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June 20, 2003

VIA HAND DELIVERY

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *TMI Communications and Company, Limited Partnership*; DA 01-1638; File No. 189-SAT-LOI-97; IBFS Nos. SAT-LOI-19970926-00161, SAT-AMD-20001103-00158, SAT-MOD-20021114-00237, SAT-ASG-20021211-00238

Dear Ms. Dortch:

On behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (jointly, the "Carriers"), we hereby submit the following response to the June 3, 2003 submission of TMI Communications and Company, Limited Partnership ("TMI") and TerreStar Networks Inc. ("TerreStar").[1] TMI and TerreStar assert that the International Bureau erred in declaring TMI's 2 GHz MSS authorization null and void, because the contract TerreStar entered into with Space Systems/Loral, Inc. ("Loral"), combined with the July 12, 2002 Letter Agreement between TMI and TerreStar, should be sufficient to meet TMI's non-contingent satellite manufacturing contract milestone.[2] Most of the arguments raised by TMI and TerreStar simply re-hash old claims that the Carriers have rebutted previously,[3] and will not be repeated

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1 Letter to the Hon. Michael K. Powell, Chairman, FCC from Gregory C. Staple *et al.*, Counsel for TMI, and Gerard J. Waldron *et al.*, Counsel for TerreStar (June 3, 2003) ("TMI and TerreStar June 3, 2003 Letter").

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

3 AT&T Wireless Services, Inc., Cingular Wireless LLC, Verizon Wireless Opposition to Application for Review, File No. 189-SAT-LOI-97 *et al.* (filed Mar. 27, 2003); Letter from Kathryn A. Zachem and L. Andrew Tollin, Wilkinson Barker Knauer, LLP, Counsel for AT&T

here. TMI and TerreStar's additional claim – that broadcasting and CMRS precedent concerning control should govern in this case – is equally without merit. The Commission should uphold the International Bureau order declaring TMI's 2 GHz MSS authorization null and void.[4]

TMI and TerreStar's claim that broadcasting and CMRS decisions should control is yet another attempt to draw the Commission away from the long-standing milestone enforcement policy and precedent. Those broadcasting and CMRS cases obviously do not involve satellite milestones, let alone the "strict enforcement" policy the Commission imposed on 2 GHz MSS licensees' milestones.

As the Carriers have noted previously, TMI's initial milestone obligation was clear on its face. The *TMI Authorization Order* was unambiguous: "TMI must . . . Enter [a] Non-contingent Satellite Manufacturing Contract" within 12 months after authorization, or by July 17, 2002.[5] In addition, TMI (and the other 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.[6] In fact, the *TMI Authorization Order* expressly stated that the license "shall become NULL and VOID with no further action required on the Commission's part" if any of the milestones were not met.[7] In the recent *MSS Flexibility* rulemaking, moreover, the Commission stated, "[w]e remain committed to the vigorous enforcement of our satellite implementation milestones."[8] This matter is about milestone enforcement, not about TMI retaining control of its license.

TMI did not enter into any contract with a satellite manufacturer. Rather, just five days before the milestone deadline, TMI entered into a terse letter agreement with TerreStar, an

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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).

4 *TMI Communications and Company, Limited Partnership,* 18 F.C.C.R. 1725 (IB 2003) ("*Bureau Order*").

5 *TMI Authorization Order*, 16 F.C.C.R. at 13812.

6 *Service Rules for MSS in the 2 GHz Band*, 15 F.C.C.R. 16127, 16150 (2000) ("*2 GHz MSS Order*") (emphasis added).

7 *TMI Authorization Order*, 16 F.C.C.R. at 13816.

8 *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 et al.,* IB Docket No. 01-185, FCC 03-15, ¶ 86 (rel. Feb. 10, 2003).

affiliate over which TMI lacks control. Applying the strict milestone enforcement standard, the Commission's inquiry should end right here. The International Bureau properly concluded the arrangement failed to satisfy the strict milestone enforcement policy and declared the authorization null and void.

TMI and TerreStar nonetheless assert that the Commission's milestone policy is misguided in that it has only allowed third parties to fulfill satellite construction obligations in parent/subsidiary situations. They argue that a contractual obligation, not an ownership relationship, "*should* be determinative."[9] As an initial matter, to the extent that TMI was contemplating an unprecedented structure for meeting its satellite construction milestone, it was incumbent upon TMI to seek guidance from the Commission as to whether such an arrangement conformed to the Commission's requirements, given the strict enforcement policy and the fact that the arrangement was inconsistent with the license condition that TMI enter into the contract.[10]

TMI and TerreStar's discussion of control precedent, moreover, is an "apples to oranges" comparison. It attempts to shift the Commission's analysis from the bright-line "strict enforcement" policy imposed on 2 GHz MSS licensees' milestone compliance to a subjective analysis that is without precedent in the satellite milestone context. The Commission's Section 310 license control precedent is wholly unrelated to whether TMI entered into a satellite manufacturing contract consistent with the initial milestone. In any event, TMI and TerreStar fail to meet the control standard they claim should be adopted here. Under the *Intermountain* standard, the Commission examines six factors, including: who is in charge of the payment of financing obligations, including operating expenses; and does the licensee have unfettered use of all facilities and equipment.[11] A review of the TMI-TerreStar Letter Agreement and the

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9 TMI and TerreStar June 3, 2003 Letter at 4 (emphasis added).

10 As the FCC observed in another decision concerning compliance with milestones:

> 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.

Morning Star Satellite Company LLC, 16 F.C.C.R. 11550, 11554 (2001).

11 *See Intermountain Microwave, Inc.*, 24 Rad. Reg. 983 (1963). In the broadcast realm, third party arrangements are permissible so long as the licensee continues to have ultimate control over the station including its programming, personnel, and finances. *See Roy R. Russo, Esquire,* 5 F.C.C.R. 7856 (MMB 1990).

TerreStar-Loral contract demonstrates that TMI is not obligated to make any payments under the TerreStar-Loral contract, and the contract explicitly states that TMI has no rights under the agreement.[12] Indeed, the letter agreement is a terse two-page document containing three operative paragraphs, five WHERAS clauses, and no commitment by TMI to proceed with implementation of its satellite system consistent with Commission requirements.

TMI has still never explained why the transaction was structured in such a convoluted fashion, because it could easily have executed the contract directly with Loral and provided for subsequent assignment of such a contract.[13] 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.

Finally, although TMI and TerreStar do not explicitly ask for a waiver in the June 3, 2003 Letter, they do suggest that a waiver would be appropriate here.[14] This suggestion is grossly untimely and inappropriate in an application for review context. TMI had ample opportunity to apply for a waiver long ago; it failed to do so. The International Bureau was never presented with any showing related to a waiver during the course of the milestone proceeding. Parties cannot lawfully insert wholly new issues in an application for review that they failed to present to the bureau. In any event, the Commission should not grant a waiver, because the standards for waiver have not been satisfied. TMI and TerreStar cite to *WAIT Radio* for the proposition that the Commission must take a "hard look" at any waiver requests. Such a "hard look," however,

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[12] The TerreStar-Loral contract at § 37.15 (emphasis added) explicitly indicates that TMI has no rights under that agreement:

> 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 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 Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16500 (IB 2000); *Motorola, Inc. and Teledesic, Inc.*, 17 F.C.C.R. 16543, 16550 (IB 2002) ("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.").

[14] TMI and TerreStar June 3, 2003 Letter at 5-6.

occurs in the context of a "high hurdle" for justifying a waiver.[15] TMI and TerreStar made no attempt to satisfy (or acknowledge) the waiver standards – a hurdle that is even higher here where waiver runs counter to the notion of strict milestone enforcement.[16] 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.[17] TMI and TerreStar have not presented any unique circumstances, and grant of a waiver would undermine the strict enforcement of the initial construction milestone.

For all of these reasons, the Carriers respectfully urge the Commission to deny TMI's Application for Review and uphold the *Bureau Order* declaring TMI's 2 GHz MSS authorization null and void.

Sincerely,

WILKINSON BARKER KNAUER, LLP

By: Kathryn A. Zachem
L. Andrew Tollin
Craig E. Gilmore

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Bryan Tramont

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15 *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").

16 *See 2 GHz MSS Order*, 15 F.C.C.R. at 16178-79; *see also P & R Temmer v. FCC*, 743 F.2d 918, 931-32 (D.C. Cir. 1984) ("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.").

17 *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).

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