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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

Re: *TMI Communications and Company Limited Partnership*
File Nos. 189-SAT-LOI-97; SAT-ASG-2002 1211-00238

Dear Ms. Dortch:

On behalf of AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless ("Carriers"), this letter responds to an oral request made by TMI Communications and Company Limited Partnership ("TMI"), TerreStar Networks, Inc. ("TerreStar") and their counsel, Gregory C. Staple of Vinson & Elkins, L.L.P, to Commission staff during a February 14, 2003 meeting. Specifically, TMI and TerreStar request that the Commission act on its own motion to review the record and stay the effectiveness of an International Bureau ("Bureau") decision finding that TMI's 2 GHz MSS authorization was null and void and declaring that the TMI-TerreStar assignment application was moot as a result.[1] As detailed below, the Carriers oppose the TMI/TerreStar request. Further, the undersigned are compelled to advise the Commission that there is "substantial reason to believe" that TMI and TerreStar may have engaged in presentations prior to the above-referenced meeting that violated the restricted proceeding *ex parte* rules, which may affect Commission consideration of this matter. 47 C.F.R. § 1.1214.

A. Opposition to Oral Request to Review the Record and Stay the *TMI Order*

In a February 14, 2003 meeting attended by counsel for the Carriers,[2] Mr. Staple made an oral request to Bryan Tramont, Senior Legal Advisor to Chairman Michael K. Powell, asking the Commission to act on its own motion to review the record and stay the effectiveness of the *TMI Order* for 60-90 days pursuant to Sections 1.117 and 1.102(b)(3) of the Commission's rules. The

[1] *TMI Communications and Company, LP,* File Nos. 189-SAT-LOI-97 *et al.*, DA 03-385 (rel. Feb. 10, 2003) ("*TMI Order*").
[2] Anna Gomez and Karl Kensinger of the International Bureau also attended the meeting, as well as Wharton ("Zie") Rivers, Jr., President & CEO of TerreStar.

Carriers hereby oppose this oral request. The Carriers observe that TMI and TerreStar have not attempted to make a formal showing that this case satisfies the Commission's high standards for issuance of a stay pursuant to *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Jobbers*), as revised by *Washington Metropolitan Area Transit System v. Holiday Tours*, 559 F.2d 841 (D.C. Cir. 1977).[3] The position of TMI and TerreStar on the merits, moreover, is inconsistent with Commission precedent, ill-conceived and, as discussed below, may be tainted as the result of presentations that violated the restricted proceeding *ex parte* rules.

The Commission has long placed critical importance on milestone compliance in the 2 GHz MSS proceeding. In deciding the service rules, the Commission concluded that it would "*impose and strictly enforce milestone requirements*" instead of financial qualifications.[4] The FCC emphasized that strict milestone enforcement would be "especially important" in lieu of "financial qualifications as an entry criterion,"[5] and specifically anticipated that spectrum would be "returned to the Commission as a result of missed milestones."[6] In this case, the Bureau found that TMI failed to satisfy the initial 2 GHz MSS milestone – executing a non-contingent satellite manufacturing contract by July 17, 2002 – and declared that TMI's 2 GHz MSS authorization was null and void.

The TMI/TerreStar request should be seen for what it is: a last-ditch effort to revive TMI's legal right to its 2 GHz authorization, a circumstance that could easily have been avoided had TMI abided by the terms of its authorization and entered into a non-contingent satellite manufacturing contract by July 17, 2002. Instead, TerreStar – a separate entity over which TMI lacks control – entered into a satellite manufacturing contract with Space Systems/Loral Inc. ("Loral"). As the Carriers stated previously, the contract between TerreStar and Loral "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."[7] Rather, 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,

[3] *See Flexibility for Delivery of Communications by Mobile Satellite Service Providers in the 2 GHz Band, the L-Ban, and the 1.6/2.4 GHz Bands,* FCC 03-315, para. 258 (rel. Feb. 10, 2003).
[4] *Service Rules for the Mobile Satellite Service in the 2 GHz Band,* 15 F.C.C.R. 16127, 16150 (2000) ("*2 GHz MSS Order*") (emphasis added).
[5] *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band,* IB Docket No. 99-81, *Notice of Proposed Rulemaking,* 14 F.C.C.R. 4843, 4881 (1999).
[6] *2 GHz MSS Order*, 15 F.C.C.R. at 16150.
[7] Petition to Deny, TMI Communications and Company, Limited Partnership, File No. SAT-ASG-20021211-00238 (filed Jan. 27, 2003) ("Petition to Deny"), appended hereto as Attachment 1.

customers and owners (*including TMI*) of a Party, or to create any obligations of a Party to any such third parties.[8]

During the February 14 meeting, Mr. Staple acknowledged the plain language of the authorization obligated TMI to enter into the non-contingent manufacturing contract. Nevertheless, he contended that there is no case law *prohibiting* the contractual arrangements between TMI and TerraStar and TerraStar and the manufacturer, and as a result TMI had no notice that privity was required. Mr. Staple asserted that the Commission, therefore, should not second guess intra-corporate arrangements and should allow the TMI-TerreStar-Loral dealings to satisfy the milestone.

This argument is without merit. First, despite Mr. Staple's claim that the Commission failed to provide notice that a contract executed by a separate entity over which TMI lacks control would not satisfy the milestone, he acknowledges that the plain language of the authorization required *TMI,* the licensee, to enter into the contract.[9] In light of the Commission's milestone precedent and the strict enforcement policy applied to the 2 GHz MSS regime, licensees cannot presume that arrangements outside the plain language of the condition are acceptable simply because the Commission has not expressly stated otherwise. Moreover, there is relevant precedent – in a milestone case addressing a similar situation concerning the absence of a contract because of a pending assignment application, the Commission indicated that the licensee could have entered into a contract with the manufacturer and provided for assignment of that contract in the event that the satellite license was subsequently assigned.[10] Given the lack of privity between TMI and Loral, TMI had no reasonable basis to believe that it had entered into a non-contingent construction contract.

Further, TMI and TerreStar chose not to pursue a declaratory ruling or other determination in advance of the July 17 deadline even though the authorization was at stake, ignoring advice the Commission had provided in prior milestone case law.[11] TMI and TerreStar

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[8] 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) (emphasis added).
[9] *See TMI Communications and Company, L.P.,* 16 F.C.C.R. 13808, 13812 (IB 2001) ("TMI must observe the following milestone requirements . . . [including] Enter Non-contingent Satellite Manufacturing Contract 12 months after authorization," or July 17, 2002) (*TMI Authorization Order*).
[10] *See Columbia Communications Corporation,* 15 F.C.C.R. 16496, 16500 (IB 2000); *see also Motorola, Inc. and Teledesic, Inc.,* 17 F.C.C.R. 16543, 16550 (IB 2002) ("Motorola 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.").
[11] *See Morning Star Satellite Company, L.L.C.,* 16 F.C.C.R. 11550, 11554 (2001) ("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."); *see also Motorola, Inc. and Teledesic, Inc.,* 17 F.C.C.R. at 16550 ("Not even having taken the basic step of apprising us of the

cannot retroactively cure the privity problem. Efforts to assign the authorization *after* the July 17 deadline cannot satisfy the milestone – the TMI authorization expressly provided that failure to comply with the condition on or before that date would result in the authorization becoming "NULL and VOID with no further action required on the Commission's part."[12]

As the Carriers have previously stated, "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."[13]

Milestone enforcement policy, Commission precedent, and sound public policy dictate that the Commission refrain from staying or overturning the *TMI Order.*

B. Notification of Potential *Ex Parte* Violations

Pursuant to Section 1.1214, the undersigned are compelled to advise the Commission of their "substantial reason to believe" that violations of the restricted proceeding *ex parte* rules have occurred which may taint any Commission consideration of this matter.[14]

On February 14, Mr. Staple invited the undersigned to a meeting later that day with Mr. Tramont. At the outset of the meeting, Mr. Staple asserted that discussions concerning the *TMI Order* and possible responses by Commission staff or counsel were not restricted. Mr. Tramont raised questions with regard to this claim. It was then agreed by all that for purposes of the February 14 meeting there were no *ex parte* issues because all interested parties had been advised of the meeting beforehand (albeit with minimal notice) and were present. Counsel for the Carriers then observed, however, that the Carriers understood that TMI and TerreStar, along with counsel, had already met with other Commission staff following release of the *TMI Order*. The Carriers had not been informed of these meetings beforehand or invited to participate in them.

On February 19, Mr. Staple sent by mail a letter to counsel for the Carriers that acknowledged that previous meetings, in fact, had taken place without notice to the Carriers and

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alleged difficulty prior to expiration of the time allowed for compliance, the Applicants must accept the consequences of their failure to satisfy the milestone requirement within that time-period.").

[12] *TMI Authorization Order,* 16 F.C.C.R. at 13816 (emphasis in original).

[13] Petition to Deny at 9.

[14] 47 C.F.R. § 1.1214; *see Press Broadcasting Company, Inc. v. FCC,* 59 F.3d 1365, 1369 (D.C. Cir. 1995) (noting that where unlawful *ex parte* contact with decisionmaking personnel occurred and the agency suddenly reverses course, a court may infer the proceeding was irrevocably tainted).

an opportunity to participate.[15] The letter indicated that on February 13, Zie Rivers, President & CEO of TerreStar, and Mr. Staple met with Sam Feder, Legal Advisor to Commissioner Kevin J. Martin, and Paul Margie, Legal Advisor to Commissioner Michael J. Copps. The letter claimed that the discussions were exempt from the *ex parte* rules pursuant to Section 1.1204(a)(10) of the Commission's rules.

The *TMI Order* dealt with a restricted proceeding as defined in Section 1.1208. The order addressed the TMI-TerreStar application for assignment of Title III authority, which was a restricted proceeding. Matters dealing with Title III authorizations are generally treated as restricted. *See* 47 C.F.R. § 1.1208. Further, the Bureau did not change the status of the proceeding from restricted to permit-but-disclose as it did with other assignment proceedings involving 2 GHz MSS licenses.[16]

Similarly, there is no doubt that the Carriers are parties to the proceedings addressed by the *TMI Order*. On January 27, 2003, the Carriers filed a petition to deny the TMI-TerreStar assignment application and served it on TMI and TerreStar. Further, the Carriers raised questions regarding TMI's milestone compliance in two earlier filings made on August 15, 2002 and December 11, 2002 and served on counsel to TMI and TerreStar.[17] Thus, the Carriers are parties entitled to notice and an opportunity to participate in meetings among TMI, TerreStar and the Commission dealing with the merits of the issues addressed in the *TMI Order*. 47 C.F.R. §§ 1.1202(d), 1.1202(b), 1.1208. The restricted nature of the proceeding, moreover, extends "until the proceeding is no longer subject to administrative reconsideration or review or judicial review." 47 C.F.R. § 1.1208.

TMI and TerreStar did not alert the Carriers or their counsel prior to the February 13, 2003 meetings. TMI and TerreStar claim that the previous meetings were exempt from the *ex parte* rules pursuant to Section 1.1204(a)(10) of the Commission's rules. *See TMI/TerreStar Letter* at 1. The Rule states in relevant part that presentations are exempt from the *ex parte* prohibitions if "[t]he presentation is requested by (or made with the advance approval of) the Commission or staff . . . ." 47 C.F.R. § 1.1204(a)(10). TMI and TerreStar acknowledge that the companies "requested the meetings." *TMI/TerreStar Letter* at 1. Given Mr. Staple's incorrect assertion at the outset of the February 14 meeting that the matters were no longer restricted, it is unclear whether prior to the February 13 meetings Commission staff were adequately informed –

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[15] *See* Letter from Gregory C. Staple, counsel to TMI and TerreStar, to Kathryn A. Zachem and Craig E. Gilmore, counsel to the Carriers (Feb. 19, 2003) ("*TMI/TerreStar Letter*"), appended hereto as Attachment 2.

[16] *Cf.* Public Notice, Rep. No. SAT-00125 (rel. Oct. 30, 2002) (stating that the Chief, Policy Branch, Satellite Division, International Bureau, granted the request to modify the *ex parte* status of the ICO-MCHI and ICO-Constellation proceedings by date-stamp on October 23, 2002).

[17] *Cf. Rainbow Broadcasting Company*, 9 F.C.C.R. 2839, 2843 (1994) (where two proceedings were inextricably linked and one of the proceedings was restricted for *ex parte* purposes, the restricted proceeding requirements applied to both matters).

and thus were able to provide "advance approval" – of meetings involving only one party in a restricted matter. In addition, while TMI and TerreStar purport that "no new information" was presented at the February 13 meetings, new information responding to the Bureau's decision was discussed during the February 14 meeting attended by counsel to the Carriers and the same handout was distributed. The undersigned are concerned that the February 13 meetings among TMI, TerreStar and the Commission also covered new ground, and therefore occurred in violation of Section 1.1208 of the Commission's *ex parte* rules.

Accordingly, the undersigned have "substantial reason to believe" that violations of the *ex parte* rules have been committed. 47 C.F.R. § 1.1214. This letter serves to advise the General Counsel as required by Section 1.1214.

The Carriers respectfully request that the Commission reject the oral request to stay the effectiveness of the *TMI Order* and review the decision on its own motion. Further, the undersigned comply herein with the duty to advise the General Counsel that unlawful *ex parte* presentations may have occurred, which may affect Commission consideration of this matter.

Sincerely,

WILKINSON BARKER KNAUER, LLP

By: Kathryn A. Zachem
Craig E. Gilmore

Attachments

cc: Bryan Tramont
Paul Margie
Sam Feder
Jennifer Manner
Barry Ohlson
Jane Mago
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CERTIFICATE OF SERVICE

I, Donna M. Crichlow, hereby certify that on this 5th day of March, 2003, copies of the foregoing letter were hand-delivered to the following:

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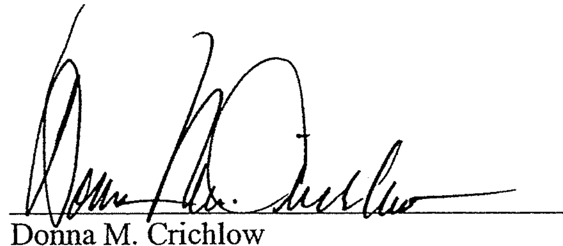

Donna M. Crichlow

STAMP AND RETURN

ATTACHMENT 1

Before the
Federal Communications Commission
Washington, DC 20554

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The International Bureau

PETITION TO DENY

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January 27, 2003

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CONCLUSION 14

Before the
Federal Communications Commission
Washington, DC 20554

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

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,

[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.

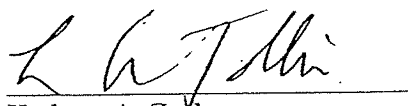
the WTO status does not, by itself, resolve the public interest analysis, including the interests reflected in the anti-trafficking rule.

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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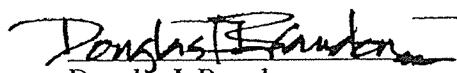

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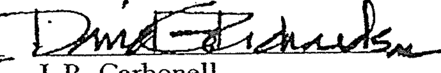

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January 27, 2003

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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Joy Marie Taylor

*Via hand delivery

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FEB 21 2003

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February 19, 2003

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Re: TMI Communications and Company Limited Partnership
File Nos. 189-SAT-L0I-97;
SAT-ASG-2002 1211-00238

Dear Ms. Zachem and Mr. Gilmore:

This is written on behalf of TMI Communications and Company Limited Partnership (TMI) and TerreStar Networks, Inc. (TerreStar) to advise your clients, AT&T Wireless Services, Inc., Cingular Wireless LLC and Verizon Wireless, that on February 13, 2003 Mr. Zie Rivers, CEO of TerreStar, and the undersigned, counsel for TMI and TerreStar, met with Mr. Sam Feder, Legal Advisor on Spectrum and International Issues, Office of Commissioner Kevin J. Martin, and Paul Margie, Spectrum and International Legal Advisor, Office of Commissioner Michael J. Copps. TMI and TerreStar requested these meetings to clarify the alternatives available to the parties following adoption of the International Bureau's Memorandum Opinion and Order, DA 03-385, released February 10, 2003 regarding the above-referenced file numbers which, *inter alia,* cancelled TMI's July 2001 authorization reserving 2 GHz spectrum for the provision of Mobile Satellite Service (MSS) in the U.S. The parties did not make a presentation on the merits of the Bureau's action. However, Messrs. Margie and Feder were provided with a copy of the document attached hereto titled: "TMI Communications: Chronology of 2 GHz MSS Letter of Intent (LOI) Authorization."

It is the view of TMI and TerreStar that any presentation made at the foregoing meeting was exempt from the Commission's ex parte rules pursuant to Section 1.1204(a)(10) of the Agency's rules and that no "new information" was presented. However, in the interest of avoiding any dispute as to whether the "TMI Chronology" constitutes "new information," a copy is enclosed herewith as required by Section 1.1204(a)(10)(ii) of the Rules.

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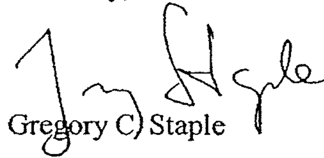
Any questions regarding this letter or the aforesaid meetings should be directed to me.

Sincerely,



Gregory C. Staple

cc: Sam Feder
Paul Margie

TMI Communications: Chronology of 2GHz MSS Letter of Intent (LOI) Authorization

1997-2000

September 26, 1997 -- TMI files initial application for reservation of 2 GHz Mobile Satellite Service (MSS) spectrum to provide U.S. service

November 3, 2000 -- TMI files amendment to application to conform to 2 GHz MSS service rules adopted August 2000 which, *inter alia*, dispensed with any financial qualifications for applicants

January 12, 2001 – TMI Agreement with Motient to combine existing U.S. and Canadian L-Band MSS assets and transfer related TMI 2 GHz Canadian and U.S. applications to JV or affiliate(s) of JV (*e.g.*, TerreStar Networks, Inc.)

July 17, 2001 -- Bureau Order granting LOI Authorization to TMI with following milestones:

July 17, 2002 -- Enter non-contingent satellite construction contract
July 17, 2003 -- Complete Critical Design Review
July 17, 2004 -- Begin Physical Construction of All Satellites
July 17, 2006 -- Complete Construction Of One Satellite and Place in Orbit
July 17, 2007 -- Certify Entire System Operational

August 9, 2001 -- FCC adopts NPRM seeking comment on flexible use of MSS spectrum (IB Dok. Nos. 01-185 et al)

November 21, 2001 -- Bureau Order and Authorization approving assignment of TMI and Motient L-band MSS authorizations to JV, now known as Motient Satellite Ventures LP (MSVPLP). TMI holds an approximately 40% interest in MSVLP and 26% in the managing general partner, MSVGP.

2002

February 20, 2002 -- TerreStar incorporated as wholly owned sub of MSVLP. The CEO of TMI's controlling entity, TMI Communications Inc. (TMI Inc.) is the founding Chairman; two other TMI Inc. officers are founding TerreStar Directors.

May 6, 2002 -- Industry Canada Grants Approval-In-Principle for TMI's 2 GHz MSS system with following milestones:

June 15, 2002 -- Submission of final design specifications
July 15, 2002 -- Signature of contract for the first of two satellites
July 17, 2006 -- Placement of the satellite into its assigned orbital position

July 8, 2002 -- Industry Canada approves final design specifications

July 12, 2002 -- TMI contracts with TerreStar to deliver 2 GHz MSS satellite meeting U.S. and Canadian authorizations and retains "control over the satellite specifications and the design, construction and delivery of the satellite" so long as it holds its U.S. and Canadian authorizations

July 14, 2002 -- TerreStar enters into non-contingent satellite construction contract with Space Systems/Loral Inc. (Loral)

July 26, 2002 -- TMI files initial milestone certification with FCC and files TMI-TerreStar and TerreStar-Loral contracts with FCC

July 30, 2002 -- TMI notifies Industry Canada regarding July 15 milestone and files TMI-TerreStar and TerreStar-Loral contracts

August 27, 2002 -- Letter from TMI's counsel to FCC (with copies to International Bureau) submitting a copy of Canadian approval-in-principle and confirming TMI's ownership interest in TerreStar, all in response to an informal request from the International Bureau's staff

October 4, 2002 -- International Bureau letter to TMI requesting additional information re TMI construction obligations and discrepancy between orbital slot authorized in LOI and that in Canadian approval-in-principle

October 15, 2002 -- TMI responds to Bureau's letter

November 14, 2002 -- TMI files application to modify LOI authorization to conform orbital slot with Canadian approval-in-principle

November 14, 2002 -- Upon request, TMI and TerreStar executives, accompanied by counsel, meet with staff of International and Wireless Bureaus, and Office of General Counsel. TMI encouraged to file application to assign LOI to TerreStar.

December 11, 2002 -- TMI files application to assign LOI to TerreStarr

December 11, 2002 -- Letter from AT&T Wireless, Cingular Wireless and Verizon Wireless (Wireless Carriers) asserting TMI has not met initial milestone condition

December 27, 2002 -- FCC Public Notice starts pleading cycle re TMI assignment application

2003

January 27, 2003 – "Petition to Deny" LOI assignment docketed by Wireless Carriers

January 29, 2003 -- FCC and International Bureau adopt "package" of decisions:

** To grant MSS operators flexibility to construct an Ancillary Terrestrial Component (by the Commission's R&O and MO&O in IB Dok. Nos. 01-185 et al, released February 10, 2003);

** To reallocate 30 MHz of 2 GHz MSS spectrum for advanced wireless services with 16 MHz reallocated from spectrum previously assigned to three licenses cancelled by the International Bureau and 14 MHz formerly held in reserve (by the Commission's 3rd R&O, 3rd NPRM and 2d M&O in ET Dok. Nos. 00-258 et al, released February 10, 2003).

** To cancel the 2 GHz MSS licenses of Constellation, MCHI (Ellipso) and Globalstar (by two Bureau decisions released January 30, 2003)

February 6, 2003 -- TMI files Opposition to Petition to Deny and hand delivers same to International Bureau staff and staff of FCC Commissioners

February 7, 2003 – Adoption of International Bureau Order (released February 10, 2003) canceling TMI's LOI authorization and dismissing assignment application as moot, notwithstanding open pleading cycle regarding said application.