

Satellite Division  
~~Mr. Donald Abelson, Chief~~  
International Bureau  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

September 26, 2003

Re: File No : 189-SAT-LOI-97  
IBFS Nos. SAT-LOI-19970926-00161  
SAT-AMD-20001103-60158

Dear Mr. Abelson:

On September 3, 2003, following a meeting with you, Bryan Tramont, Chief of Staff, and John Rogovin, General Counsel, we included as part of our ex parte submission a chart that TMI and TerreStar had used in the meeting the day before. It shows that in every case where a satellite authorization has been cancelled on milestone grounds there was no outstanding non-contingent satellite construction contract that conformed to the authorization and that, in several cases, licenses remained in good standing, even when such a contract did not exist. This submission encloses an updated chart that incorporates the most recent decision on this point.

Last week the Commission issued the *Constellation* decision (FCC 03-217), in which it affirmed the Bureau's earlier cancellation of Constellation's satellite authorization because of its failure to meet milestone requirements. The Commission held this to be the case with respect to the second and subsequent milestone requirements, though it noted, n. 12, that it had not ruled whether even the initial milestone had been met by a non-contingent construction contract. It also held (para. 18) that as to 44 of the 46 satellites in question, Constellation had provided no "evidence that it has entered into a non-contingent contract for . . . construction."

This is the critical distinction -- whether there is a non-contingent satellite construction contract that conforms to the authorization. Such a contract existed in our case; it did not exist in the *Constellation* case. Constellation argued for a waiver because it alleged that economic conditions beyond its control and rapidly changing technology had caused the delay. In our case the issue was not whether excuses for delay were sufficient, because there was *no* delay in entering the required contract. In the *Constellation* case (para. 20) the Commission cited the objective of making spectrum "available to parties that appear able and willing to use it to bring service rapidly to the public." TMI/TerreStar met that test as well. Moreover, in the words of last week's *Constellation* decision, TMI and TerreStar were "diligently proceeding with the implementation of its system."

The Bureau's February 10 Order cited seven milestone cases in connection with the cancellation of the TMI/TerreStar authorization, not all of which are covered by our chart. Accordingly, we thought it would be useful briefly to summarize all of the cited cases, thereby documenting that none of them supports the result which the Bureau reached in the TMI/TerreStar case.

*Columbia*: The Bureau's Opinion singled out *Columbia* as being "in many respects, analogous" to the situation in our case. The facts of *Columbia* are completely different from the facts in our case, however. In *Columbia* a transfer of the authorization was contemplated by the parties, as was the case here, but unlike here, the parties in *Columbia* chose to use the pendency of the deal as an excuse not to enter into a conforming, non-contingent construction contract. In contrast, there is no dispute that a conforming, non-contingent construction contract was entered into here.

*Motorola and Teledesic*: In this case, no conforming, non-contingent satellite construction contract had been entered into by the milestone deadline. The parties argued that this was infeasible because an assignment application was pending. The Bureau concluded:

"what actually thwarted Motorola from complying with the construction-commencement requirement prior to the milestone deadline was that it could not reach agreement with Teledesic regarding apportionment of cost burdens that would arise under a construction contract executed while the Assignment Application was pending. The Applicants' failure to reach agreement with each other concerning reimbursement was not a circumstance beyond their control and cannot be deemed good cause for waiving the milestone rule."

In contrast, TMI and TerreStar reached agreement, the basic structure of which had been hammered out in January 2001, and pursuant to that agreement a conforming, non-contingent construction contract had been entered into by the milestone deadline.

*PanAmSat*: This case, decided by the full Commission, also involved a transfer of a satellite authorization via a merger, and the parties tried to use the pendency of the merger and certain modification proposals that flowed from the merger as an excuse for not having entered into a conforming, non-contingent satellite construction contract. Here, of course, TMI and TerreStar not only did not use the pending transfer as an excuse but in fact entered into a construction contract by the milestone deadline.

*AMSC*: This case is particularly relevant because the Commission found that adequate grounds existed to extend AMSC's construction completion and satellite launch milestones based on AMSC's construction contract with Hughes, a satellite vendor, and TMI, a then unrelated third party, for the joint procurement of AMSC's and TMI's satellites. Although several parties protested the resulting construction delay, the Commission found that, based upon AMSC's ongoing efforts to implement its project (e.g., by seeking to finalize the system's technical parameters and complete coordination with Canada), even if the joint procurement was not a circumstance beyond AMSC's control, a milestone extension was consistent with its anti-warehousing policy and would advance the public interest by allowing new and needed mobile satellite voice services to reach the public. The Commission (para. 13) stated: "Significantly . . . in every instance where the Commission has denied an extension request construction of the satellite either had not begun or was not continuing, raising questions regarding the licensee's intention to proceed."

Far from supporting cancellation of a satellite authorization for failure to execute a conforming, non-contingent construction contract, the *AMSC* case, therefore, provides a clear

statement of the Commission's policy of preserving satellite authorizations (and granting milestone extensions, if warranted) where a valid construction contract exists and the grantee's actions show that construction is continuing. Further, in the *AMSC* case, the Commission reached that conclusion even though *AMSC* relied, in part, on a procurement agreement with an unrelated third party. Therefore, the *AMSC* case stands for a policy exactly opposite to the Bureau's February 10 Order.

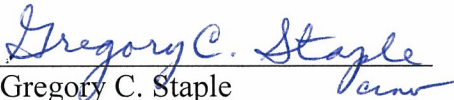
*MCI*: This 1987 Common Carrier Bureau case was cited solely to evidence the FCC's long-standing policy of imposing construction milestones on satellite licensees which TMI and TerreStar fully accept. There, the Bureau decided to extend by 11 months *MCI*'s initial construction milestone for one of its satellites even though no manufacturing contract had been executed and no timely extension request had been filed. Here, by contrast, no extension was asked for or needed, because a conforming, non-contingent satellite manufacturing contract was executed. The *MCI* case thus provides no support whatsoever for license cancellation in these circumstances.

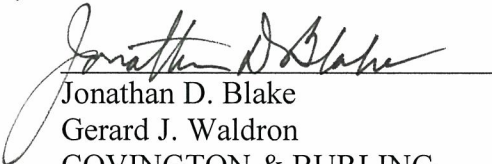
*Norris*: This was a very straightforward case in which the authorization holder failed to make a down payment necessary to qualify its construction contract as non-contingent. *Norris* did not challenge that finding of fact. Instead, it argued that regulatory delay and uncertainties justified its failure to make the payments necessary to make the contract non-contingent. But the Commission rejected this as a ground for waiver or extension. Payment to Loral under the construction contract was not in arrears here and, therefore, *Norris* is inapposite.

*Tempo*: This similarly straightforward case also does not support cancellation of TMI's authorization. It involved the review of a one-year construction contract milestone for a DBS license. Upon looking at the particulars of the contract, the Commission found that they were specific enough to satisfy the initial milestone and there were no unresolved contingencies. The Commission (para. 11) also noted: "We have acted adversely to applicants that were not prepared to commit themselves to going forward with construction of a DBS system. That is not the case here. *Tempo* has executed its contract and is willing to proceed." The same is also true in the current case where a conforming, non-contingent construction contract indisputably existed as of the milestone deadline (and continues in existence), and TMI and TerreStar are willing and determined to proceed.

We appreciate your careful review of the TMI/TerreStar case and are available as needed to answer any further questions that might arise.

Respectfully submitted,

  
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Enclosure

cc: Mr. Bryan Tramont  
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## SATELLITE MILESTONE ORDERS

### A. Revocation Cases Involving First Milestone

Grantee	First Milestone: Non-Contingent Construction Contract in Compliance with Authorization	Reasons for Revocation
TMI (GHz License, Feb. 10, 2003) DA 03-385	YES	TMI, as the authorization holder, "did not enter into a satellite manufacturing agreement," though it contracted with TerreStar to do so and it did. In addition, TMI did not "demonstrat[e] an investment and commitment."
<b>Commission Decisions</b>		
PanAmSat (Ka-band License, June 26, 2000) FCC 01-178	No	PanAmSat did not enter into a non-contingent construction contract and failed to provide adequate justification for seeking to extend its construction commencement milestone.
Morning Star Satellite Company (Ka-band License, June 26, 2000) FCC 01-179	No	Morning Star's contract (lacking any construction or payment schedules) failed to meet the Commission's minimum requirements for a non-contingent contract.
Norris Satellite Communications (Ka-band License, March 14, 1996) FCC 97-377	No	Norris failed to make a critical installment payment to make its contract non-contingent. Norris's failure to make this payment prevented satellite construction from commencing by the extended authorization deadline.
<b>Bureau Decisions</b>		
Globalstar (2 GHz License, Jan. 30, 2003) DA 03-328	No	Globalstar's manufacturing contract provided for construction pursuant to an implementation schedule at variance with the milestones in its license grant.
Motorola (Ka-band License, Sept. 4, 2002) DA 02-416	No	Motorola did not enter into a non-contingent contract and did not commence construction of its Ka-band satellite system by the first milestone deadline.
Columbia Communications Corporation (C-band license, April 5, 2000) DA 00-702	No	Despite grant of a seven month extension of the first milestone, Columbia failed to sign a manufacturing contract because of the pendency of a merger with GE Americom.

<p>Constellation Communications Holdings, Inc. (2 GHz License, Jan. 30, 2003) DA 03-285</p>	<p>No</p>	<p>The “sharing agreement” that CCHI entered into with ICO was not a satellite manufacturing contract. It was merely a contract for purchase of capacity if and when the satellites have been constructed, launched, and made ready for operation pursuant to a separate contract over which CCHI has no control.</p>
<p>Mobile Communications Holdings, Inc. (2 GHz License, Jan. 30, 2003) DA 03-285</p>	<p>No</p>	<p>The “sharing agreement” MCHI entered into with ICO was not a satellite manufacturing contract. It was merely a contract for purchase of capacity if and when the satellites have been constructed, launched, and made ready for operation pursuant to a separate contract over which MCHI has no control.</p>

**B. Reinstatement and Waiver Cases Involving First Milestone (selective)**

<p><b>Bureau Orders</b></p>		
<p><b>Grantee</b></p>	<p><b>First Milestone: Non-Contingent Construction Contract in Compliance with Authorization</b></p>	<p><b>Reasons For Action</b></p>
<p>The Boeing Company (2 GHz MSS License, June 24, 2003) DA 03-2073</p>	<p>No</p>	<p>The Bureau held that, Inter-organizational Work Authorization (IWA) between Boeing IDS, a division of licensee, and Boeing Satellite System met the first milestone. Bureau also found there was compliance although the IWA was for a GSO system rather than a NGSO system, as originally authorized.</p>
<p>EchoStar Satellite Corporation (Ka-band license, November 8, 2002) DA 02-3085</p>	<p>No</p>	<p>License reinstated, on reconsideration, based on additional evidence, as of the milestone date, as to the payload and power budget for the hybrid Ku/C/Ka band satellites. Thus, Bureau finds that construction contract did in fact cover the authorized system.</p>
<p>Volunteers In Technical Assistance (“Little LEO” License, March 7, 1997) DA 97-501</p>	<p>No</p>	<p>Licensee was permitted to rely upon construction of a third party’s satellite to meet milestone applicable to replacement satellite.</p>

<b>Bureau Orders</b>		
<b>Grantee</b>	<b>First Milestone: Non-Contingent Construction Contract in Compliance with Authorization</b>	<b>Reasons For Action</b>
NetSat 28 Company LLC (Ka-band License, May 25, 2001) DA 01-1284	No	Bureau waived construction milestone granted and reinstated license even though construction contract post-dated milestone by approximately 18 months because contract provided for timely completion of satellite and launch and licensee had expended over \$10 million on system development.
United States Satellite Broadcasting Company, Inc. (DBS License, October 22, 1992) [Mass Media Bureau] DA 92-1462	No	Construction contract milestone was held to be satisfied by licensee's having entered contract to purchase for 5 transponder payload on third party's satellite ( <i>i.e.</i> , without a separate manufacturing contract) because the licensee had met payment schedule to date under purchase contract.

**C. Bureau Orders Canceling Licenses after the First Milestone**

<b>Grantee</b>	<b>First Milestone: Non-Contingent Construction Contract in Compliance with Authorization</b>	<b>Reasons for Revocation</b>
Mobile Communications Holdings, Inc. (Big LEO License, May 31, 2001) DA 01-1315	Not Applicable	The Bureau concluded that MCHI failed to contract for all of its May 31, 2001 authorized satellites by the milestone deadline and thus violated its second milestone requirement.
Constellation Communications Holdings, Inc. (Big LEO License, Nov. 8, 2002) DA 02-3086 *** Affirmed by full Commission on Reconsideration (September 17, 2003) FCC 03-217	Not Applicable *** Not Applicable, but FCC points out that it had not concluded that a non-contingent construction contract existed that conformed with Constellation's authorization	Constellation did not certify completion of its second and third construction milestones. The Bureau found that Constellation did not provide sufficient grounds to justify an extension of those milestone deadlines. *** Full Commission confirmed the Bureau's findings and noted that as to 44 of 46 of Constellation's satellites, there was no construction contract.

E-SAT, Inc. (Little LEO License, April 23, 2003) DA 03-1113	Not Applicable	The Bureau concluded that E-SAT had not demonstrated that it faced unforeseeable circumstances beyond its control requiring an extension; nor were there unique and overriding public interest concerns.
Loral (Ka-band License, April 1, 2003) DA 03-1045	Not Applicable	Loral did not complete construction of its Orion satellites by the requisite milestone and the Bureau found no reason to extend Loral's milestone schedule.

**D. Waiver Case after the First Milestone**

<b>Grantee</b>	<b>First Milestone: Non-Contingent Construction Contract in Compliance with Authorization</b>	<b>Reasons for Revocation</b>
GE American Communications (Ka-band License, May 25, 2001) DA 01-1286	Not Applicable	Bureau waived milestones on its own motion based on facts showing licensee's "intent to proceed," noting that milestone waivers have been denied and licenses cancelled only "where construction of the satellite either had not begun or was not continuing . . ."