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

In re	)	
	)	
TMI Communications and Company, Limited Partnership and TerreStar Networks Inc. Application for Review and Request for Stay	)	File Nos. SAT-LOI-19970926-00161 SAT-AMD-20001103-00158
	)	
TMI Communications and Company, Limited Partnership, Application for Modification of 2 GHz LOI Authorization	)	File No. SAT-MOD-20021114-00237
	)	
TMI Communications and Company, Limited Partnership, and Terrestar Networks, Inc. Request to Assign Spectrum Reservation	)	File No. SAT-ASG-20021211-00238

MEMORANDUM OPINION AND ORDER

Adopted: June 21, 2004 **Released: June 29, 2004**

By the Commission: Commissioner Abernathy dissenting and issuing a statement.

I. INTRODUCTION

1. In this decision we grant, in part, an application for review[1] of an Order of the International Bureau ("Bureau").[2] That Order declared null and void a reservation of spectrum issued to TMI Communications and Company, Limited Partnership ("TMI"), for provision, using a Canadian-licensed satellite, of 2 GHz Mobile-Satellite Service ("MSS") in the United States. The Bureau took this action because it found that TMI had failed to satisfy a milestone condition requiring execution, within one year, of a non-contingent satellite manufacturing contract. We conclude that there are special circumstances warranting a waiver of the milestone condition and are therefore overruling the Bureau's holding that the spectrum reservation had become null and void. Specifically, we conclude that, as a result of a contract entered into by an affiliated company, there is a satellite proceeding toward construction, and that in light of this and other relevant circumstances, the underlying purposes of the milestone requirement will not be disserved by a waiver of the requirement for TMI to enter into a satellite construction contract. We therefore reinstate TMI's spectrum reservation. We also grant a request for modification of subsequent milestone deadlines and affirm the Bureau's dismissal of a request for assignment of the spectrum

[1] Application for Review filed jointly by TMI Communications and Company, Limited Partnership and TerreStar Networks, Inc. on March 12, 2003. ("*TMI/TerreStar Application for Review*").

[2] *TMI Communications and Company, Limited Partnership*, Memorandum Opinion and Order, 18 FCC Rcd 1725 (Int'l Bur. 2003) ("*TMI Milestone Order*").

reservation from TMI to a company without authorization from the relevant foreign government for the satellite.[3]

II. BACKGROUND

A. The Commission's Milestone Policy

2. It has been a longstanding Commission policy to impose milestone schedules for system implementation in satellite licenses.[4] Milestone schedules are designed to ensure that licensees will proceed with construction and launch their satellites in a timely manner, and that spectrum resources will not be "warehoused" by licensees who are unable or unwilling to proceed with their plans.[5] Warehousing could hinder the availability of services to the public at the earliest possible date by blocking entry by others who would be willing and able to proceed immediately with the construction and launch of satellite systems using the same spectrum.[6] Moreover, warehousing undercuts decisions by the Commission to allocate scarce spectrum resources to satellite services over other competing services.

3. The Commission has required satellite licensees to adhere to milestone schedules for over two decades. For most of that time, the Commission has imposed three milestone conditions in each satellite-system authorization. These milestone conditions require that, within specified time periods, licensees must (1) begin construction – which the Commission has defined as entering into a non-

[3] Application for Assignment of 2GHz LOI Authorization, File No. SAT-ASG-20021211-00238, filed Dec. 11, 2002.

[4] *See, e.g.*, *Inquiry into the Development of Regulatory Policy in Regard to Direct Broadcast Satellites*, Report and Order, 90 F.C.C.2d 676, 719 ¶ 114 (1982) (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, 2 FCC Rcd 233, 233 ¶ 5 (Com. Car. Bur. 1987) ("*MCI Order*") (noting that a milestone schedule is included in each domestic space station authorization issued by the Commission). *See also Norris Satellite Communications, Inc.*, Memorandum Opinion and Order, 12 FCC Rcd 22299 (1997) ("*Norris Review Order*"); *Morning Star Satellite Company, L.L.C.*, Memorandum Opinion and Order, 15 FCC Rcd 11350 (Int'l Bur. 2000) ("*Morning Star*"), *aff'd*, Memorandum Opinion and Order, 16 FCC Rcd 11550 (2001).

[5] *See, e.g.*, *Advanced Communications Corporation*, Memorandum Opinion and Order, 10 FCC Rcd 13337, 13338 ¶ 4 (Int'l Bur. 1995), *aff'd*, Memorandum Opinion and Order, 11 FCC Rcd 3399 (1995) ("*Advanced Review Order*"), *aff'd*, *Advanced Communications Corporation v. FCC*, 84 F.3d 1452 (D.C. Cir. 1996) (unpublished order available at 1996 WL 250460); *National Exchange Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 1990 (Com. Car. Bur. 1992) ("*Nexsat Order*"); *AMSC Subsidiary Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 4040, 4042 ¶ 13 (1993); *Motorola, Inc. and Teledesic LLC*, Memorandum Opinion and Order, 17 FCC Rcd 16543 (Int'l Bur. 2002) ("*Motorola/Teledesic*"); and *Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band*, Report and Order, IB Docket No. 99-81, 15 FCC Rcd 16127, 16177 ¶106 (2000) ("2 *GHz MSS Order*"). *See also Columbia Communications Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 15566, 15571, ¶ 11 (Int'l Bur. 2000) ("*First Columbia Milestone Order*").

[6] *Amendment of the Commission's Space Station Licensing Rules and Policies*, First Report and Order, IB Docket No. 02-34, 18 FCC Rcd 10760, 10827 ¶ 173 (2003) ("*First Space Station Reform Order*"), *citing 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° W.L. and 125° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11537-38 ¶ 12 (2001) ("*PanAmSat Milestone Review Order*"), *citing Nexsat Order*, 7 FCC Rcd at 1991 ¶ 8; *MCI Order*, 2 FCC Rcd at 233 ¶ 5; *First Columbia Milestone Order*, 15 FCC Rcd at 15571 ¶ 11.

contingent construction contract;[7] (2) complete construction; and (3) launch. As early as 1983, the Commission stated that including specified dates for each milestone as a condition of each license will "discourage warehousing" and noted that "delays in the commencement and completion of construction and launch activities beyond the specified dates will render the orbital assignment null and void."[8]

4. The Commission has viewed the first milestone condition – the "beginning construction" or "contract" milestone – as especially important because it provides an early objective indication of whether a licensee is committed to proceeding with implementation of its proposal.[9] The Commission established the criteria for meeting this first milestone requirement in the *Tempo Order*. First, licensees must enter into a binding, non-contingent contract with a spacecraft manufacturer to construct the licensed satellite system.[10] Second, the *Tempo Order* also required that satellite construction contracts describe the licensee's payment terms and schedule sufficiently to demonstrate the parties' investment and commitment to completion of the system.[11] In other words, the Commission established two general principles for milestone review in the *Tempo Order*: (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[12]

5. The Bureau has correctly clarified that the first prong of this analysis, the "binding, non-contingent contract" requirement, requires that the contract identify specific satellites and their design characteristics, and specify dates for the start and completion of construction.[13] The Bureau also has correctly provided that there must be neither significant delays between the execution of the construction contract and the actual commencement of construction nor conditions precedent to construction.[14]

6. In order to meet the second prong of this analysis, the construction contract must set forth a specific construction schedule that is consistent with the licensee's milestones.[15] In particular, the contract

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[7] *See Tempo Enterprises, Inc., et al.,* Memorandum Opinion and Order, 1 FCC Rcd 20, 21 ¶7 (1986) (*Tempo Order*).

[8] *Licensing of Space Stations in the Domestic Fixed-Satellite Service*, Report and Order, CC Docket No. 81-704, 48 Fed. Reg. 40233 (1983) at ¶82.

[9] *See, e.g., Motorola/Teledesic*, 17 FCC Rcd at 16547 ¶ 11.

[10] *Tempo Order*, 1 FCC Rcd at 21 ¶7. *See also, e.g, MCI Order*, 2 FCC Rcd at 234 ¶ 10, and *Nexsat Order,* 7 FCC Rcd at 1990 ¶¶ 3-4. *See also* Letter from Chief, Domestic Facilities Division, Common Carrier Bureau to Counsel, Hughes Communications Galaxy, Inc. (June 7, 1990) stating that "[r]equiring a non-contingent construction contract provides a uniform standard for all licensees and tangible evidence that implementation is proceeding."

[11] *Tempo Order*, 1 FCC Rcd at 21 ¶7.

[12] *Id.*

[13] *Id.*

[14] *Norris Review Order*, 12 FCC Rcd at 22303-04 ¶9; *PanAmSat Licensee Corp*., Memorandum Opinion and Order, 15 FCC Rcd 18720 (Int'l Bur. 2000); *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° W.L. and 125° W.L.*, Memorandum Opinion and Order, 16 FCC Rcd 11534, 11539 ¶16 (2001) (*PanAmSat Milestone Review Order*); *Mobile Communications Holdings, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 11898 (Int'l Bur. 2002), aff'd 18 FCC Rcd 11650 (2003) ("*MCHI Milestone Affirmance Order*").

[15] *See Morning Star*, 15 FCC Rcd at 11352 ¶6.

must require the licensee to make significant initial payments and the majority of payments well before the end of the construction period.[16]

7. Under the two prong analysis for the first milestone, there is substantial FCC precedent that provides guidance to the Commission and licensees in making a determination as to whether a licensee[17] has met its first milestone. Specifically, in determining whether a satellite system construction contract demonstrates the requisite investment and commitment to meet the standards of the two-prong analysis, the Commission has generally considered several factors, including, but not limited to, the following: 1) it sets forth a specific construction schedule that is consistent with the licensee's milestone schedule and that does not unduly postpone commencement of construction work; 2) the licensee is required to make significant initial payments; 3) most of the consideration to be paid by the licensee under the contract will be due well before the end of the construction period; 4) the contract identifies specific satellites and their design characteristics, consistent with the license, in appropriate detail; and 5) obligations under the contract are not contingent upon future performance of an elective action by the licensee. During the milestone review process, if the individual case analysis does not demonstrate that the licensee has met these or related factors, the Commission, in the absence of some countervailing factor,[18] will find that the licensee has not met its first milestone commitment.

8. Bureau decisions have correctly followed these two principles in determining whether a licensee has met the first milestone. For example, in nullifying a license held by Norris Satellite Communications, Inc. in 1994 for failure to meet the first milestone, the International Bureau noted that while Norris had, in fact, "signed a construction contract with Harris Corporation, it failed to make the $3 million down payment necessary to render that contract non-contingent."[19] Thus, Norris's contract was not binding and non-contingent. Similarly, on several occasions, the Commission has found that satellite construction contracts that do not provide for completion of the satellite system within the milestone schedule in the license are not sufficient to meet the second prong of the standard set forth in the *Tempo Order*, that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[20] Also, the Bureau has stated that contracts that unduly delay the

[16] *Tempo Order*, 1 FCC Rcd at 21 ¶7.

[17] In this Order, the term "license" is used for the sake of brevity to refer both to licenses issued pursuant to Section 301 of the Communications Act, 47 USC Section 301, and to a spectrum reservation adopted pursuant to the Commission's procedures for considering letter of intent filings. *See* 47 CFR § 25.137; and *Amendment of the Commission's Regulatory Policies 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 ¶185 (1997) ("*DISCO II Order*").

[18] One example of a countervailing factor is a case in which the licensee committed to build its own satellite system rather than hiring an outside satellite manufacturer. In that case, the licensee submitted an "Inter-organizational Work Order" committing a subsidiary to build the satellite system, and allocating $3 million to the project. The licensee also demonstrated that it had sufficient facilities to build a satellite system. *See The Boeing Company*, Order and Authorization, 18 FCC Rcd 12317, 12328-29 ¶¶ 30-31 (Int'l Bur. and OET, 2003) (listing factors that the Commission may consider in reviewing "in-house" satellite manufacturing arrangements).

[19] *Norris Satellite Communications, Inc.*, Order, 11 FCC Rcd 5402, 5402 ¶ 4 (Int. Bur. 1996), *aff'd Norris Review Order*, 12 FCC Rcd 22299.

[20] *See Direct Broadcasting Satellite Corp.*, Memorandum Opinion and Order, 8 FCC Rcd 7959, 7960 ¶6 (Mass Media Bur., Video Services Div. 1993) (a non-contingent contract must specify a construction timetable with "regular, specific" progress deadlines), quoting *United States Satellite Broadcasting Co., Inc. and Dominion Video Satellite, Inc.*, Memorandum Opinion and Order, 3 FCC Rcd 6858, 6861 ¶20 (1988) (*USSB/Dominion Order*); *Morning Star*, 15 FCC Rcd at 11352 ¶8 (contract found contingent in part because it did not specify a (continued….)

commencement of satellite construction do not show that the licensee has sufficient commitment to proceed with construction of the satellite.[21] Moreover, the Commission has determined that a contract to use capacity on another satellite does not show that the licensee is committed to construct and operate a licensee's own satellite, and so cannot meet the *Tempo Order* standard.[22] Last, the Bureau held that a licensee had met its first milestone when its commonly-controlled sister corporation had entered into a non-contingent construction contract with a spacecraft manufacturer.[23]

9. The Commission is not required to prescribe all-inclusive, specific, and detailed terms for contractual arrangements that meet the requirements of the contract execution milestone.[24] Such an intrusion into a licensee's business decisions is not necessary to determine whether it is sufficiently committed to constructing and launching a satellite system. In addition, we have never found it to be desirable or possible to try to anticipate and articulate every possible scenario that we might be asked to rule on in deciding compliance with our milestone requirements. Instead of adopting such detailed rules requiring or prohibiting certain contract provisions or types of arrangements, the Commission has adopted general standards. Under those standards, (1) the contract must be binding and non-contingent, and (2) the contract must demonstrate that the licensee is committed to completing the construction of the satellite system.[25] As a result, licensees have more flexibility to consider different construction and related financing arrangements, as long as they meet the general standards developed in the Commission's precedents.[26]

B. TMI's Reservation of Spectrum for Provision of 2 GHz MSS in the United States

10. The Commission has established special procedures for obtaining authorization for provision of radio communication service in the United States via satellites licensed by foreign administrations.[27] A party with a foreign-issued satellite license, or with a proposal for satellite operation previously submitted by a foreign administration to the International Telecommunication Union ("ITU") for coordination, may participate in an FCC space-station license-application processing round by filing a letter of intent

(Continued from previous page)
construction schedule); *EchoStar Satellite Corp.*, Memorandum Opinion and Order, 17 FCC Rcd 12780, 12783 ¶7 (Int'l Bur. 2002) ("*EchoStar II*").

[21] *EchoStar II*, 17 FCC Rcd at 12783 ¶7.

[22] *Advanced Review Order*, 11 FCC Rcd at 3414 ¶39.

[23] *KaStarCom World Satellite, LLC*, Order and Authorization, 18 FCC Rcd 22337, 22339 n.16 (Int'l. Bur. 2003) ("*KaStarCom Order*").

[24] *See Lakeshore Broadcasting, Inc. v. FCC*, 199 F.3d 468, 475 (D.C. Cir. 1999) (while parties need "full and explicit notice of all prerequisites," the Commission need not have "made the clearest possible articulation") and *Trinity Broadcasting of Florida v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (notice is adequate if "by reviewing the regulations and other public statements by the agency, a regulated party … would be able to identify, with ascertainable certainty, the standards … which the agency expects [it] to [meet]").

[25] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[26] It is well established that administrative agencies may develop policy in either rulemaking or adjudicatory proceedings. *SEC v. Chenery Corp*., 332 U.S. 194 (1947), *cited in Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 351 n.4 (D.C. Cir. 1989); *SBC Communications, Inc. v. FCC*, 138 F.2d 410, 421 (D.C. Cir. 1998) (Commission is allowed to proceed in adjudications so that it can develop policy in small steps).

[27] *See DISCO II Order*, 12 FCC Rcd 24094. *See also DISCO II First Reconsideration Order*, 15 FCC Rcd 7207 (1999); *DISCO II Second Reconsideration Order*, 16 FCC Rcd 19794 (2001); *First Space Station Reform Order*, 18 FCC Rcd at 10867-81 ¶¶ 285-329; 47 C.F.R. § 25.137.

("LOI") prior to the pertinent application cut-off date. Among other things, the application must provide information of the same kind required in ordinary satellite license applications.[28] Grant of an LOI request reserves spectrum for radio transmission between the foreign-licensed satellite and earth stations in the United States. License authority for operation of such U.S. earth stations must be obtained from the FCC and may be issued either to the operator of the foreign-license satellite(s) or to another party with a contractual right of access to the satellite(s).[29]

11. TMI – a Canadian limited partnership controlled by a wholly-owned subsidiary of a publicly-traded Canadian corporation – filed an LOI with the Commission in 1997, requesting a reservation of spectrum in the 2 GHz MSS band for provision of MSS in the United States via "CANSAT-M3," a geostationary-orbit ("GSO") satellite proposed in a pending request to Industry Canada, an agency of the Canadian government.[30] In an order released on July 17, 2001, the Bureau found that TMI had standing to request the reservation of spectrum because Industry Canada had commenced pertinent ITU coordination.[31] Finding, moreover, that the specifications for the proposed satellite set forth in the LOI were consistent with the Commission's pertinent technical requirements, the Bureau granted TMI's request for a reservation of spectrum in the 2 GHz MSS band for transmission in both directions between the satellite and mobile earth-station terminals in the United States.[32]

12. ***Milestone Conditions***. The order that granted TMI's LOI request explicitly conditioned the reservation of spectrum on compliance with a milestone schedule that required execution of a "non-contingent" contract for construction of the satellite within one year, *i.e*., by July 17, 2002.[33] The authorization order also included conditions requiring completion of Critical Design Review within two years, commencement of physical construction of the satellite within three years, launch of a completely-constructed satellite into its assigned orbital location within five years, and certification that the system was fully operational within six years. The order stipulated that the spectrum reservation would become "null and void" in the event this milestone schedule was not met.[34]

C. Agreement to Assign 2 GHz MSS Authorizations to MSVLP or Designated Subsidiaries

13. At the time when the Bureau granted the request for reservation of spectrum, TMI was providing L-band MSS in Canada with an existing Canadian-licensed satellite, MSAT-1, and a network control center in Ottawa. TMI was also providing L-band MSS in the United States via MSAT-1 under

[28] *DISCO II Order*, 12 FCC Rcd at 24173 ¶184 and 47 C.F.R. §§ 25.137(b) and (c). As amended in 2003, Section 25.137 now provides for processing and grant of LOIs for geostationary-orbit satellites pursuant to the "first-come" licensing procedure specified in 47 C.F.R. § 25.158.

[29] *See* 47 U.S.C. § 301 and 47 C.F.R. §§ 25.102, 25.115(d), and 25.137.

[30] Letter of Intent of TMI Communications and Company, Limited Partnership, File No. 189-LOI-97, IBFS No. SAT-LOI-19970926-00161. Because it proposed to route all traffic through a network-control station in Canada, TMI did not request an FCC reservation of spectrum for feeder-link transmission. *Id.* at ¶2.

[31] *TMI Communications and Company, Limited Partnership*, Order, 16 FCC Rcd 13808, 13815-16 ¶21 (Int'l Bur. 2001).

[32] *Id.* at ¶¶ 5, 6, and 23.

[33] *Id.* at ¶¶ 10 and 24.

[34] *Id.* at ¶24.

FCC blanket licenses for mobile terminal operation.[35] TMI competed in the U.S. market with Motient Corporation, a publicly-traded U.S. corporation that had been providing L-band MSS in this country via an FCC-licensed satellite, AMSC-1.

14. In January 2001, several months before the Bureau granted TMI's LOI request, TMI and Motient entered into agreements to consolidate their MSS interests by assigning assets to companies in which both would have ownership shares. Subject to FCC approval, they agreed to assign their FCC licenses for provision of L-band MSS in the United States to a wholly-owned subsidiary of Mobile Satellite Ventures LLC ("MSV LLP"), a Delaware limited-liability company. TMI also agreed to assign its Canadian license for MSAT-1 and its facilities in Ottawa to a Canadian affiliate of MSV LLP.[36] Further, TMI agreed, contingent upon FCC approval, to assign its then-pending 2 GHz LOI request, or an ensuing reservation of spectrum, to MSV LLC or a designated subsidiary thereof.[37]

15. Upon consummation of the L-band license assignments, MSV LLC was reformed as Mobile Satellite Ventures LP ("MSVLP"), of which Motient and TMI had 48.1% and 39.9% ownership shares, respectively. MSVLP was controlled by a general partner, Mobile Satellite Ventures GP, Inc. ("MSVGP"), a Delaware corporation, seventy percent of which was indirectly owned by U.S. citizens .[38] Motient, TMI, and MSV Investors LLC – a company indirectly controlled by a publicly-traded corporation not affiliated with Motient or TMI – each had the right to appoint three of MSVGP's twelve directors.[39] MSVLP is a Delaware limited partnership and is indirectly owned primarily by U.S. citizens.[40]

16. In sum, TMI assigned, or agreed to assign, all of its existing and prospective authorizations for provision of MSS in the United States to MSVLP's predecessor-in-interest and consequently obtained approximately forty percent of MSVLP's equity and a twenty-five percent share of *de jure* control of MSVLP.

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[35] *See TMI Communications and Company, L.P.*, Order and Authorization, 14 FCC Rcd 20798 (1999) (granting blanket license for transmission between MSAT-1 and mobile terminals in the United States in portions of the 1545- 1558.5 and 1646.5-1660 MHz frequency bands).

[36] *See Motient Services, Inc. and TMI Communications and Company, LP Assignors and Mobile Satellite Ventures Subsidiary LLP Assignee* Order and Authorization, 16 FCC Rcd 20469, 20479 n.75 (Int'l Bur. 2001) ("*MSV L-band Assignment Order*").

[37] *LOI Assignment Application*, Exhibit 2, Attachment A (confidential). Motient and TMI accordingly declared in an application for permission to assign their U.S. L-band licenses that TMI contemplated assigning the anticipated 2 GHz spectrum reservation to MSV LLC and would apply for FCC approval for such an assignment before consummating it. TMI Application for Assignment filed Jan. 1, 2001, File No. SES-ASG-20010116-00099, at n.13. The Bureau granted the L-band assignment application in November 2001. *See MSV L-band Assignment Order*, 16 FCC Rcd 20469. That *Order* did not address the 2 GHz spectrum reservation.

[38] *MSV L-band Assignment Order*, 16 FCC Rcd at 20476 ¶20.

[39] *Id.* The right to appoint the remaining three MSVGP directors was divided among three other shareholders not affiliated with Motient, TMI, or MSV Investors.

[40] According to assignment applications filed in 2001, indirect foreign ownership and voting interests in a wholly-owned subsidiary of MSVLP (and thus of MSVLP itself) amounted to approximately 45%, most of which was Canadian. *Id.* at ¶19.

D. Formation of TerreStar, Execution of Construction Contract for CANSAT-M3, and Correspondence Pertaining to Milestone Compliance

17. In early 2002, MSVLP's Board of Directors unanimously agreed to create a subsidiary to provide 2 GHz MSS in the United States via CANSAT-M3 pursuant to the reservation of spectrum previously issued to TMI. At their direction, TerreStar Networks Inc. ("TerreStar") was incorporated for that purpose on February 20, 2002.[41] TerreStar is a Delaware corporation and is wholly owned by MSVLP.

18. In March 2002 representatives of TerreStar and TMI commenced negotiation with Space Systems/Loral, Inc. ("Loral") – an established designer, manufacturer, and integrator of high-power telecommunications satellites and satellite systems for commercial and governmental customers in the United States and abroad – for construction of the proposed CANSAT-M3 satellite.[42] From March through June of 2002, Loral worked closely with TerreStar and TMI to develop and refine preliminary specifications for CANSAT M-3 consistent with TMI's Canadian space-station application and pertinent technical requirements prescribed by Industry Canada.[43]

19. In May, 2002, Industry Canada issued an Approval in Principle to TMI for launch and operation of CANSAT-M3 for provision of 2 GHz MSS in Canada.[44] The authorization was subject to conditions that, among other things, required a contract for construction of the satellite to be executed by July 15, 2002.

20. On July 12, 2002, TMI and TerreStar signed an agreement with each other ("TMI/TerreStar Agreement"), in which TerreStar promised to execute a procurement contract with Loral providing for construction and delivery to TMI of a 2 GHz MSS satellite in accordance with the terms of the Canadian CANSAT-M3 authorization and the FCC reservation of spectrum. In return, TMI promised to assign, on instruction from TerreStar, the FCC reservation of spectrum to "a suitable entity in which TerreStar … and/or TMI or affiliates thereof will have an interest," after obtaining necessary regulatory approval. Similarly, TMI also promised to assign, at TerreStar's instruction, its Canadian authorization for CANSAT M-3 and associated Canadian earth-station licenses to an entity that would be eligible under Canadian law to hold those authorizations and in which TerreStar and/or TMI would have an interest.[45]

21. On July 14, 2002, TerreStar and Loral executed a binding, firm-fixed-price contract providing for design, construction, delivery, launch, orbital positioning, and in-orbit testing of the

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[41] *See* sworn declarations of Wharton B. Rivers, Jr. and Ted H. Ignacy, submitted as attachments to Reply to Opposition to Application for Review filed April 7, 2003 by TMI and TerreStar. Rivers is TerreStar's President and CEO. Ignacy is TMI's Vice President of Finance.

[42] Affidavit of Ted H. Ignacy at ¶9; Declaration of Eric H. Butte, submitted as attachment to TMI/TerreStar Reply to Opposition to Application for Review filed April 7, 2003, at ¶¶ 2 and 3. Mr. Butte is Loral's Executive Director of Government Systems and Programs and supervised implementation of its satellite construction contract with TerreStar.

[43] Declaration of Wharton B. Rivers, Jr. at ¶6; Declaration of Eric H. Butte at ¶4; Affidavit of Ted H. Ignacy at ¶9.

[44] Letter of 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, submitted to the Commission as attachment to Letter of Gregory C. Staple, Counsel, TMI to Marlene H. Dortch, Secretary, FCC, filed August 27, 2002.

[45] Attachment to Letter of Gregory C. Staple, counsel to TMI, to Marlene H. Dortch, FCC Secretary, filed July 26, 2002.

CANSAT M-3 satellite ("TerreStar/Loral Contract").[46] The contract included detailed performance specifications, a work schedule that was consistent with the milestone implementation schedule on which TMI's reservation of spectrum was conditioned, and a payment schedule that required TerreStar to immediately remit $250,000 and pay additional installments at frequent intervals. Payments amounting to more than half of the total contract price were due within twenty-seven months of contract execution, *i.e.*, by October 2004, well before the satellite was to be launched.[47] The contract prescribed substantial penalties, moreover, for non-performance and termination without cause.[48]

22. TMI subsequently certified that the milestone condition in its reservation of spectrum that required execution of a non-contingent contract for construction of the proposed 2 GHz MSS satellite by July 17, 2002 had been met.[49] TMI submitted copies of the TerreStar/Loral Contract and the TMI/TerreStar Agreement with the certification statement as proof that the milestone condition had been fulfilled.

23. In August, 2002 TMI received official notice of a determination by Industry Canada that it "was bound to a contractual agreement for the construction of the proposed satellite" and had therefore met the first milestone condition in that agency's Approval in Principle for launch and operation of CANSAT M-3.[50]

24. In a letter sent to TMI in October, 2002, however, Bureau staff noted that TMI was not a party to the TerreStar/Loral contract and inquired whether there were other agreements that obligated TMI to implement its proposed 2 GHz MSS system or would subject it to legal liability if the system were not implemented.[51] TMI maintained that it had an interest in the TerreStar/Loral Contract by virtue of its position as a shareholder in MSVLP, TerreStar's parent company and sole owner.[52] TMI pointed out, moreover, that it had a contractual obligation to assign its reservation of spectrum for U.S. provision of 2 GHz MSS to MSVLP or a designated MSVLP subsidiary, at MSVLP's request, and said that it anticipated assigning the authorization to TerreStar within the next few months.[53] TMI argued that under these circumstances it was reasonable for it to contract with TerreStar to fulfill the first milestone

[46] Contract Between TerreStar Networks Inc. and Space Systems/Loral Inc. for the TerreStar 1 Satellite Program, filed July 26, 2002. TMI requested that portions of the contract be withheld from the public file. *See* Letter of Gregory C. Staple, counsel for TMI, to Marlene H. Dortch, FCC Secretary, dated and filed July 26, 2002.

[47] Under the terms of the contract launch was due to occur in June 2006. TerreStar/Loral Contract, Exhibit F at 2.

[48] For instance, TerreStar would incur a $10 million liability, over and above the amount that would otherwise be due, if it were to terminate without cause fifteen months or more after contract execution. *Id.*, Exhibit F at 1.

[49] Letter of Gregory C. Staple, counsel for TMI, to Marlene H. Dortch, FCC Secretary, dated and filed July 26, 2002. *See* 47 C.F.R. § 25.143(e)(3) (requiring licensees to certify milestone compliance or file a notice of non-compliance within ten days after a milestone deadline).

[50] Letter dated Aug. 23, 2002 from Jan Skora, Director General, Radiocommunication and Broadcasting Regulatory Branch, to Ted H. Ignacy, filed as attachment to Letter dated April 21, 2003 from Gregory C. Staple to Marlene H. Dortch, FCC Secretary.

[51] Letter from the Chief, Satellite Division to Gregory C. Staple, counsel to TMI, dated Oct. 18, 2002.

[52] Letter from Gregory C. Staple to Marlene H. Dortch, FCC Secretary, dated Oct. 15, 2002, at p.2.

[53] *Id*. at pp. 2 and 3.

requirement by entering into a satellite-construction contract with Loral.[54]

25. In December, 2002, three terrestrial wireless carriers – AT&T Wireless Services, Inc., Cingular Wireless LLC, and Verizon Wireless ("Wireless Carriers") – jointly filed a pleading contesting TMI's milestone certification.[55] They argued that the execution of the TerreStar/Loral Contract did not satisfy the first milestone condition for TMI's reservation of spectrum because TMI was not a party to that contract or a guarantor of payment to Loral and because the contract explicitly stated that it should not be construed as conferring any right of enforcement on TMI.[56] The Wireless Carriers therefore contended that TMI's reservation of spectrum was null and void.

E. Application for Assignment of Spectrum Reservation

26. On December 11, 2002, TMI filed an application for permission to assign its reservation of spectrum for provision of 2 GHz MSS to TerreStar.[57] TMI contended that grant of the application would serve the public interest by enabling full implementation of the pooling of resources contemplated by the 2001 joint-venture agreement between TMI and Motient, thereby fostering more effective competition between MSS and terrestrial wireless services in North America. TMI added that the proposed assignment would "place the … service authorization in the hands of the party currently responsible for procuring the … [satellite] on TMI's behalf."

27. In response to public notice of the filing of the assignment application,[58] the Wireless Carriers filed a petition to deny, arguing that the assignment application was moot because TMI's reservation of spectrum was null and void for failure to meet the first milestone condition and, furthermore, that the proposed assignment would have violated a rule that prohibited sale of a spectrum authorization for an unbuilt system for profit.[59]

F. Adverse Milestone Ruling and Dismissal of Assignment Application

28. In a decision released on February 10, 2003, the Bureau ruled that, as the Wireless Carriers had previously contended, TMI's reservation of spectrum was null and void for failure to meet the milestone condition that required execution of a non-contingent satellite construction contract by July 17, 2002.[60] Hence the Bureau dismissed, as moot, the application to assign the spectrum reservation to TerreStar.[61]

29. In discussing the milestone issue, the Bureau held, at the outset, that "the plain terms" of the spectrum reservation required TMI, itself, to enter into a contract for construction of the satellite.[62] The

[54] *Id.* at p.3.

[55] Letter from Kathryn A. Zachem and L. Andrew Tollin to Marlene H. Dortch, FCC Secretary, dated Dec. 11, 2002.

[56] *Id.* at 2, referring to Section 37.15 of the TerreStar/Loral Contract.

[57] File No. SAT-ASG-20021211-00238. *See* Public Notice, Report No. SAT-00130 (December 27, 2002).

[58] Public Notice, Report No. SAT-00130 (Dec. 27, 2002).

[59] Petition to Deny filed Jan. 27, 2003. *See also* Opposition to Petition to Deny filed Feb. 6, 2003.

[60] *TMI Milestone Order,* 18 FCC Rcd 1725.

[61] *Id.* at ¶19. The Bureau also dismissed as moot the application to re-specify the satellite's orbital location. *Id.* at ¶18.

[62] *Id.* at ¶9.

Bureau acknowledged that in some cases the Commission had concluded that analogous milestone conditions had been satisfied by the execution of satellite construction contracts not signed by recipients of the relevant spectrum authorizations. The Bureau observed, however, that in those instances a company closely affiliated with the licensee had entered into the construction contract, and there was such a commonality of interests between the licensee and the affiliated company that they could reasonably be viewed as interchangeable for purposes of milestone compliance.[63] Specifically, the Bureau said that in those cases "the obligations undertaken by the affiliate [under the construction contract], and the risks associated with those obligations … [would] impact the company holding the authorization in a manner essentially identical to the impact on the affiliated company."[64] The Bureau found no such commonality of interest between TMI and TerreStar. On the contrary, the Bureau found that TMI had not incurred any obligation to guarantee payments required by the construction contract or incurred any other legal obligation demonstrating commitment to the project.[65] Further, the Bureau held that TMI's agreement to assign the reservation of spectrum to TerreStar was immaterial to the milestone issue because it did not demonstrate relevant commitment on TMI's part and was conditioned on Canadian regulatory approval, which the Bureau regarded as "a material unresolved contingency."[66]

G. The Application for Review

30. TMI and TerreStar ("appellants") jointly filed an application for review of the Bureau's milestone decision, requesting reinstatement of TMI's reservation of spectrum and the associated assignment application.[67] They contend that TMI should have been found in compliance with the first milestone condition because it had an enforceable right, under its contract with TerreStar, to the benefit of a bona fide contract between TerreStar and Loral for timely construction of the satellite in question. They argue that the Bureau erred in finding that there was no substantial commonality of interest between TMI and TerreStar and that the Bureau misconstrued the condition in the TMI/TerreStar Agreement pertaining to Canadian regulatory approval. Furthermore, the appellants dispute the Bureau's finding that the spectrum reservation explicitly required TMI, itself, to enter directly into a contract with a satellite manufacturer. On the contrary, the appellants maintain that neither the Bureau nor the Commission had ever previously held that direct contractual privity between a satellite manufacturer and the recipient of the satellite authorization, or between the manufacturer and a subsidiary under the authorization-holder's de jure control, is necessary for milestone compliance. The appellants maintain, moreover, that the Commission did not establish such a requirement when it adopted service rules for 2 GHz MSS. Hence the appellants contend that they had no advance notice that such contractual privity would be deemed necessary. They therefore complain that the Bureau deprived them of due process when it declared TMI's spectrum reservation null and void without considering the TMI-TerreStar assignment application, grant of which would have eliminated the supposed privity problem by transferring the spectrum reservation to a party with a direct contractual relationship with the satellite manufacturer. The appellants also contend that the Commission's *DISCO II* market entry policy requires appropriate deference to foreign licensing decisions and that the Bureau's adverse milestone ruling in this case was in violation of that requirement because it was inconsistent with Industry Canada's prior milestone determination. In the

[63] *Id.* at ¶10.

[64] *Id*.

[65] *Id.* at ¶¶ 12 and 14.

[66] *Id.* at ¶11. Actually, the condition requiring Canadian approval applied only to a commitment to assign TMI's Canadian space-station authorization, not to its commitment to assign the FCC spectrum reservation.

[67] *See supra* n.1 and Request for Stay filed March 12, 2003.

alternative, the appellants urge the Commission to waive the first milestone requirement, arguing that such action would serve the public interest by facilitating timely construction and launch of a new MSS system pursuant to a binding satellite manufacturing contract.

31. In opposition, the Wireless Carriers argue that the Bureau decided the milestone issue correctly and that the holding is consistent with precedent.[68] The Wireless Carriers stress that TMI does not have voting control of TerreStar and has no obligation to Loral or any right against it under the TerreStar/Loral Contract, pointing out that the contract declares that it should not be construed to confer any rights or impose any obligations on TMI or any other third party.[69] They argue, moreover, that failure to satisfy the condition requiring entry into a non-contingent satellite construction contract by July 17, 2002 could not be cured by TMI's filing of an assignment application after that deadline was past. The Wireless Carriers contend that the argument is a procedurally-impermissible attack against an authorization condition and fails on the merits because *DISCO II* does not excuse recipients of a foreign satellite licenses from complying with FCC milestone requirements. The Wireless Carriers also contend that the appellants' alternative waiver request is untimely and that granting such relief would defeat the purpose that the milestone requirement was designed to serve.

32. In reply, the appellants assert that neither the Bureau nor the Wireless Carriers have cited any case in which a satellite authorization was declared void for milestone noncompliance under analogous circumstances – *i.e.*, while satellite construction was progressing in a timely fashion under a non-contingent contract executed before the initial milestone deadline.[70] Furthermore, the appellants argue that the TMI/TerreStar Agreement (as well as the ensuing contract between TerreStar and Loral) was a non-contingent satellite-construction contract in its own right, as it required TerreStar to contractually engage Loral to construct the proposed CANSAT M-3 satellite and deliver it to TMI. The appellants therefore contend that, in signing the agreement with TerreStar, TMI entered *directly* into a non-contingent satellite-construction contract in compliance with the first milestone condition in its reservation of spectrum.[71]

33. The appellants submitted affidavits with their reply pleading to prove that TerreStar and Loral had met their obligations under the TerreStar/Loral Contract to date and that significant progress had been made since its execution. In a sworn statement signed on April 7, 2003, TerreStar's President testified that work under the contract had progressed as planned and that TerreStar had paid $750,000 to Loral under the contract thus far and would be obliged to pay another installment of $250,000 in June 2003.[72] In another sworn statement, signed on April 4, 2003, Eric Butte, Loral's Executive Director for the CANSAT M-3 construction project, testified as follows: that in a meeting held shortly after the execution of the TerreStar/Loral Contract representatives of Loral and TerreStar agreed on a 90-day timetable for finalizing system architecture and identifying program milestones; that Loral's program team met with TerreStar executives in September 2002 to discuss top-level payload budget, feeder-link requirements, and development schedules for hardware and subsystems; that Loral carried on planning and design work for the satellite-construction program throughout the remainder of 2002, refining scope

[68] Opposition to Application for Review, filed March 27, 2003.

[69] *Id.* at 6, quoting Section 37.15 of the contract.

[70] Reply to Opposition to Application for Review, filed April 7, 2003, at 3.

[71] *Id.* at 2.

[72] Declaration of Wharton B. Rivers, Jr. filed as attachment to Reply to Opposition, *supra.* Several months later, counsel for the appellants reported that TerreStar's total payments to date under the contract amounted to $850,000. Letter dated July 16, 2003 from Gregory C. Staple and R. Edward Price, counsel for TMI, and Jonathan D. Blake and Gerard J. Waldron, counsel for TerreStar, to Michael K. Powell, FCC Chairman.

of work requirements, establishing a baseline for link budgets, designing the on-board digital processor and downlink antennas, devising an orbital debris mitigation strategy, and calculating fuel requirements; that Loral continued working in earnest on the program through the first quarter of 2003, developing designs for the RF input and output subsystems and refining the processor design; that the design specifications for the on-board digital processor – "a key objective," according to Mr. Butte – were 95% complete and Loral was ready to solicit proposals for manufacture of the processor from potential subcontractors; that, overall, "excellent" progress had been made on the project consistent with the work schedule in the contract; that TerreStar had submitted all required payments on time and had met all of its other obligations under the contract to date; and that the contract continued in full force and effect.[73]

III. DISCUSSION

A. Adequacy of Contract

34. We do not agree with the appellants' contention that TMI entered directly into a "non-contingent" contract for construction of the CANSAT M-3 satellite when its representatives signed the TMI/TerreStar Agreement on July 12, 2003. That agreement imposed no obligation on TerreStar beyond signing a satellite-construction contract with Loral on terms satisfactory to TMI;[74] it did not hold TerreStar, Loral, or any other party, responsible to TMI for successful performance of work under the construction contract once it was signed. In short, the TMI/TerreStar Agreement did not require anyone

[73] Declaration of Eric Butte, Space Systems/Loral, filed as attachment to Reply to Opposition, *supra*. The Appellants and the Wireless Carriers restated their arguments in numerous supplemental filings and *ex parte* presentations after the ordinary pleading cycle closed. *See* letters to Chairman Powell from Gregory C. Staple and R. Edward Price (counsel to TMI) and Jonathan Blake and Gerard Waldron (counsel to TerreStar) dated April 24, April 28, April 30, May 23, June 25, July 16, August 6, August 27, September 30, October 2, October 3, and Nov. 4, 2003; letters from Jonathan D. Blake to Marlene H. Dortch dated May 6, May 13, May 23, June 19, June 25, July 8, July 16, July 21, August 5, August 8, and September 3, 2003; Letter from Gerard J. Waldron, counsel to TerreStar, to Marlene H. Dortch dated June 5, 2003; Letter from Gregory C. Staple and Jonathan D. Blake to Michael K. Powell, FCC Chairman, dated June 3, 2003; letters from Kathryn A. Zachem, L. Andrew Tollin, and Craig E. Gilmore (counsel to the Wireless Carriers, to Marlene H. Dortch) dated June 20 and August 8, 2003; Letter from Gregory C. Staple and Jonathan D. Blake to Donald Abelson, Chief, International Bureau, dated September 12, 2003; letters from Gregory C. Staple, R. Edward Price, Jonathan Blake, and Gerard Waldron dated Sept.12 and 26, 2003; letter to Jennifer Manner from from Gregory C. Staple and Jonathan Blake dated Oct. 20, 2003; letter to Commissioner Martin from Gregory C. Staple, R. Edward Price, Jonathan Blake, Brian Smith, and Alfred Mottur dated Oct. 29, 2003; letter to Chairman Powell from Zie Rivers dated Nov. 6, 2003; letters to Chairman Powell from Louis J. Cordia dated Dec. 3, 2003 and Jan. 20, 2004; letter to Jennifer Manner from Zie Rivers dated Dec. 3, 2003; letters to Marlene H. Dortch from Kathryn A. Zachem, L. Andrew Tollin, and Adam D. Krinsky dated Dec. 11, 2003 and Jan. 6, 2004; letter to Marlene H. Dortch from Gregory C. Staple, R. Edward Price, Jonathan Blake, and Gerard Waldron dated Dec. 17, 2003; letter to Paul Margie from Gregory C. Staple, R. Edward Price, Jonathan Blake, and Gerard Waldron dated Dec. 18, 2003; letter to Sheryl Wilkerson, *et al.* from Gregory C. Staple, R. Edward Price, Jonathan Blake, Brian Smith, and Alfred Mottur dated Dec. 31, 2003; letter to Commissioner Copps from David Marchick dated Jan. 5, 2004; letter to John Rogovin and Linda Kinney from Gregory C. Staple, Alfred Mottur, and Jonathan Blake dated Jan. 12, 2004; letter to Chairman Powell from Jonathan Blake dated Jan. 15, 2004; and letter to Marlene H. Dortch from Jonathan Blake dated Feb. 10, 2004.

[74] TMI/TerreStar Agreement at 2.

either to construct a satellite or procure a satellite constructed by a third party.[75] Hence the execution of the TMI/TerreStar Agreement did not satisfy the first milestone condition in TMI's spectrum reservation.

35. We also disagree with the appellants' contention that cancellation of TMI's reservation of spectrum for failure to meet the first milestone condition would be unfair because the holding was predicated on failure to do something that the milestone condition did not clearly require. As we noted above, the standard for determining whether a licensee has met its contract milestone is whether it has entered into a "binding, non-contingent contract." In other words the contract must be binding and non-contingent, and the contract must demonstrate that the licensee is committed to completing the construction of the satellite system within the time frame specified in the license.[76] TMI was not a signatory to the TerreStar/Loral contract, incurred no obligation to pay for satellite construction, and derived no right to enforce Loral's performance obligations. Moreover, the TMI/TerreStar agreement imposed no obligation on TerreStar beyond signing a satellite-construction contract with Loral on terms satisfactory to TMI;[77] it did not hold TerreStar, Loral, or any other party, responsible to TMI for successful performance of work under the construction contract once it was signed. Hence, the execution of the TerreStar/Loral contract did not demonstrate that *TMI* was committed to completing the construction of the satellite system within the time frame specified in the license, as required by the standards set forth in the *Tempo Order*.[78] A reasonable satellite operator reading the Commission's milestone precedents could not reasonably have concluded that it could meet the *Tempo Order* standards by submitting the contracts that TMI submitted in this case.[79]

36. To the extent that TMI and TerreStar argue the Bureau's decision created a "strict privity" requirement,[80] they are incorrect. Though the *TMI LOI Ruling* indicated that TMI should enter into the contract, the Bureau emphasized in the *TMI Milestone Order* that a direct contractual relationship between the entity holding an authorization and a satellite manufacturer is not generally required.[81] Using an affiliate or other intermediary to handle the management of a manufacturing contract is a reasonable business decision in some cases. The Bureau's decision did not suggest the contrary. Rather, the Bureau's decision rests on the standard set forth in the *Tempo Order*, *i.e.*, that the authorized entity demonstrate the requisite *investment* and *commitment* to completion of its systems. The Bureau properly applied this standard to TMI/TerreStar's alternative arrangements and found that TMI did not adequately invest or commit to building its satellite system. Indeed, as discussed in the *TMI Milestone Order*, the TerreStar/Loral arrangement would have been acceptable if TMI had guaranteed TerreStar's payments, or

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[75] *Cf. Mobile Communications Holdings, Inc. and ICO Global Communications (Holdings) Limited*, 18 FCC Rcd 1094, 1100 ¶16 (Int'l Bur. 2003) ("*MCHI/ICO*"), *aff'd*, *Joint Application for Review of Constellation Communications Holding, Inc., Mobile Communications Holdings, Inc., and ICO Global Communications (Holdings) Limited*, Memorandum Opinion and Order, FCC 04-131 (released June 24, 2004) (holding that agreements for purchase of capacity contingent on construction and launch of satellites under other contracts to which MCHI and Constellation were not party were not satellite construction contracts for purposes of compliance with milestone conditions in MCHI's and Constellation's 2 GHz MSS licenses).

[76] *Tempo Order*, 1 FCC Rcd at 21 ¶ 7.

[77] TMI/TerreStar Agreement at 2.

[78] *Tempo Order*, 1 FCC Rcd at 21 ¶7.

[79] *See Lakeshore Broadcasting, Inc. v. FCC*, 199 F.3d at 475, *Trinity Broadcasting of Florida v. FCC*, 211 F.3d at 628.

[80] TMI/TerreStar Application for Review at 10-12, 14-15, 19-20.

[81] *TMI Milestone Order*, 18 FCC Rcd at 1729 ¶10. *See also KaStarCom Order*, 18 FCC Rcd 22337.

if there were other reasons to consider TMI as standing in TerreStar's shoes for purposes of meeting obligations under the agreement.[82]

37. Two cases that the appellants cite, *USSB* and *VITA*, are distinguishable. USSB signed a contract to purchase a payload of transponders on Hughes' satellite. The Video Services Division of the Mass Media Bureau found USSB had shown its commitment and investment by paying Hughes more than 40% of the purchase price for its contracted channels while the satellite was under construction, and had "arranged for the remainder of the financing for the completion and launch of that satellite."[83] In this case, on the other hand, TMI has no payment obligation to Loral whatsoever, as all payments and financing obligations rest with TerreStar. In *VITA*, the licensee was clearly committed to launching its own system, as it had previously entered into a satellite manufacturing agreement and had a satellite constructed that was lost in a launch failure before entering into a spectrum sharing arrangement.[84]

B. DISCO II Policy

38. Nor do we agree that the *DISCO II* market-entry policy precludes us from assessing compliance with the first milestone condition in TMI's U.S. reservation of spectrum merely because Industry Canada has determined that TMI met a similar condition in that agency's Approval in Principle for the proposed CANSAT M-3 satellite. The Commission made it clear in the *DISCO II* decision that provision of service within the United States via foreign-licensed satellites will be subject to the same rules that apply to provision of service in this country via FCC-licensed satellites; otherwise, as the Commission observed, providers of U.S. service via foreign-licensed satellites would have an unfair competitive advantage and the policy objectives of the Commission's pertinent rules would be disserved.[85] There is no reason to depart from this general policy where milestone compliance is concerned. The reservation of spectrum that the Commission granted to TMI preempts other possible uses of 2 GHz spectrum for provision of service in the United States in precisely the same way, and to the same extent, as the licenses that the Commission issued to other parties for 2 GHz MSS space-station operation. Hence, it is of no less concern to us that construction of TMI's CANSAT M-3 satellite proceed expeditiously than that construction of FCC-licensed 2 GHz MSS satellites be carried out in a timely fashion in compliance with prescribed milestone schedules. We must exercise our own judgment when deciding whether a milestone condition in a reservation of spectrum for provision of service in the United States has been met; to rely, instead, on a conclusory finding by a foreign licensing agency would be an abdication of responsibility.

C. Waiver

39. Although we find that TMI did not meet the first milestone, we must address the appellants' alternative request for waiver of that milestone. The Commission may waive a rule for good cause shown.[86] Waiver is appropriate if special circumstances warrant a deviation from the general rule and such deviation would better serve the public interest than would strict adherence to the general rule.[87]

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[82] *TMI Milestone Order*, 18 FCC Rcd at 1730 ¶12.

[83] *United States Satellite Broadcasting Company, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 7247, 7250 ¶ 17 (Mass Media Bur. 1992).

[84] *Volunteers in Technical Assistance*, Order, 12 FCC Rcd 3094 (Int'l Bur. 1997) ("*VITA*").

[85] *DISCO II Order*, 12 FCC Rcd at 24168 ¶173 and 24173 n.358.

[86] 47 C.F.R. § 1.3.

Generally, the Commission may grant a waiver of its rules in a particular case if the relief requested would not undermine the policy objective of the rule in question and would otherwise serve the public interest.[88]

40. We believe that a waiver, conditioned upon TMI being obligated to cover TerreStar's future payments to Loral in some appropriate manner, is warranted. We discuss this condition in more detail in this Order below. We base this conclusion upon the unique facts and circumstances presented in this case. Specifically, we conclude that TMI and TerreStar faced special circumstances in that Canadian foreign ownership requirements compelled the parties to enter into somewhat unusual contractual arrangements. The TMI/TerreStar contract is a binding, non-contingent contract and does not appear to be an effort to evade or avoid a firm commitment to progressing with satellite construction. In addition, we find that a conditional waiver in this case would not undermine the Commission's milestone policy. This is in part because, but for the identity of one of the contracting parties, the TerreStar/Loral contract would meet the *Tempo Order* standards for a binding, non-contingent contract. We also note that TerreStar was making payments under the TerreStar/Loral contract, and find that this provides some evidence that construction will resume when we reinstate TMI's spectrum reservation. Nevertheless, to maintain the integrity of our milestone policies, which are designed to ensure that the satellite licensee is committed to constructing the satellite, we require TMI to cover TerreStar's construction payments in some appropriate manner.

1. Special Circumstances

41. TMI faced special circumstances because relevant Canadian laws significantly limit the amount of foreign investment that can be made in a Canadian licensee.[89] The current MSVLP investor group, TerreStar's parent company, cannot obtain a Canadian authorization without substantially altering their investment and/or ownership shares. Under these special circumstances, we conclude that there is a reasonable explanation for the fact that an entity other than the spectrum reservation holder entered into the satellite manufacturing agreement in this case. Accordingly, we disagree with the Wireless Carriers' contention that the appellants have not plausibly explained why TerreStar, rather than TMI, contracted with Loral for construction of the satellite.

2. No Undermining of Commission Policy

42. For several reasons, we find that the waiver as conditioned here will not undermine the purposes of the Commission's milestone policy, -- ensuring that licensees and spectrum reservation holders construct their satellite systems and provide service to the public in a timely fashion. As an initial matter, we find that the terms and conditions of the TerreStar/Loral contract would meet the standards set forth in the *Tempo Order* and the factors discussed in this Order above, had TMI entered into the contract. First, we find that the TerreStar/Loral contract would meet the first prong of the *Tempo* analysis, a binding, non-contingent contract, because the contract is a genuine, binding contract for complete construction and in-orbit delivery of the proposed CANSAT M-3 satellite. In this regard, no party disputes that the contract between TerreStar and Loral for construction of CANSAT M-3 is a bona fide satellite-construction contract. Second, the construction contract would meet the second prong of the *Tempo* analysis, demonstrating an adequate investment and commitment to constructing the satellite

(Continued from previous page)

[87] Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164 (D.C. Cir. 1990) ("*Northeast Cellular*").

[88] *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *Dominion Video Satellite, Inc.*, Order and Authorization, 14 FCC Rcd 8182 (Int'l Bur. 1999).

[89] TMI claims that Canadian law requires a minimum of 80 percent Canadian ownership of Canadian licensees. *See TMI Milestone Order*, 18 FCC Rcd at 1729 n.25.

system in a timely manner, because it does not unduly postpone the commencement of work, and does not establish elective pre-conditions that must be met before any performance or payment obligations arise or that remain unresolved as of the initial milestone deadline. The contract specifies satellite design in appropriate detail. Further, the contract prescribes payment terms that require significant initial payments and payment of a preponderant portion of the agreed compensation well before the end of the construction period. In addition, the contract sets forth a performance schedule requiring complete construction of the satellite by a specified date consistent with the milestone deadlines for launch and commencement of full system operation. Thus, the Terrestar/Loral contract is analogous to other contracts which met the *Tempo Order* standards, and different from contracts that did not.[90]

43. Furthermore, there is no evidence to suggest that the TerreStar/Loral contract is in any way a sham, subterfuge, or accommodation designed simply to meet regulatory requirements. To the contrary, the evidence indicates that substantial work was performed under the TerreStar/Loral Contract prior to the Bureau's issuance of the adverse milestone ruling in February 2003, and that TerreStar met all payment obligations that fell due up to that point and for several months afterwards.[91] In addition, we note that TMI has represented to the Commission that it and TerreStar are fully committed to the satellite construction project, and are prepared to do their parts to see the construction completed.[92] Accordingly, we conclude that the TerreStar/Loral contract provides further support for concluding that the underlying goals of our milestone policy – prompt initiation of service and avoidance of warehousing – will be met.

44. Finally, we observe that TMI holds approximately 40 percent of the equity and 26 percent share of the voting rights in MSVLP, TerreStar's parent and sole owner.[93] To this extent, TMI appears to stand to suffer some financial loss if the satellite is not constructed as a result of its 40 percent ownership of TerreStar's parent company. We cannot conclude, however, that TMI's financial commitment in TerreStar is adequate for the purposes of the milestone requirements, however, because TMI does not have a controlling interest in TerreStar. Moreover, as noted above, TMI has not made an adequate commitment to completing construction of its satellite system, because the TMI/TerreStar contract did not bind TMI, the spectrum reservation holder, to constructing a satellite or procuring a satellite constructed by a third party.

45. Thus, while we conclude that granting a waiver to TMI, without a further condition, will not result in warehousing spectrum, we are concerned that granting such a waiver could create a precedent

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[90] *See*, *e.g.*, *Norris Review Order*, 12 FCC Rcd at 22305 ¶14; *EchoStar Satellite Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 1765, 1767-68 ¶11 (1992); *Tempo Satellite, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 6597 (1992); and *MCHI Milestone Affirmance Order*, 18 FCC Rcd at 11656 ¶19.

[91] *See* affidavits cited in nn. 72 and 73, *supra*; letter from Gerald J. Waldron, Counsel for TerreStar, to the FCC Secretary dated June 5, 2003 (asserting that TerreStar authorized performance of an additional $100,000 of design work after the Bureau issued the adverse milestone ruling); and letter from Gregory C. Staple and Jonathan D. Blake, Counsel for TerreStar, to the FCC Chairman dated July 16, 2003 (asserting that TerreStar had paid $850,000 to Loral to date for work performed pursuant to the contract).

[92] *See* Declaration of Wharton B. Rivers, Jr., filed as attachment to TMI/TerreStar Reply to Opposition to Application for Review, at ¶¶ 11-12; letter from Counsel for TMI and TerreStar to Donald Abelson dated Sept. 12, 2003; and letter from Counsel for TMI and TerreStar to Commissioner Kevin J. Martin dated Oct. 29, 2003, with attachment.

[93] *See TMI/TerreStar Assignment Application*, Exhibit 2, p.1; *MSV L-band Assignment Order*, 16 FCC Rcd at 20476 ¶20.

under which licensees might try to warehouse spectrum by not entering into their own satellite construction contracts or otherwise binding themselves to constructing their satellite systems. To avoid any possible undermining of the purposes of the milestone requirement, and out of an abundance of caution, we condition the waiver we grant here on TMI increasing its commitment to completing construction of the satellite system. Specifically, we require TMI to obligate itself to cover Terrestar's future satellite construction contract expenditures, by entering into a guarantee or reimbursement agreement with TerreStar and/or Loral, or by some similar arrangement. With this increased commitment on the part of TMI, together with TMI's current investment in TerreStar, coupled with TerreStar's binding, non-contingent satellite construction contract with Loral, there is a sufficient basis to conclude that the satellite system will be built in a timely fashion, and that the satellite will be used to provide service in the United States, as proposed in TMI's Letter of Intent.

4. Public Interest

46. We find that granting this conditional waiver is in the public interest. This is in part because all the considerations discussed above, taken together, including the condition on TMI's waiver, provide a sufficient basis to conclude that the satellite system will be built within the time frame proposed in TMI's application for review.

5. Conclusion

47. We therefore conclude that a waiver of TMI's first milestone requirement, as conditioned here, is warranted. TMI faces special circumstances because it has to obtain financing for its satellite construction project and remain in compliance with Canadian foreign ownership laws. The conditional waiver will not defeat the objectives of the milestone policy, in that (1) there is a binding, non-contingent satellite construction contract in this case, (2) TMI's investment in the satellite construction project is only slightly less than that needed to meet the *Tempo Order* standards, and (3) the condition we place on TMI's waiver will help ensure that it makes an adequate commitment to completing its satellite system construction. We also conclude that grant of the conditional waiver will serve the public interest by facilitating completion of construction of CANSAT M-3, and provision of new service to users in the United States more quickly than if we assigned the spectrum to another party. While none of the justifications for the conditional waiver individually are sufficient to support granting the waiver request, we find that all of them, taken together, provide sufficient support for a grant.

48. In the future, we intend to grant waivers of this kind only under very limited circumstances. Specifically, we will consider waivers of the contract milestone requirement that the spectrum reservation holder sign a satellite construction contract *only* if: (1) the spectrum reservation holder is based in a country that limits foreign ownership in satellite licensees, (2) the spectrum reservation holder uses a third party to enter into the satellite construction contract in order to meet those foreign ownership limits; (3) the contract meets the requirements of the *Tempo Order*, but for the parties who enter into the contract; (4) the spectrum reservation holder has a substantial ownership interest, 40 percent or more, in the party entering into the contract, and (5) in cases where the spectrum reservation owner does not have a controlling interest in the party entering into the contract, the spectrum reservation owner must make an additional commitment to cover the payments of the party entering into the contract.

49. Accordingly, within 30 days after the release date of this Order, TMI must demonstrate to the International Bureau that it has entered into an agreement to cover TerreStar's payments to Loral as set forth above, or reject the waiver as conditioned and surrender its spectrum reservation. To determine whether TMI's commitment is sufficient, we will look to the factors that we use to determine whether a satellite construction contract meets the *Tempo Order* two-prong test, to the extent those factors are relevant.

D. Modifications

50. ***Modification of Subsequent Milestone Deadlines.*** In a Request for Stay filed simultaneously with their application for review, the appellants asserted that the release of the Bureau's decision declaring TMI's reservation of spectrum null and void was hindering them from raising additional capital to fund further construction of CANSAT M-3. They therefore asked the Commission to "toll" the remaining milestone requirements – *i.e.*, to stay the requirements pending disposition of the application for review and to modify the milestone schedule, in the event the Commission were to grant the application for review and reinstate the spectrum reservation, by postponing the compliance deadlines to compensate for delay of progress since the release of the Bureau's adverse decision.[94]

51. The appellants later reported that Critical Design Review ("CDR") was not completed by July 17, 2003, as required by the second milestone condition in TMI's spectrum reservation, but they promised to proceed expeditiously with construction and launch of CANSAT M-3 upon grant of the application for review and the stay request.[95] In a supplement filed in October, 2003 in response to an inquiry from a member of the Commission, the appellants proposed an adjusted milestone schedule for adoption in the event of reinstatement of the spectrum reservation.[96] The proposed schedule would require CDR to be completed within four months after reinstatement; physical construction to commence within eight months after reinstatement; satellite launch to occur within three years and four months after reinstatement; and full system operation to commence within four years and four months after reinstatement.

52. The request for modification of the milestone schedule is reasonable.[97] We note, however, that Industry Canada's Approval in Principle for CANSAT M-3 was conditioned on compliance with a milestone schedule that required the satellite to be placed into its assigned orbital position by July 17, 2006 (the date that the Bureau had previously specified as the launch milestone deadline in the order

[94] Request for Stay filed March 12, 2003.

[95] Letter dated July 17, 2003 from Gregory C. Staple, counsel for TMI, and Jonathan Blake, counsel for TerreStar, to Marlene H. Dortch, FCC Secretary.

[96] Letter dated Oct. 29, 2003 from Gregory C. Staple, counsel for TMI, and Afred E. Mottur, Jonathan D. Blake, and Gerard J. Waldron, counsel for TerreStar, to FCC Commissioner Kevin J. Martin.

[97] Had it been upheld, the ruling that TMI's spectrum reservation was null and void might not have foreclosed all opportunity for provision of 2 GHz MSS in the United States via the proposed CANSAT M-3 satellite. It might still have been possible for TerreStar to obtain a blanket earth-station license authorizing such U.S. service provision – *if* it could complete construction of the satellite, launch it, and place it into operation despite the loss of the U.S. spectrum reservation, and *if* U.S. 2 GHz MSS spectrum were available at that time (which might happen if some of the current 2 GHz MSS licenses are subsequently surrendered, revoked, or become void). *See DISCO II Order*, 12 FCC Rcd at 24173-74 ¶¶ 183-188 (authority for provision of U.S. service via foreign-licensed satellites can be obtained either through participation in a U.S. space-station processing round or by filing an earth-station application for operation with an existing satellite system), and *Amendment of Part 2 of the Commission's Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services, including Third Generation Wireless Systems*, Third Report and Order, Third NPRM, and Second Memorandum Opinion and Order, ET Docket No. 00-258, 18 FCC Rcd 2223, 2239 ¶32 (2003) ("*AWS Third Report and Order*") (policy for reassignment of 2 GHz MSS spectrum freed as a result of future milestone rulings left for later determination). The appellants' assertion that the adverse milestone ruling hindered TerreStar from raising additional capital is fully credible, however, as the ruling undoubtably cast a shadow on the prospect for provision of service in the U.S. market. *See DISCO II Order*, 12 FCC Rcd at 24177-78 ¶196 (noting that provision of U.S. service via foreign-licensed satellites might be foreclosed to parties without spectrum reservations).

granting TMI's spectrum reservation).[98] Since the reservation of spectrum is premised upon the continued validity of the Canadian Approval in Principle, we are attaching a condition requiring TMI to inform the Commission promptly in the event the Canadian approval lapses or is modified with respect to a required completion date, so that we may take appropriate action. Our decision to extend TMI's milestones is not intended in any way to suggest a course of action by Industry Canada in connection with required completion dates for TMI's approval in principle.

53. ***Orbital Location.*** TMI indicated in its LOI that the Canadian-licensed satellite that it proposed to use for provision of 2 GHz MSS to users in the United States would be located at 106.5° W.L. In an application filed on November 14, 2002, TMI requested modification of its reservation of spectrum to change the specified orbital location to 107.3° W.L. TMI explained in the application that it had learned in the course of the Canadian licensing process that the Ku-Band frequencies it was proposing to use for feeder links would not be allotted, under ITU rules, for use by a Canadian-licensed satellite at 106.5° W.L.[99] TMI therefore amended the Canadian license application to request authority for operation at 107.3° W.L., and Industry Canada approved the amended proposal in May 2002.[100] In requesting a corresponding modification of its reservation of spectrum, TMI contends that the change of orbital position is not precluded by any provision of the FCC's rules, does not require any alteration of other technical specifications, and presents no interference issue. We agree with these contentions and therefore grant the requested modification.

54. ***Service Link Bandwidth.*** Under the Commission's licensing policy for 2 GHz MSS, paired spectrum assignments for service-link operation ("Selected Assignments") are to be granted on a first-come, first-served basis; each licensee or spectrum-reservation recipient is to choose its Selected Assignments from previously-unassigned portions of the 2 GHz MSS service-link bands after having placed a satellite in its authorized orbit.[101] Last year, after reallocating certain 2 GHz bands from MSS to other services, the Commission decided that the remaining 2 GHz MSS service-link spectrum should be divided equally among licensees in compliance with milestone requirements. Two frequency bands, each 20 megahertz wide, are currently allocated for 2 GHz MSS service links – 2000-2020 MHz (for earth-to-space transmission) and 2180-2200 MHz (for space-to-earth transmission) – and there are now five outstanding system authorizations for provision of 2 GHz MSS in the United States, including TMI's. Hence we are modifying TMI's spectrum reservation, which formerly authorized selection of 3.5 megahertz service-link assignments, to grant authority for selection of 4 megahertz service-link bands, instead.[102]

E. Assignment Application

55. In December 2002, shortly after TMI's first milestone deadline, it submitted an application to assign its spectrum reservation to TerreStar. The Bureau did not act on that application, but rather

[98] *See* attachment to Letter dated Aug. 27, 2002 from Gregory C. Staple, counsel for TMI, to Marlene H. Dortch, FCC Secretary.

[99] TMI Application for Modification of Space Station License, File No. SAT-MOD-20021114-00237, Exhibit 2., p.1. Because the system's network control center would be in Canada, not the United States, TMI's LOI application did not request FCC authority for feeder-link operation.

[100] *See* n.44, *supra*.

[101] *2 GHz MSS Order*, 15 FCC Rcd at 16138 ¶16.

[102] We delegate authority to the International Bureau to modify current licenses for other 2 GHz MSS systems to re-specify Selected Assignment bandwidth in accordance with this action.

dismissed it as moot in the *TMI Milestone Order*.[103] In light of our reinstatement of the TMI spectrum reservation, we also reinstate to pending status TMI's application to assign its spectrum reservation to TerreStar, and we direct the Bureau to act on the assignment application.

IV. CONCLUSION AND ORDERING CLAUSES

56. We conclude, in light of all the relevant facts and circumstances, that it will serve the public interest to waive the first milestone condition in TMI's reservation of spectrum and modify the subsequent milestone deadlines as requested.

57. Accordingly, IT IS ORDERED that the Application for Review filed on March 23, 2003 by TMI Communications and Company, Limited Partnership and TerreStar Networks, Inc. IS GRANTED IN PART, the first milestone condition in TMI's spectrum reservation IS WAIVED, the Bureau's ruling that TMI's reservation of spectrum for provision of 2 GHz MSS was null and void[104] IS OVERRULED, and TMI's application for minor modification filed on November 14, 2002, File No. SAT-MOD-20021114-00237, IS REINSTATED and GRANTED.

58. IT IS FURTHER ORDERED that the Application for Review filed on March 23, 2003 by TMI Communications and Company, Limited Partnership and TerreStar Networks, Inc. IS OTHERWISE DENIED.

59. IT IS FURTHER ORDERED that the Request for Stay filed on March 12, 2003 by TMI Communications and Company, Limited Partnership and TerreStar Networks, Inc. IS GRANTED to the extent indicated herein and that the milestone implementation schedule for TMI's reservation of spectrum for provision of 2 GHz MSS in the United States IS MODIFIED as follows:

Milestone	**Deadline**
Complete Critical Design Review	November 2004
Begin physical construction of satellite	March 2005
Launch satellite into assigned orbital location	November 2007
Certify entire system operational	November 2008

As modified hereby, the reservation of spectrum IS CONDITIONED on compliance with the following requirements: TMI must inform the Commission within ten days of lapse or cancellation of Industry Canada's Approval in Principle for CANSAT M-3, or of any other action by Industry Canada affecting the approval, or of any modification of the approval with respect to an implementation deadline.

60. IT IS FURTHER ORDERED that:

- upon launch of its satellite into its authorized orbit TMI shall choose Selected Assignments in the 2000-2020 MHz and 2180-2200 MHz frequency bands that will give access to 4 megahertz in each direction of transmission on a primary basis;[105]
- each Selected Assignment shall be chosen so that its band edge is an integer multiple of 4 megahertz from the edge of the encompassing 2 GHz MSS band;

[103] *TMI Milestone Order*, 18 FCC Rcd at 1732 ¶15.

[104] Cited in n.2, *supra*.

[105] This assignment may be subject to adjustment necessitated by the outcome of reconsideration, review, or judicial appeal of the *AWS Third Report and Order* or rulings on milestone compliance by 2 GHz MSS licensees.

- operation in 2 GHz MSS frequencies outside of the Selected Assignments shall be on a secondary basis to operation of other 2 GHz MSS systems.

61. This *Memorandum Opinion and Order* is issued pursuant to Sections 4(i) and 5(c)(5) and (6) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c)(5) and (6), and Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

DISSENTING STATEMENT OF
COMMISSIONER KATHLEEN Q. ABERNATHY

Re: TMI Communications Company, Limited Partnership and TerreStar Networks, Inc. Application for Review and Request for Stay.

One of my core principles, and one that I believe is essential in order for effective regulation, is that the FCC aggressively enforce its rules. Failure to enforce rules sends the inappropriate signal that licensees may engage in unlawful conduct with impunity. And, in the case of satellite milestones, failure to enforce our requirements results in spectrum laying fallow and inefficient utilization of the orbital resource.

In the current case, the majority finds that TMI Communications Company (TMI) should be granted a waiver of the first milestone requirement of its license. Under this milestone, TMI was required to execute within one year a non-contingent satellite manufacturing contract. While the majority concedes that TMI did not meet this milestone, it nonetheless grants a retroactive waiver of the requirement and concludes that the underlying purposes of the milestone will not be disserved by providing such relief.

This is simply not true. While I have sympathy for TMI in this proceeding, I think it is mistaken to undermine the Commission's policy of strict milestone enforcement by granting a waiver. To turn compliance into a subjective evaluation undermines the very basis of this policy and, as such, does not meet the requirements of our waiver standard. If the Commission wishes to abandon its milestone policy it must do so via a rulemaking proceeding and not through inconsistent ad hoc waivers.[106]

In the long term, I believe that the public interest is best served by requiring strict compliance with our milestone policy. Any approach that relies on something less substantially weakens our milestone enforcement policy and enables licensees to warehouse spectrum. It is for these reasons that I dissent from this order.

[106] For example, in *Joint Application for Review of Constellation Communications Holdings, Inc., Mobile Communications, Inc. and ICO Global Communications* (*Holdings*) *Limited*, Memorandum Opinion and Order, FCC No. 04-131 (released June 24, 2004) (ICO Decision), the Commission determined that it should not grant a waiver of its milestone requirement. By denying a waiver in the ICO Decision, but granting one here, we have created an inconsistency in our milestone enforcement, hence creating greater ambiguity for licensees.