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April 23, 2002

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED

APR 23 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: MDS America, Inc.
Application for Modified Radio Station under Part 5 of the FCC Rules -
Experimental Radio Service
Call Sign WC2XPU, FCC File No. 0005-EX-ML-2002**

Dear Ms. Dortch:

MDS America, Incorporated ("MDS America"), submits this Opposition to the Petition to Deny filed by Northpoint Technology, Ltd. in the above-referenced matter.

Please date-stamp the enclosed extra copy and return it in the enclosed self-addressed envelope. If you have any questions regarding this submission, please contact the undersigned.

Respectfully submitted,

Nancy K. Spooner

Nancy K. Spooner
Helen E. Disenhaus
Counsel for MDS America, Incorporated

cc: Kirk Kirkpatrick

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

In the Matter of

**MDS America, Incorporated
Application for Modified
Radio Station under Part 5 of FCC Rules --
Experimental Radio Service
Call Sign WC2XPU**

File No. 0005-EX-ML-2002

**OPPOSITION TO PETITION TO DENY OF
NORTHPOINT TECHNOLOGY, LTD.**

I. INTRODUCTION

MDS America, Incorporated ("MDS America"), by its undersigned counsel, hereby responds to the Petition to Deny ("Petition") filed March 18, 2002, by Northpoint Technology, Ltd. ("Northpoint") against MDS America's application ("Application") for modification of its Experimental License (File No. 0005-EX-ML-2002, Call Sign WC2XPU) ("Experimental License").¹ The Petition affords no basis for denial of the Application (or for revocation of the Experimental License) but merely restates erroneous and irrelevant arguments previously raised by Northpoint and responded to by MDS America in the context of a separate open Commission proceeding. The Commission has never found these Northpoint arguments to warrant further inquiry.

MDS America submits that prompt grant of the Application is in the public interest so that the Commission and the public may soon have the benefit of additional technical information concerning sharing of the 12 GHz band between Direct Broadcast Satellite ("DBS")

¹ Northpoint's Petition appeared as an attachment to MDS America's application on the FCC's website on March 28, 2002. FCC Staff has informed MDS America that it has 30 days from that date, March 28, 2002, within which to respond to Northpoint's Petition.

service operations and terrestrial Multichannel Video Distribution and Data Service ("MVDDS") systems. The Commission should therefore promptly dismiss Northpoint's Petition and grant the subject Application.

II. THE COMMISSION CANNOT BE LIABLE FOR PATENT INFRINGEMENT BY GRANTING THE APPLICATION.

Northpoint once again attempts to confuse the issue before the Commission by suggesting that the Commission could somehow be found to be an "aider and abettor" with respect to alleged patent infringement by MDS America. Further, Northpoint apparently wants the Commission to act as Northpoint's private patent enforcement agency.

As Northpoint is well aware, however, the very validity of Northpoint's patents, as well as whether MDS America has infringed them, is being vigorously litigated in the United States District Court for the Southern District of Florida.² Simply because Northpoint alleges infringement does not mean that infringement has occurred or would occur from additional testing of the MDS America system. Even if it would, that is MDS America's problem, not the Commission's.

As MDS America has previously demonstrated, regardless of the outcome of that Patent Case litigation, the Commission cannot be held liable for aiding or abetting patent infringement, whether by granting the subject Application, or otherwise. The United States has waived its sovereign immunity only for direct infringement of patents, not for inducement of third party infringement or for contributory infringement.³

² *Northpoint Technology, Ltd. v. MDS America, Inc.*, Case No. 01-14207-CIV) (West Palm Beach Div.) ("Patent Case").

³ *See, Ex Parte* Letter dated October 26, 2001, from Nancy K. Spooner to Magalie Roman Salas ("Patent Law Ex Parte") at 2 (citing *Gargoyles, Inc. v. United States*, 113 F.3d 1572, 1581 (Fed. Cir. 1997); *Motorola, Inc. v. United States*, 729 F.2d 765 (Fed. Cir. 1984)).

With all due respect, the Commission is not an expert agency with respect to patent law, and it has no responsibility for enforcement of any private patent rights. There is no reason for the Commission to deny the public the benefits that will accrue from grant of the subject Application and the testing to be conducted thereunder merely because Northpoint wants the Commission to “enforce” what MDS America strongly believes to be invalid patents. Indeed, for the Commission to give precedence to Northpoint’s claims over promoting the development of advanced telecommunications services through experimental licensing would be inconsistent with the Commission’s own mandate. The Commission should therefore give no credence to Northpoint’s specious patent arguments, which afford no basis for either dismissal of the Application or revocation of the Experimental License.

III. MDS AMERICA’S FOREIGN OWNERSHIP COMPLIES WITH FCC REQUIREMENTS.

Northpoint’s statement that “MDS [America] is likely not qualified to hold a wireless license because it is 71.3% foreign owned,”⁴ is not only erroneous but also irrelevant, and it provides no basis for denial of the Application. Given that no such foreign ownership restrictions apply to experimental licenses, Northpoint’s arguments are inapplicable and should require no consideration in this proceeding. They certainly do not warrant dismissal or denial of the subject Application.

Section 310 of the Communications Act places foreign ownership restrictions primarily on broadcast and common carrier licensees.⁵ However, as the Commission has made very clear, there are *no* restrictions on non-governmental, foreign ownership of non-common carrier

⁴ Petition at 1.

⁵ 47 U.S.C. § 310(b). The other two types of radio licenses for which foreign ownership is restricted are aeronautical en route and aeronautical fixed radio station licenses.

wireless licensees.⁶ MDS America is a U.S. corporation, and the fact that certain of its owners are World Trade Organization (“WTO”) member citizens is irrelevant to its eligibility for an experimental license. Not only may U.S. corporations with such ownership hold experimental licenses, but also WTO-member nation citizens themselves may directly hold experimental licenses, without special permission, *because private licenses are not subject to the foreign ownership restrictions of Section 310(b)*.⁷

However, even if Northpoint were correct that Section 310(b) somehow applied to experimental licenses (perhaps because experimental licenses are “common carrier” or “broadcast” licenses?), Northpoint still mischaracterizes the applicable law. In accordance with U.S. commitments to the WTO, the Commission will *presume* that up to a 100% indirect foreign ownership in a *common carrier* licensee by a WTO member nation citizen is in the public

⁶ MDS America is a U.S. corporation, and therefore, the ability of foreign nationals to hold non-common carrier licenses is irrelevant to its situation. However, to further elaborate on this point, the Commission explained in the *Voicestream* case how the Communications Act permits non-governmental foreign entities to hold private radio station licenses, as follows:

In 1974, the Communications Act was amended to separate sections 310(a) into the current sections 310(a) and 310(b). The legislative history reflects that this structural change was designed to lessen the burden on private radio licensees and permit entities other than foreign governments and their representatives to hold private radio licenses directly.

The footnote to this section then goes on to state:

See S. Rep. No. 795, 93d Cong., 2d Sess. 1 (1974) (“The purpose of this legislation is to amend section 310 of the Communications Act of 1934, as amended, to permit direct licensing of aliens and corporations with certain alien officers, directors or stockholders rather than licensing them indirectly under subsection 310(a)(5) of the Communications Act of 1934, as amended, which has been utilized to set up a subsidiary corporation with no alien officers or directors, to be the radio licensee.”).

Voicestream Wireless Corporation, et al., Memorandum Opinion and Order, IB Docket No. 00-187, FCC 01-142, at ¶¶ 37, 46 (April 27, 2001) [footnotes omitted].

⁷ *Id.*

interest.⁸ Thus, regardless of whether an experimental license is judged to be a private wireless licenses or a common carrier license, MDS America is quite qualified to hold either one.

Northpoint's statements concerning the foreign ownership restrictions on MVDDS spectrum completely ignore the Commission's specific position on this matter, as well, even though they are wholly irrelevant here. As the MVDDS NPRM⁹ makes clear, MVDDS licenses are not broadcast licenses (or DBS licenses).¹⁰ The Commission is addressing in ET Docket No. 98-206 whether to limit MVDDS licensees to provision of non-common carrier services, or to permit them to choose to be common carriers. In fact, the Commission stated in the MVDDS NPRM that MVDDS licensees providing video programming "will" be treated as non-common carriers (not broadcasters or common carriers).¹¹

Regardless of how one examines the issue, MDS America is eligible to hold an experimental license, and Northpoint's mistaken arguments afford no basis for denial of the Application, or for revocation of the Experimental License.

IV. NORTHPOINT'S STATEMENTS CONCERNING THE LCC INTERNATIONAL REPORT REVEAL A FUNDAMENTAL LACK OF UNDERSTANDING OF BASIC RF ENGINEERING PRINCIPLES AND TESTING PARAMETERS.

Northpoint makes what can only be characterized as a preposterous assertion that "MDS has failed to obtain data under its existing license that would suggest that MDS has the ability to

⁸ See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market, *Report and Order and Order on Reconsideration*, 12 FCC Rcd 23891, 23951-52 (1997), and *Order on Reconsideration*, 15 FCC Rcd 18158 (2000).

⁹ Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-Frequency with GSO and Terrestrial Systems in the Ku-Band Frequency Range, *First Report and Order and Further Notice of Proposed Rule Making*, ET Docket No. 98-206, 16 FCC Rcd 4096 (2000) ("MVDDS NPRM").

¹⁰ *Id.* at ¶ 295.

¹¹ *Id.* at n.596.

operate a terrestrial transmitter without causing harmful interference to DBS operations.”¹² Anyone with the most basic understanding of RF engineering principles who has read the LCC International report would have to agree that this statement is patently false. Nor do any of Northpoint’s allegations concerning deficiencies in the report pass even the most cursory muster.

Rather than being concerned that testing by MDS America could be cited as evidence of interference with DBS service, Northpoint should be grateful that MDS America is willing to expend the substantial resources required for the testing. The testing conducted by MDS America, combined with the evidence it has provided of the long-term operational experience of its technology licensor, provides direct evidence that under real-world conditions, MVDDS can in fact co-exist with DBS operations without causing harmful interference to reception of the DBS signals.¹³

While MDS America will not waste the Commission’s time with a point-by-point refutation of Northpoint’s erroneous assertions about the Clewiston testing and the LCC International report, MDS America, as well as LCC International, take strong exception to Northpoint’s insinuation that MDS America “sought to purchase a friendlier evaluation by its own contractor.”¹⁴ In the first place, the outstanding results of the testing demonstrate beyond a doubt that MDS America’s licensed technology could survive even the most skeptical review.

¹² Petition at 1. Indeed, the *MITRE Report*, while validating the feasibility of DBS/MVDDS frequency sharing, with respect to MITRE’s testing of Northpoint prototype equipment hardly presents a glowing endorsement of Northpoint technology and, if anything, calls into question *Northpoint’s* “ability to operate a terrestrial transmitter without causing harmful interference to DBS operations.”

¹³ Northpoint persists in asserting that Northpoint alone provided equipment for MITRE Corporation testing, Petition at 5, as if this had any relevance whatsoever. Because this matter has been discussed *ad nauseam* in ET Docket 98-206, MDS America will not readdress these arguments here.

¹⁴ Petition at 5.

Further, LCC International is a highly respected independent engineering firm with no connection with MDS America or MDS International (MDS America's technology licensor) other than as a consultant. LCC International would hardly risk its well-earned international reputation in the RF engineering field by, as Northpoint insinuates, altering its report to favor MDS America.

The detailed and well-documented LCC International report, previously made part of the MVDDS docket,¹⁵ provided the Commission with substantial independent test data collected pursuant to MDS America's experimental license as currently in effect. The report provided a thorough description of the test methodology and documented the highly positive results thoroughly and in accordance with standard engineering practices. The LCC International report conclusively demonstrates that MDS America's MVDDS technology easily coexists with DBS systems. MDS America's licensed technology, which utilizes currently available (not prototype or experimental) equipment, does not require any alterations to DBS equipment, systems, or operations in order to avoid causing harmful interference to DBS. Far from suggesting that it would be premature to demonstrate MDS America's licensed equipment in a full system mode in all weather conditions, the results of the LCC International report demonstrate that the test conditions in the original Experimental License were not necessary to protect DBS consumers.

As in the case of its other arguments, Northpoint's assertions about the Clewiston testing should be dismissed forthwith, and the Application granted promptly.

¹⁵ See MDS America *ex parte* submissions of October 17, 2001, October 18, 2001, and October 23, 2001. Due to the great length of the test report, a copy is not attached hereto, and therefore this letter cross-references the report previously submitted in ET Docket 98-206.

V. NORTHPOINT'S REITERATION OF ERRONEOUS ALLEGATIONS DOES NOT VALIDATE THEM.

Northpoint's defamatory allegations to the contrary, as MDS America demonstrated nearly a year ago, MDS America did not procure the Experimental License on the basis of misstatements that were either intentional or material. Nor is there any inference to be derived from the referral of Northpoint's complaint to the Enforcement Bureau by the General Counsel's office. Northpoint's unilateral complaint, not any act of MDS America, triggered this automatic procedure. Indeed, if there is any significance to be drawn from that circumstance, it is to be found in the fact that neither the Enforcement Bureau nor the General Counsel's office has deemed it of sufficient concern to warrant further inquiry of MDS America.

Far more serious is that Northpoint continues to reiterate erroneous allegations that were completely refuted nearly a year ago. Significantly, the Northpoint Petition never even acknowledges the existence of the *ex parte* letter sent by counsel for MDS America to Norman Goldstein of the Enforcement Bureau on July 16, 2001. That letter pointed out the numerous mischaracterizations of MDS America statements made in Northpoint's previous submissions and reiterated in the Petition.¹⁶

In fact, as MDS America has previously demonstrated to the Commission, any misstatements about the use and operations of the equipment of MDS International, MDS America's technology licensor, are those of Northpoint, not MDS America.¹⁷ Contrary to

¹⁶ MDS America *ex parte* submission of July 15, 2001, Letter from James W. Olson to Norman Goldstein, Esq., dated July 16, 2001, at 1-2; *see also* MDS America *ex parte* submission of June 14, 2001, Letter from James W. Olson to Jane Mago, dated June 14, 2001 (detailing numerous other inaccuracies in Northpoint's allegations of misstatements by MDS America).

¹⁷ *See* July 15 *ex parte*, *supra* note 16. In this letter, MDS America pointed out that Northpoint misrepresented statements made in MDS America's experimental license application, and then erroneously attributed those statements to MDS America.

Northpoint's allegations, for example, MDS America never asserted that MDS International itself commercially operated MVDDS systems. Rather, in addition to noting MDS International's operation of its demonstration system in Lyons, France, that co-exists with co-frequency DBS operations, MDS America has stated that MDS International has made numerous commercial sales of MVDDS systems to buyers in various parts of the world.

Whether or not *Northpoint* can confirm that MDS International systems co-exist with co-frequency DBS operations, moreover, is irrelevant. The significant fact is that systems designed and built using MDS International technology and equipment have been deployed and are operating as testing, governmental, or commercial installations in many parts of the world. In all cases, as demonstrated, for example, in the video footage submitted by MDS America in ET Docket No. 98-206,¹⁸ the systems have performed in an exemplary manner. Even in extremely harsh operating environments such as Greenland, MDS International transmission systems have co-existed with immediately adjacent co-frequency DBS reception without causing interference to the DBS reception.

Northpoint may not yet be prepared to acknowledge that MDS International has engineered MVDDS systems that are operational and co-exist with co-frequency DBS operations in many parts of the world. It is certainly high time for Northpoint to desist from cluttering the record and wasting the Commission's time with repetitive erroneous allegations concerning statements never made by MDS America. Such allegations certainly afford no basis for revocation of MDS America's Experimental License or for denial of the requested Application for modifications to that license.

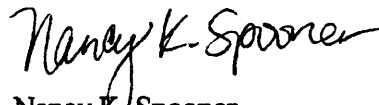
¹⁸ See, e.g., *Ex Parte Notice* filed by MDS America in ET Docket 98-206, March 11, 2002.

VI. CONCLUSION

As shown above, Northpoint's Petition affords no basis for dismissal or denial of the subject Application for modification of the MDS America Experimental License. MDS America filed the subject license modification Application precisely because the testing conducted by LCC International under restricted operational parameters required by the unmodified Experimental License confirmed the ability of MDS America's technology to co-exist with co-frequency DBS operations. To date, there have been no other tests of MVDDS systems using commercially available equipment. The authority to operate modified facilities requested in the Application will permit testing of an MDS America system operating with typical commercial operation power and tower height facilities in all weather conditions.

A prompt grant of the subject Application will be in the public interest by permitting the collection of valuable technical information concerning sharing of the 12 GHz band between MVDDS and DBS operations. MDS America therefore respectfully requests that the Commission dismiss the Northpoint Petition forthwith and promptly grant the subject Application.

Respectfully submitted,

A handwritten signature in black ink, reading "Nancy K. Spooner". The signature is fluid and cursive, with the first name "Nancy" being the most prominent.

Nancy K. Spooner
Helen E. Disenhaus
Counsel for MDS America, Inc.

cc: Kirk Kirkpatrick

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of April, 2002, a true and correct copy of the foregoing was served via hand-delivery, e-mail (denoted by *) or first class United States mail, postage prepaid, on the following individuals:

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