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February 6, 2003

Via Hand Delivery

Marlene H. Dortch
Federal Communications Commission
Office of the Secretary
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Policy Branch
International Bureau

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: IBFS File Number SAT-ASG-20021211-00238

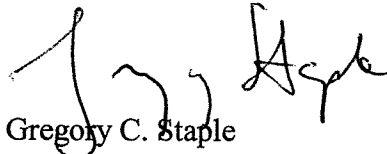
Dear Ms. Dortch,

Transmitted herewith, on behalf of TMI Communications and Company, Limited Partnership, are an original and four copies of the Opposition to Petition to Deny in the above-captioned proceeding.

Also enclosed is a copy of the filing marked "Stamp and Return," which I would appreciate your stamping and returning to my attention via my messenger.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,



Gregory C. Staple
Counsel for TMI Communications and
Company, Limited Partnership

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Before the
Federal Communications Commission
Washington, D.C. 20554

FEB - 6 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Application of)
)
TMI Communications and Company,)
Limited Partnership)

File No. SAT-ASG-20021211-00238

To: The International Bureau

OPPOSITION TO PETITION TO DENY

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February 6, 2003

SUMMARY

The Wireless Carriers' petition has no legal merit. TMI satisfied the initial construction milestone written into its LOI authorization by timely obligating its affiliate, TerreStar, to consummate a non-contingent satellite manufacturing contract, which TerreStar did, and to deliver to TMI a completed satellite. TMI's contract with TerreStar expressly grants TMI "control over the satellite specifications and the design, construction and delivery of the satellite so as long as it holds" its FCC and Canadian authorizations. In these circumstances, TMI met the milestone obligation and may lawfully assign its authorization to TerreStar.

This is not a case where a licensee has failed to timely commence construction of its own bona fide satellite system. Nor is it one where the manufacturing contract is deficient or the satellite system being constructed is materially different from the one which the FCC has authorized. To the contrary, here, the substance of the relevant milestone obligation has already been met.

Neither the text of the FCC's milestone certification rule nor the terms of TMI's authorization expressly preclude a 2 GHz MSS grantee from entering into a non-contingent satellite manufacturing contract through an affiliate. Thus, so long as TMI has an enforceable right to the benefits of a bona fide manufacturing contract (which is undisputed here), and the underlying manufacturing contract is non-contingent (also undisputed), the central purpose of the initial milestone requirement — the timely manufacture of an authorized satellite — has been upheld.

Significantly, the FCC has previously permitted mobile wireless licensees to rely upon third parties (even though unaffiliated) in meeting network buildout requirements which are directly analogous to the 2 GHz MSS construction milestones.

Reading a strict privity requirement into the satellite manufacturing contract mandated by the initial milestone condition would be inconsistent with the Commission's prior decision not to adopt any financial qualification for 2 GHz MSS licensees. Having dispensed with these qualifications, it would be unreasonable for the Bureau now to second-guess the inter-corporate funding arrangements used by TMI to procure its satellite.

Denial of TMI's assignment application also would be at odds with the treaty commitments of the United States to permit foreign MSS operators non-discriminatory access to the United States market pursuant to the WTO Basic Telecommunications Agreement and the FCC's DISCO II Order. The back-to-back construction contracts contested by the Wireless Carriers have been submitted to Industry Canada, without objection, in satisfaction of the analogous satellite manufacturing milestone in TMI's Canadian authorization.

Even if TMI is found not to have met the initial construction milestone on a legal technicality (i.e., for want of privity), the Bureau should grant TMI an interim waiver of any implied privity requirement relating to the satellite manufacturing contract pending approval of this application. There are special circumstances in TMI's case which excuse any interim lack of privity (e.g., TMI had a prior obligation to assign its LOI authorization to the affiliate which contracted for its satellite). Good cause also exists for a waiver because the FCC's milestone rules would not be disserved thereby (TMI is in substantive compliance with the relevant milestone and, following a meeting with the Bureau's staff, TMI agreed to mitigate the alleged breach of privity by promptly filing this application.) The potential benefits of a waiver (timely construction and deployment of a competitive MSS system) also clearly outweigh those which might flow from enforcing a rule which would lead to cancellation of TMI's authorization.

The assignment is consistent with the agency's anti-trafficking rules because TMI will not profit thereby. The LOI authorization is being transferred pursuant to a pre-existing joint venture agreement involving the consolidation of the L-band MSS systems of TMI and Motient Corporation, a U.S. MSS operator. In connection with that transaction, which has already closed, the 2 GHz LOI authorization was accorded no value — the transfer of TMI's 2 GHz interest was part of a “package” deal — and TMI will not receive any further consideration upon grant of the current assignment application.

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**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

To: The International Bureau

OPPOSITION TO PETITION TO DENY

TMI Communications and Company, Limited Partnership (TMI) and its affiliate, TerreStar Networks Inc. (TerreStar), hereby oppose the January 27, 2003 Petition of AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless (jointly the “Wireless Carriers” or “Petitioners”) asking the Commission to deny TMI’s application to assign to TerreStar, as part of a January 2001 asset sale, the TMI Letter of Intent (LOI) authorization to use spectrum in the 2 GHz band for the provision of U.S. Mobile Satellite Service (MSS) via TMI’s Canadian licensed (CANSAT-M3) satellite system.

SUMMARY

The Wireless Carriers’ petition has no legal merit. TMI satisfied the initial construction milestone written into its LOI authorization by timely obligating its affiliate, TerreStar, to consummate a non-contingent satellite manufacturing contract, which TerreStar did, and to deliver to TMI a completed satellite. TMI’s contract with TerreStar expressly grants TMI

“control over the satellite specifications and the design, construction and delivery of the satellite so as long as it holds” its FCC and Canadian authorizations.¹

The assignment is also consistent with the agency’s anti-trafficking rules because TMI will not profit from the assignment. The LOI is being transferred pursuant to a pre-existing joint venture agreement involving the consolidation of the L-band MSS systems of TMI and Motient Corporation, a U.S. MSS operator.² In connection with that transaction, which has already closed, the 2 GHz LOI authorization was accorded no value³ — the transfer of TMI’s 2 GHz interest was part of a “package” deal — and TMI will not receive any further consideration upon grant of the current assignment application.

As this Opposition will show:

- A non-contingent satellite contract has been timely signed to comply with the Commission’s milestone;
- Spectrum is not being warehoused; and
- There is no trafficking — TMI and TerreStar are affiliated companies and TMI will not profit from the assignment.

I. INTRODUCTION

Petitioners — the three largest U.S. cellular telephone operators — candidly admit that they are “competitors in the mobile telephone marketplace”⁴ served by TMI, though the competition is entirely lopsided — the combined telephone base of the Petitioners is more than

¹ A copy of the contract between TMI and TerreStar was filed with the FCC in connection with TMI’s initial milestone certification. See Letter of Gregory C. Staple, Vinson & Elkins L.L.P., Counsel to TMI, to Marlene H. Dortch, Secretary, FCC, re File No. 129-SAT-LOI-97 et al. (July 26, 2002).

² See generally Motient Services, Inc. and TMI Communications and Company LP, Order and Authorization, 16 FCC Rcd 20469 (Int’l Bur. 2001).

³ See Affidavit of Ted Ignacy, Vice-President, Finance, TMI Communications Inc. (TMI Inc.) appended as Exhibit 1 hereto. TMI Inc. is the General Partner of TMI.

⁴ Wireless Carriers’ “Petition to Deny” at 1.

1400 times that of the TMI and Motient joint venture, Mobile Satellite Ventures (MSV).⁵ The Petitioners also admit that they are “seeking a re-allocation of the 2 GHz spectrum”⁶ covered by the LOI for advanced wireless or 3G services. Consequently, the Petitioners plainly have little interest in the actual facts of this case — whether TMI’s satellite system is being timely constructed, which it is — so long as a legal pretext can be found for grounding a potential competitor and reallocating its spectrum for their own use. Since the Petitioners filed their pleading, however, the FCC has issued several decisions which have the effect of awarding to them the additional MSS spectrum they desire for new 3G services.⁷ As a result, the Petitioners’ practical objections to the instant application have been mooted.

In any event, there are no legal grounds for canceling TMI’s authorization and denying its application. The key facts are not in dispute: TMI has begun to construct the 2 GHz MSS system authorized by Industry Canada and the FCC; a qualified satellite manufacturer, Space Systems/Loral Inc. (Loral), has begun the critical design review and is being compensated accordingly; and TMI has a contractual right to timely delivery of the completed satellite system by TerreStar and Loral in keeping with the terms and conditions contained in both its Canadian and U.S. authorizations.

⁵ At October 1, 2002, the cellular subscriber base of AT&T Wireless totaled over 20 million; it was approximately 22 million for Cingular and over 30 million for Verizon. In contrast, MSV currently has less than 50,000 voice customers. See <http://www.attws.com/aboutus/> (for AT&T Wireless subscribers); http://www.Cingular.com/about/company_overview (for Cingular); and <http://www.verizonwireless.com/jsp/aboutus/index.jsp> (for Verizon).

⁶ Petition to Deny at 1. The Wireless Carriers’ persistent efforts to reverse the FCC’s prior decision to allocate spectrum for 2 GHz MSS systems is detailed at n.2 of their Petition. Beyond that, the Wireless Carriers, their trade association, the Cellular Telecommunications & Internet Association (CTIA), and other mobile operators filed numerous pleadings in IB Docket Nos. 01-105 et al. urging the Commission not to grant 2 GHz and other MSS systems authority to use their spectrum more flexibly.

⁷ See, e.g., “FCC Reallocates Spectrum For New Wireless Services,” FCC News Release, January 30, 2003; Third Report and Order Third Notice of Proposed Rulemaking and Second Memorandum Opinion and Order, ET Docket No. 00-258 (FCC 03-16), adopted January 29, 2003.

In short, this is not a case where a licensee has failed to timely commence construction of its own bona fide satellite system. Nor is it one where the manufacturing contract is deficient or the satellite system being constructed is materially different from the one which the FCC has authorized. To the contrary, here, the substance of the relevant milestone obligation has already been met. The authorized MSS system is under construction and TMI has an enforceable agreement to take delivery. So long as TMI holds an FCC and a Canadian authorization for the satellite, TMI also retains contractual control over the satellite's design and construction.⁸ On these facts, there simply is no precedent for finding that TMI has failed to meet its initial construction milestone.

Beyond that, denial of TMI's assignment application on the grounds asserted by Petitioners would be inconsistent with the treaty commitments of the United States to permit foreign MSS operators non-discriminatory access to the United States market pursuant to the WTO Basic Telecommunications Agreement and the FCC's DISCO II Order.⁹ The back-to-back construction contracts contested by the Wireless Carriers have been submitted to Industry Canada in satisfaction of the analogous satellite manufacturing milestone in TMI's Canadian authorization.¹⁰ A contrary decision by the FCC regarding the same contracts would unfairly prejudice TMI and amount to the type of duplicative licensing regime eschewed by the FCC in

⁸ See supra note 1.

⁹ See Fourth Protocol to the General Agreement on Trade in Services (GATS) (April 30, 1996), 36 I.C.M. 336 (1997) (entered into force Jan. 1, 1998); In re Amendment of the Commission's Regulatory Policies to Allow Non-US Space Stations to provide Domestic and International Satellite Service in the United States, Report and Order, 12 FCC Rcd 24094 (1999) (DISCO II).

¹⁰ The construction milestones contained in Industry Canada's approval-in-principle for CANSAT-M3 are parallel to those in the FCC's LOI Order. A copy of TMI's Canadian authorization was previously furnished to the FCC. See Letter from Gregory C. Staple, Vinson & Elkins, Counsel to TMI, to Marlene H. Dortch, Secretary, FCC, File No. 129-SAT-LOI-97 et al. (August 27, 2002), Attachment. As described infra, the contractual arrangements which TMI, TerreStar and Loral have consummated to ensure the timely construction of the 2 GHz satellite system have been filed with Industry Canada on July 25, 2002 and TMI has continued to submit progress reports with Industry Canada as set forth in the approval-in-principle.

DISCO II when it invited foreign-based satellite providers to reserve U.S. spectrum on a non-discriminatory basis by filing letter of intent applications.

Finally, even if TMI is found not to have met the initial construction milestone on a legal technicality (i.e., for want of privity), the Bureau should grant TMI an interim waiver of any implied privity requirement relating to the satellite manufacturing contract pending approval of this application. Good cause exists for a waiver because the FCC's milestone rules would not be disserved thereby. (TMI is in substantive compliance with the relevant milestone; the lack of direct privity with the satellite vendor was reasonable given TMI's prior contractual obligation to assign its authorization to the affiliate which procured the satellite; and, following a meeting with the Bureau's staff, TMI agreed to mitigate the alleged breach of privity by promptly filing this application.) The potential benefits of a waiver (timely construction and deployment of a competitive MSS system) also clearly outweigh those which might flow from enforcing a rule which would lead to cancellation of TMI's authorization.

II. TMI HAS MET THE INITIAL CONSTRUCTION MILESTONE AND CAN LAWFULLY ASSIGN ITS LOI AUTHORIZATION

The Wireless Carriers contend that TMI may not assign its LOI because it has not satisfied the initial construction milestone. This is so, the Petitioners state, because TMI did not directly enter into a satellite manufacturing contract with Loral but rather contracted with TerreStar to deliver the required satellite system and TerreStar, in turn, executed a manufacturing contract with Loral. Consequently, TMI itself is not directly bound by the manufacturing contract as the relevant milestone condition requires, according to the Petitioners.

The claims of the Wireless Carriers lack legal authority and ignore the salient facts which, as described above, unquestionably show that TMI timely obligated its affiliate to contract for the construction of the authorized MSS system with a bona fide vendor while

maintaining control itself over the satellite design specifications. Before more fully rebutting the Petitioners' legal arguments, we briefly review the background of the current assignment application and the relationship between TMI and TerreStar.

A. History of Application: The 2001 TMI-Motient Joint Venture

This assignment application was filed to transfer the last of TMI's U.S. MSS assets to the TMI-Motient joint venture, now known as Mobile Satellite Ventures, LP (MSVLP), pursuant to a January 8, 2001 Asset Sale Agreement between MSVLP's predecessor (Mobile Satellite Ventures LLC) and TMI.¹¹ In keeping with this Agreement, the bulk of TMI's MSS assets, including TMI's L-band MSS authorization, was transferred to MSV more than a year ago following the FCC's grant of TMI's initial assignment application on November 21, 2001. In approving that assignment (and a parallel assignment of Motient Corporation's L-band MSS licenses to MSV), the FCC stated:

Grant of these applications will serve the public interest because it will enable Motient and TMI, and certain investors, to use their combined resources to develop widespread, competitive, and affordable communications services for the underserved areas of the United States.¹²

At the time of the FCC's decision, although TMI was contractually bound to transfer its FCC 2 GHz MSS authorization (see supra note 11), TMI had yet to receive the underlying satellite license from Industry Canada. In addition, after the Asset Sale Agreement was executed, the FCC began a proceeding to determine whether certain MSS providers would be

¹¹ A copy of relevant portions of the Agreement was appended, in confidence, to the Application, FCC Form 312, as Exhibit 2, Attachment A. The Agreement provides, inter alia, at Paragraph 2.1, that TMI shall transfer the "Subject Assets" (which include "TMI's rights in the application made by it to the FCC relating to the 2 GHz frequency band") to MSV or at MSV's election "to a wholly owned subsidiary of MSV." In 2002, MSVLP directed TMI to assign its FCC authorization for a 2 GHz MSS system to the MSVLP subsidiary, TerreStar.

¹² See Motient Services Inc. et al., Order and Authorization, 16 FCC Rcd 20469 (Int'l Bur. 2001) ¶1.

authorized to construct an Ancillary Terrestrial Component (ATC).¹³ Given these regulatory contingencies, which were beyond TMI's control, TMI and MSVLP postponed the assignment of TMI's 2 GHz LOI authorization.

In early 2002, however, MSV and TMI, which then held an approximately 40% ownership interest in MSVLP and an approximately 26% interest in MSVGP,¹⁴ took steps to create a wholly owned MSV subsidiary, namely TerreStar Networks Inc., to develop the 2 GHz MSS business. TerreStar was formally incorporated in February 2002 and, to ensure continuity, including the timely construction of the 2 GHz satellite system, the Chairman and CEO of TMI's managing partner, TMI Communications Inc. (TMI Inc.), agreed to serve as the founding Chairman (and a Director) of TerreStar.¹⁵ Two other officers of TMI Inc. also became members of TerreStar's initial Board.¹⁶ Thus, as a result of the substantial financial interest which TMI had in MSV and the service of TMI Inc.'s principal officers on TerreStar's Board, TMI was closely involved in the affairs of TerreStar from the outset. Though wholly owned by MSVLP, TerreStar also functioned as an affiliate of TMI in fact as well as in law.¹⁷

¹³ See Flexibility For Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band et al., Notice of Proposed Rule Making, 16 FCC Rcd 15532 (2001). Among other things, TMI recognized that the outcome of this proceeding was likely to impact the capital requirements for its 2 GHz MSS system and hence the future structure of the U.S. and Canadian entities to which TMI's regulatory authorization would be transferred. Beyond that, Canadian foreign ownership rules limit the non-Canadian ownership of a carrier to 20%, a factor that further complicates the regulatory planning required where new investment is required (e.g., to construct an ancillary terrestrial component).

¹⁴ The current ownership of MSVGP and MSVLP is detailed at Exhibit 3 to the assignment application.

¹⁵ See Exhibit 1.

¹⁶ Id.

¹⁷ Under the FCC's foreign affiliation rules, "[t]wo entities are affiliated with each other if one of them . . . directly or indirectly owns more than 25 percent of the capital stock of . . . the other one." 47 C.F.R. § 63.09(e). Note 1 to this rule provides: "'Capital stock' includes all forms of equity ownership, including partnership interests."

On May 6, 2002, Industry Canada issued its approval in principle (the precondition to a license) for TMI's 2 GHz MSS system. The approval was subject to TMI's written acceptance of certain conditions and implementation milestones stated in an Attachment. The first milestone required the submission of final design specifications by June 15, 2002 (later extended to June 30, 2002; see infra note 20). "Milestone 2" requires "signature of contract for the construction of the first of two satellites,"¹⁸ by July 15, 2002 and further states that "within 15 days of final signature of the Milestone 2 contract TMI must provide evidence satisfactory to the Department that TMI is bound to a contractual agreement with a satellite manufacturer for the construction of the proposed satellite."¹⁹

Consistent with the foregoing first milestone requirement, and based upon consultations with prospective satellite manufacturers, TMI submitted its final design specifications to Industry Canada on June 27, 2002.²⁰ The specifications were approved by the Canadian Government on July 8, 2002. TMI then entered into an agreement with TerreStar on July 12, 2002 to obligate TerreStar, as the presumptive assignee of TMI's LOI authorization, to conclude a satellite construction contract with Loral that satisfied the terms and conditions contained in both the Canadian and U.S. satellite authorizations, including the milestone requirements. The Agreement between TMI and TerreStar also expressly provided for "delivery to TMI" of the satellite and stated that:

¹⁸ See Letter from Jan Skora, Director General, Radio Communications and Broadcasting Regulatory Branch, Industry Canada, to Ted H. Ignacy, Vice President, Finance, TMI Communications, Inc. (May 6, 2002), Attachment. A copy of this letter was previously furnished to the Commission. See Letter from Gregory C. Staple, Vinson & Elkins, Counsel to TMI, to Marlene H. Dortch, Secretary FCC, re File No. 129-SAT-LOI-97 et al. (August 27, 2002).

¹⁹ Attachment to Skora Letter, supra note 18, at Section 6.5.

²⁰ Following issuance of the approval-in-principle, Industry Canada granted TMI's request to amend the Milestone date to June 30, 2002 to coincide with the first interim report.

TMI shall retain control over the content of the satellite specifications and the design, construction and delivery of the satellite so long as it holds [its] Canadian . . . and the FCC Authorization[s]²¹

On July 14, 2002, TerreStar, in turn, executed a non-contingent satellite construction contract with Loral for the satellite system covered by TMI's two sets of regulatory authorizations.

The back-to-back contracts between TMI, TerreStar and Loral were expressly approved by TMI Inc.'s principal officers, once on behalf of TMI, and again in their capacity as Directors of TerreStar.²² Consistent with TMI's July 12 contract with TerreStar, the Loral construction contract provided that the terms thereof would be confidential to TMI as well as to TerreStar, thus affording TMI full access to the documentation necessary to control the satellite's future design specifications.

We return now to the Wireless Carriers' legal claims.

B. TMI Met The Initial Construction Milestone

1. The Milestone Does Not Preclude A Grantee From Relying Upon An Affiliate To Procure Its Satellite, Provided the Grantee Retains Control

Given TMI's prior obligation to assign its LOI authorization to MSV and TMI's substantial cross-interest in MSV, it was reasonable for TMI to obligate TerreStar to procure the 2 GHz MSS system on TMI's behalf. Neither the text of the FCC's milestone certification rule²³

²¹ As noted, this contract was filed with the FCC on July 26, 2002. See supra note 1.

²² See Exhibit 1.

²³ See 47 C.F.R. § 25.143(e)(3). The rule merely requires a grantee to certify that a milestone has been met within 10 days after applicable milestone date (or to notify the Commission by letter that the date has not been met).

nor the terms of TMI's authorization²⁴ expressly preclude a 2 GHz MSS grantee from entering into a non-contingent satellite manufacturing contract through an affiliate. Thus, so long as TMI has an enforceable right to the benefits of a bona fide manufacturing contract (which is undisputed here), and the underlying manufacturing contract is non-contingent (also undisputed), the central purpose of the initial milestone requirement — the timely manufacture of an authorized satellite — has been upheld.

Significantly, the FCC has previously permitted mobile wireless licensees to rely upon third parties (even though unaffiliated) in meeting network buildout requirements which are directly analogous to the 2 GHz MSS construction milestones. For example, in 1994, when the FCC adopted construction rules for broadband PCS, it stated that licensees failing to meet their population coverage requirements by the applicable 5 and 10 year benchmarks would forfeit their licenses.²⁵ However, the Commission advised that service “resale of a licensee’s geographic area to other entities, subject to the licensee’s control, is not prohibited by our rules,” and therefore stated that a licensee could meet its geographic coverage requirements by reselling service so long as the resold service was under the control of the licensee.²⁶ The FCC’s buildout

²⁴ The LOI authorization simply states that “TMI must observe the following milestone requirements: Enter non-contingent Satellite Manufacturing Contract . . . 12 months after authorization” See TMI Communications and Company, Limited Partnership, 16 FCC Rcd 13808, at ¶ 10 (Int’l Bur. 2001). Similarly, in adopting its milestone policies for the 2 GHz MSS, the FCC stated that “Geostationary Satellite Systems [such as TMI’s] must enter into a non-contingent satellite manufacturing contract within one year from the date of authorization” but the FCC did not proscribe the use of an affiliate for that purpose. Service Rules for the Mobile Satellite Service in the 2 GHz Band IB Docket No. 99-81, Report and Order, 15 FCC Rcd 16127, ¶ 106 (2000) (“2 GHz MSS Order”).

²⁵ Amendment of the Commission’s Rules to Establish New Personal Communications Services, Memorandum Opinion and Order, 9 FCC 4957, 5019 (1994).

²⁶ Id. at 5020.

requirements for the Specialized Mobile Radio (SMR) service also permit a licensee to contract with a third party to meet its obligations.²⁷

The FCC's interpretation of the foregoing PCS and SMR buildout rules are apposite here. Given that TMI's authorization did not explicitly foreclose TMI from contracting with an affiliate for procurement of its satellite, and there was no prior case law on the issue, it was not unreasonable for TMI to rely upon TerreStar for this purpose.²⁸ This is especially so when TMI had a pre-existing commitment to assign its authorization to such an affiliate. In addition, TMI's contract with its affiliate expressly stated that TMI retained control over the satellite specification and the design, construction and delivery of the satellite, so long as it held regulatory authorization therefor.

2. TMI's Decision to Fund Satellite Procurement Via An Affiliate Is Consistent with The FCC's Decision To Dispense With Financial Qualifications

Reading a strict privity requirement into the satellite manufacturing contract mandated by the FCC's milestone rules would be inconsistent with the agency's decision not to adopt any financial qualifications for 2 GHz MSS systems. In dispensing with financial qualifications, the Commission stated that its "milestone requirements will ensure timely construction of systems."²⁹ In a similar vein, the Commission concluded that market pressures (rather than

²⁷ See Amendment of Parts 2 and 90 of the Commission's Rules to Provide for the Use of 200 Channels Outside the Designated Filing Areas in the 896-901 MHz and the 935-940 MHz Bands Allocated to the Specialized Mobile Radio Pool, Second Request and Order and Second further Notices of Proposed Rule Making, 10 FCC Rcd 6884, 6899 (1995).

²⁸ In contrast, cancellation of TMI's authorization by the FCC for failure to comply with an unannounced interpretation of a milestone condition would amount to arbitrary and capricious action and a violation of TMI's right to due process. See, e.g., Satellite Broadcasting Co. v. FCC, 824 F.2d 1, 3 (D.C. Cir. 1987) ("Traditional concepts of due process incorporated into administrative law preclude an agency from penalizing a private party for violating a rule without first providing adequate notice of the substance of the rule."); see also Trinity Broadcasting of Florida, Inc. v. FCC, 211 F.3d 618 (D.C. Cir. 2000) (reversing the denial of a broadcast renewal application where the FCC had not provided notice of its interpretation of a rule that the licensee be "minority-controlled").

²⁹ 2 GHz MSS Service Rules at ¶48.

qualification rules) would incent MSS operators to raise the necessary financing to meet the costs of relocating any incumbent 2 GHz operators. These policy decisions would be undermined if the Bureau subsequently decided to micromanage the inter-corporate funding arrangements that an MSS party chooses to employ to meet a milestone requirement.

Some parties may be able to raise the funds directly from their own reserves; others may choose to draw upon the resources of affiliated entities or new investors, as in TMI's case. In each case, milestone compliance should not turn on whether the original grantee is directly liable for covering the satellite manufacturing cost but on whether manufacturing has timely commenced pursuant to an adequate contract and whether the grantee has an enforceable right to timely delivery of the completed satellite system. If these conditions are met (as here), the FCC need not investigate the particular financial arrangements involved.³⁰

3. TMI Has Met Canada's Milestone Requirements

In TMI's case, considerations of international comity and the FCC's WTO commitments also counsel against the interpretation of the milestone rule advanced by the Wireless Carriers. The application of the FCC's initial construction milestone to a party holding an LOI authorization is a matter of first impression. It consequently provides an important test of the FCC's ability to implement the market access commitments the U.S. made for satellite services under the Basic Telecom Agreement in a non-discriminatory manner. TMI's MSS system is

³⁰ The Wireless Carriers (at pp. 7-8 of the Petition) suggest that because TMI is not itself bound by the Loral contract or allegedly liable to Loral in the event the 2 GHz MSS system is not implemented the public interest has been harmed. This argument is speculative inasmuch as TMI's system is being timely implemented. The Wireless Carriers also ignore the fact that TMI's financial interest in TerreStar — and the separate responsibilities which TMI's officers and Directors have as members of the TerreStar board — gives TMI a strong interest in the performance of the Loral contract.

Further, the FCC has never required that a satellite construction contract hold the buyer (i.e., licensee) fully liable in the event the system is not implemented. Non-contingent contracts approved by the FCC typically permit the buyer to suspend or cancel performance subject to certain penalties. The Loral-TerreStar contract is no different. And, as a principal investor in TerreStar's 100% owner, MSVLP, any liability incurred by TerreStar for non-performance would also adversely affect TMI.

being licensed in Canada, not the U.S., and the Canadian authorization issued to TMI contains an independent set of construction milestones (see supra note 18) which TMI must meet. The initial Canadian milestone required TMI to submit a design specification to Industry Canada by June 30 and by July 15 (two days before the analogous U.S. milestone) to have “signature of contract for construction of the first of two satellites.”

In June 2002, TMI submitted the design specifications for its planned system to Industry Canada based on the review of proposals from prospective manufacturers. The design specifications were subsequently approved by Industry Canada on July 8, 2002. And on July 25, 2002 TMI timely submitted, in confidence, to Industry Canada the back-to-back contracts between TMI and TerreStar, on the one hand, and TerreStar and Loral, on the other, which have been described earlier.³¹ Industry Canada has not stated that the arrangement is non-compliant with the conditions in TMI’s approval-in-principle, and TMI and TerreStar have consequently moved forward with the construction of the MSS system based upon said agreements and continue to file necessary information in compliance with that approval-in-principle.³²

Given that Canada is the licensing administration for TMI’s system, and that the milestone requirements on their face are essentially identical, national comity argues for reasonable deference, in the first instance, to the Canadian government’s position.³³ The market access regime for foreign licensed satellites adopted in DISCO II also suggests that inconsistent interpretation of analogous Canadian and U.S. milestones should be avoided, whenever possible,

³¹ Significantly, in the six months since the contracts were submitted, Industry Canada has not put any written or oral questions to TMI regarding either the TerreStar or the Loral contract.

³² For example, TMI submitted its most recent interim performance report to Industry Canada on February 5, 2003.

³³ See, e.g., Centennial Communications Corp., 17 FCC Rcd 10794 (2002) (dismissing a complaint, for reasons of international comity, where the issues raised therein were being addressed by a foreign regulatory authority); U.S. Electrodynamics, Inc., 14 FCC Rcd 9809 (Int’l Bur. 1999) (granting, for reasons of international comity, authority to provide TT&C in the United States to a satellite constellation not yet licensed in the United States).

so that U.S. milestone requirements do not function as a second de facto licensing regime which frustrates U.S. entry by a non-U.S. MSS System.³⁴

C. Good Cause Exists Here For Waiving Any Implicit Privity Requirement For The Manufacturing Contract Required By The Milestone Condition

If the Bureau were to find, based on a lack of privity, that TMI's back-to-back contracts for the manufacture of its satellite system did not satisfy the initial milestone, good cause exists for the Bureau to grant TMI a waiver of any such privity requirement, on its own authority,³⁵ pending approval of the current assignment application. Under the FCC's rules, a waiver is appropriate if (1) special circumstances warrant a deviation from the general rule; and (2) a deviation would not disserve the rule's underlying purpose and would better serve the public interest than would strict enforcement.³⁶ All of these conditions are met here.

First, the fact that TerreStar (rather than TMI) executed the satellite procurement contract stemmed from the unique circumstances of a pre-existing asset purchase agreement. That contract obligated TMI to assign its MSS authorization to MSV or a subsidiary, such as TerreStar. Second, the party which executed the manufacturing contract, TerreStar, was not an unrelated third party but an affiliate of TMI with a shared officer and several Directors. Third, TMI only authorized its affiliate to contract with Loral on the condition that TMI "retain control over the content of the satellite specifications and the design, construction and delivery" so long as it held the requisite regulatory authorization therefore. See Exhibit 1 hereto. All of these special circumstances excuse any lack of direct privity between TMI and Loral.

³⁴ In DISCO II, FCC decided that it would "not issue a separate, and duplicative, U.S. license for a non-U.S. space station" because doing so "would raise issues of national comity" DISCO II, 12 FCC Rcd at 24174.

³⁵ See 47 C.F.R. § 1.3 ("Any provision of the rules may be waived by the Commission on its own motion."); GE American Communications, Inc., 16 FCC Rcd 11038 (Int'l Bur. 2001).

³⁶ See generally WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1960); Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

In this case, a narrow waiver of any implicit privity requirement also would not disserve the purpose of the milestone condition. A waiver would not delay construction.³⁷ TMI also is in substantive compliance with the milestone and has begun construction of its own satellite system pursuant to a non-contingent manufacturing contract.³⁸ Hence, TMI has plainly demonstrated that it is committed to construct its authorized system and is not seeking to warehouse the spectrum.

TMI also has acted in good faith and equitable considerations are properly considered in granting a waiver.³⁹ The FCC had not previously given express notice that the non-contingent contract milestone required privity between the FCC grantee and the satellite manufacturer and TMI was unaware that the Bureau had questions regarding TMI's compliance with its initial milestone certification until it received an October 4, 2002 letter from the Chief, Satellite Division, International Bureau.⁴⁰ TMI responded to this letter, as requested, on October 15, 2002.⁴¹ Thereafter, at the Bureau's request, representatives from TMI and TerreStar, together with the undersigned counsel, met with the FCC's staff on November 14, 2002. During that

³⁷ Contrast GlobalStar L.P., DA 03-328, released January 30, 2003, where the licensee sought a milestone waiver to extend by over two years the date for completing construction and additional time to reform its underlying manufacturing contract, in the event the waiver was denied.

³⁸ In distinction, the Bureau recently denied two waiver requests where the licensees contended that a Sharing Agreement for use of a third party's system, if and when that satellite was ready for operation was legally equivalent to a manufacturing contract for their own satellite systems. See Mobile Communications Holdings, Inc. and ICC Global Communications (Holdings) Limited For Transfer of Control et al., DA 03-285, released January 30, 2003.

³⁹ See, e.g. GE American Communications, Inc., 16 FCC Rcd 11038, at ¶¶ 9-10 (waiver granted, in part, based on good faith discussion with FCC staff regarding milestone compliance); Tempo Enterprises, Inc., 1 FCC Rcd 20 (1986) (accepting an untimely construction contract because the licensee was unaware of FCC staff's view that contingencies regarding future design changes could be accommodated by a construction contract and shall not delay contract execution). See also NetSat 28 Company, L.L.C., 16 FCC Rcd 11025 (Int'l Bur. 2001).

⁴⁰ See Letter from Thomas S. Tycz, Chief, Satellite Division, International Bureau, FCC, to Gregory C. Staple, Counsel to TMI, File No. 189-SAT-LOI-97 et al. (October 4 2002). As discussed in n.28 *supra*, due process considerations bar the FCC from penalizing a party for violation of a rule without first providing adequate notice.

⁴¹ See Letter from Gregory C. Staple, Vinson & Elkins L.L.P., Counsel to TMI, to Ms. Marlene H. Dortch, Secretary, FCC, File No. 189-SAT-LOI-97 et al. (October 15, 2000).

meeting, the staff invited TMI to file an application to assign its LOI authorization to TerreStar so as to address their privacy concerns — a step TMI agreed to take as soon as practicable, notwithstanding TMI's view that it had already substantively complied with the milestone condition. The current application was then docketed on December 11, 2002.

Finally, grant of a waiver is likely to produce public benefits — the timely construction and launch of a competitive MSS system — in excess of those which can be expected from enforcement. Cancellation of TMI's authorization would further reduce intra-modal competition for mobile services while returning only a very small amount of spectrum to the FCC. Moreover, it is likely that the underlying 2 GHz spectrum could not easily be used by another MSS provider because TMI would still be authorized to construct and launch its satellite system pursuant to the underlying Canadian license, thus raising novel coordination issues for U.S. MSS operators. As well, reallocating a few more MHz of MSS spectrum for alternative 3G service would provide limited, if any, benefits as compared to the 120 MHz which the FCC has allocated since October 2002 for terrestrial mobile services. On balance, therefore, a waiver which preserves the FCC's long standing commitment to a competitive MSS industry would outweigh the uncertain benefits, if any, from an alternative course of action.

In view of the foregoing, if need be, good cause exists for granting TMI a limited waiver of any implicit privacy applicable to the manufacturing contract mandated by the first milestone condition.

III. GRANT OF TMI'S ASSIGNMENT APPLICATION WOULD NOT VIOLATE THE FCC'S ANTI-TRAFFICKING POLICY

The FCC's anti-trafficking rules are designed to prevent unjust enrichment by parties who obtain an authorization for speculative purposes and do not intend to implement their

proposed systems.⁴² The rules apply equally to licensees and LOI holders. In adopting its anti-trafficking rules, however, the Commission stated that it “did not intend [the rules] to be an impediment to legitimate investments in 2 GHz MSS systems”⁴³ or to “hamper[] a licensee’s ability to raise capital.”⁴⁴

Based on the facts described in Part II supra, it is clear that the FCC’s anti-trafficking rule is not relevant to TMI’s proposed assignment. First, TMI has demonstrated that it intends to implement its proposed system by obligating its affiliate, TerreStar, to enter into a non-contingent satellite manufacturing contract while maintaining control over the design and construction of the system pending transfer of control. Pursuant thereto, design and pre-manufacturing work for the satellite system began within three weeks after the procurement contract was signed and the scheduled performance payments have been duly made.⁴⁵

Second, TMI will not receive any additional consideration from the assignment of the LOI to TerreStar and will not realize a profit. TMI was obliged to file the current application as part of a 2001 asset purchase agreement which previously included TMI’s L-band MSS assets. The principal transaction closed in 2001 following FCC approval and TMI has already received the agreed consideration. TMI will not receive any additional payments from MSV for transferring its LOI authorization to TerreStar. Nor did TMI profit from the pre-existing asset sale. The L-band assets were transferred to MSV for consideration which was considerably less

⁴² 2 GHz MSS Order, supra at ¶ 131.

⁴³ Id. ¶ 130.

⁴⁴ Id. ¶ 131.

⁴⁵ Status reports from Loral, the satellite manufacturer, were previously submitted to the FCC, in confidence. See Letter from Gregory C. Staple, Counsel to TMI, to Marlene H. Dortch, Secretary, FCC, October 15, 2002. Exhibit 1.

than the value of TMI's investments in constructing and launching its L-band MSS system, and no value was assigned to TMI's 2 GHz MSS LOI authorization when the bulk of the assets were transferred to MSV.⁴⁶

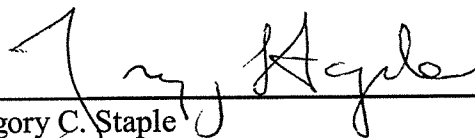
In addition, the current assignment is being consummated to facilitate the long term capitalization of TMI's 2 GHz MSS system. TerreStar was incorporated as a separate subsidiary of MSV to afford TMI and Motient Corporation additional flexibility in capitalizing the system by, for example, permitting the existing MSV shareholders (notably Motient Corporation and TMI) to hold a greater or lesser interest in TerreStar. The establishment of a separate subsidiary by MSV also provided a vehicle to accommodate new investors which might wish to take an interest in MSV's 2 GHz MSS system separately from MSV's existing L-band business. The current assignment thus is designed to facilitate just the type of legitimate investment contemplated by the Commission's anti-trafficking policy. The assignment involves an authorization for a partially constructed satellite (not a bare license) and it will not unjustly enrich TMI which, indeed, will not receive any additional consideration from this transaction.

⁴⁶ Again, See Exhibit 1 hereto.

IV. CONCLUSION

For all of the above reasons, the Wireless Carrier's Petition to Deny should be dismissed and TMI's application to transfer its 2 GHz MSS authorization should be granted without further delay.

Respectfully submitted,



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TMI Communications and Company
Limited Partnership

Opposition to Petition to Deny

File No. SAT-ASG-2002 1211-00238

Exhibit 1

Affidavit of

Ted H. Ignacy

Vice President, Finance

TMI Communications Inc.,

Affidavit of Ted H. Ignacy

1. My name is Ted H. Ignacy and since 1997 I have served as Vice President, Finance, of TMI Communications Inc. (TMI Inc.), General Partner of TMI Communications and Company, Limited Partnership (TMI) and I continue to hold this position as of the date hereof.

2. As an officer of TMI Inc., I am familiar with the business affairs of TMI and, in particular, with the terms and conditions of the 2001 joint venture between TMI and Motient Corporation, including a certain Asset Sale Agreement between Mobile Satellite Ventures LLC and TMI, dated as of January 8, 2001, which I executed on behalf of TMI as did Mr. Larry Boisvert, President and CEO of TMI Inc.

3. The joint venture between TMI and Motient Corporation, Mobile Satellite Ventures L.P. (MSVLP) (formerly Mobile Satellite Ventures LLC) and Mobile Satellite Ventures (Canada) Inc., was formed for the purpose of pooling the North American Mobile Satellite Service (MSS) assets of TMI and Motient Corporation. As detailed in the aforementioned Asset Sale Agreement, the principal assets contributed by TMI were its in-orbit L-band satellite system, the Ottawa, Ontario ground station and network control facility, and TMI's customer base. TMI also agreed to contribute its 2 GHz letter of intent (LOI) application (then pending) before the Federal Communications Commission (FCC) for a reservation of spectrum to provide MSS in the 2 GHz band, and the underlying license application with Industry Canada to construct and operate a 2 GHz MSS system.

4. As of January 2001, TMI had expended in excess of \$450 million in the construction and operation of its existing L-band MSS system. However, the purchase consideration for the assets transferred to MSV was substantially less than that.

5. The Asset Sale Agreement closed on November 26, 2001 whereupon TMI was paid the stated purchase consideration for all of the TMI assets contributed to the MSV joint venture. Given the uncertain value of TMI's then pending application to the FCC and outstanding application to Industry Canada, no value was attributed to TMI's LOI authorization;

the consideration received by TMI was attributed to the other assets, namely the L-band MSS assets.

6. No additional consideration is due TMI for the assignment of its LOI interest to MSVLP or its designate under the Asset Sale Agreement or otherwise. MSVLP has agreed to reimburse TMI for reasonable legal fees and expenses incurred in connection with said assignment, however.

7. Upon the formation of MSVLP, I was elected a Director of Mobile Satellite Ventures, GP, Inc. (MSVGP), which manages MSVLP. Mr. Boisvert and Mr. Rory McCormick, a Senior Counsel to TMI, were also elected Directors. In my capacity as a Director of MSVGP, I attended Board meetings in January and February 2002. During those meetings the Board discussed and unanimously agreed upon the formation of a subsidiary to MSVLP (later named TerreStar Networks Inc.) to assume TMI's LOI authorization. A separate subsidiary was created to facilitate funding of the planned 2 GHz MSS system because it would permit Motient Corporation and TMI, principal owners of MSVLP, to hold lesser or greater interests in TerreStar than in MSVLP. A subsidiary also provides an independent vehicle for new investors to fund the 2 GHz MSS system separate from MSVLP's other businesses. The Board of MSVGP asked TMI Inc.'s CEO, Mr. Boisvert, to be TerreStar's founding Chairman; Mr. McCormick and I were also nominated to be founding Directors of TerreStar.

8. The Minutes of MSVGP indicate that TerreStar Networks Inc., (TerreStar) was incorporated as a wholly owned subsidiary of MSVLP on February 20, 2002. Messrs. Boisvert, McCormick and myself were confirmed as Directors.

9. Beginning in approximately March 2002, TMI and TerreStar commenced discussions with Loral/Space Systems, Inc. (Loral) and other potential manufacturers regarding the construction of a 2 GHz MSS system that would satisfy the terms and conditions of the LOI authorization and the expected grant of an approval-in-principle from Industry Canada. By approximately June 1, 2002, Loral had provided a draft manufacturing contract to TMI and TerreStar for review. Based upon this draft and further discussions, Mr. Boisvert and I executed a contract with TerreStar, on behalf of TMI, for the procurement of a 2 GHz MSS satellite from Loral which would meet the terms of the FCC and Canadian authorizations. On or about

July 12, 2002 the Boards of MSVGP and TerreStar also authorized TerreStar to enter into contracts with TMI and Loral to procure the requisite 2 GHz MSS system on TMI's behalf.

10. As Directors of TerreStar, Messrs. Boisvert, McCormick and I receive regular briefings from TerreStar's CEO, Mr. Wharton B. Rivers, Jr., regarding the activities and progress of Loral pursuant to the satellite manufacturing contract.



Ted H. Ignacy
Vice President, Finance
TMI Communications, Inc.

Sworn to me this 5th day of February, 2003.



Notary Public

CERTIFICATE OF SERVICE

I, Ana Maria Ablaza, hereby certify that a copy of the foregoing "Opposition to Petition to Deny" has been served this 6th day of February 2003 by first class United States mail, postage prepaid, on the following:

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