Before the
Federal Communications Commission
Washington, DC 20554

ORIGINAL

In the Matter of Applications of	)	
	)	
TMI Communications and Company, Limited Partnership	)	File No. SAT-ASG-20021211-00238
	)	

To: The International Bureau

PETITION TO DENY

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Pursuant to Section 25.154 of the Commission's rules, 47 C.F.R. § 25.154, AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly, the "Carriers" or "Petitioners") hereby petition to deny the above-referenced application filed by TMI Communications and Company, Limited Partnership ("TMI") seeking authority to assign its authorization reserving spectrum in the 2 GHz Mobile Satellite Service ("MSS") to TerreStar Networks Inc. ("TerreStar").[1] As competitors in the mobile telephony marketplace and as parties seeking a re-allocation of the 2 GHz MSS spectrum, the Carriers have a strong interest in the assignment application.[2] As discussed in greater detail below, TMI seeks to assign its presently

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[1] *Public Notice*, Report No. SAT-00130, December 27, 2002.

[2] The Carriers are licensed to compete with TMI in the nationwide mobile telephony market. *See Seventh Annual CMRS Competition Report*, 17 F.C.C.R. 12985, § II.A.2 (2002); *Service Rules for the Mobile Satellite Service in the 2 GHz Band*, IB Docket No. 99-81, *Report and Order*, 15 F.C.C.R. 16127, 16128-29 (2000) ("*2 GHz MSS Order*"). As such, the Carriers have standing as parties-in-interest to file this petition. *See* 47 U.S.C § 309(d); 47 C.F.R. § 25.154(a)(4); *FCC v. Sanders Brothers*, 309 U.S. 470, 476-77 (1940); *Atlantic Radio Communications*, 7 F.C.C.R. 5105, 5106 n.3 (1992); *Juarez Communications Corp.*, 56 Rad. Reg. 2d. 961, 962 (RB 1984). Moreover, the Carriers are active participants in pending proceedings examining whether to redistribute and/or reallocate non-viable MSS spectrum to advanced wireless services. *See New Advanced Wireless Services*, ET Docket No. 00-258, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 16 F.C.C.R. 16043, 16054-55 (2001) ("*3G FNPRM*"); Application for Review of AT&T Wireless Services,

unconstructed authorization to TerreStar ostensibly to permit TMI and Motient Corporation ("Motient") "to proceed with the restructuring and consolidation of their North American mobile satellite businesses."[3] For the reasons set forth below, Petitioners have established a *prima facie* case that grant of the assignment application would be inconsistent with established rules and case law and the public interest.[4] Accordingly, the application should be denied.

INTRODUCTION AND SUMMARY

The subject application cannot be granted because doing so would violate the rules and policies established in the Commission's *2 GHz MSS Order*, as well as the conditions in the 2 GHz MSS authorization itself. That order, released in August 2000, established the rules for a satellite-only service expected to serve rural and underserved areas. Eligibility was limited to satellite-only companies with existing applications or letters of intent on file.[5] The Commission also decided to rely upon: (i) a series of "strictly enforced" milestones in lieu of financial qualifications to prevent spectrum warehousing, and (ii) an anti-trafficking rule to prevent new

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Inc., Cellco Partnership d/b/a Verizon Wireless, and Cingular Wireless LLC, re: DA 01-1631 through 01-1638 (filed Aug. 16, 2001) ("Application for Review"); Petition for Reconsideration of the Cellular Telecommunications & Internet Association ("CTIA") in ET Docket Nos. 00-258, 95-18 and IB Docket No. 99-81 (filed Oct. 15, 2001). Accordingly, the Carriers would be adversely affected by a grant of this application, which would impede their access to a portion of this needed spectrum. *See AmericaTel Corporation*, 9 F.C.C.R. 3993, 3995 (1994) (citing *Sierra Club v. Morton*, 405 U.S. 727, 733 (1972)).

[3] Application, Ex. 2 at 1.

[4] Official notice should be taken of the essential facts because they consist largely of matters already before the Commission, FCC rules and decisions, and filings and statements by TMI itself. *See, e.g., Palm Beach Cable Television Co.*, 78 F.C.C.2d 1180, 1183 (1980) (FCC can take official notice of facts and information which are a matter of public record); *Real Life Educational Foundation of Baton Rouge, Inc.*, 8 F.C.C.R. 2675, 2676 n.4 (1993) (same); *Rocky Mountain Radio Co.*, 15 F.C.C.R. 7166, 7167 (1999) (FCC can take official notice of facts which have independent support in the Commission's records); *AT&T Corporation*, 17 F.C.C.R. 11641, 11651 (2002) (FCC can take official notice of factual issues related to its expertise or of which it has prior knowledge).

[5] *See 2 GHz MSS Order*, 15 F.C.C.R. at 16129, 16138-40.

licensees from transferring bare (non-operational) licenses for commercial gain.[6] Failure to meet the milestones automatically renders an MSS license "NULL and VOID."[7]

The first milestone – the requirement to enter into a non-contingent satellite manufacturing contract – came due on July 17, 2002. In response to that deadline, TMI filed a certification claiming that it had fulfilled its obligation as a result of TerreStar's entering into a contract with Space Systems/Loral, Inc. ("Loral") for manufacture and in-orbit delivery of a MSS satellite capable of operating in the 2 GHz band.[8] TMI also attached a letter agreement between TMI and TerreStar, and a redacted copy of a contract between TerreStar and Loral. Thus, TMI claims to have vicariously satisfied the non-contingent contract milestone by virtue of the agreement between TerreStar – a company in which TMI holds a minority, non-controlling interest – and Loral. Notwithstanding TMI's reference to TerreStar as an "affiliate,"[9] TerreStar is a separate entity over which TMI lacks control, as reinforced by the fact that this is a substantive, and not a *pro forma*, transfer.

TMI now seeks to assign its 2 GHz MSS authorization to TerreStar. As explained below, the assignment application is not grantable and should be denied. First, TMI did not meet its initial milestone requirement. Because failure to satisfy a milestone renders an MSS license null and void, TMI has nothing to assign. Second, grant of the assignment application also appears to contravene the anti-trafficking rule, and TMI has neither sought nor justified a waiver. TMI

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[6] *See id.* at 16150, 16177-80, 16185-86.

[7] *See TMI Communications and Company, L.P.*, 16 F.C.C.R. 13808, 13816 (IB 2001); *see also* 47 C.F.R. § 25.143(e)(3).

[8] *See* Certification of Ted H. Ignacy, Vice President, Finance, TMI, appended to 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.* (July 26, 2002) ("TMI Certification").

[9] *E.g.*, Application, Ex. 2 at 1.

seeks to characterize this assignment as "consistent with" the previous approval of the consolidation of some of the assets and licenses of TMI and Motient.[10] However, that earlier decision involved licenses for constructed and operating satellites, not a bare authorization as is the case here. Moreover, the earlier decision explicitly indicated that 2 GHz MSS issues were not germane to that transfer application.[11] Thus, the Commission's previous decision allowing TMI and Motient to combine some of their operations does not resolve the issues raised by this assignment application.

For all of these reasons, the application for assignment of TMI's unconstructed 2 GHz MSS authorization should be denied.

I. TMI HAS NO LICENSE TO ASSIGN

The Commission stated that it will "strictly enforce milestone requirements" to "ensure timely construction of systems and deployment of service" in adopting the 2 GHz MSS licensing and service rules.[12] As noted above, milestones were also adopted in lieu of financial qualifications as a threshold requirement.[13] In fact, the Commission has explicitly rejected a relaxed approach to milestone enforcement, noting that "there is no policy reason, and no basis in Commission precedent, for treating a milestone commitment as a flexible, qualitative assessment of a licensee's construction progress,"[14] adding:

> [M]ilestones are obligations placed on licensees as conditions on their authority to launch and operate a satellite, *not* merely times

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[10] Application, Ex. 2 at 2

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

[12] *2 GHz MSS Order*, 15 F.C.C.R. at 16150-51.

[13] *See id.* at 16177.

[14] *Columbia Communications Corporation*, 15 F.C.C.R. 16496, 16503 (IB 2000).

> set aside for a qualitative assessment of a licensee's progress. Columbia's license expressly provides that the license would be null and void if it failed to meet its construction commencement milestone. Thus, Columbia has no basis to maintain that its construction commencement milestone was not a "cut-off date."[15]

The Commission explained that strict enforcement of milestones prevents spectrum from being warehoused by licensees to the exclusion of entities prepared to put spectrum into use immediately.[16] Accordingly, all 2 GHz MSS licenses, including that of TMI, are expressly conditioned upon compliance with the milestones and "shall become NULL and VOID with no further action required on the Commission's part" if any milestone is missed.[17]

The first 2 GHz MSS milestone required licensees to enter a "non-contingent" satellite manufacturing contract by July 17, 2002.[18] The FCC has explained that the term non-contingent contract means that "there will be neither significant delays between the execution of the contract and the actual commencement of construction, nor conditions precedent to construction."[19] In affirming the revocation of a license for non-compliance with this milestone, the Commission has observed that requiring licensees to execute non-contingent contracts in a timely manner

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[15] *Id.* at 16502-03 (emphasis in original).

[16] *See PanAmSat Licensee Corp.*, 16 F.C.C.R. 11534, 11537-38 (2001) (citing *National Exchange Satellite, Inc.*, 7 F.C.C.R. 1990, 1991 (CCB 1992)); *Columbia Communications Corporation*, 15 F.C.C.R. 15566, 15571 (IB 2000)); *Netsat 28 Company*, 15 F.C.C.R. 11321, 11323 (IB 2000); *MCI Communications Corporation*, 2 F.C.C.R. 233 (CCB 1987); *see also Morning Star Satellite Company*, 16 F.C.C.R. 11550, 11551 (2001) ("Milestones are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner and that orbit-spectrum is not being held by licensees unable or unwilling to proceed with their plans.").

[17] *TMI Communications and Company, L.P.*, 16 F.C.C.R. at 13816.

[18] *E.g., id.* at 13812, 13816.

[19] *Amendment of the Commission's Space Station Licensing Rules and Policies*, IB Docket No. 02-34, *Notice of Proposed Rulemaking and First Report and Order*, 17 F.C.C.R. 3847, 3882 n. 142 (2002) ("*Space Station NPRM*") (citations omitted).

enables the Commission "to determine early on if a license is being held by a licensee that is unable or unwilling to proceed with its plans."[20]

On July 26, 2002, TMI submitted a certification that "it is TMI's view that TMI has met the initial milestone in the FCC authorization."[21] In addition, TMI submitted the letter agreement between TMI and TerreStar, and a contract between TerreStar and Loral for the TerreStar 1 Satellite Program. This material does not demonstrate compliance with the first milestone.

The contract on its face provides no evidence that the licensee – TMI – has entered into a non-contingent contract to construct, launch and operate a proposed satellite system. The contract is between TerreStar and Loral for construction of the TerreStar 1 satellite, and 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.[22]

There is nothing in the contract to indicate that TMI will be able to timely launch and operate its proposed satellite as a result of this agreement. The terse letter agreement between TMI and TerreStar, entered into two days before execution of the contract between TerreStar and Loral, merely provides that in return for TerreStar executing the contract, TMI intends to transfer its FCC and Canadian authorizations (subject to any necessary approvals) to a suitable entity.[23]

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[20] *Morning Star Satellite Company*, 16 F.C.C.R. at 11553.

[21] TMI Certification, *supra* note 8.

[22] *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).

[23] *See* Letter Agreement between TMI Communications and Company, Limited Partnership and TerreStar Networks Inc. (July 12, 2002). That agreement also provides that TMI

This assignment application presumably is that contemplated transfer. Without initial milestone compliance or any progress towards construction by TMI, however, there is no license to assign.

TMI has no rights under the satellite construction agreement between TerreStar and Loral that it seeks to rely on to demonstrate compliance with the initial milestone. Equally important, 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. It is to avoid such a possibility that the Commission imposed (and has long applied) an initial milestone requirement to enter into a binding, non-contingent contract. The proffered TerreStar/Loral contract, however, is not binding on TMI.

Subsequent to TMI's submission of the satellite construction contract and certification, the Carriers submitted a letter to the FCC 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."[24] Thereafter, TMI met with Commission Staff, who raised questions concerning the relationship between TMI and TerreStar.[25] TMI indicated in response that it presently "only has

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further agrees to transfer to TerreStar "all of its right, title and interest in and under the Loral contract, the satellite, and all work in progress under the Loral contract," *id.* at ¶ 3, but as noted above, TMI has no rights or interest under the Loral contract. *See* TerreStar/Loral Contract at § 37.15

[24] 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) (footnote omitted).

[25] *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).

an indirect [minority] interest in TerreStar through its ownership interest in" the parent company of TerreStar.[26] On October 4, 2002, the Commission sent a letter to Counsel for TMI requesting additional information "to assist in our review of whether TMI entered into a 'non-contingent satellite manufacturing contract' by July 17, 2002," observing that:

> 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 any way liable in the event the satellite system is not implemented.[27]

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.[28] TMI's "response" begs the question – why did TMI not simply execute the contract in its own name and provide for the subsequent assignment of the contract and its

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[26] *Id.* at 2.

[27] 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.*

[28] In that response, TMI also asserts that TMI has an "indirect interest" in performance of the Loral contract. *See* Letter from Gregory C. Staple, Vinson & Elkins, Counsel to TMI, to Marlene H. Dortch, Secretary, FCC, re: File No. 189-SAT-LOI-97 *et al.* (October 15, 2002). As noted above, however, the TerreStar/Loral contract explicitly disclaims any interest of TMI in the contract. *See* TerreStar/Loral Contract at § 37.15.

payment obligations to TerreStar?[29] The only logical explanation for the chosen arrangement 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) – precisely the type of speculation the initial milestone is intended to preclude.[30] In any event, the contracts relied on by TMI clearly fail to comply with Commission requirements. As a result, TMI's authorization has already been forfeited and thus there is nothing to assign.

TMI did not request any waivers in its application (response to Question No. 35), including any waiver of the milestone deadlines or the antitrafficking rule. Moreover, there is no basis to avoid application of the Commission's policy of "strict enforcement" of the milestone requirements in the circumstances presented in the assignment application. The Commission has established a specific milestone extension standard, providing additional time "only in the case of extraordinary circumstances beyond the control of the licensee."[31] The FCC has found, for example, that the decision to seek a license modification is a business decision within the control

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[29] 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 Motorola, Inc. and Teledesic, LLC*, DA 02-2146, *Memorandum Opinion and Order* at ¶¶ 18-19 ("[T]he Applicants assert that it was not a viable option for Motorola to negotiate a construction contract with a contingency clause that would shift payment obligations to Teledesic LLC in the event the proposed license assignment were consummated. . . . The Applicants are mistaken in this regard. . . . [C]ontrary to the Applicants' assertions, 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.").

[30] 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 (Dec. 11, 2002).

[31] *Columbia Communications Corporation*, 15 F.C.C.R. at 16497; *see, e.g., PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11537-38; *National Exchange Satellite, Inc.*, 7 F.C.C.R. at 1991; *MCI Communications Corporation*, 2 F.C.C.R. at 233; *see also* 47 C.F.R. § 25.117(e)(1).

of the licensee, and thus is not a "circumstance beyond its control" that would justify a milestone extension.[32] The Commission has also made clear that milestone extensions cannot be justified by delays due to mergers,[33] and has repeatedly denied milestone extension requests where "construction of the satellite either had not begun or was not continuing, thus raising questions regarding the licensee's intention to proceed."[34]

In this case, TMI offered as the explanation of its failure to enter into a contract itself the fact that it expected to subsequently assign the authorization. However, the business decisions as to when and to whom it would seek assignment are clearly business decisions within TMI's control, and so cannot justify a waiver of the requirement that it enter into a binding, non-contingent contract for construction of the satellite by the July 17, 2002 deadline specified in the authorization its proposes to assign here.

II. GRANTING THE ASSIGNMENT APPLICATION WOULD VIOLATE THE ANTI-TRAFFICKING RULE

Any grant of the assignment application would also present a straightforward violation of the Commission's anti-trafficking rule, which prohibits the transfer of "bare" licenses for many

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[32] *See Loral Space & Communications Corporation*, 16 F.C.C.R. 11044, 11047 (IB 2001); *GE American Communications, Inc.*, 16 F.C.C.R. 11038, 11041 (IB 2001); *PanAmSat Licensee Corp.*, 15 F.C.C.R. 18720, 18723 (IB 2000), *aff'd*, 16 F.C.C.R. 11534 (2001); *Columbia Communications Corporation*, 15 F.C.C.R. at 16496-97; *Columbia Communications Corporation*, 15 F.C.C.R. at 15571-72; *Advanced Communications Corporation*, 10 F.C.C.R. 13337, 13340-41 (IB 1995). The Commission has explained that extending milestones on the basis of modification applications would allow licensees to extend their nonperformance indefinitely by repeatedly modifying their proposals. *Loral Space*, 16 F.C.C.R. at 11047 (citing *Advanced Communications*, 10 F.C.C.R. at 13341).

[33] *PanAmSat Licensee Corp.*, 16 F.C.C.R. at 11538; *MCI Communications Corporation*, 2 F.C.C.R. at 234; *Columbia Communications Corporation*, 15 F.C.C.R. at 15571 n.35; *Columbia Communications Corporation*, 15 F.C.C.R. at 16500-01.

[34] *GE American Communications, Inc.*, 16 F.C.C.R. at 11042 (citing *AMSC Subsidiary Corporation*, 8 F.C.C.R. 4040, 4042 (1993)).

satellite services, including 2 GHz MSS.[35] In the 2 GHz MSS proceeding, the Commission expressly observed that the purpose of the anti-trafficking rule is to ensure that 2 GHz MSS licensees do not sell "bare," *i.e.*, non-operational, MSS licenses for commercial gain.[36] In adopting an anti-trafficking rule for 2 GHz MSS, the Commission reiterated that "the purpose of the anti-trafficking rule is to prevent unjust enrichment of those who had obtained a license only for speculation and would not implement systems."[37] The Commission recently explained that this prohibition is based on important concerns:

> the first is that an entity might obtain a license without any intention to build facilities and operate a communications service, but only in order to resell the bare license in order to make a profit.[38]

Consistent with these concerns, the *2 GHz MSS Order* rejected arguments by one of the applicants that milestones were enough to prevent speculative applications.[39] The Commission was particularly concerned about trafficking where licenses were not assigned by competitive bidding – as was the case with 2 GHz MSS.[40]

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[35] 47 C.F.R. § 25.143(g)(1).

[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, 4887 (1999) ("*2 GHz MSS NPRM*") (noting that an anti-trafficking rule prohibits "selling bare licenses for profit," but does "permit firms to combine operations or sell *operating* facilities, including their licenses, subject to Commission approval") (emphasis added); *see also Space Station NPRM*, 17 F.C.C.R. at 3885 (equating trafficking with the sale of licenses by their holders "before they have built and operated facilities"); *id.* at 3886 (explaining that "[a]nti-trafficking rules discourage speculators and prevent unjust enrichment of individuals or companies that have no intention of building facilities and actually operating satellite systems.").

[37] *2 GHz MSS Order,* 15 F.C.C.R. at 16186.

[38] *Space Station NPRM*, 17 F.C.C.R. at 3884.

[39] *2 GHz MSS Order,* 15 F.C.C.R. at 16186.

[40] *See id.*; *see also 2 GHz MSS NPRM*, 14 F.C.C.R. at 4887 (proposing not to apply an anti-trafficking rule if competitive bidding is adopted).

There is no evidence that TMI had any intent to build. TMI did not enter into a non-contingent satellite manufacturing contract by the date of the first milestone, and in fact did not enter into any such contract. Rather, TMI seeks to rely upon a contract for which TMI has no responsibility or legal obligation. Indeed, the assignment application itself reinforces the speculative nature of TMI's participation in the 2 GHz MSS licensing process. In the assignment application, TMI indicates that the ownership of TerreStar or its parent likely will change depending on the Commission's decision on the requests for an ancillary terrestrial component ("ATC") for 2 GHz MSS satellite systems, suggesting that the 2 GHz MSS authorization is merely a speculative play for ATC spectrum.[41] This is exactly what the anti-trafficking rule is designed to prevent.

In attempting to defend the transaction, TMI asserts that some ownership changes were contemplated for 2 GHz MSS licensees. TMI also claims that the Commission is only concerned with the integrity of the processing rounds, and that integrity would not be adversely affected as long as the transferee is based in a WTO-member country.[42] TMI goes on to argue that since Canada (the licensing country for TMI's satellite) and the United States (TerreStar's home country) are WTO-member countries, any concern with the integrity of the processing rounds is met. TMI misstates the Commission's policy. In discussing the possibility of transfers of the 2 GHz MSS licenses, the Commission merely indicated that in any such transfer it would evaluate the public interest, one component of which is the openness of the transferee's market.[43] Thus,

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[41] *See* Application, Ex. 2 at 4. The Application's suggestion that the ownership will likely change depending on Commission action on the ATC request also calls into question the claim of TMI and others that ATC will be strictly ancillary to the licensed 2 GHz MSS satellite systems.

[42] Application, Ex. 2 at 5 (citing the *2 GHz MSS Order*, 15 F.C.C.R. at 16187).

[43] *2 GHz MSS Order*, 15 F.C.C.R. at 16187.

the WTO status does not, by itself, resolve the public interest analysis, including the interests reflected in the anti-trafficking rule.

The details furnished by TMI with regard to the proposed assignment were redacted from the publicly filed application. Thus, the Carriers are not in a position to address the extent to which TMI will be profiting from the proposed assignment of the bare, albeit now null and void, license. The Carriers are concurrently filing a request under the Freedom of Information Act, and intend to supplement this Petition once access is obtained to that material. Even without that information, however, the speculative nature of TMI's actions is apparent. Thus, the assignment application contravenes the anti-trafficking rule applicable to the 2 GHz MSS authorizations.

CONCLUSION

For the foregoing reasons, the TMI application for assignment of its 2 GHz MSS authorization is not grantable and must be denied.

Respectfully submitted,

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January 27, 2003

CERTIFICATE OF SERVICE

I, Joy Marie Taylor, hereby certify that a copy of the foregoing "Petition to Deny" has been served this 27th day of January, 2003, by first class United States mail, postage prepaid, on the following:

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