

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

In the Matter of)
)
TMI Communications and Company, Limited Partnership) File Nos: 189-SAT-LOI-97
)
Request for Modification of Spectrum) IBFS Nos. SAT-LOI-19970926-00161
Reservation for a Mobile-Satellite Service in the 2) SAT-AMD-20001103-00158
GHz Bands) SAT-MOD-20021114-00237
)
TMI Communications and Company, Limited Partnership, Assignor) SAT-ASG-20021211-00238
)
And)
)
TerreStar Networks Inc.)
Assignee)
)
Request to Assign Spectrum Reservation)

MEMORANDUM OPINION AND ORDER

Adopted: February 7, 2003

Released: February 10, 2003

By the Chief, International Bureau:

I. INTRODUCTION

1. In this Order, we declare null and void the reservation of spectrum issued to TMI Communications and Company, Limited Partnership ("TMI") to provide Mobile-Satellite Service ("MSS") in the United States in the 2 GHz frequency band.1 TMI has failed to satisfy the initial implementation milestone set forth in its Letter of Intent ("LOI") authorization.2 This milestone required

1 TMI Communications and Company, Limited Partnership, Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands, Order, DA 01-1638, 16 FCC Rcd 13808 (Int'l Bur. 2001) (TMI Authorization). The term "2 GHz MSS Band," as used in this Order, refers to the 1990-2025 MHz (uplink) and 2165-2200 MHz (downlink) frequencies.

2 A satellite system being licensed by a foreign administration, and seeking to obtain spectrum for service to the United States, may file an LOI requesting that the Commission "reserve" spectrum for that system. We consider an LOI request in a space-station processing round in anticipation that future earth station applications will seek authority to access the non-U.S.-licensed satellite system. See Amendment of the Commission's Regulatory Policies (continued...)

TMI to sign a non-contingent satellite manufacturing agreement by July 2002. While an affiliate of TMI entered into a satellite manufacturing contract pursuant to an agreement with TMI, we find that the arrangements on which TMI relies are insufficient to meet the first milestone requirement. Consequently, TMI's authorization is null and void by its own terms. In addition, we are dismissing TMI's recently-filed applications requesting modification and transfer of its LOI authorization as moot.

II. BACKGROUND

2. TMI submitted its 2 GHz MSS LOI on September 26, 1997. On July 17, 2001, the Commission reserved spectrum in the 2 GHz frequency band for TMI, provided it acted consistently with Commission rules and with the conditions set out in the LOI authorization.³ Consistent with the *2 GHz MSS Order*,⁴ TMI's authorization stated that it would become null and void if TMI did not meet the implementation milestones delineated in the authorization.⁵ The first of those milestones obligated TMI to enter into a non-contingent satellite manufacturing contract within 12 months of the authorization - or July 17, 2002.

3. To determine whether TMI complied with its implementation milestone, the International Bureau's Satellite Division ("Satellite Division") requested that TMI submit a copy of an executed contract.⁶ In response, TMI submitted executed copies of a contract between TMI and Terrestrial Networks, Inc. ("Terrestrial") and a satellite manufacturing contract between Terrestrial and Space Systems/Loral, Inc. ("Loral"), subject in parts to a request for confidential treatment.⁷ Terrestrial, a Delaware corporation, is a wholly owned subsidiary of Mobile Satellite Venture LP ("MSV LP"), a Delaware limited partnership. MSV LP is managed by its general partner, Mobile Satellite Ventures GP Inc. ("MSV GP"), a Delaware corporation. TMI, a Canadian limited partnership,⁸ owns 25.9% of MSV GP's shares, the remainder of which are held by a variety of U.S.-based companies. TMI's equity share in MSV LP is 39.9%. The single largest shareholder in MSV GP is Motient Corporation, a U.S. company in the MSS business. The contract between TMI and Terrestrial required Terrestrial to enter into a satellite manufacturing contract with Loral, in consideration of which TMI agreed to transfer its authorizations for a 2 GHz MSS system to a company in which "Terrestrial and/or TMI or affiliates thereof have an interest," subject to United States and Canadian regulatory approvals.

4. After review of TMI's filing, the Satellite Division made an additional request to TMI to provide information regarding TMI's construction contract.⁹ The Satellite Division requested that TMI

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to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, IB Docket No. 96-111, 12 FCC Rcd 24094, 24173-74 ¶ 185 (1997) (*DISCO II Order*) (describing the procedures under which foreign-licensed satellite systems may provide service in the United States).

³ *TMI Authorization*.

⁴ *The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, IB Docket No. 99-81, FCC 00-302, 15 FCC Rcd 16127, 16177-78 ¶ 106 (2000) (*2 GHz MSS Order*).

⁵ *TMI Authorization*, 16 FCC Rcd at 13816 ¶ 24.

⁶ Letter from Cassandra Thomas, Deputy Chief, Satellite Division, to R. Edward Price, Counsel for TMI, dated July 18, 2002.

⁷ Letter from Gregory C. Staple, Counsel for TMI, to Marlene H. Dortch, Secretary of the FCC, dated July 26, 2002.

⁸ BCE Inc., a publicly traded Canadian corporation, owns 100% of TMI Communications Inc., the general partner controlling TMI.

⁹ See Letter from Thomas S. Tycz, Chief, Satellite Division, to Gregory C. Staple, Counsel for TMI, dated October 4, 2002.

(continued...)

provide any further information concerning its obligations to Loral or Terrestar under the satellite manufacturing agreement:

[W]e note that TMI is not a party to the Terrestar/Loral contract, and that the TMI/Terrestar agreement does not appear to bind TMI in any way to pay for satellite construction under the Terrestar/Loral contract. Please indicate whether there are any agreements or other arrangements by which TMI is legally obligated to pursue the construction of [the] proposed system, or is in any way liable in the event the satellite system is not implemented.¹⁰

5. In responses filed on October 15, 2002, and October 24, 2002, TMI argued that its agreement with Terrestar must be viewed in the context of TMI's overall relationship with MSV and the ongoing reorganization of TMI's North American mobile satellite business.¹¹ TMI indicated that, pursuant to a joint venture agreement into which it entered with MSV on January 8, 2001, it agreed to transfer its 2 GHz MSS authorization to MSV LP, or a subsidiary, at MSV LP's election, subject to regulatory approvals. TMI also noted that work is progressing under the construction contract, and that all scheduled payments had been made up to that date, and that, therefore, the intent of the FCC's milestone requirements was being met. TMI argues that there is nothing in the terms of its authorization, or in FCC rules and policies, that precludes an MSS licensee from contracting with an affiliate in order to meet milestones.¹² According to TMI, "so long as TMI has an enforceable right to the benefits of a *bona fide* satellite manufacturing contract, which it does, and the underlying contract is non-contingent, which it is, the public interest in the timely manufacture and launch of an authorized satellite is satisfied."¹³ TMI also indicates that its contractual arrangements "have been submitted to Industry

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¹⁰ *Id.* Bureau staff reiterated that request in a subsequent meeting on November 14, 2002. The Satellite Division also asked TMI to address a discrepancy between the orbital location specified in its LOI authorization, 106.5° W.L., and the orbital location specified in an "approval in principal" issued by Canada, 107.3° W.L. See Letter from Gregory C. Staple, Counsel for TMI, to Marlene H. Dortch, Secretary of the FCC, dated August 27, 2002, attaching a letter from Jan Skora, Director General, Radiocommunications and Broadcasting Regulatory Branch, Industry Canada, to Ted H. Ignacy, Vice-President, Finance, TMI Communications Inc., dated May 6, 2002. On November 14, 2002, TMI submitted a request for modification of its LOI authorization to change the orbital location of its system, to conform it to the location specified in the Canadian authorization.

¹¹ Letter from Gregory C. Staple, Counsel for TMI, to Marlene H. Dortch, Secretary of the FCC, dated October 15, 2002. That letter included a request for confidential treatment. On October 24, 2002, TMI filed a redacted version of the letter and modified its request for confidential treatment to cover only certain attachments to the October 15 letter. We will refer to these documents as the *TMI October Response*.

¹² The reorganization contemplated by that joint venture, which involved the assignment of various authorizations to companies in which TMI, and its affiliates, and MSV, and its affiliates, hold interests, was implemented following FCC approval in November 2001. See *Motient Services Inc. et al*, Order and Authorization, DA 01-2732, 16 FCC Rcd 20469 (Int'l Bur. 2001). That Order approved the reorganization only insofar as it involved MSS authorizations for operations in the L-Band. TMI did not seek approval for, and the FCC did not approve, any transfer of its 2 GHz MSS authorization. Furthermore, although TMI entered into the joint venture agreement in January 2001, TMI's application for a 2 GHz MSS authorization was never amended to reflect the agreement. TMI's application for approval of the transfer of L-Band authorizations, filed on March 1, 2001, indicated only that "TMI *may* also assign [to MSVLP's predecessor-in-interest] its pending application for a Canadian license for a [2 GHz MSS system]. In that event, appropriate applications will be filed with the FCC ... and with Industry Canada." In the Matter of *TMI Communications and Company, Limited Partnership*, Application for Modification and Assignment of Licenses to Operate Mobile Earth Terminals for Mobile Satellite Services, Application, filed January 16, 2001, at page 6, n. 13 (emphasis added).

¹³ *TMI October Response* at 2.

Canada in satisfaction of the independent construction milestones contained in TMI's Canadian approval-in-principle."¹⁴

6. On December 11, 2002, AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless (jointly, the "Carriers") filed an objection to TMI's claim that it had met the first milestone. The Carriers note that under the Terrestrial/Loral contract, TMI has no liability, either directly or as a guarantor of Terrestrial's obligations, and is "seemingly free to walk away from its proposed 2 GHz MSS system without penalty, and apparently without having spent any money constructing the satellite."¹⁵ The Carriers observe that TMI could have entered into a contract directly with Loral, subject to assignment at a later date to Terrestrial. They argue that the only logical explanation for TMI's alternative arrangement is that TMI "wanted to avoid exposing itself to any liability so as [to] preserve its option to walk away from its 2 GHz MSS proposal (while maintaining its authorization in case the right to use the spectrum developed any significant independent value)."¹⁶

7. TMI did not respond directly to these objections. Instead, on December 11, 2002, TMI filed an application to assign its LOI authorization to Terrestrial.¹⁷ In that application, TMI indicated that it had delayed transferring its LOI authorization repeatedly so the parties could evaluate the impact (on the venture's financial structure and ownership) of any decisions by FCC and Canadian regulators with respect to authorization of an ancillary terrestrial component for its system. TMI also indicated that Canadian foreign ownership rules limit the non-Canadian ownership of a carrier to 20%, therefore adding a "further layer of complexity" to its planning process.¹⁸ On January 27, 2003, the Carriers filed a petition to deny this application.

III. DISCUSSION

8. It is longstanding Commission policy to impose milestones for system implementation upon licensees.¹⁹ Milestone schedules are designed to ensure that licensees are proceeding with construction and will launch their satellites in a timely manner, and that the orbit spectrum resource is not being held by licensees unable or unwilling to proceed with their plans.²⁰ The first milestone requires the licensee to commence the construction process by entering into a non-contingent satellite manufacturing agreement. This first milestone requirement is especially important because it provides an early

¹⁴ *Id.*

¹⁵ Objection to *TMI Communications and Company, Limited Partnership*, DA 01-1638; File No. 189-SAT-LOI-97; IBFS Nos. Sat-LOI-19970926-00161, SAT-AMD-20001103-00158, filed by AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless on December 11, 2002, at 3. The Carriers rely specifically on Section 37.15 of the TMI contract, which explicitly states that the contract "shall not be deemed to create any rights in third parties, including suppliers, customers and owners (including TMI) of a Party [to the contract], or to create any obligations of a Party to any such third parties."

¹⁶ *Id.* at 4-5.

¹⁷ *See Public Notice*, Report No. SAT-00130 (December 27, 2002).

¹⁸ TMI Assignment Application at 4.

¹⁹ *See, e.g., Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites* (Report and Order), FCC 82-285, 90 FCC 2d 676 (1982) at ¶114 (adopting rule requiring DBS licensees to "begin construction or complete contracting for construction" of satellites within one year after receiving construction permits), and *MCI Communications Corp.* (Memorandum Opinion and Order), DA 87-24, 2 FCC Rcd 233 (1987) at ¶5 (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission).

²⁰ *See, e.g., AMSC Subsidiary Corp.* (Memorandum Opinion and Order), FCC 93-243, 8 FCC Rcd 4040 (1993) at ¶13, and *Motorola, Inc. and Teledesic LLC* (Memorandum Opinion and Order), DA 02-2146, 17 FCC Rcd 16543 (Int'l Bur. 2002).

objective indication as to whether a licensee is committed to proceeding with implementation of its proposal.²¹ The "non-contingent" requirement contemplates that there will be neither significant delays between the execution of the construction contract and the actual commencement of construction, nor conditions precedent to construction.²² The Commission provided a more-detailed general description of a non-contingent construction contract in *Tempo Satellite, Inc*:

The [contract] identifies specific satellites and their design characteristics, and specifies the dates for the start and completion of construction. The payment terms and schedule demonstrate the applicant's investment and commitment to completion of the system. The payments are spread throughout the [term of the] contract, the initial payments are significant, and the majority of payments will be made well before the end of the construction period.²³

9. By its terms, TMI's authorization required it to enter a non-contingent satellite manufacturing contract for its 2 GHz MSS system by July 17, 2002.²⁴ TMI did not enter into a satellite manufacturing agreement. Thus, it failed to comply with the plain terms of its authorization. Nonetheless, we have analyzed TMI's arrangements to determine whether they otherwise satisfy the intent of our milestone requirements by demonstrating an investment and commitment to completion of the satellite system. We conclude that they do not.

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, those cases typically involve circumstances in which the affiliated company executing the contract is wholly owned 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. This commonality of interests means that obligations undertaken by the affiliate, and the risks associated with those obligations, such as payment commitments and potential contractual liability, will impact the company holding the authorization in a manner essentially identical to the impact on the affiliated company. Thus, the obligations of the affiliated company under any satellite manufacturing contract can be reasonably considered as obligations undertaken by the licensee. The contractual arrangements present in this case, on the other hand, do not establish a similar commonality of interest. Indeed, the types of arrangements in this case are precisely the kind that a party would use to limit its risks and obligations, as compared to the risks and obligations from pursuing a venture through a wholly-owned subsidiary.

11. TMI's agreement to assign its LOI authorization to Terrestrial does not provide any other basis for viewing Terrestrial's obligations under the manufacturing contract with Loral as TMI's obligations. In fact, the agreement between TMI and Terrestrial must be considered in light of the fact

²¹ *Motorola, Inc. and Teledesic LLC*, Memorandum Opinion and Order, DA 02-2146, 17 FCC Rcd 16543 at ¶11 (Int'l Bur. 2002).

²² *Panamsat Licensee Corp., Application for Authority to Construct, Launch, and Operate a Ka-Band Communications Satellite System in the Fixed-Satellite Service at Orbital Locations 58 degrees W.L. and 125 degrees W.L.*, Memorandum Opinion and Order, DA 00-1266, 15 FCC Rcd 18720 (Int'l Bur. 2000) aff'd, 16 FCC Rcd 11534 (2001). See also *Norris Satellite Communications, Inc.*, 12 FCC Rcd 22299 (1997) ("A contract with unresolved contingencies, such as further payments required to commence construction," does not meet the first milestone requirement.)

²³ *In Re Petition and Application of Tempo Satellite, Inc., Petition for Reconsideration and Clarification For Assignment of Direct Broadcast Satellite Orbital Positions and Channels*, Memorandum Opinion and Order, File No. DBS-88-04, 7 FCC Rcd 6597 (1992) at ¶ 13.

²⁴ *TMI Authorization*, 16 FCC Rcd at 13811 ¶ 10, and 16 FCC Rcd at 13816 ¶ 24.

that it is subject to Canadian regulatory approval, and that the current ownership of Terrestar would not appear to meet Canadian ownership requirements.²⁵ Under these circumstances, and particularly given TMI's stated interest in continuity with respect to Terrestar,²⁶ we regard the condition requiring approval by the Canadian government as a material unresolved contingency, as TMI has not shown that such approval will be granted. Thus, the TMI/Terrestar agreement provides no basis whatsoever for viewing the Terrestar/Loral contract as sufficient to meet TMI's milestone conditions.

12. Even assuming that a cure to this defect could be found, we disagree with TMI's contention that, for purposes of milestone compliance, it is sufficient that TMI has an enforceable right to the benefits of a *bona fide* satellite manufacturing contract. In fact, equally if not more important than the issue of benefits under a contract is the question of whether TMI has undertaken concrete obligations that demonstrate a commitment to and investment in the project. TMI has not undertaken obligations, other than its agreements to transfer its authorizations. Indeed, TMI has not guaranteed Terrestar's payments to Loral, nor has it in any way provided information about obligations it has undertaken that would allow us to conclude that TMI effectively stands in the shoes of Terrestar in connection with obligations under the satellite manufacturing agreement.

13. TMI's situation is, in many respects, analogous to the situation presented in *Columbia Communications*.²⁷ In that case, we declined to extend a licensee's milestone for entering into a construction contract. The licensee had indicated that a pending transaction in which it contemplated transferring its authorization created complexities that made it difficult to enter into a construction contract. The International Bureau concluded that these complexities did not justify an extension of milestones, and that, even assuming they would, the licensee had not adequately explained why it could not enter into a contract with a satellite vendor, under terms permitting the assignment of the contract to the proposed transferee at a later date. TMI's only explanation as to why it did not pursue a similar option with Loral was that "TMI wanted to ensure continuity in the relationship with its satellite manufacturer and Terrestar provided an appropriate vehicle for that."²⁸ Under these circumstances, TMI's interest in continuity – of a relationship in which its obligations are extremely limited – does not establish the level of commitment necessary in connection with the first milestone.

14. We also do not believe the fact that all payments due up until now under the Terrestar/Loral contract have been made sufficiently establishes TMI's commitment to proceeding. Clearly, a failure to make payments, particularly at this early stage of system construction when expenditures are typically relatively modest, would raise serious concerns about construction progress. Conversely, while making

²⁵ Terrestar's 25.9% Canadian ownership is well short of the 80% it indicates is required under Canadian law. TMI Assignment Application at Exhibit 2, Page 4. See also Telecommunications Act of 1993, Chapter 38, available at <http://laws.justice.gc.ca/en/T-3.4/97729.html>; Radiocommunication Act, Section 6, available at <http://laws.justice.gc.ca/en/R-2/92420.html>; Canadian Telecommunications Common Carrier Ownership and Control Regulations (permitting non-Canadian ownership of voting shares at the holding company level of up to 33⅓%), available at <http://laws.justice.gc.ca/en/T-3.4/SOR-94-667/168883.html#rid-168893>; Canadian Radio Regulations Sections 9 and 10, available at <http://laws.justice.gc.ca/en/R-2/SOR-96-484/index.html>. While Industry Canada is currently reviewing Canada's foreign ownership limits, there can be no guarantee that they will be changed, or that those changes would permit the ownership arrangements contemplated by TMI. See "Minister Rock Announces Review of Telecommunications Foreign Investment Restrictions" Press Release dated November 19, 2002. Industry Canada released a discussion paper on the issue, available at www.ic.gc.ca/cmb/innovation.nsf/MenuE/Invest00, and requested that the Chair of the House of Commons Standing Committee on Industry, Science and Technology undertake a review of Canadian Telecommunications Foreign Investment Restrictions, with the analysis to be presented by the end of February 2003.

²⁶ See *infra*, n.26 and accompanying text.

²⁷ *Columbia Communications Corporation*, Order, DA 00-702, 15 FCC Rcd 16496 (Int'l Bur. 2000).

²⁸ *TMI October Response* at 3.

such payments provides one indicator of system progress, it is unclear from the record whether TMI has provided any funding in connection with those payments. In any event, even if TMI funded those payments by itself, our review of milestone compliance focuses on the legal arrangements for construction of the satellite. Our review of those legal arrangements and of TMI's response to our inquiries indicates no basis whatsoever for concluding that TMI is obligated to fund future steps in the construction process or is in any way otherwise obligated to proceed with construction.

15. TMI has pending applications to modify the orbital location of its authorization, and to assign its U.S. LOI authorization to Terrestar. As a result of our action today, we dismiss these applications as moot because there is no longer a valid 2 GHz MSS authorization. We note that the pendency of the transfer of the LOI authorization to Terrestar does not obviate our concerns. TMI remains the holder of the Canadian issued "agreement in principle" space station authorization. We therefore look to it as the party primarily responsible for addressing the conditions of our LOI authorization, which have to do with progress in the construction of space stations. Furthermore, in view of the fact that the transfer does not reflect a change in the Canadian license, we question whether such an application would be appropriate for processing. In any event, the contract upon which we base our decision does not satisfy the construction commencement milestone for TMI's 2 GHz MSS system.

IV. CONCLUSION AND ORDERING CLAUSES

16. Based on the foregoing, we conclude that TMI has failed to meet the July 2002 construction commencement deadline as required by its authorization. We further conclude that TMI's failure to satisfy this condition renders its authorization null and void.

17. Accordingly, IT IS ORDERED that the 2 GHz MSS LOI authorization held by TMI Communications and Company, Limited Partnership, 16 FCC Rcd 13808 (Int'l Bur. 2001), File Nos. 189-SAT-LOI-97, SAT-LOI-19970926-00161 is DECLARED NULL and VOID.

18. IT IS FURTHER ORDERED that TMI's Application for Minor Modification of Authorization to Construct, Launch and Operate a Mobile-Satellite Services System in the 2 GHz Frequency Band, File No. SAT-MOD-20021114-00237, is DISMISSED.

19. IT IS FURTHER ORDERED that TMI's Application for Assignment of 2 GHz LOI Authorization, File No. SAT-ASG 20021211-00238, is DISMISSED.

20. This Order is issued pursuant to delegated authority, 47 C.F.R. § 0.261, and is effective upon release.

FEDERAL COMMUNICATIONS COMMISSION

Donald Abelson
Chief
International Bureau