October 29, 2003

Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: File No: 189-SAT-LOI-97
IBFS Nos. SAT-LOI-19970926-00161
SAT-AMD-20001103-00158
SAT-MOD-20021114-00237
SAT-ASG-20021211-00238

Dear Chairman Powell and Commissioners:

As reflected in various ex parte notices, representatives of TerreStar and TMI have met with your offices about whether it is lawful, equitable, and consistent with sound public policy for the Commission to affirm the "death penalty" imposed by the International Bureau in its February 10, 2003, order canceling TMI's 2 GHz authorization despite the existence of a non-contingent satellite construction contract entered into prior to the first milestone requirement. In these discussions several questions have been raised to which this letter responds.

Sufficiency of the back-to-back contracts:

- TerreStar, as required under its contract with TMI and as the prospective transferee of the 2 GHz authorization, executed a non-contingent satellite construction contract with Loral before the milestone date. The Commission has never cancelled a satellite authorization where such a contract existed. It is therefore inconsistent with milestone policy, Commission practice and precedent, and basic equities for the Bureau to do so here.

- The reasons why TMI and TerreStar arranged for TerreStar to enter into the satellite construction contract with Loral are described in Attachment A (a narrative) and Attachment B (flow charts). As early as January 2001 it was planned that the FCC authorization would be contributed (along with other assets) to a joint venture (MSV) being formed at that time by TMI, Motient, and several new investors. The FCC approved that transfer in November 2001.

- In February 2002, a wholly owned subsidiary of the joint venture (TerreStar) was established as the intended transferee of the future FCC 2 GHz authorization; the future Canadian authorization was to be transferred to a separate entity qualified to hold it, as TerreStar might direct.

- However, because the FCC and Industry Canada authorizations were not both issued until two months before the first milestone deadline, the transfers could not take place prior to the deadline. Because that step was expected to take place shortly thereafter, it was TerreStar, the prospective transferee of the FCC authorization, that entered into the satellite construction contract with Loral. An application to transfer the FCC's 2 GHz authorization from TMI to TerreStar was duly submitted to the International Bureau but that transfer application was dismissed at the same time that the Bureau cancelled the authorization. Had the Bureau granted the transfer, there would have been complete alignment between the authorization holder and the party that had entered the construction contract.

Sufficiency of the July 2002 TMI/TerreStar contract:

- The contract prevents TMI from walking away from the project. TerreStar and, through it, Loral can require TMI to abide by its obligations, including its obligation to transfer, "at TerreStar's election," a clean U.S. authorization to TerreStar and a clean Canadian authorization to an entity designated by TerreStar that meets Canadian citizenship requirements.

- This was not a lengthy contract because it stood on the shoulders of (a) the detailed arrangements entered into between TMI and Motient in January 2001 and approved by the Commission in November 2001 calling for the pooling of such parties' respective satellite assets in a new joint venture, and (b) the course of dealing between the two parties as they implemented those arrangements. As between the two parties, there was no need for additional details in the contract.

- The fact that Loral included its customary, "no-third-party-beneficiary" provision in the Loral/TerreStar contract may affect TMI's direct recourse against Loral. But, as a matter of law, it has no effect whatsoever on TerreStar's or Loral's ability to enforce TMI's obligations under the TerreStar/TMI contract.

Propriety of third-party construction contracts:

- In the broadcast, cellular, PCS, SMRS, ITFS, MDS, and MMDS services, third-party construction contracts are commonplace and routinely accepted by the Commission as such. *See* Attachment C.

- In its August 25, 2000, MSS Report and Order, the FCC referred to its satellite milestone requirements as being "[c]onsistent with our practice in other services," and it pointed out that "the policies of deterring speculation and unjust enrichment are well served by this rule in other services." FCC 00-302 ¶¶ 106, 131. It thereby signaled that its practices and policies in other services would be applicable to satellite construction issues. And even the Bureau's own February 10, 2003, Order conceded that "the Commission has in some instances viewed a satellite manufacturing contract as sufficient to meet milestones, even though it is not entered into by the company that holds the Commission authorization." Order ¶ 10.

- The Bureau's Order then went on to hold that an *affiliate* relationship would suffice, but not a *contractual* obligation such as existed between TMI and TerreStar. Yet a contractual obligation is more binding than, for example, a parent/subsidiary or other affiliate relationship, and therefore a more reliable assurance that the satellite will be put into service (because a contract is an enforceable legal obligation, while a parent has no obligation to back the business plans of a subsidiary or affiliate). Just two weeks ago, in another context, the Commission said, "[w]e will allow licensees using the leasing option to rely on the activities of their spectrum lessees for purposes of complying with the build-out requirements." FCC 03-113 ¶ 146; *see also id.* ¶ 177. The Commission found that this practice not only comported with the Communications Act, but served the public interest.

Compliance with international law:

- The attached legal opinion of Osler, Hoskin & Harcourt LLP, commissioned and submitted by TerreStar, explains why the Bureau's Order is inconsistent with the Market Access and Domestic Regulation provisions (Articles XVI and VI) of the General Agreement on Trade in Services and is inconsistent with the additional commitments given by the United States pursuant to GATS Article XVIII to adopt the obligations of the GATS Reference Paper on Telecommunications Services. *See* Attachment D.

Proper scope of FCC review where the underlying authorization has been issued by a foreign country:

- The TMI/TerreStar satellite system uses a Canadian orbital slot, and it is therefore under the jurisdiction of Industry Canada. On August 23, 2002, Industry Canada issued a letter holding that "TMI is bound to a contractual agreement for the construction of the proposed facilities" and finding that "you [TMI] have met the requirements of condition 6.2," which is equivalent to the FCC's first milestone requirement. This letter was not available to the Bureau prior to its February 10, 2003, decision but it is now a matter of public record at the FCC.

- This Industry Canada letter should be controlling, absent the most unusual circumstances. As the FCC's MSS Report and Order stated, "the Commission has determined not to subject [ICO] or other similarly foreign-authorized systems to redundant licensing requirements in the United States." FCC 00-302 ¶ 113. Yet that is precisely what the IB's February 10, 2003, Order did.

- In fact, in *DISCO II*, the FCC stated that it did not wish to "issue a separate, and duplicative U.S. license for a non-U.S. space station" because doing so "would raise issues of national comity." Yet in rendering a determination on the first milestone requirement of TMI's LOI authorization, the Bureau's Order does just that.

- Because Industry Canada has no milestone requirements comparable to the FCC's second and third milestone requirements, the FCC is free to impose them on TMI/TerreStar, and if they are not complied with, the FCC may cancel the authorization at that time. That approach would comply with international law and U.S. trade commitments, provide fair notice to the parties, maintain the integrity of the salutary milestone requirements and fully protect against spectrum warehousing or other abuses.

* * *

For these reasons and the reasons previously submitted, the Commission should reinstate TMI's authorization by waiver or otherwise, provide clarifying advice for future cases, grant the transfer of the 2 GHz authorization to TerreStar, which incontestably is bound to a noncontingent contract with Loral, and strictly enforce all future milestone requirements, though making reasonable tolling adjustments, for the delays incurred as a result of the February 10, 2003, Order.

Respectfully submitted,

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Attachments

cc: File No. 189-SAT-LOI-97
IBFS Nos. SAT-LOI-19970926-00161, SAT-AMD-20001103-00158,
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ATTACHMENT A

EXPLANATION OF BACK-TO BACK CONSTRUCTION CONTRACTS

TMI, a Canadian company, first began to seek authorizations for the 2 GHz spectrum in Canada and in the United States in 1997. In January 2001 TMI entered into an agreement with Motient, an American company, to pool their satellite resources in a joint venture, which was called Mobile Satellite Ventures (MSV), also an American company. TMI placed assets that had cost $450 million into MSV, including its L-band satellite assets. Motient contributed its L-band satellite assets into MSV. Other new parties participated in MSV. The transfer of these licenses into MSV was approved by the FCC in November, 2001.

From the outset, the parties intended and specified in the Asset Sale Agreement that TMI's 2 GHz interests would also be contributed to the new joint venture, but at the time the joint venture was formed, those interests consisted only of 2 GHz applications pending before Industry Canada and the FCC. Industry Canada granted TMI's 2 GHz application in May 2002 - leaving insufficient time for the parties to get through the process of transferring the 2 GHz authorizations to MSV or its designee prior to the first milestone deadlines in July, two months later. By then, MSV had created a wholly-owned subsidiary, TerreStar, to take over the 2 GHz authorization in the United States. It was recognized that a separate affiliate of TerreStar would have to acquire the Canadian license because of Canadian ownership rules, but this was not problematic because TMI and MSV had undertaken similar steps in connection with their pooled L-band licenses.

Taking into account that (1) the parties had intended since January 2001 to transfer the 2 GHz licenses to the joint venture, (2) TMI had contributed assets of substantial value to MSV and had a continuing interest in MSV and TerreStar, and (3) the first Canadian and U.S. milestone requirements had to be satisfied before the transfer could take place, TMI and TerreStar took two steps in July 2002. First, they contracted with each other for TerreStar to enter into a satellite construction contract that would satisfy both the Canadian and FCC milestone requirements and for TMI, as directed by TerreStar, to transfer the 2 GHz authorizations to TerreStar (in the United States) and to TerreStar's designee (in Canada). Second, TerreStar entered into a non-contingent satellite construction contract with Loral whereby, consistent with the TMI/TerreStar contract, TMI maintained control over design decisions until the authorization was transferred to TerreStar.

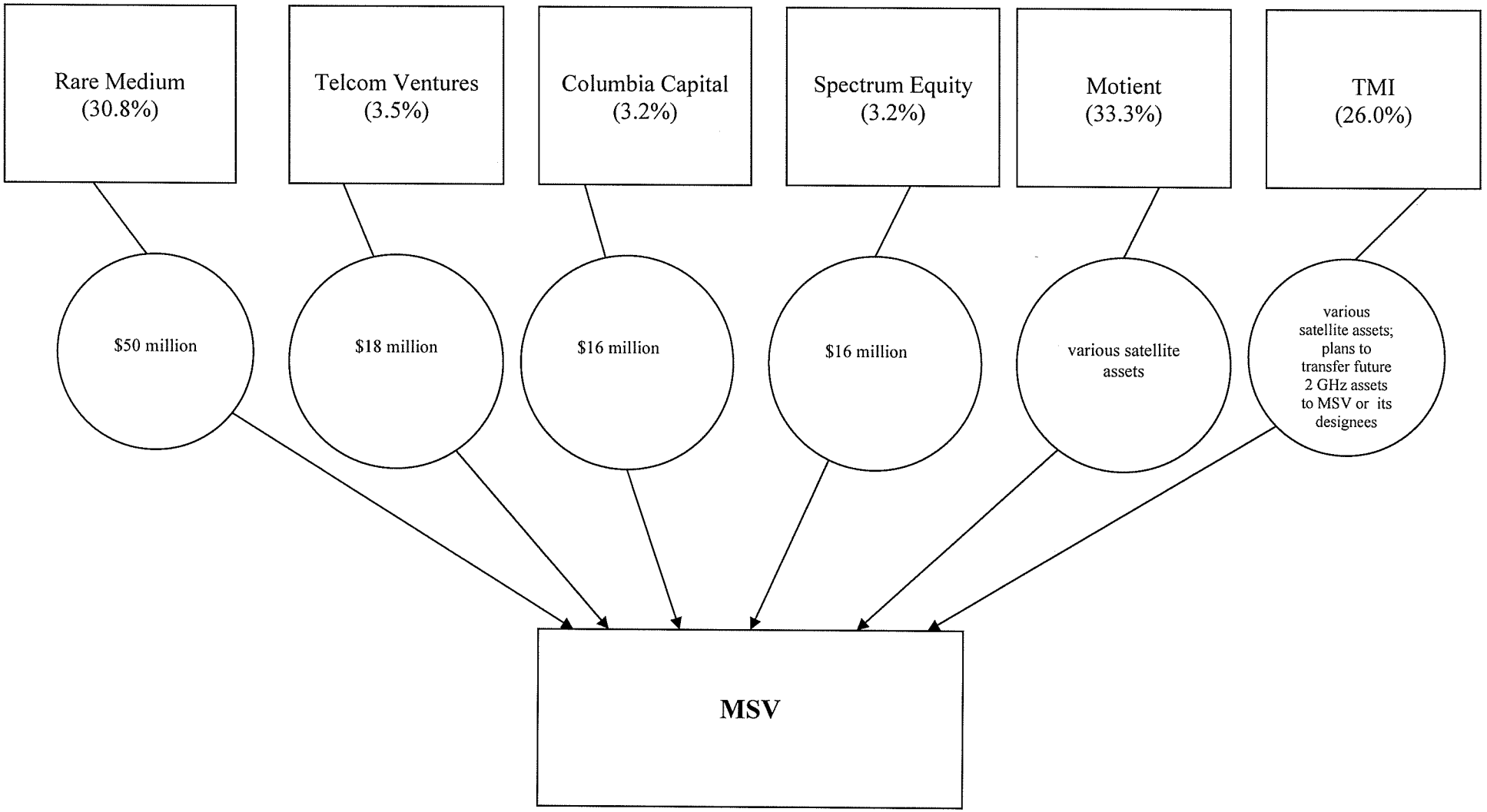
In December 2002, TerreStar and TMI triggered the transfer process in the United States by filing a transfer application at the FCC for this purpose. Before they could proceed with the parallel transfer process in Canada, the International Bureau canceled the U.S. authorization, thus putting a hold on the project.

From 1997, TMI has had a continuing commitment to, and stake in, the 2 GHz project. At no time has it been able simply to walk away from the project. Nor has it desired to do so. Given its large contributions to the project and given TMI's ongoing 26% interest in the joint venture entities, TMI continues to have a strong commitment to the project. Its desire to transfer the authorization to TerreStar, far from being an abandonment of its 2 GHz plans, is in fact the implementation of its longstanding intentions.

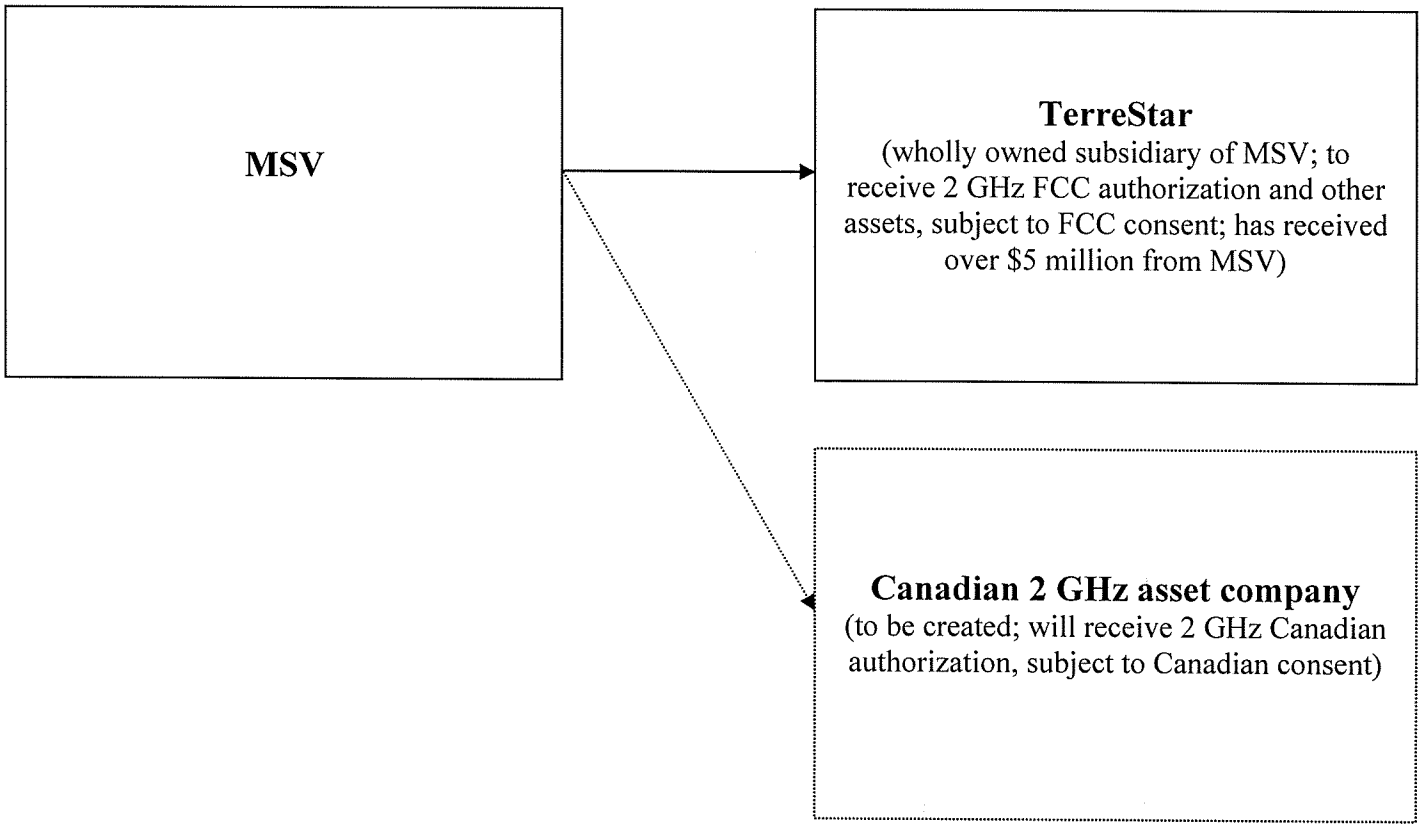
ATTACHMENT B

CONTRACTUAL FLOW CHART

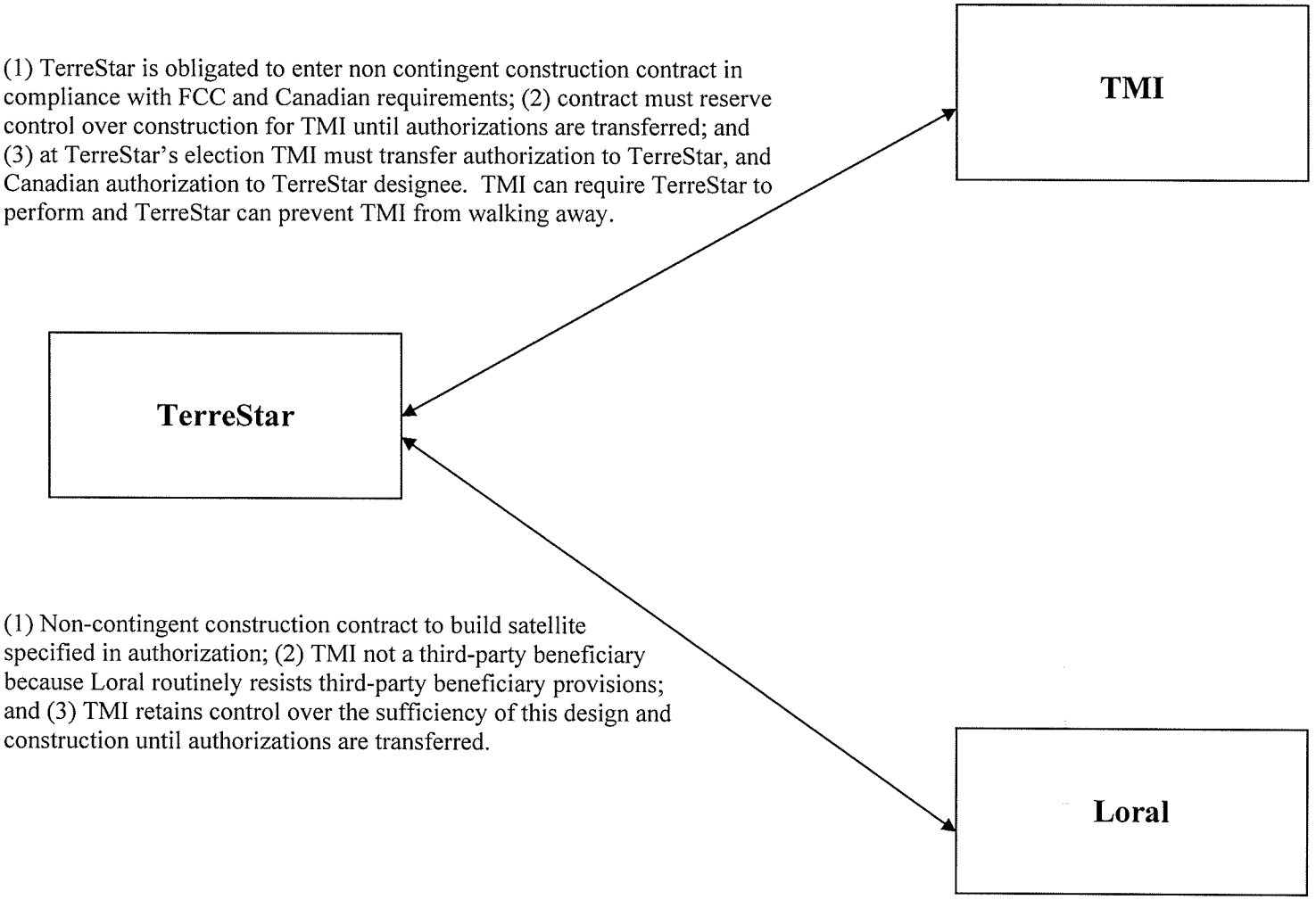
Step One: November, 2001 (creation of joint venture); ownership interests are shown as of February 2003



Step Two: February 2002 (creation of TerreStar)



Step Three: July 2002 (creation of back-to-back contracts to construct satellite)



* * *

This flow chart demonstrates that (1) through MSV, TMI has contributed to the project both initially when the joint venture was formed and subsequently in the funding of Terrestar; (2) Loral is contractually obligated to construct satellite; and (3) TMI cannot walk away from the project (because under its contract with TerreStar, it is obligated to preserve the 2 GHz authorization and other 2 GHz assets and to transfer them to TerreStar, in the case of the FCC authorization, and to a TerreStar designee, in the case of the Canadian authorization).

In all eight previous cases where the Bureau or the Commission canceled a satellite license for failure to meet the first milestone, the reason given for the cancellation was the absence of a construction contract; not the case here. In five cases where a waiver or extension was granted, there was no contract. None of the seven cases cited by the Bureau's February 10 Order involved cancellation where there was a construction contract in existence. In three of those cases the parties gave as an excuse for not entering a construction contract that they were engaged in transfer discussions, but here though they intended to transfer the authorization, the parties proceeded to enter a construction contract.

ATTACHMENT C

PREVALENCE AND PROPRIETY OF THIRD-PARTY CONSTRUCTION ARRANGEMENTS IN OTHER SERVICES REGULATED BY THE FCC

Broadcast

- Construction of broadcast stations is often undertaken by a party that is not the licensee. That is because the physical assets of the station and their licenses are often held by two separate entities. *E.g.*, *Application of UTV of San Francisco, Inc.*, 16 FCC Rcd 14975, 14976-77 (2001) (Chris-Craft acquisition by News Corp.; licenses held by FTS and station equipment held and operated by Newco).
- Under local marketing agreements third-party operators can take responsibility for constructing the station. If the operator later exercises an option to buy the licensee, the purchaser can receive an "unbuilt station" duopoly waiver. *E.g.*, *K-W TV, Inc.*, 17 FCC Rcd 775, 777 ("But for the assistance of WTNH, this station would not have been constructed and commenced broadcast service.").
- Proposed buyers often assist licensees with fulfilling their digital construction deadlines. The buyer agrees to construct the station and to lease the physical assets back to the licensee, pending FCC approval of an assignment application.
- Such arrangements were entered into to facilitate analog station construction as well. For example, with the licensee facing an analog construction deadline, a third party would agree to purchase the necessary equipment for the licensee and the licensee would lease the facilities from the third party.
- Stations in time brokerage agreements often enter agreements by which the operator agrees to fulfill the licensee's digital construction deadline.
- Broadcast licensees are permitted to enter into time brokerage agreements or local marketing agreements where a third party operates all aspects of the station, so long as the licensee retains ultimate control. *E.g.*, *WGPR, Inc.*, 10 FCC Rcd 8141 (1995); *Southwest Texas Public Broadcasting Council*, 85 FCC Rcd 713, 715 (1981).

Cellular

- In reviewing the conduct of a cellular licensee that, shortly after winning a cellular license in a 1986 lottery, contracted with another cellular carrier to construct the system and operate it for at least ten years, the Commission invalidated certain contractual controls, but it found no problem with the third party construction of the system. *Ellis Thompson*, 4 FCC Rcd 2599 (1989). In addition, the Commission later found that the licensee had not engaged in an unauthorized transfer of control. *Ellis Thompson*, 10 FCC Rcd 12554 (1995); *Ellis Thompson*, 9 FCC Rcd 7138 (1994).

PCS

- The Commission routinely grants PCS licenses with the understanding that it is commonplace for licensees to enter into management agreements with third parties to construct and operate the PCS systems in question. *Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, 15 FCC Rcd 24203, 24208-09 (2000).
- When a CMRS operator enters into a contract to construct a PCS system for the licensee, the arrangement does not give rise to an attributable interests in the license. *Implementation of Sections 3(n) and 332 of the Communications Act*, 9 FCC Rcd 7123, 7129 (1994).
- In Auction 35, PCS licensees were required to disclose certain agreements in the long-form submission. Designated entity licensees regularly disclosed technical service agreements in which a major wireless provider agreed to provide all operational, engineering, maintenance, insurance, and repair responsibilities on behalf of the licensee, *including construction of the system*. The FCC approved these applications in the regular course.

SMRS

- SMR licensees are permitted to enter into contracts for third parties to construct and manage their services. *E.g.*, *Amendment of Parts 2 and 90 of the Commission's Rules*, 10 FCC Rcd 6884 (1995).

ITFS, MDS and MMDS

- ITFS licensees are permitted by the Commission to lease excess capacity to MDS and MMDS providers. In these leases, ITFS licensees arrange for MDS and MMDS operators to construct their authorized facilities. *Amendment of Parts 21 and 74 to Enable Multipoint Distribution Service and Instructional Television Fixed Service Licensees to Engage in Fixed Two-Way Transmissions*, 13 FCC Rcd 19112, 19157 (1998).

ATTACHMENT D

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October 29, 2003

Mr. Wharton B. Rivers, Jr.
Chief Executive Officer
TerreStar Networks Inc.
7925 Jones Branch Drive
McLean VA 22102

Dear Mr. Rivers:

Re: Legal Opinion on the International Bureau's *Memorandum Opinion and Order* of February 7, 2003 revoking the 2 GHz Authorization of TMI Communications and Company, Limited Partnership

You have asked us, on behalf of TerreStar Networks, Inc. ("TerreStar"), to consider the consistency of a February 7, 2003 order (the "IB Order") of the International Bureau (IB) of the Federal Communications Commission (FCC) with the commitments made by the United States under the General Agreement on Trade in Services (GATS).

I. EXECUTIVE SUMMARY

The IB Order revoked a July 2001 Letter of Intent (LOI) authorization held by TMI Communications and Company, Limited Partnership (TMI) for U.S. spectrum needed to establish a new Mobile Satellite System (MSS) in the 2 GHz band because TMI allegedly had failed to meet the first construction milestone specified in the LOI authorization.

By its terms, the authorization required that TMI "must observe" the following milestone requirements: "Enter Non-Contingent Satellite Manufacturing Contract" within 12 months after the authorization was granted. According to the IB Order, the foregoing milestone provision required TMI to enter directly into a non-contingent satellite manufacturing contract with a satellite manufacturer. In the IB's view, TMI could not satisfy the milestone by contractually binding its affiliate, TerreStar, to timely enter a non-contingent satellite manufacturing contract (which TerreStar did with Loral Space Systems, Inc. (Loral)), and then binding TerreStar to deliver the authorized satellite to TMI.[1]

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[1] TerreStar is a wholly owned subsidiary of Mobile Satellite Ventures, LP (MSVLP), in which TMI has an approximately 26% interest. MSV was formed in 2001 pursuant to a joint venture agreement between TMI and Motient Corporation, then the principal provider of MSS services in the U.S., to combine the parties' MSS interests. Pursuant to the underlying joint venture agreements, TMI is obligated to transfer the U.S. and Canadian authorizations for its 2 GHz MSS service to TerreStar and/or such other U.S. and Canadian MSV entities as MSV shall designate.

The aforementioned satellite manufacturing contracts between TMI and TerreStar, on the one hand, and TerreStar and Loral on the other, were considered sufficient by the Canadian regulatory authority (Industry Canada) to meet an almost identical construction milestone contained in a satellite authorization issued by Industry Canada to TMI. The Canadian construction milestone was imposed on TMI by Industry Canada because it is the Canadian Government, not the U.S., which has jurisdiction over the satellite orbital slot into which TMI's satellite will actually be launched.

The effects of the IB Order are that (1) it restricts market access by certain suppliers of MSS in the U.S. market; and (2) it imposes conditions on 2 GHz MSS suppliers which are not transparent and not based on the competence or ability to supply the service in question and, in fact, are more burdensome than is necessary to ensure the quality of the service.

This opinion considers whether the IB Order is consistent with the obligations of the United States under the GATS. For the reasons more fully set out below, we conclude that they do not.

A. U.S. Obligations Under the GATS

The GATS is a multilateral agreement concluded under the auspices of the Uruguay Round of Multilateral Trade Negotiations and administered by the WTO Secretariat. As a signatory to the WTO Agreement, the U.S. has committed to wide-ranging obligations respecting market access, national treatment and domestic regulation to the benefit of foreign service suppliers which its regulatory bodies, including the FCC, are bound to observe.

B. Measures Affecting Trade in Services

The FCC regulates telecommunications in the United States through the exercise of statutory powers pursuant to federal legislation. Therefore, the decisions of the FCC are measures subject to review before the WTO. In this regard, the U.S. has undertaken commitments in the market for MSS. Foreign-owned MSS suppliers wishing to supply services to the U.S. market are entitled to assert the rights to which the U.S. agreed to be bound under the GATS.

C. Market Access

The regulatory regime established by the IB Order governing the licensing of MSS service suppliers is inconsistent with the obligations of the United States under the GATS. The IB Order – by requiring the applicant itself to have entered into a contract with a satellite manufacturer - restricts the "specific type of legal entity or joint venture" (GATS, Article XVI:2.(e)) through which a service provider can provide MSS service. The specific legal relationship which TMI was required to enter into in order to satisfy the IB's authorization condition had the effect of permitting only TMI itself, as an individual corporate legal entity, to meet the condition. No alternate legal configuration, such as TMI's TerreStar joint venture with Motient, was permitted.

The IB Order therefore constitutes a limitation on market access, contrary to the obligations of the U.S. under Article XVI of the GATS and contrary to the commitments contained in the U.S. Schedule of Specific Commitments to the GATS. In addition, under the market access provisions of the GATS, it is no defence that the rule or measure in question applies equally to both domestic and non-domestic service providers, as might be the case with the national treatment provisions of the GATS (Article XVII). If a measure denies market access to a non-domestic provider, this will constitute a violation of the market access provisions, even if that measure also applies to domestic providers.

D. Domestic Regulation, Transparency and the GATS Reference Paper

The limitation which the IB Order placed on TMI's corporate arrangements with TerreStar is not based on objective criteria such as TMI's "competence and ability" to supply the service (GATS, Article VI:4(a)). In addition, the IB's restriction was not based on "transparent criteria" insofar as the IB had previously permitted third parties to satisfy a satellite manufacturing milestone on behalf of a licensee (GATS, Article VI:4(a) and the GATS Reference Paper). Thus, the IB Order had the effect of nullifying and impairing the ability of TMI to enter the U.S. market by relying in part on its TerreStar joint venture with Motient. The IB Order thus amounts to a reversal of the IB's pre-existing position without public notice or an opportunity for public comment. Further, the IB's restrictive interpretation of its construction milestone policy is more burdensome than necessary on TMI without achieving any difference in the quality of the service (GATS, Article VI:4(b)). In effect, the conditions and restrictions imposed by the IB create licensing requirements that are inconsistent with the obligations owed by the U.S. under Article VI of the GATS as well as its additional commitments under Article XVIII of the GATS to adopt the GATS Reference Paper.

E. Extraterritoriality

Although this opinion is restricted to an examination of the IB Order in relation to the commitments made by the United States under the GATS, we note that TMI intends to launch its 2 GHz satellite system into an orbital slot that has been assigned to Canada by the International Telecommunications Union (ITU).

While it is true that the IB has regulatory jurisdiction over the 2 GHz spectrum that will be used by TMI to provide MSS in the United States, it is doubtful that this jurisdiction extends to the Canadian satellite orbital slot into which TMI intends to launch its satellite. This is not to say that the IB does not have the jurisdiction to establish technical conditions of service relating to the 2 GHz spectrum that was granted to TMI (*e.g.*, transmit/receive frequencies and spectrum interference levels). It is of significantly greater doubt, however, whether the IB has the jurisdiction to dictate the legal arrangements that should be used by a foreign service provider in order to launch a satellite into an orbital position that has been assigned to another country.

OSLER,
HOSKIN &
HARCOURT

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II. FACTS

The facts that have been considered in this opinion are drawn from the following documents: (1) the FCC's July 17, 2001 LOI authorization; (2) TMI's December 11, 2002 application to transfer its LOI authorization to TerreStar; (3) the IB Order of February 7, 2003; (4) and the TMI/TerreStar Application for Review, dated March 12, 2003. For ease of reference, these facts are set out below.

A. Background

1. FCC/IB Application by TMI for 2 GHz license

TMI is one of the most experienced providers of mobile satellite services in North America, having launched its first L-band MSS system in 1996 and obtained authorization to serve the U.S. in 1999. TMI's commitment to provide next-generation MSS to U.S. consumers dates from 1997 when it filed an application with the FCC for the reservation of spectrum in the 2 GHz band. As a Canadian business, TMI advised the FCC that its proposed 2 GHz MSS system, CANSAT-M3, would be licensed by Industry Canada and use a Canadian orbital position.

2. Corporate Structure of TMI/TerreStar

In 2000, TMI decided to form a joint venture to combine TMI's various MSS assets with those of Motient Corporation, the principal provider of L-band MSS services in the United States. In connection with the new venture, then organized as Mobile Satellite Ventures LLC and now Mobile Satellite Ventures, LP ("MSV"), TMI and Mobile Satellite Ventures LLC entered into an Asset Sale Agreement on January 8, 2001. The Agreement provided, *inter alia*, for the transfer to MSV (or, at MSV's election, to an MSV subsidiary) of "TMI's rights in the Application made by it to the FCC relating to the 2 GHz frequency band." TMI and Motient Services Inc. (a Motient Corp. subsidiary) filed applications with the FCC to assign their L-band authorizations to the new joint venture and the Commission approved the parties' applications in November 2001.

Consistent with the prior MSV related Asset Sale Agreement, in February 2002, TMI and MSV incorporated TerreStar as a wholly owned subsidiary of MSV to develop a 2 GHz MSS business. TMI then held an approximate 40% ownership interest in MSV and an approximate 26% interest in MSV's general partner, which controls the joint venture. Hence, pursuant to the FCC's rules, TerreStar is legally considered to be an "affiliate" of TMI.[2] The president and CEO of TMI's

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[2] 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.C. § 63.09(e). Note 1 to this rule provides: "'Capital stock' includes all forms of equity ownership, including partnership interests."

managing partner, TMI Communications Inc., agreed to serve as the founding chairman and a director of TerreStar. Another officer and the company's counsel also became members of TerreStar's initial Board. Thus, from the outset, in fact as well as in law, TerreStar functioned as a close affiliate of TMI.

3. TMI Regulation by and Authorization by Industry Canada

On May 6, 2002, Industry Canada notified TMI that it had approved TMI's 2 GHz MSS license application in principle (the precondition to issuance of a license), subject to TMI's acceptance of certain conditions and specified implementation milestones. The first milestone required the submission of final design specifications by June 15, 2002 (later extended to June 30, 2002). "Milestone 2" required "signature of contract for the construction of the first of two satellites," by July 15, 2002, and further stated 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."

Pursuant to the first milestone requirement in the Canadian satellite authorization, TMI submitted its final design specifications to Industry Canada on June 27, 2002. The specifications were approved by Industry Canada on July 8, 2002.

4. Imposition of Conditions on Licence

On July 17, 2001, the International Bureau issued TMI's LOI Authorization, which reserves 2 GHz spectrum in the U.S. for use by TMI in providing MSS - a precondition for competitive market access. Citing the Commission's 2 GHz MSS service rules, and regardless of the fact that TMI's 2 GHz MSS system was being licensed in Canada and would be constructed and launched into a Canadian orbital position, the LOI grant stated that "TMI must observe the following milestone requirements: Enter Non-Contingent Satellite Manufacturing Contract . . ." 12 months after grant of the authorization.

B. Fulfilment of IB Licence Conditions

1. Agreement between TMI and TerreStar

TMI 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 that satisfied the terms and conditions in both the Canadian and U.S. satellite authorizations, including the milestone requirements. The Agreement between TMI and TerreStar also provided for "delivery to TMI" of the satellite and stated that "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] . . ."[3]

2. Agreement between TerreStar and Loral

On July 14, 2002, TerreStar executed a non-contingent satellite construction contract with Space Systems/Loral Inc. ("Loral") for the satellite system covered by TMI's two sets of regulatory authorizations.

The interrelated contracts between TMI, TerreStar and Loral were expressly approved by TMI Communications Inc.'s principal officers, once on behalf of TMI, and again in their capacity as directors of TerreStar. 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.

On July 25, 2002, TMI filed the TerreStar and Loral contracts with Industry Canada in order to demonstrate that it had satisfied the second milestone of the Canadian authorization, namely a "signature of contract for the construction of the first of two satellites."[4]

By letter dated August 23, 2002, Industry Canada informed TMI that it had met all of the requirements of the second milestone in the Canadian authorization. In particular, Industry Canada stated that TMI "has demonstrated that [it] is bound to a contractual agreement for the construction of the prepared satellite." We understand that this letter, inadvertently, was not made available to the FCC until a year after it was originally issued.

On July 26, 2002, TMI filed its FCC certification regarding the initial construction milestone and provided the Commission with copies of the contracts between TerreStar and Loral, on the one hand, and TMI and TerreStar, on the other.

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[3] The preface to the letter agreement confirmed that TMI planned to transfer its FCC authorization to an entity in which TerreStar and/or TMI or affiliates will have an interest, and its Canadian authorizations to a separate entity eligible under Canadian law to hold the Canadian authorization in which TerreStar and/or TMI or affiliates will have an interest.

[4] As indicated above, the Industry Canada deadline for meeting this milestone was July 15, 2002, which was two days before the July 17, 2002 deadline established by the IB for the satisfaction of its own equivalent milestone.

C. Actions of the FCC International Bureau

1. The IB Process prior to the IB Order

On October 4, 2002, the Bureau wrote to TMI asking for further information concerning TMI's obligations to Loral or TerreStar and asked "whether there are any agreements or other arrangements by which TMI is legally obliged to pursue the construction of [the] proposed system or is in any way liable in the event the satellite system is not implemented."

TMI responded on October 15, 2002 that it had both a legal and economic interest in the performance of the satellite manufacturing contract through its substantial ownership interest in MSV and its seats on TerreStar's board of directors. TMI also said that the procurement agreements it had entered into with TerreStar and Loral must be viewed in the context of TMI's prior obligation to transfer the 2 GHz LOI to MSV (or an affiliate, which TerreStar is) and that the satellite procurement contracts questioned by the IB had been submitted to Industry Canada in satisfaction of an identical milestone requirement. TMI said that, to its knowledge, no FCC rule or policy precluded a party holding a satellite authorization from contracting with an affiliate for the timely delivery of a satellite pursuant to a milestone requirement.

On November 14, 2002, at the request of the Bureau, TMI and TerreStar, accompanied by counsel, met with the Bureau's staff to discuss TMI's October 15, 2002 response. During the meeting, TMI reiterated that it had relied upon TerreStar to procure its satellite given the pre-existing contractual obligation of TMI to transfer its FCC authorization to an MSV affiliate and offered to provide relevant parts of the joint venture agreement that documented TMI's obligation. The TMI also explained its plans to transfer its existing LOI authorization to TerreStar, subject to various regulatory considerations. The Bureau's staff said they had been unaware of the terms of the TerreStar joint venture between TMI and Motient Corp. and wished to review relevant documents. The staff also encouraged TMI to file an application to assign its LOI authorization to TerreStar so that the assignment application and any other new information could be taken into account in the IB's ongoing review of TMI's milestone certification. TMI and TerreStar subsequently filed their LOI assignment application on December 11, 2002.

2. The IB Order

On February 7, 2003, notwithstanding that the pleadings in the assignment application had not closed, the Bureau adopted an order declaring TMI's LOI authorization null and void; TMI's assignment application to TerreStar was simultaneously dismissed as moot.

The IB Order provided four reasons for cancelling TMI's authorization: First, the Bureau concluded that TMI "failed to comply with the plain terms of the authorization" which, according to the Bureau, requires TMI itself to enter into a manufacturing contract. Second, the Bureau found that TMI's arrangements with TerreStar and Loral did not "satisfy the intent of our

milestone requirement by demonstrating an investment and commitment to completion of the satellite system." This is so, the Bureau claimed, because unlike other milestone cases (though no such cases were cited) which "typically involve an affiliated company wholly owned or controlled by the licensee, in TMI's case, there was an insufficient "commonality of interest" between TMI and TerreStar to make the obligations of the affiliated company under the manufacturing contract obligations of the licensee. Third, the IB Order stated that TMI's contract with TerreStar for the delivery of the MSS system "is subject to Canadian regulatory approval, and the current ownership of TerreStar would not appear to meet Canadian ownership requirements." Thus, the Bureau concluded that "the TMI/TerreStar agreement provides no basis whatsoever for viewing the TerreStar/Loral contract as sufficient to meet TMI's milestone conditions."[5] Finally, the IB Order held that, for purposes of milestone compliance, the fact that TMI had an enforceable right to the benefits of a *bona fide* satellite contract is not as important as the "question of whether TMI has undertaken concrete obligations that demonstrate a commitment to and investment in the project." TMI had not incurred such obligations, according to the Bureau, by, for example, guaranteeing TerreStar's payments to Loral or accepting other obligations "that would allow us to conclude that TMI effectively stands in the shoes of TerreStar in connection with obligations under the satellite manufacturing agreement."

Significantly, however, the IB Order did not state that the commercial provisions of the TerreStar-Loral contract, were in any way contingent or otherwise inadequate under the FCC's milestone policy.

III. DISCUSSION

This section examines the measures applied by the U.S. in relation to MSS in the context of the obligations undertaken by the U.S. in its capacity as a member of the WTO.

The WTO provisions governing trade in telecommunications services are set out in the General Agreement on Trade in Services (GATS), the GATS Annex on Telecommunications, the GATS Annex on Negotiations on Basic Telecommunications, the Fourth Protocol to the GATS and the GATS Reference Paper.

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[5] However, in reaching this finding which, in the Bureau's view, made the TMI-TerreStar manufacturing contract contingent, we understand that the Bureau was unaware of the August 23, 2002 letter to TMI from Industry Canada stating that TMI was bound to a contractual agreement for the construction of the prepared satellite. The Industry Canada letter also specifically indicates that Canadian regulatory authorities did not view either the TMI-TerreStar or TerreStar-Loral contract as contingent because they were aware that under Canadian foreign ownership rules TMI's Canadian regulatory authorization could not be transferred to TerreStar, but that MSV would need to create a separate Canadian entity for that purpose. In that regard, Industry Canada's August 23, 2002 letter states that the Government "look[s] forward to an update on the development of the Canadian-owned and controlled entity that will operate the satellite network leading to the eventual submission of information to the Department demonstrating eligibility to hold the licenses for the network."

The GATS establishes a multilateral framework regulating trade in services through a set of principles and rules which include general obligations and disciplines (such as the most-favoured-nation obligation) that apply to all WTO Members, and virtually all services.[6] There are also Member-specific commitments on market access and national treatment as well as "additional commitments" that are given by Members in their Schedules of Specific Commitments to the GATS.

Prior to the entry into force of the GATS in 1995, trade in services fell outside the scope of multilateral trade regulation. The General Agreement on Tariffs and Trade ("GATT"), which was concluded in 1947, applies only to international trade in goods. Consequently, the GATS substantially broadened the scope of trade disciplines by bringing trade in services within the international regulatory framework. The adoption of the Fourth Protocol and its entry into force in 1998 further expanded trade disciplines in the area of basic telecommunications services.

A. Interpretation of the GATS

Because the GATS only came into force in 1995, there has been limited authoritative consideration of the substantive provisions of the Agreement by WTO panels and the Appellate Body. Consequently, the precise meaning of many of the provisions of the Agreement remains to be established by definitive precedent. In order to interpret the content and meaning of the text of the WTO agreements, including the GATS, WTO panels and the Appellate Body are directed by the rules of treaty interpretation developed under international law. In the absence of Appellate Body guidance, construction of the GATS obligations of the United States necessitates speculation on the interpretative principles which would be brought to bear by the Appellate Body. Certain general principles are well-established, however, and it is to these that we now turn.

The WTO Appellate Body has on numerous occasions recognized that the proper approach to the interpretation of treaties is expressed in the *Vienna Convention on the Law of Treaties* (the "Vienna Convention"). In particular, Articles 31 and 32 of the Vienna Convention are regarded as expressions of customary international law and should be applied in interpreting the provisions of the covered agreements and their schedules.[7]

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[6] Subject to Members' Annexes on Article II Exemptions.

[7] See for example, the Appellate Body Reports in: *United States – Gasoline*, adopted 20 May 1996, WT/DS2/AB/R, p. 17; *Japan – Taxes on Alcoholic Beverages*, adopted 1 November 1996, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, pp. 10-12; *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, adopted 16 January 1998, WT/DS50/AB/R, paras. 45-46; *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, adopted 13 February 1998, WT/DS56/AB/R, para. 47; and *European Communities – Customs Classification of Certain Computer Equipment*, adopted 22 June 1998, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R, para. 85.

Article 31 of the Vienna Convention provides:

> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

The basic principle enunciated in Article 31:1 is that the ordinary meaning of treaty words read in context, as ascertained from standard dictionaries and with due regard to the expectations and intentions of WTO members signatory to the treaty, supplies the basis for their proper interpretation. Where the meaning of the treaty is ambiguous, obscure or leads to a manifestly absurd or unreasonable result, recourse may be had to other interpretative aids such as the preparatory work of the treaty and the circumstances of its conclusion.[8]

In this regard, Article 32 of the Vienna Convention outlines the circumstances in which other interpretative aids can be used:

> Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) leaves the meaning obscure; or
>
> (b) leads to a result which is manifestly absurd or unreasonable.

The terms at issue in this opinion are not ambiguous or obscure, and should be accordingly interpreted in conformity with Article 31:1 of the Vienna Convention.

B. Scope of the GATS

Articles I and XXVIII of the GATS provide a number of definitions setting out the scope of the Agreement. Article I:1 provides that the GATS "applies to measures by Members affecting trade in services". Flowing from this definition are three threshold issues that must be addressed in order to ascertain the applicability of GATS obligations, namely whether

(1) the IB Order is a "measure";

(2) the provision of MSS is a "trade in services"; and

(3) the IB Order "affects" trade in MSS services.

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[8] *Young Loan Arbitration*, International Law Reports 59, 495 at 543-8; *Fothergill* v. *Monarch Airlines Ltd.*, International Law Reports 74, 627; *Commonwealth of Australia* v. *State of Tasmania*, International Law Reports, 68, 266.

1. The IB Order is a "Measure"

Under the GATS the term "measure" is broadly defined to capture all forms of governmental or administrative regulation. Article XXVIII(a) provides the following definition of the term "measure":

> For the purpose of this Agreement,
>
> (a) "measure" means any measure by a Member, whether in the form of a law, regulation, rule, procedure, ***decision***, administrative action, or any other form; *(emphasis added)*

In addition, Article I:3(a) defines "measures by Members" as follows:

> (a) "measures by Members" means measures taken by:
>
> (i) central, regional or local governments and authorities; and
>
> (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

The GATS has been the subject of interpretation in two separate dispute resolution proceedings at the WTO, namely, *EC-Regime for the Importation, Sale and Distribution of Bananas* ("*EC-Bananas*"), and *Canada-Automotive Certain Measures Affecting the Automotive Industry* ("*Canada-Automotive*"). In *EC – Bananas* III, the Panel noted that the broad applicability of GATS:

> "[N]o measures are excluded a *priori* from the scope of the GATS as defined by its provisions. The scope of the GATS encompasses any measure of a Member to the extent it affects the supply of a service regardless of whether such measure directly governs the supply of a service or whether it regulates other matters but nevertheless affects trade in services."[9]

In addition, the WTO jurisprudence on the term "measure" in claims relating to the GATT provides useful interpretative guidance. The term "measure" is used under various of the covered agreements to describe the range of governmental actions which are subject to WTO scrutiny. In *Japan – Measures Affecting Consumer Photographic Film and Paper* ("*Japan-Film*"), the Panel considered the meaning of the term "measure" under Article XXIII of the GATT. The Panel reviewed the ordinary meaning of the term "measure" as well as the GATT jurisprudence and determined that "measure" encompassed a variety of regulatory tools. The Panel stated:

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[9] Panel Report on *EC – Bananas III*, para. 7.285.

> The ordinary meaning of *measure* as it is used in Article XXIII:1 (b) certainly encompasses a law or regulation enacted by a government. But in our view, it is broader than that and includes other governmental actions short of legally enforceable enactments.
>
> ...
>
> Another panel, that on *Japan – Restrictions on Imports of Certain Agricultural Products*, found that the informal administrative guidance used by the Japanese Government to restrict production of certain agricultural products could be considered to be a governmental measure within the meaning of GATT Article XI:2 because it emanated from the government and was effective in the Japanese context. Specifically as regards the method used to enforce certain measures, the panel found that:
>
> > the practice of 'administrative guidance' played an important role. Considering that this practice is a traditional tool of Japanese Government policy based on consensus and peer pressure, the Panel decided to base its judgements on the *effectiveness of the measures* in spite of the initial lack of transparency.
>
> In line with this observation of the *Japan – Agricultural Products* panel, we consider that our analysis of the alleged "measures" in this case must proceed in a manner that is sensitive to the context in which these governmental actions are taken and the effect they have on private actors.[10]

The approaches taken in *EC-Bananas*, *Canada-Automotive* and *Japan-Film* indicate that the GATS is applicable to all governmental requirements affecting trade in services.

The Federal Communications Commission (FCC) is a body established by legislation. In relation to telecommunications, the FCC exercises powers conferred by federal legislation to regulate telecommunications in the U.S. The decisions of the FCC have the force of law. In our view, the decisions of the FCC are, insofar as they regulate the provision of covered telecommunications services, measures subject to the disciplines set out in the GATS. This would apply to all decisions of the FCC, including those of the IB.

2. The Provision of MSS Constitutes "Trade in Services"

Under the GATS, the term "trade in services" is denominated in terms of four possible "modes of supply" of services. These modes of supply are defined in Article I:2 of the GATS, which provides that trade in services is defined as the supply of a service:

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[10] Report of the Panel – *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, 31 March 1998, paras. 10.43, 10.46 (footnotes omitted).

> (a) from the territory of one Member into the territory of any other Member;
>
> (b) in the territory of one Member to the service consumer of any other Member;
>
> (c) by a service supplier of one Member, through commercial presence in the territory of any other Member;
>
> (d) by a service supplier of one Member, through presence of natural persons of a Member in the territory of any other Member.

(a) First Mode of Supply – Cross Border Supply of Services

Article I:2(a) relates to the *cross border supply of services*, whereby the service is delivered within the territory of one WTO Member from a service supplier located within the territory of another WTO Member.

(b) Second Mode of Supply – Consumption Abroad

Article I:2(b) covers consumption *abroad* which, according to a Note prepared by the WTO Secretariat, involves the provision of a service in the supplying country to a consumer from another WTO Member.[11] For example, this mode of supply contemplates situations where a person travels to the country in which the service is supplied to consume the service in the country of supply.[12]

(c) Third Mode of Supply - Commercial Presence

Under this mode of supply the service is delivered within the territory of a WTO Member through the *commercial presence* of the foreign supplier. This mode of supply covers services, for example, that are delivered through branch offices or subsidiaries of foreign owned parent companies.

(d) Fourth Mode of Supply – Presence of Natural Persons

This mode of supply relates to the admission of foreign nationals (*natural persons*) to the country of the WTO Member in question to provide services there.

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[11] Note by WTO Secretariat, *An Introduction to the GATS*, October 1999 (www.wto.org).

[12] *An Introduction to the GATS,* WTO Secretariat, Trade in Services Division, October 1999, Section I.2.

(e) The Provision of MSS by TMI constitutes "Trade in Services"

Article I:3(b) of the GATS indicates that the term "services" includes any service in any sector except services supplied in the exercise of governmental authority.[13]

Further, the broad definition of "supply of a service" in Article XXVIII(b) of the GATS encompasses several different aspects of delivery of services, including the production, distribution, marketing, sale and delivery of the service.

The GATS applies to measures affecting "trade in services". As discussed above, the term "service" is expressively defined to include all services in all sectors except services that are not supplied on a commercial basis nor in competition with other service suppliers. Mobile satellite services are provided in the U.S. by various service providers on a commercial basis. Therefore, they fall within the definition of "service" set out in Article I.3(b) of GATS.

Furthermore, TMI is a service supplier supplying a service through the first mode of supply (cross-border supply) and/or the third mode of supply (commercial presence). Consequently, the provision of MSS in the U.S. through either or both of these modes of supply constitutes, in our view, "trade in services" within the meaning of the GATS.

3. The IB's Order Constitutes a Measure "Affecting" Trade in Services

The term "measures by Members affecting trade in services" is also broadly defined in Article XVIII(c) of the GATS as follows:

> (c) "measures by Members affecting trade in services" include measures in respect of
>
> (i) the purchase, payment or use of a service;
>
> (ii) the access to and use of, in connection with the supply of a service, services which are required by those Members to be offered to the public generally;
>
> (iii) the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member.

This definition is non-exhaustive, and virtually any regulatory measure which impacts on trade in a service supplied under any of the four modes of supply will be considered a measure *affecting* trade in services.

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[13] The definition of "a service supplied in the exercise of governmental authority" is defined in Article I:3(c) as "any service which is supplied neither on a commercial basis, nor in competition with one or more service suppliers."

In *EC – Bananas III,* the WTO Appellate Body examined the scope of the phrase "measures affecting trade in services" and concluded:

> In our view, the use of the term "affecting" reflects the intent of the drafters to give a broad reach to the GATS. The ordinary meaning of the word "affecting" implies a measure that has "an effect on", which indicates a broad scope of application. This interpretation is further reinforced by the conclusions of previous panels that the term "affecting" in the "context of Article III of the GATT is wider in scope than such terms as "regulating" or "governing". We also note that Article I:3(b) of the GATS provides that "services includes *any service* in *any sector* except services supplied in the exercise of governmental authority: (emphasis added), and that Article XXVIII(b) of the GATS provides that the "supply of a service includes the production, distribution, marketing, sale and delivery of a service". There is nothing at all in these provisions to suggest a limited scope of application for the GATS.[14]

In summary, the definitions of "measures", "trade in services" and "measures by Members affecting trade in services" clearly subject a broad range of measures to the substantive disciplines of the GATS. All forms of governmental regulation that affect trade in any service delivered through one of the four modes of supply are captured by the broad scope of application of the GATS and subject such measures to the obligations set out in Parts II and III of the Agreement.

C. Overview of Specific GATS Obligations

Part III of the GATS sets out the framework under which Members undertake specific commitments, which are entered in their Schedules of Specific Commitments ("Member Schedules"). There are three main types of specific commitments: "Market Access", "National Treatment", and "Additional Commitments". In the discussion below, we will examine the specific commitments of the United States in the area of telecommunications services.

Several Members of the WTO, including the United States, have undertaken substantial commitments regarding "Market Access" and "National Treatment" in the field of telecommunications. Although the commitments negotiated during the Uruguay Round (1986-1994) were generally limited to "enhanced" or "value added" services, in 1997, an agreement was reached which secured wide-ranging commitments regarding "basic" telecommunications services (such as voice telephone services, packet- and circuit-switched data transmission services, and mobile services). Approximately 70 countries, including the United States, accepted further commitments which are set out in country Member Schedules annexed to the Fourth Protocol. A copy of the U.S. Schedule for Basic Telecommunications Services is attached as Appendix A.

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[14] Appellate Body Report on *EC – Bananas III*, para. 220, footnotes omitted.

1. The Interpretation of Members' Schedules

Each Member's Schedule to the GATS outlines the specific commitments undertaken by that Member in relation to "Market Access", "National Treatment" and "Additional Commitments". The inclusion of a service sector or subsector in the first column of the Schedule indicates a commitment by the Member in question to provide "Market Access" and "National Treatment" for the service activity specified, on the terms and conditions set out in its Schedule. Such a commitment binds the Member to the specified level of "Market Access" and "National Treatment" and circumscribes the Member's ability to impose new measures that would restrict entry into the market, or to introduce new obstacles to the supply of the service.

Article XX of GATS provides:

> 1. Each Member shall set out in a schedule the specific commitments it undertakes under Part III of this Agreement. With respect to sectors where such commitments are undertaken, each Schedule shall specify:
>
> (a) terms, limitations and conditions on market access;
>
> (b) conditions and qualifications on national treatment;
>
> (c) undertakings relating to additional commitments;
>
> (d) where appropriate the time-frame for implementation of such commitments; and
>
> (e) the date of entry into force of such commitments.
>
> 2. Measures inconsistent with both Articles XVI [market access] and XVII [national treatment] shall be inscribed in the column relating to Article XVI. In this case the inscription will be considered to provide a condition or qualification to Article XVII as well.
>
> 3. Schedules of specific commitments shall be annexed to this Agreement and shall form an integral part thereof.

In other words, for each service sector or sub-sector included in a Member's Schedule, the Schedule is required to indicate, with respect to each of the four modes of supply, any limitations on market access or national treatment which the Member wishes to maintain.

The entries in Members' Schedules are subject to interpretation in order to determine the scope of the commitments undertaken by Members in their Schedules. The Appellate Body has considered the question of whether and in what way the rules of treaty interpretation should be applied to Members' Schedules in the context of tariff (goods) schedules under the GATT

1994.[15] Based on Appellate Body interpretations in the context of trade in goods, the terms of the Schedule of the United States would, in our view, be considered as treaty language and interpreted in accordance with the principles of the Vienna Convention summarized above. Put another way, the terms of the U.S. Schedule are to be interpreted in accordance with their ordinary meaning in their context and in light of the object and purpose of the GATS. Schedule terms are not, in contrast, interpreted in light of any particular Member's expectations, specialized meaning or usage.[16]

A brief description of the format of Members' Schedules is set out at Appendix B.

2. Service Sector Classification

As noted above, the commitments of WTO Members with respect to trade in a particular service are specified in each Member's Schedule.

In order to ensure consistency and comparability in the terms, limitations and conditions, and of course, in the very services themselves, for which each WTO Member was prepared to undertake obligations, the GATS required WTO Members to identify commitments in terms of a single system of services nomenclature. The nomenclature adopted by the GATS is set out in the Services Sectoral Classification List,[17] which is based on the United Nations Provisional Central Product Classification (CPC) System.[18]

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[15] Report of the Appellate Body in *EC – Customs Classification of Certain Computer Equipment,* WT/DS62, WT/DS67, WT/DS 68, adopted 22 June 1998, para. 94.

[16] These principles were applied by a WTO Panel in *Korea-Measures Affecting Government Procurement,* WT/DS163/R, May, 2000 at paras. 7.7 – 7.9.

[17] WTO Document, MTN. GNS/W/120, 10 July, 1991.

[18] UN Doc. ST/ESA/STAT/SER.M/77 (1991).

The Services Sectoral Classification List subsumed all telecommunications services within the following hierarchical list:

Services Sectoral Classification List

	Sectors and Subsectors	Corresponding CPC
1.	Business Services	
	A.	...
2.	**Communication Services**	
	A. Postal Services	
	...	
	B. Courier Services	
	...	
	C. Telecommunication services	
	a. voice telephone services	7521
	b. packet-switched data transmission services	7523**
	c. circuit-switched data transmission services	7523**
	d. telex service	7523**
	e. telegraph services	7522
	f. facsimile services	7521** + 7529**
	g. private leased circuit services	7522** + 7523**
	h. electronic mail	7523**
	i. voice Mail	7523**
	j. on-line information and data base retrieval	7523**
	k. electronic data interchange (EDI)	7523**
	l. enhanced/value-added facsimile services, incl. store and forward, store and retrieve	7523**
	m. code and protocol conversion	n.a.
	n. on-line information and/or data processing (incl. transaction processing)	843**
	o. other	

The (**) indicates that the service specified constitutes only a part of the total range of activities covered by the CPC concordance (*e.g.*, voice mail is only a component of CPC item 7523).

3. The Specific Commitments of the United States

By the combined operation of the U.S. Schedule to the GATS in force in 1995 for value added telecommunications services, and of the further commitments undertaken by the U.S. upon

adoption of the Fourth Protocol in 1998 for basic telecommunications services, the U.S. has made commitments in all of the telecommunications services listed in the Sectoral Services Classification List, subject only to the exceptions noted in the U.S. Schedule, discussed below.

A number of the services listed in the Schedule of the United States to the GATS are offered through MSS. For instance, the U.S. Schedule lists 2C(a) "Voice services", 2C(b) "Packet-switched data transmission services", and 2C(c) "circuit-switched data transmission services". In addition, the U.S. Schedule lists under category (o) "Other", both "Mobile Services" and "Mobile data services", without qualifications or conditions.

The 2C(a) to (o) services identified in the U.S. Schedule represent the pool of telecommunications services for which the United States undertook market access and national treatment obligations, as well as any additional commitments. If the United States had wished to undertake obligations with respect to only a part of a category listed in the Sectoral Services Classification List, it was required to inscribe this limitation in its Schedule.

Further, if the U.S. wanted to limit the extent of its market access and national treatment obligations in respect of any of those services, it was required to so indicate in its schedule, for each of the four modes of supply.

With respect to the first mode of supply, namely cross-border supply, the United States has not listed any limitations on market access or national treatment in the 2C Telecommunications Services sector. With respect to the third mode of supply, commercial presence, the United States did not inscribe any limitations with respect to national treatment and the only limitation specified with respect to market access relates to foreign ownership thresholds in holders of common carrier radio licenses.[19]

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[19] The limitation specified in the U.S. schedule, which relates to Telecommunication services 2C(a) through (g) and (o) is as follows:

Ownership of a common carrier radio license:

Indirect: None

Direct: May not be granted to or held by

(a) foreign government or the representative thereof

(b) non-U.S. citizen or the representative of any non-U.S. citizen

(c) any corporation not organized under the laws of the United States or

(d) U.S. corporation of which more than 20% of the capital stock is owned or voted by a foreign government or its representative, non-U.S. citizens or their representatives or a corporation not organized under the laws of the United States.

As a result, the United States is committed to the GATS market access and national treatment obligations for MSS as well as any other additional commitments specified in its Schedule.[20]

D. GATS Article XVI – Market Access

Article XVI of the GATS prohibits Members from taking measures which have the effect of restricting the access of service suppliers of other GATS Members to their services markets. Article XVI of the GATS states that:

> 1. With respect to market access through the modes of supply identified in Article 1, each Member shall accord services and service suppliers of any other Member treatment no less favourable than that provided for under the terms, limitations and conditions agreed and specified in its Schedule.

Article XVI:2 sets out the structure within which the market access commitments operate and provides as follows:

> 2. In sectors where market-access commitments are undertaken, the measures which a Member shall not maintain or adopt either on the basis of a regional subdivision or on the basis of its entire territory, unless otherwise specified in its Schedule, are defined as:
>
> ...
>
> (e) measures which ***restrict or require specific types of legal entity or joint venture*** through which a service supplier may supply a service; and... (Emphasis added)

Article XVI:1 requires each WTO Member to accord services and service suppliers of other WTO Members treatment no less favourable than that which is provided for under the terms, limitations and conditions agreed and specified in its Schedule. The market access obligation therefore requires a Member to accord, at a minimum, the level of treatment specified in its Schedule.

Subject only to any limitations inscribed in a Member's Schedule, Article XVI:2(e) prohibits adoption or maintenance of "measures which restrict or require specific types of legal entities or joint ventures through which a service supplier may supply a service". In the present case, the condition of licence imposed by the IB restricts the specific type of legal entity or joint venture through which TMI may supply the mobile satellite communications service and, in fact,

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[20] As noted above, the second and fourth modes of supply are not at issue here. By way of background, with respect to the second mode of supply, consumption abroad, there are no limitations on market access or national treatment. With respect to the fourth mode of supply, presence of natural persons, the only limitations on market access and national treatment are those applicable to all covered services (i.e. not limited to telecommunications services), as inscribed by the U.S. in Part I of its Schedule.

requires a specific type of legal entity through which TMI must supply MSS. The IB Order is therefore inconsistent with Article XVI:2(e). Each of the relevant criteria are addressed more fully below.

First, as noted above, MSS is included within a number of service sectors where the U.S. has undertaken market access commitments (*i.e.*, voice telephone services, circuit- and packet-switched data transmission services, and mobile services). Second, the IB Order is a measure affecting trade in services. Third, TMI is a service provider that provides service through mode one and/or mode three. Fourth, the United States has not inscribed in its Schedule any limitations on market access with respect to MSS provided under the either of these modes of supply.

Fifth, the contracting rules, which were imposed directly on TMI by the IB prohibits (and therefore "*restricts*") TMI from supplying the service through its TerreStar joint venture with Motient. TMI cannot supply MSS without a 2 GHz spectrum authorization. Revocation of the authorization therefore denies TMI access to the satellite mobile services market. Furthermore, revocation of the authorization was imposed on the sole basis of the nature of TMI's legal relationship with its joint venture partner or partners through which the satellite is being constructed.

Sixth, the IB's Order *required* TMI to enter into a specific type of legal relationship with the satellite construction firm Loral. The specific and mandatory legal relationship which TMI was required to enter into in order to satisfy the IB's authorization condition had, in turn, the effect of permitting only TMI itself, as an individual corporate legal entity, to meet the condition. No alternate legal configuration, such as its TerreStar joint venture with Motient, was permitted.

Put differently, the only vehicle recognized by the IB as allowing TMI to maintain its 2 GHz spectrum authorization had the effect of requiring TMI to supply its MSS through a specific type of legal entity, *i.e.*, its corporate self, and not through its TerreStar joint venture with Motient. The IB Order is therefore inconsistent with the obligations of the United Stated under Article XVI:2(e) of the GATS.

As a final matter, it is important to point out that, in the context of the market access provisions of the GATS, it is no defence that the rule or measure in question applies equally to both domestic and non-domestic service providers, as might be the case with an argument under to the national treatment provisions of the GATS (Article XVII). If a measure denies market access to a non-domestic provider, this will constitute a violation of the market access provisions, even if that measure also applies to domestic providers.

E. GATS Article VI – Domestic Regulation

To ensure that market access commitments are not undermined by a Member through unfair or prejudicial application of its domestic laws, Article VI sets out certain requirements relating to the domestic regulation of services and service providers. In particular, Article VI provides in relevant part as follows:

> Article VI Domestic Regulation
>
> 4. With a view to ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Council for Trade in Services shall, through appropriate bodies it may establish, develop any necessary disciplines. Such disciplines shall aim to ensure that such requirements are, *inter alia*:
>
> (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
>
> (b) not more burdensome than necessary to ensure the quality of the service;
>
> (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.
>
> 5. (a) In sectors in which a Member has undertaken specific commitments, pending the entry into force of disciplines developed in these sectors pursuant to paragraph 4, the Member shall not apply licensing and qualification requirements and technical standards that nullify or impair such specific commitments in a manner which;
>
> (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c); and
>
> (ii) could not reasonably have been expected of that Member at the time the specific commitments in those sectors were made.
>
> (b) In determining whether a Member is in conformity with the obligation under paragraph 5(a), account shall be taken of international standards of relevant international organizations [3] applied by that Member.

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[3] The term "relevant international organizations" refers to international bodies whose membership is open to the relevant bodies of at least all Members of the WTO.

As demonstrated above, the limitation on TMI's ability to exercise its rights to construct its satellite via its affiliated joint venture company, TerreStar, amounts to a licensing requirement that nullifies and impairs the U.S. specific commitment of market access in the mobile satellite telecommunications sector. In particular, the IB Order requires TMI to supply its MSS through a specific type of legal entity contrary to Article XVI:2(e) of the GATS.

Having regard to the domestic regulation provisions of the GATS, and in particular Articles VI:4(a) and (b), it is also apparent that the IB's limitation on TMI's ability to exercise its joint venture rights is not based on objective criteria such as competence and ability to supply the service, but on the legal form through which TMI chose to do so. Put differently, the IB Order elevates form over substance, in direct contradiction of the legal criteria of "competence" and "ability" referenced in Article VI:4(a) of the GATS.

Moreover, the IB limitation on TMI's ability to work through its TerreStar affiliate was not based on the "transparent criteria" requirement of GATS Article VI:4(a) because the IB acknowledged that it had previously permitted a party to meet a satellite manufacturing milestone based on a third party's performance, such as a wholly owned or controlled affiliate, though no such cases are cited in the IB Order.[21] Consequently, the IB Order represents a wholly unannounced and unexplained (*i.e.*, non-transparent) change of FCC policy - and a departure from the FCC's policy of providing both prior notice and an opportunity to comment on the matter in question.

Finally, the IB's requirement that only TMI (but not its joint venture company) can enter into a contract with the satellite manufacturer "is more burdensome than necessary" without achieving any difference in the quality of the service. This requirement does not go to the competence or

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[21] The IB Order states at para. 10:

> "As TMI correctly observes, the Commission has in some instances viewed a satellite manufacturing contract as sufficient to meet milestones, even though it is not entered into by the Company that holds the Commission authorization. However, these cases typically involve circumstances in which the affiliated company exercising the contract is wholly owned and/or controlled by the licensee. Under those circumstances, the licensee and the affiliated company have such commonality of interests that, in the absence of specific facts to the contrary, we may reasonably view their interests as interchangeable." In its FCC Application for Review, however, TMI cited two cases in which the FCC had permitted a licensee to rely upon a satellite procurement contract by a non-affiliated third party (i.e., a party which was not a wholly owned or controlled subsidiary) to satisfy the non-contingent manufacturing milestone. *See Volunteers in Technical Assistance*, 12 FCC Rcd. 3094, 3107–3108 (Intl. Bur. 1997); *United States Satellite Broadcasting Company, Inc.*, 7 FCC Rcd. 7247 (Mass. Media Bur. 1992). *See also AMSC Subsidiary Corp.*, 8 FCC Rcd. 4040 (1993).

ability of an MSS licensee to provide a high quality 2 GHz service. It relates solely to the legal form of an arrangement between two affiliated companies (*i.e.,* TMI and TerreStar) which has no impact on MSS service quality and which, in other contexts and other proceedings, the IB and FCC have expressly authorized.

Therefore, the restriction imposed by the IB is a licensing requirement that nullifies and/or impairs the specific commitments made by the U.S. in relation to the mobile services market and in a manner which does not comply with the objectivity and transparency requirements of GATS Article VI:4(a), and the minimal burden requirements of GATS Article VI:4(b).

With respect to the criteria in Article VI:5(a)(ii), the new criteria established in the IB Order could not reasonably have been expected of the U.S. at the time the specific commitments in respect of MSS were made. The IB's practice in this regard, including its practice at the time of the scheduling of U.S. commitments in 1995 and again in 1998, is discussed in more detail in the TMI/TerreStar March 12, 2003 Application for Review, Section II.C above, as well as in Section F below.

F. GATS Article XVIII - Additional Commitments and the GATS Reference Paper

In addition to its broad commitments in relation to the market access and domestic regulation provisions of the GATS, the U.S. undertook additional commitments pursuant to GATS Article XVIII in the form of the GATS Reference Paper on Telecommunications Services (the Reference Paper), which articulates additional principles respecting the regulatory framework applicable to basic telecommunications services.

GATS Article XVIII provides as follows:

> Members may negotiate commitments with respect to measures affecting trade in services not subject to scheduling under Articles XVI or XVII, including those regarding qualifications, standards or licensing matters. Such commitments shall be inscribed in a Member's Schedule.

The terms of the additional commitments in the U.S. Schedule are:

> Additional Commitments: The United States undertakes the obligations contained in the reference paper attached hereto.

In our view, the U.S. adoption of the Reference Paper's obligations means that the Reference Paper establishes minimum criteria in the areas within its scope, that are enforceable by other Members in relation to the supply of telecommunications services for which the U.S. has undertaken specific commitments. In particular, Reference Paper obligations apply regardless of the nationality of the service or service suppliers.

Paragraphs 4 and 6 of the Reference Paper provide relevant obligations with respect to the IB Order:

> 4. Public availability of licensing criteria
>
> Where a licence is required, the following will be made ***publicly available***:
> (a) ***all the licensing criteria*** and the period of time normally required to reach a decision concerning an application for a licence and
> (b) the terms and conditions of individual licences.
> The reasons for the denial of a licence will be made known to the applicant upon request.
>
> ...
>
> 6. Allocation and use of scarce resources
>
> ***Any procedures for the allocation and use of scarce resources***, including frequencies, numbers and rights of way, ***will be carried out in an objective, timely, transparent and non-discriminatory manner.*** The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required. (Emphasis added)

Together, these provisions impose strict transparency and disclosure requirements. Paragraph 4 requires that a Member make licensing criteria publicly available. It is self-evident that for the obligation in paragraph 4 to have any value or meaning, the criteria must be made publicly available prior to the decision on licensing being made. The IB Order effectively created a new licensing criterion, namely that only TMI can enter into a contract with a satellite manufacturer. As noted above, this criterion has not been the subject of comment, runs counter to long-standing IB and FCC practice[22] and was certainly not publicly available prior to the IB Order.[23]

Similarly, the obligation under paragraph 6 requires that the process of allocating scarce resources be carried out in a transparent manner. The creation of a new criterion, without notice or the ability to comment and at a stage well into the application, is clearly not transparent. It also results in a spectrum allocation process which is not objective. The new criterion relates primarily to the legal form by which a licensee chooses to contract for the construction and delivery of a satellite, and is not necessary for the purpose of actually providing mobile satellite service. Accordingly, the introduction of a criterion not related to the provision of the service itself is not objective.

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[22] *Volunteers in Technical Assistance*, 12 FCC Rcd. 3094, 3107–3108 (Intl. Bur. 1997); *United States Satellite Broadcasting Company, Inc.*, 7 FCC Rcd. 7247 (Mass. Media Bur. 1992). *See also AMSC Subsidiary Corp.*, 8 FCC Rcd. 4040 (1993).

[23] *Ibid.*

In light of these considerations, the IB Order is inconsistent with the commitments made by the United Stated under the Reference Paper and, therefore, inconsistent with its commitments under Article XVIII of the GATS.

G. Extraterritoriality of the IB Order

Although this opinion is restricted to an examination of the IB Order in relation to the commitments made by the United States under the GATS, we note that TMI intends to launch its 2 GHz satellite system into an orbital slot that has been assigned to Canada by the International Telecommunications Union (ITU).

While it is true that the IB has regulatory jurisdiction over the 2 GHz spectrum that will be used by TMI to provide MSS in the United States, it is somewhat doubtful that this jurisdiction extends to the Canadian satellite orbital slot into which TMI intends to launch its satellite. This is not to say that the IB does not have the jurisdiction to establish technical conditions of service relating to the 2 GHz spectrum that was granted to TMI (*e.g.*, transmit/receive frequencies and spectrum interference levels). It is of significantly greater doubt, however, whether the IB has the jurisdiction to dictate the legal arrangements that should be used by a foreign service provider in order to launch a satellite into an orbital position that has been assigned to another country. Presumably, this was one of the reasons why the FCC stated in its DISCO II Order that it did not wish to "issue a separate, and duplicative U.S. license for a non-U.S. space station" because doing so "would raise issues of national comity."[24]

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[24] *See Report and Order,* 12 FCC Rcd (1999) at 24174.

IV. CONCLUSION

Based on the foregoing, it is our view that the IB Order is inconsistent with the obligations of and commitments made by the U.S. under Articles XVI (market access), VI (domestic regulation of the GATS) and XVIII (additional commitments – GATS Reference Paper) of the GATS.

We trust the foregoing is satisfactory. Should you have any questions regarding this legal opinion, please do not hesitate to contact the undersigned.

Yours very truly,

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WORLD TRADE

ORGANIZATION

GATS/SC/90/Suppl.2
11 April 1997

(97-1457)

Trade in Services

THE UNITED STATES OF AMERICA

Schedule of Specific Commitments

Supplement 2

(This is authentic in English only)

This text supplements the entries relating to the Telecommunications section contained on pages 45 to 46 of document GATS/SC/90.

UNITED STATES - SCHEDULE OF SPECIFIC COMMITMENTS

Modes of supply: 1) Cross-border supply 2) Consumption abroad 3) Commercial presence 4) Presence of natural persons

Sector or Sub-sector	Limitations on Market Access	Limitations on National Treatment	Additional Commitments
2.C. TELECOMMUNICATIONS SERVICES*:			
2.C.a. Voice services	(1) None	(1) None	The United States undertakes the obligations contained in the reference paper attached hereto.
2.C.b. Packet-switched data transmission services	(2) None	(2) None	
2.C.c. Circuit-switched data transmission services	(3) None, other than - Comsat has exclusive rights to links with Intelsat and Inmarsat.	(3) None	
2.C.d. Telex services			
2.C.e. Telegraph services	- Ownership of a common carrier radio license:		
2.C.f. Facsimile services	Indirect: None		
2.C.g. Private leased circuit services	Direct: May not be granted to or held by (a) foreign government or the representative thereof		
	(b) non-U.S. citizen or the representative of any non-U.S. citizen		

2.C.o. Other Mobile Services Analogue/Digital cellular services PCS (Personal Communications services) Paging services Mobile data services *Excluding one-way satellite transmissions of DTH and DBS television services and of digital audio services	(c) any corporation not organized under the laws of the United States or (d) U.S. corporation of which more than 20% of the capital stock is owned or voted by a foreign government or its representative, non-U.S. citizens or their representatives or a corporation not organized under the laws of the United States. (4) Unbound except as indicated by horizontal commitments	(4) Unbound except as indicated by horizontal commitments.	

ATTACHMENT TO THE UNITED STATES SCHEDULE

REFERENCE PAPER

Scope

The following are definitions and principles on the regulatory framework for the basic telecommunications services.

Definitions

Users mean service consumers and service suppliers.

Essential facilities mean facilities of a public telecommunications transport network or service that

(a) are exclusively or predominantly provided by a single or limited number of suppliers; and

(b) cannot feasibly be economically or technically substituted in order to provide a service.

A major supplier is a supplier which has the ability to materially affect the terms of participation (having regard to price and supply) in the relevant market for basic telecommunications services as a result of:

(a) control over essential facilities; or

(b) use of its position in the market.

1. Competitive safeguards

1.1 Prevention of anti-competitive practices in telecommunications

Appropriate measures shall be maintained for the purpose of preventing suppliers who, alone or together, are a major supplier from engaging in or continuing anti-competitive practices.

1.2 Safeguards

The anti-competitive practices referred to above shall include in particular:

(a) engaging in anti-competitive cross-subsidization;

(b) using information obtained from competitors with anti-competitive results; and

(c) not making available to other services suppliers on a timely basis technical information about essential facilities and commercially relevant information which are necessary for them to provide services.

2. Interconnection

2.1 This section applies to linking with suppliers providing public telecommunications transport networks or services in order to allow the users of one supplier to communicate with users of another supplier and to access services provided by another supplier, where specific commitments are undertaken.

2.2 Interconnection to be ensured[1] Rural telephone companies do not have to provide interconnection to competing local exchange carriers in the manner specified in section 2.2. until ordered to do so by a state regulatory authority.

Interconnection with a major supplier will be ensured at any technically feasible point in the network. Such interconnection is provided.

(a) under non-discriminatory terms, conditions (including technical standards and specifications) and rates and of a quality no less favourable than that provided for its own like services or for like services of non-affiliated service suppliers or for its subsidiaries or other affiliates;

(b) in a timely fashion, on terms, conditions (including technical standards and specifications) and cost-oriented rates that are transparent, reasonable, having regard to economic feasibility, and sufficiently unbundled so that the supplier need not pay for network components or facilities that it does not require for the service to be provided; and

(c) upon request, at points in addition to the network termination points offered to the majority of users, subject to charges that reflect the cost of construction of necessary additional facilities.

2.3 Public availability of the procedures for interconnection negotiations

The procedures applicable for interconnection to a major supplier will be made publicly available.

2.4 Transparency of interconnection arrangements

It is ensured that a major supplier will make publicly available either its interconnection agreements or a reference interconnection offer.

2.5 Interconnection: dispute settlement

A service supplier requesting interconnection with a major supplier will have recourse, either:

(a) at any time or

(b) after a reasonable period of time which has been made publicly known

to an independent domestic body, which may be a regulatory body as referred to in paragraph 5 below, to resolve disputes regarding appropriate terms, conditions and rates for interconnection within a reasonable period of time, to the extent that these have not been established previously.

[1] Rural local exchange carriers may be exempted by a state regulatory authority for a limited period of time from the obligations of section 2.2. with regard to interconnection with competing local exchange carriers.

3. Universal service

Any Member has the right to define the kind of universal service obligation it wishes to maintain. Such obligations will not be regarded as anti-competitive *per se*, provided they are administered in a transparent, non-discriminatory and competitively neutral manner and are not more burdensome than necessary for the kind of universal service defined by the Member.

4. Public availability of licensing criteria

Where a licence is required, the following will be made publicly available:

(a) all the licensing criteria and the period of time normally required to reach a decision concerning an application for a licence and

(b) the terms and conditions of individual licences.

The reasons for the denial of a licence will be made known to the applicant upon request.

5. Independent regulators

The regulatory body is separate from, and not accountable to, any supplier of basic telecommunications services. The decisions of and the procedures used by regulators shall be impartial with respect to all market participants.

6. Allocation and use of scarce resources

Any procedures for the allocation and use of scarce resources, including frequencies, numbers and rights of way, will be carried out in an objective, timely, transparent and non-discriminatory manner. The current state of allocated frequency bands will be made publicly available, but detailed identification of frequencies allocated for specific government uses is not required.

Appendix B – The Structure and Format of Members' Schedules

First Column – Sectoral Commitments

The WTO Secretariat has published the *Guide to Reading the GATS Schedules of Specific Commitments and Lists of Article II (MFN) Exemptions* (the "Guide"). A footnote to the Guide indicates that the Guide is intended to assist in reading and understanding the Schedules and should not be considered an authoritative legal interpretation of the GATS. However, the Guide does provide assistance in understanding the structure and content of the Schedules. The Guide states:

> - Sector or sub-sector column: this column contains a clear definition of the sector, subsector or activity that is the subject of the specific commitment. Members are free, subject to the results of their negotiations with other participants, to identify which sectors, subsectors or activities they will list in their schedules, and it is only to these that the commitments apply. It will be seen that committed sectors are sometimes very broad, as in "banking and other financial services" and sometimes very narrow, as in "noise abatement services".

Second Column – Limitations on Market Access

When a Member undertakes a market access commitment in a particular sector, the Member must specify in its Schedule any terms, limitations and conditions on market access. The Guide provides the following elaboration:

> - Market access column: When a Member undertakes a commitment in a sector or subsector it must indicate for each mode of supply what limitations, if any, it maintains on market access. Article XVI:2 of the GATS lists six categories of restriction which may not be adopted or maintained unless they are specified in the schedule. All limitations in schedules therefore fall into one of these categories. They comprise four types of quantitative restriction plus limitations on types of legal entity and on foreign equity participation.

Third Column – Limitations on National Treatment

When a Member wishes to restrict national treatment in a sector or subsector subject to a specific commitment, that Member must list any conditions or qualifications in its Schedule. The Guide indicates:

> - National treatment column: The national treatment obligation under Article XVII of the GATS is to accord to the services and service suppliers of any other Member treatment no less favourable than is accorded to domestic services and service suppliers. A Member wishing to maintain any limitations on national treatment – that is any measures which result in less favourable treatment of foreign services or service suppliers – must indicate these limitations in the third column of its schedule.

It should be noted that limitations inscribed in the second column (relating to market access) may be considered to provide a limitation or qualification to Article XVII (national treatment) obligations as well.[1]

Fourth Column – Additional Commitments

The "Additional Commitments" column permits Members to undertake commitments over and above those set out elsewhere in the Schedule. In this regard the Guide indicates:

- Additional commitments column: Entries in this column are not obligatory but a Member may decide in a given sector to make additional commitments relating to measures other than those subject to scheduling under Articles XVI and XVII, for example qualifications, standards and licensing matters. This column is to be used to indicate positive undertakings, not the listing of additional limitations or restrictions.

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1 GATS Article XX:2.