 1969); *see also Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16504 (IB 2000) (explaining that "[w]e have waived construction commencement milestones only in rare instances").

[72] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16178-79; *see also Temmer*, 743 F.2d at 931-32 ("Licensees who [meet the conditions of their authorizations] retain them; licensees who fail to [do so] lose them. Under this regulatory structure, requests for waiver or extensions are disfavored.").

[73] *See* 47 C.F.R. § 1.3; *WAIT Radio*, 418 F.2d at 1157-59; *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *Dominion Video Satellite, Inc.*, 14 F.C.C.R. 8182, 8185 (IB 1999).

not itself execute the satellite construction contract and provide for its assignability, much less provide any special circumstances that compelled it to create the non-compliant arrangement with TerreStar. The only logical explanation for the chosen arrangement is that TMI wanted to avoid binding itself while maintaining its 2 GHz MSS authorization in case the right to use the spectrum developed any significant independent value – precisely the type of speculation the initial milestone is intended to preclude.[74] Moreover, grant of the requested relief would undermine the policies underlying the "strict enforcement" of the 2 GHz MSS milestones. Indeed, the strict enforcement of the 2 GHz MSS milestones substitutes for the financial qualifications standard normally applied to satellite licensees,[75] and TMI admits that it lacks sufficient financial resources to construct and launch its satellite system.[76] Thus, TMI has failed to demonstrate that waiver would be appropriate in this case.

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[74] Indeed, TMI even acknowledges that it delayed the filing of the assignment application by a desire to await the outcome of the Commission's ATC proceeding. *See supra* note 29.

[75] Under a traditional financial qualifications test, the Commission only issues a license to an applicant that can demonstrate a present ability to finance the construction, launch and first year's operations of the proposed satellite system.

[76] Request for Stay, re: File No. 189-SAT-LOI-97 *et al.* at 7 (Mar. 12, 2003) ("In order for construction of TMI's satellite to remain on course and be completed, the company must obtain additional investment and capital resources through a further round of fundraising").

## CONCLUSION

For the foregoing reasons, TMI's Application for Review should be denied and the *Bureau Order* upheld.

Respectfully submitted,

Kathryn A. Zachem
L. Andrew Tollin
Craig E. Gilmore
Wilkinson Barker Knauer, LLP
2300 N Street, NW, Suite 700
Washington, DC 20037
(202) 783-4141

Douglas I. Brandon
AT&T Wireless Services, Inc.
1150 Connecticut Avenue, NW
Washington, DC 20036
(202) 223-9222

John T. Scott, III
Charla M. Rath
Cellco Partnership
d/b/a Verizon Wireless
1300 I Street, NW
Suite 400-W
Washington, DC 20005
(202) 589-3760

J. R. Carbonell
Carol L. Tacker
David G. Richards
Cingular Wireless LLC
5565 Glenridge Connector
Suite 1700
Atlanta, GA 30342
(404) 236-5543

March 27, 2003

CERTIFICATE OF SERVICE

I, Paula Lewis, hereby certify that a copy of the foregoing "Opposition to Application for Review" has been served this 27th day of March, 2003, by hand delivery, on the following:

Gregory C. Staple
R. Edward Price
Vinson & Elkins L.L.P.
1455 Pennsylvania Avenue, NW
Washington, DC 20004

Jonathan D. Blake
Gerard J. Waldron
Covington & Burling
1201 Pennsylvania Avenue, NW
Washington, DC 20004

Bryan Tramont
Senior Legal Advisor
Office of Chairman Michael K. Powell
Federal Communications Commission
445 - 12th Street, SW, Room 8-B201
Washington, DC 20554

Samuel L. Feder
Legal Advisor
Office of Commissioner Kevin Martin
Federal Communications Commission
445 - 12th Street, SW, Room 8-A204
Washington, DC 20554

R. Paul Margie
Legal Advisor
Office of Commissioner Michael Copps
Federal Communications Commission
445 – 12th Street, SW, Room 8-A302
Washington, DC 20554

Jennifer Manner
Legal Advisor
Office of Commissioner Kathleen Abernathy
Federal Communications Commission
445 – 12th Street, SW, Room 8-B115
Washington, DC 20554

Barry Ohlson
Interim Legal Advisor
Office of Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 - 12th Street, SW, Room 8-C302
Washington, DC 20554

Donald Abelson, Chief
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-C750
Washington, DC 20554

Thomas J. Sugrue, Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 3-C252
Washington, DC 20554

Edmond J. Thomas, Chief
Office of Engineering and Technology
Federal Communications Commission
445 – 12th Street, SW, Room 7-C153
Washington, DC 20554

Robert M. Pepper, Chief,
Policy Development
Office of Strategic Planning
& Policy Analysis
Federal Communications Commission
445 – 12th Street, SW, Room 7-C347
Washington, DC 20554

John A. Rogovin
General Counsel
Office of General Counsel
Federal Communications Commission
445 – 12th Street, SW, Room 8-C758
Washington, DC 20554

David E. Horowitz
Attorney Advisor
Office of General Counsel
Federal Communications Commission
445 – 12th Street, SW, Room 8-A636
Washington, DC 20554

Neil A. Dellar
Office of General Counsel
Federal Communications Commission
445 - 12th Street, SW, Room 8-C818
Washington, DC 20554

Howard Griboff
Attorney Advisor, Satellite Division
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-C467
Washington, DC 20554

Karl A. Kensinger
Special Advisor, Satellite Division
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-A663
Washington, DC 20554

Alexandra Field
Senior Legal Advisor
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-C407
Washington, DC 20554

Breck J. Blalock
Deputy Chief , Policy Division
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-A764
Washington, DC 20554

Thomas S. Tycz
Chief, Satellite Division
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-A665
Washington, DC 20554

Christopher Murphy
Senior Legal Advisor
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-C750
Washington, DC 20554

William H. Bell
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-B505
Washington, DC 20554

Cheryl Williams
Administrative Management Specialist
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-A721
Washington, DC 20554

James L. Ball
Chief, Policy Division
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-A763
Washington, DC 20554

Thomas Sullivan
Assistant Bureau Chief
Administrative and Management Office
International Bureau
Federal Communications Commission
445 - 12th Street, SW, Room 6-C841
Washington, DC 20554

Richard B. Engelman
Chief Engineer
International Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 6-A668
Washington, DC 20554

David L. Furth
Senior Legal Advisor
Wireless Telecommunications Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 3-C217
Washington, DC 20554

John Branscome
Attorney Advisor
Commercial Wireless Division
Wireless Telecommunications Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 4-A324
Washington, DC 20554

Evan R. Kwerel
Senior Economist
Office of Strategic Planning
& Policy Division
Federal Communications Commission
445 - 12th Street, SW, Room 7-C347
Washington, DC 20554

Kathleen O'Brien Ham
Deputy Bureau Chief
Wireless Telecommunications Bureau
Federal Communications Commission
445 – 12th Street, SW, Room 3-C255
Washington, DC 20554

Fern J. Jarmulnek
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Cassandra Thomas
International Bureau
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Paula Lewis