January 12, 2004

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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 John and Linda:

On January 8, 2004, you graciously met with Jon Blake about the above matter. The thrust of the discussion was whether the facts in this case meet the standard, not for determining whether the International Bureau's decision is a reasonable interpretation of what the milestone requirements should mean, but whether notice of this interpretation was sufficient. Although the Court of Appeals has used various formulations as to what constitutes sufficient notice when the Commission actions are punitive -- in this case the death penalty -- the notice here fell far below any of those formulations. This makes the Bureau's decision highly vulnerable on appeal, which is why the discussion on Thursday focused on the notice issue as a matter of particular concern to the Office of General Counsel.

The emphasis of the discussion was on the guidance, or lack of guidance, publicly available to TMI and TerreStar at the time of the milestone deadline. But since then, the Bureau has decided another case, which has now become a final order, *KaStarCom*, DA 03-3428, Oct. 27, 2003.[1] On judicial review of our case, the Commission may be called upon to reconcile that decision with ours. This issue is not unrelated to the adequacy-of-notice point. For it seems inconceivable that a reasonable person could have examined the state of the law on July 17, 2002 (the date of the first milestone here) or November 1, 2002 (the date of the first milestone in the *KaStarCom* case) and could have concluded that TMI's authorization would be canceled and *KaStarCom*'s upheld.

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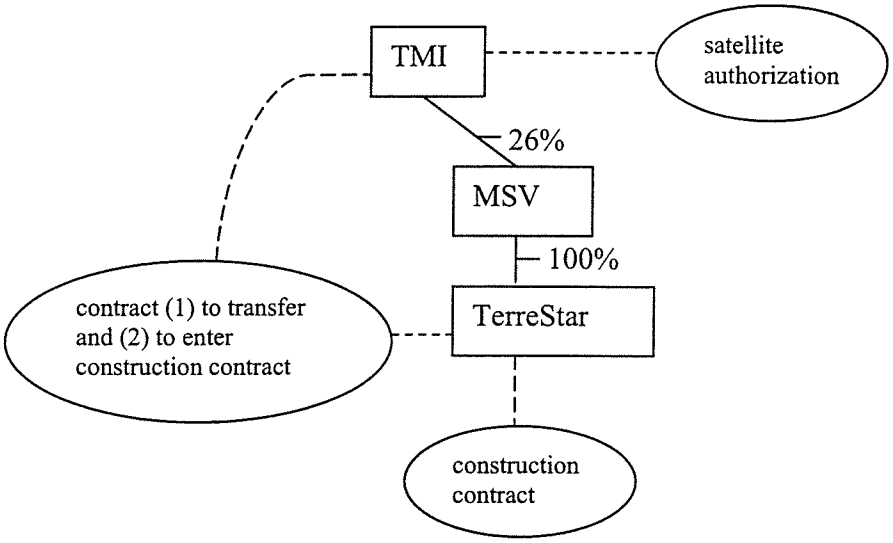
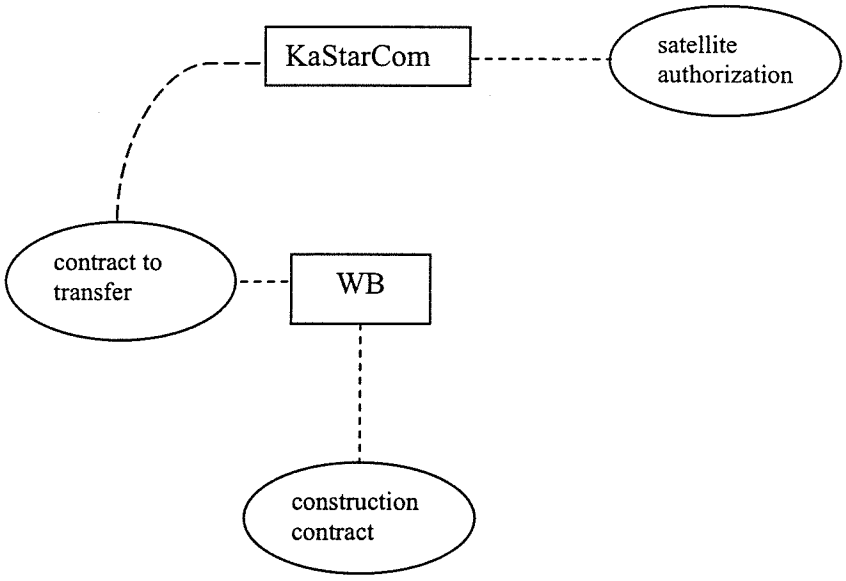
[1] The discrepancy between *KaStarCom* and our case was brought to the Commission's attention in time for it to review *KaStarCom* on its own motion, but it chose not to do so.

In simplified terms, here is a comparison of the two situations at the time of the two milestone deadlines:

TMI/TerreStar



KaStarCom/WB



The similarities between the two cases are striking. At the time of the first milestone in both cases, (1) the construction contract with the satellite manufacturer was held by an entity different from the authorization holder, (2) the authorization holder intended to transfer the authorization to the entity that held the construction contract, and (3) *most critically,* the construction contract was non-contingent, conformed to the specifications of the authorization, was being performed in a timely manner by both parties and was being sustained by prompt payments under the contract. The decision in *KaStarCom* consists of a single finding in a single sentence: "We conclude that the contract entered into by WB satisfies KaStarCom's first milestone. . . ."[2] The IB decision in the TMI case should also have been resolved by the finding: "We conclude that the contract entered into by TerreStar satisfies TMI's first milestone. . . ."

There are three, inconsequential differences between the two cases. But they don't justify the death penalty for TMI and a clean bill of health for KaStarCom. If anything, they justify the reverse.

First, at the time of the milestone, TMI had a 26% ownership interest in TerreStar and an agreement requiring TerreStar to enter into a compliant satellite construction contract. The IB decision in *KaStarCom* cites no comparable agreement or ownership relationship between KaStarCom and WB. Though one may have existed, it was not mentioned or relied on. And the contract between KaStarCom and WB, if there was any contract at all, was for satellite sharing, not satellite construction. This first difference, therefore, shows TMI to be more deserving than KaStarCom.

Second, in *KaStarCom*, the satellite contract predated, by a full two years, the grant of the authorization to the licensee. In our case, TMI, through its affiliate TerreStar, arranged for a new construction contract specifically for the design and construction of the satellite covered by the Canadian and FCC 2 GHz authorizations. It retained control over design and construction of the satellite until the transfer to TerreStar would take place. And under its contractual obligation to TMI, TerreStar committed itself to a contract calling for it to make payments of $380 million, phased in over the various construction stages for the satellite. Like the first, therefore, this second difference also shows TMI to be more deserving than KaStarCom.

Third, nine days before the deadline, KaStarCom and WB filed an application to transfer the license from KaStarCom to WB, as the party on the construction contract, whereas

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[2] In the preceding paragraph, the IB decision stresses that "the Commission has consistently required *licensees* to execute non-contingent satellite construction contracts," which is exactly the kind of language the Wireless Carriers have relied on to argue that the Commission has made clear that third party contracts will not suffice. The same paragraph emphasizes "strict enforcement" -- another prop that the Wireless Carriers have relied on. Yet in the very next paragraph, just a few sentences later, the IB held that the milestone had been met, though the licensee had *not* itself entered the construction contract. This demonstrates the complete fallacy of the Wireless Carriers' reliance on such language in other cases.

TMI and TerreStar did not take this step until five months after the milestone deadline.[3] For this last distinction to matter, the Bureau and the Commission would need to ignore completely their repeated statements that milestones should be enforced on the operative facts on the date of the milestone deadline. Moreover, it would ignore that the Bureau was apprised that TMI would transfer the authorization to TerreStar when appropriate, and that nothing in the Commission's rules, the Bureau's orders, or the Bureau's dealings with TMI and TerreStar indicated that it would be relevant when the transfer application was filed. *Can it possibly be lawful, right, or fair that this difference should be the difference between license cancellation and license validation, between extinction and survival?*

TMI and TerreStar do not believe that any of the three differences matter. They believe that a fair reading of the holdings of the relevant cases, the 2 GHz order, and the TMI authorization shows that the decisive issue is whether a satellite construction contract existed at the time of the milestone, whether it conformed to the authorization in question, and whether it was noncontingent and current. The IB's decision in *KaStarCom* -- which we again emphasize has become final -- could not be clearer that that is the dispositive fact. TMI and TerreStar ask only for the same treatment.

Respectfully submitted,

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Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Commissioner Jonathan S. Adelstein

[3] In *KaStarCom*, the IB granted the transfer application five months later and relied on the transfer as mooting, for example, whether the KaStarCom/WB sharing agreement satisfied the construction contract requirement. The IB could have and should have acted similarly with respect to the TMI/TerreStar transfer application.

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