

March 1, 2004

The Manager
Mobile Services
Telecommunications Policy Branch
Industry Canada
300 Slater Street, Room 1604A
Ottawa, Ontario
K1A 0C8

Re: Canada Gazette Notice No. DGTP-007-03 of October 10, 2003: Consultation on Spectrum for Advanced Wireless Services and Review of the Mobile Spectrum Cap Policy

1. Mobile Satellite Ventures (Canada) Inc. ("MSV Canada"), a majority-owned subsidiary of TMI Communications and Company, Limited Partnership ("TMI"), is pleased to submit the following comments in response to the above-referenced Canada Gazette Notice (the "Notice"). MSV Canada is the owner of the Canadian-licensed MSAT-1 mobile satellite which has been serving Canada and other countries since 1996. TMI is also a shareholder in Mobile Satellite Ventures L.P. ("MSVLP"), a U.S.-incorporated company, which owns the U.S.-licensed MSAT-2 mobile satellite and which offers mobile satellite services continent-wide under the "MSV" banner using capacity from both MSATs. TMI also holds an approval-in-principle from Industry Canada to develop a mobile satellite in the 2 GHz frequency band, which is one of the subjects on which the Department is seeking comments.
2. The Notice deals primarily with issues which relate to terrestrial mobile services, however some proposals relate to the mobile satellite service ("MSS"). To the extent that these proposals relate to MSS, MSV Canada submits that following comments on behalf of itself and TMI. In this document, MSV Canada submits that Industry Canada should not reallocate spectrum currently designated for MSS in the 2 GHz range pending final

resolution of this same issue in the United States, particularly as it could adversely affect the Canadian approval-in-principle for this same band issued by the Department to TMI. MSV Canada also urges the Department to continue to exclude MSS frequencies, including the future ancillary terrestrial component (“ATC”), from inclusion under the spectrum cap, as these are not newly-allocated frequencies but rather are those which have long been allocated to satellite use and which will continue to be used as part of the satellite system.

PROPOSED CHANGES TO THE CANADIAN TABLE OF FREQUENCY ALLOCATIONS

Bands 1990-2025 MHz and 2160-2200 MHz

3. As noted above, on May 6, 2002 Industry Canada granted an approval-in-principle to TMI to develop a 2 GHz mobile satellite at the 107.3° W.L. Canadian orbital position.
4. By way of background, in September 1997, TMI had entered the 2 GHz ‘processing round’ held by the Federal Communications Commission (“FCC”) in the U.S., and was granted an authorization on July 17, 2001 allowing TMI to access a portion of the 2 GHz MSS frequency band to provide service in the U.S.¹
5. Given the potential difficulty in coordinating frequencies with other satellite operators when coverage typically extends beyond the borders of just one country, TMI had taken the precaution of entering the processing round to ensure that the FCC was aware of TMI’s interest and did not allocate the entire band to other applicants. Furthermore, it was critical for TMI to ensure that it was properly positioned to take advantage of the recently-concluded WTO Agreement liberalizing trade in telecom services so that it could offer MSS services both in Canada and the United States.
6. At the time the FCC granted the July 2001 approval to TMI, this action was pursuant to a two-part framework developed the previous year. The first part of this framework consisted of an Order adopted in June 2000 outlining rules for MSS licensees in the

¹ In the Matter of TMI Communications and Company, Limited Partnership, Letter of Intent to Provide Mobile-Satellite Service in the 2 GHz Bands, *Order*, DA 01-1638, adopted July 17, 2001.

2 GHz band to relocate existing terrestrial users and thereby clear the band for MSS use.² The second part was an August 2000 Order setting out the licensing rules for MSS operators. This latter Order confirmed that the 2 GHz MSS band would be divided equally among the (then-existing) nine applicants.³ Under the FCC's frequency allocation (which differed slightly from the Canadian band), the MSS frequencies in the 2 GHz band were 1990-2025 and 2165-2200 MHz, or 35 MHz in each of the uplink and downlink directions respectively. Consequently, the FCC intended to grant 3.5 MHz (in both directions) to each of nine licensees, and keep one slice of 3.5 MHz in reserve to be allocated in the future.⁴ Subsequent to the withdrawal of one applicant, in July 2001 the FCC granted approval to a total of eight applicants to each access 3.5 MHz.

7. As the Department stated in the Notice, the FCC reallocated a portion of the 2 GHz MSS band in January 2003⁵. The reallocated spectrum was obtained, in part, from spectrum that had not been assigned to a licensee (as described above) and the balance from spectrum which the FCC terms "abandoned" by three licensees who did not meet implementation milestones. Subsequent to this Order, the FCC's International Bureau revoked TMI's authorization,⁶ but on March 12, 2003 TMI and its U.S. partner, TerreStar Networks Inc. (the company created to pursue the 2 GHz satellite business in the U.S., and in which TMI indirectly holds a substantial interest), jointly filed an Application for Review and a Request for Stay with the FCC, seeking reinstatement of TMI's 2 GHz

² In the Matter of Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service, ET Docket No. 95-18, *Second Report and Order and Second Memorandum Opinion and Order*, FCC 00-233, adopted June 27, 2000.

³ In the Matter of The Establishment of Policies and Service Rules for the Mobile Satellite Service in the 2 GHz Band, IB Docket No. 99-81, *Report and Order*, FCC 00-302, adopted August 14, 2000.

⁴ The FCC would consider whether a licensee should be awarded additional spectrum based on the use of the licensee's initial allotment to provide service to unserved areas. *Op cit* ¶17, ¶¶31-44.

⁵ In the Matter of 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 Notice of Proposed Rulemaking and Second Memorandum Opinion and Order*, FCC 03-16, adopted January 29, 2003.

⁶ In the Matter of TMI Communications and Company, Limited Partnership, Request for Modification of Spectrum Reservation for a Mobile-Satellite Service in the 2 GHz Bands, *Memorandum Opinion and Order*, DA 03-385, adopted February 7, 2003.

authorization.⁷ Similar appeals have also been filed with the FCC by other parties whose 2 GHz authorizations were revoked.

8. Finally, and what is directly relevant to the Department's consultation in the Notice, is that on April 14, 2003, TMI and Terrestrial jointly filed a Petition for Reconsideration with the FCC seeking a reversal of its decision to reallocate the 2 GHz spectrum from MSS to terrestrial uses. One of the issues cited in this appeal is that if the FCC proceeds to assign MSS spectrum to the remaining licensees and newly-reallocated spectrum to terrestrial users, any licensees such as TMI whose authorizations are reinstated will be prejudiced in their ability to access enough spectrum to develop viable systems.⁸ The petition also notes that the band 2010-2020 MHz is not globally allocated to MSS, and accordingly that it would be preferable to retain the 1990-2000 MHz band.
9. Therefore, the FCC has before it a number of appeals which must be resolved before its reallocation of MSS 2 GHz spectrum for non-satellite services can be considered "final".
10. However, and without prejudice to the outcome of the above-noted appeals, TMI is in general agreement with the Department's view that harmonization of spectrum in the North American market is important to ensuring the economic viability of an MSS system. To have misalignments between frequencies allocated to MSS by neighbouring countries only increases the burden for satellite and terrestrial operators to coordinate their systems, particularly in areas close to the border.
11. Given that the FCC has determined that it would reallocate spectrum such that only the bands 2000-2020 and 2180-2200 would remain as MSS, the Department now proposes to redesignate in Canada the bands 1990-2000, 2020-2025, and 2160-2180 for terrestrial uses. TMI agrees that it makes little sense for the allocated 2 GHz MSS bands to be different between the two countries. However, as noted above, the reallocation of these bands in the U.S. is the subject of appeals which may cause the FCC to reverse its decision, at least in part, to reduce the MSS allocation of 2 GHz spectrum, or to realign its new allocation with the global allocation.

⁷ A decision from the FCC is expected imminently, and TMI remains optimistic that the authorization will be reinstated.

⁸ Petition for Reconsideration, filed April 14, 2003, file No. 189-SAT-LOI-97. A copy of the Petition is attached as Appendix 1.

12. Therefore, while TMI supports the Department's view that the 2 GHz MSS allocation should be harmonized between Canada and the U.S., TMI respectfully submits that the Department should only do so once all proceedings relating to the allocation of 2 GHz MSS spectrum in the United States have been fully and finally disposed of by the FCC or the courts as the case may be. This will ensure that a subsequent change is not then required in Canada.

REVIEW OF THE MOBILE SPECTRUM CAP POLICY

13. Industry Canada seeks comments on several public interest aspects of the mobile spectrum cap. As a mobile satellite service provider, MSV Canada has had no involvement with the workings or effectiveness of the spectrum cap and is not in a position to provide meaningful input to the Department on this subject.

14. However, MSV Canada continues to be concerned that the Department might be considering including satellite L-band spectrum used in a supplementary ancillary terrestrial component ("ATC"), as was first raised in the Consultation pursuant to Canada Gazette Notice DGTP-009-01 *Consultation on an Application to Use Mobile Satellite Spectrum to Provide Complementary Terrestrial Mobile Service to Improve Satellite Coverage*, released October 19, 2001. The Department raised the issue in the context of what would be the appropriate regulatory treatment for the ATC service.

15. MSV Canada reiterates the comments it made in its December 28, 2001 submission. The spectrum cap policy was never meant to apply to MSS spectrum, and indeed L-band MSS frequencies are not included in the Department's spectrum cap policy documents. The spectrum which the ATC system will use is not "new" but rather "reused" satellite frequencies, and thus the spectrum cap is not relevant. (The "reuse" of those L-band frequencies is only made possible through the use of a space/ATC allocation system dynamically integrated with the satellite's operation.) In fairness, MSS operators with ATC systems will face a number of regulatory obligations which terrestrial cellular and PCS operators do not face, including the significant requirement for a satellite system. Clearly, it would be inappropriate to attempt to apply a 'one size fits all' spectrum cap policy to MSS systems which face an entirely different set of circumstances and

challenges. Put simply, the cap has never been applied to MSS satellites because it has never been needed.

16. Therefore, MSV Canada urges Industry Canada not to amend its policy so as to include satellite services under the spectrum cap. In any event, the Department should not modify the spectrum cap policy in a manner which impedes the development of ATC systems in Canada. In the Notice, the Department notes that the economic viability of North American MSS systems would benefit from harmonization of spectrum with other countries. As well, it is noted that the FCC completely removed the spectrum cap in the U.S. as of January 1, 2003. Removal of the spectrum cap in Canada is one option the Department should consider to ensure that this policy does not hinder the rollout of Canadian ATC systems. This would be consistent with the objective of harmonization across borders, as MSS providers such as the MSV companies will have the flexibility to develop their systems in the most efficient manner.

17. MSV Canada appreciates the opportunity to submit these comments to the Department and to participate in this proceeding.

All of which is respectfully submitted on behalf of MSV Canada this first day of March 2004.

Yours truly,



Robert D. Power
Vice President, Regulatory Matters
Mobile Satellite Ventures (Canada) Inc.

Appendix 1

TMI/TerreStar Petition for Reconsideration
filed with the FCC April 14, 2003

STAMP AND RETURN

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 14 2003

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)	
)	
Amendment of Part 2 of the Commission's)	
Rules to Allocate Spectrum Below 3 GHz for)	
Mobile and Fixed Services to Support the)	ET Docket No. 00-258
Introduction of New Advanced Wireless)	
Services, including Third Generation Wireless)	
Systems)	
)	
The Establishment of Policies and Service)	IB Docket No. 99-81
Rules for the Mobile-Satellite Service in the 2)	
GHz Band)	
)	
Amendment of the U.S. Table of Frequency)	
Allocations to Designate the 2500-2520/2670-)	RM-9911
2690 MHz Frequency Bands for the Mobile-)	
Satellite Service)	
)	
Petition for Rule Making of the Wireless)	
Information Networks Forum Concerning the)	RM-9498
Unlicensed Personal Communications Service)	
)	
Petition for Rule Making of UTStarcom, Inc.,)	
Concerning the Unlicensed Personal)	RM-10024
Communications Service)	

To: The Commission

PETITION FOR RECONSIDERATION

Pursuant to 47 C.F.R. § 1.429, TMI Communications and Company, LP ("TMI") and TerreStar Networks Inc. ("TerreStar") hereby petition for reconsideration of the Commission's *Third Report and Order* in the above-captioned proceedings concerning Advanced Wireless Services ("AWS").¹ TMI previously participated in this rulemaking, and

¹ *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* (continued...)

TerreStar, a TMI affiliate, is the prospective assignee of TMI's LOI authorization to operate MSS service in the 2 GHz band.

There are several defects in the Commission's *Third Report and Order* that should be remedied on reconsideration.

1. *Distribution of Reclaimed MSS Spectrum*: TMI and TerreStar seek clarification of the method by which the MSS spectrum reclaimed in the Order is to be reallocated to currently authorized MSS licensees to avoid any prejudice to a party whose authorization is reinstated. Specifically, the Commission delegated authority to the International Bureau "to issue revised authorizations . . . when the initial milestone review is completed."² As noted below, TMI and TerreStar currently have pending an Application for Review and Request for a Stay of an International Bureau Order revoking TMI's LOI authorization in the 2 GHz band as part of the initial milestone review, and dismissing as moot an assignment of that LOI to TerreStar. On reconsideration, the Commission should clarify that the International Bureau may not reallocate reclaimed MSS spectrum among the currently authorized licensees until after disputes about the milestone process are resolved. That clarification is necessary to prevent TMI and TerreStar from being prejudiced by any reallocation that might occur before TMI's authorization is restored. Only after a revocation decision is final and not subject to further

Third Generation Wireless Systems; Establishment of Policies and Service Rules for the Mobile-Satellite Service in the 2 GHz Band; Amendment of the U.S. Table of Frequency Allocations to Designate the 2500-2520/2670-2690 MHz Frequency Bands for the Mobile-Satellite Service; Petition for Rule Making of the Wireless Information Networks Forum Concerning the Unlicensed Personal Communications Service; Petition for Rule Making of UTStarcom, Inc., Concerning the Unlicensed Personal Communications Service; ET Docket No. 00-258, IB Docket No. 99-81, RM-9911, RM-9498, RM-10024, FCC 03-16 (rel. Feb. 10, 2003) (published in the Federal Register March 13, 2003) ("*Third Report and Order*").

² *Id.* ¶ 33.

appeal should the International Bureau be authorized to reallocate the reclaimed MSS spectrum among the currently authorized licensees.

2. *Implications for Milestone Review Process:* On reconsideration, the Commission should also confirm that the public interest reasons upon which its spectrum reallocation decision are based did not (and will not, going forward) prompt the cancellation of any outstanding 2 GHz MSS authorization for failure to meet a milestone condition. In other words, the Commission's pre-existing milestone policies for the 2 GHz MSS remain in effect, on reconsideration, even if the FCC decides to confirm its policy decision that some MSS spectrum is needed for AWS.

TMI and TerreStar have reason to be concerned about the potentially inadvertent and arguable unlawful spillover of FCC policy decisions in this docket. For example, in a recent review of TMI's initial construction milestone, a disagreement over the technical meaning of the FCC's non-contingent contract requirement was resolved by the International Bureau declaring TMI's LOI authorization null and void—despite a pending assignment application to TerreStar that would have vitiated the Bureau's concern.³ (TMI and TerreStar have pending an Application for Review and a Request for a Stay of that decision.⁴) In ruling against TMI and TerreStar, the Bureau relied on a milestone test that was completely novel, unsupported by Commission practice in other licensing areas, and internally inconsistent with the text of the milestone requirements—even as the satellite construction was proceeding at Space Station/Loral.

³ *TMI Communications and Company, Limited Partnership*, File No. 189-SAT-LOI-97, DA 03-385 (rel. Feb. 10, 2003).

⁴ Application for Review, File No. 189-SAT-LOI-97 (filed Mar. 12, 2003).

The Commission should make clear in this proceeding that its desire to obtain more spectrum for AWS may not be used to justify new requirements or novel interpretations of the MSS milestone requirements. In particular, the Commission should advise that any decision in this docket would not justify the Bureau in applying a new or different interpretation of the Commission's milestone policy in order to free-up spectrum more quickly. Aside from being a violation of APA requirements and the Commission's rules, it also would be the height of irony for the International Bureau to cancel—through exceptional interpretations of the milestones—authorizations for satellites currently under construction in order to give spectrum to the mobile services, where the type and kind of activity undertaken by the satellite licensee would have fully met the build-out requirements.

3. *Unjustified Decisions in the Order:* Finally, the Commission's *Third Report and Order* does not provide adequate record support for its decision to eliminate nearly half of the MSS authorizations in the 2 GHz band because, among other things, as TMI demonstrated in its prior submissions, the demand showings made by the terrestrial wireless industry are inadequately documented.

The Commission's spectrum reallocation has also unfairly compromised the development of a competitive MSS industry. Instead of giving MSS the opportunity to be tested in the marketplace, the Commission has chosen to hobble it with a dramatically reduced allocation. It is not sufficient for the Commission to claim that it is only revoking the spectrum of the licensees that have not met their milestones—even successful operators, those meeting their milestones and otherwise playing by the rules, will be foreclosed from expanding their service if the Order is allowed to stand because the entire MSS band has been cut nearly in half. Under the Commission's Order, a 2GHz MSS carrier is completely precluded from ever having

access to 30 MHz of spectrum reallocated by the Order. This situation is not altered by the FCC's reference to the fact that other (i.e., non-2 GHz) MSS systems may have enough spectrum to support MSS growth "for the foreseeable future."⁵

In short, the *Third Report and Order* is entirely inconsistent with the Commission's commitment in the *Further Notice*, repeated in the Order, "that any reallocation of existing MSS spectrum would not significantly impair any of the current licensees' rights and reasonable expectations to retain its current assigned spectrum allotment and acquire additional MSS spectrum for purposes of deploying and operating a fully matured 2 GHz MSS system."⁶ The Commission therefore should reverse the decision to reallocate nearly half of the MSS spectrum away from this promising but emerging service that has a unique ability to bring service to underserved and unserved areas.

In addition, TerreStar and TMI have reviewed the Petition for Reconsideration being filed by the Satellite Industry Association ("SIA"). As SIA points out, the Commission has failed to explain why it reallocated spectrum that is allocated globally, while leaving in place nonglobally allocated spectrum.

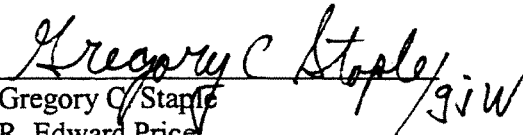
TMI and TerreStar seek to operate satellite services across national boundaries. The *Third Report and Order* will prevent the companies from making the most efficient use of globally available MSS spectrum because the use of some globally allocated spectrum in the United States is foreclosed by the Order. As noted by SIA, the Commission has failed to justify this reallocation, especially in light of its prior policy and decisions favoring international

⁵ *Third Report and Order* ¶ 31; *see id.* ¶ 31 n.92.

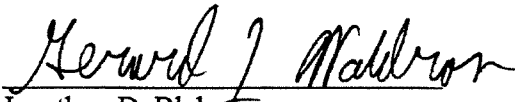
⁶ *Amendment of Part 2 of the Commission's Rules*, 16 FCC Rcd 16,043, 16,056 (2001); *accord Third Report and Order* ¶ 14.

spectrum harmonization. In addition, the justification offered by the Commission, namely economies for new PCS entrants, does not bear scrutiny if only because the reallocated spectrum may well be used for other wireless services. The Commission's reallocation decision should be reversed or, at a minimum, modified to preserve the existing global MSS band plan (i.e., the nonglobally allocated 2010-2020 MHz band should be reallocated instead of the 1990-2000 MHz band).

Respectfully submitted,


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April 14, 2003