

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

In the Matter of	)	
	)	
MDS America Inc. Application for Modified	)	File No. 0005-EX-ML-2002
Radio Station Under Part 5 of FCC Rules --	)	File No. 0063-EX-RR-2002
Experimental Radio Service	)	Call Sign WC2XPU
	)	

**REPLY OF NORTHPOINT TECHNOLOGY, LTD.,
IN SUPPORT OF PETITION TO DENY**

Since the beginning of its brief history before the Commission, MDS America, Inc. ("MDS") has been long on bluster and short on facts. Its latest filing¹ is no exception: in response to a Petition to Deny² in which Northpoint Technology, Ltd. ("Northpoint") pointed out at least three specific deficiencies in the engineering test report that underlies MDS's current application for modification of its experimental license, MDS does not even attempt to refute Northpoint's analysis. Instead, MDS offers mainly hyperbole and rhetoric, together with a bland assurance that its engineering contractor has a good reputation. MDS's Opposition does not address, much less resolve, the fundamental problem with its application, which is that MDS has failed to obtain data under its existing license that would justify authorizing the increased antenna height and liberalized operating parameters that MDS now seeks. The Commission's recent

¹ MDS America, Inc., Opposition to Petition to Deny, *of MDS America, Inc. Application for Modified Radio Station Under Part 5 of FCC Rules – Call Sign WC2XPU*, (FCC filed Apr. 23, 2002) ("MDS Opposition").

² Northpoint Technology, Ltd., Petition to Deny, *of MDS America, Inc. Application for Modified Radio Station Under Part 5 of FCC Rules – Call Sign WC2XPU*, (FCC filed Mar. 18, 2002) ("Petition to Deny").

decision on a licensing plan for a new Multichannel Video and Data Distribution Service (“MVDDS”) in the 12.2-12.7 GHz band underscores the deficiencies in MDS’s data collection.³ MDS has provided no information about its efd, C/I ratio, or estimated interference with DBS operations – in short, none of the data at the heart of the Commission’s chosen framework of analysis for evaluating proposed MVDDS operations. At the very least, the Commission should insist that adequate data be collected under the existing terms of the license before those terms are expanded in a way that might increase the risk of harmful interference to DBS.

More fundamentally, the Commission should revoke or suspend MDS’s existing experimental license pending the outcome of the Commission’s investigation into the misstatements contained in MDS’s application for the experimental license. The documents submitted to the Commission in connection with that pending investigation are enclosed herewith so that the Office of Engineering and Technology may evaluate for itself whether these misstatements are of sufficient gravity to justify suspension of the license pending conclusion of the formal investigation.

MDS America has recently filed an application to extend the life of its experimental license.⁴ For the reasons set forth herein, that application should likewise be denied or, at least, held in abeyance pending conclusion of the Commission’s formal investigation of MDS’s misstatements.

³ See FCC Press Release, *FCC Affirms MVDDS Authorization and Adopts Service Rules for the 12.2-12.7 GHz Band* (FCC rel. Apr. 23, 2002) (“MVDDS Press Release”).

I. MDS Has Failed To Justify Liberalizing the Terms of Its Experimental License

MDS's application to liberalize the terms of its experimental license is based on an engineering report describing the tests conducted under the license to date.⁵ As detailed in Northpoint's Petition to Deny, this report contains at least three serious flaws that render it invalid. Instead of addressing Northpoint's specific criticisms of the report, MDS offers in response only the conclusory assertion that its "report provided a thorough description of the test methodology and document the highly positive results thoroughly and in accordance with standard engineering practices."⁶ Even if that general statement were true, it would not alter the fact that MDS has failed to produce a record that would justify liberalizing the terms of its license as called for in its application, in view of the specific flaws Northpoint has identified. Under these circumstances, any decision by the Commission to allow MDS to increase its tower height by a six times and to operate in the rain would be arbitrary and capricious.

As noted in Northpoint's petition, MDS did not demonstrate that its equipment was capable of transmitting or receiving video, data, or any other coherent signal. One would think that it would be easy enough for MDS to allay the Commission's concerns on this point: How hard can it be to document what was being transmitted? Yet, even after MDS's most recent filing, for all the Commission can know, MDS might well have been transmitting nothing but noise.

⁴ See *MDS America, Inc. Application for Renewal of Radio Station License in Specified Services*, Call Sign WC2XPU, File No. 0063-EX-RR-2002 (FCC filed Apr. 30, 2002).

⁵ See LCC Engineering Report (attached as exhibit to current application for modification of experimental license terms).

⁶ MDS Opposition at 7.

Nor has MDS attempted to explain the unquantified anomalies in its test data, including a bizarre, “almost constant bias in received power levels between two observations of DBS signal.”⁷ What assurance does the Commission have that any given set of data points reflects this mysterious bias of unknown magnitude rather than indicating an actual change in DBS performance that resulted from MDS’s operations? MDS provides none. Nor does MDS explain how its carrier signal, which it claims was 27 MHz wide, appears to have impacted the DBS signal over at least 100 MHz of bandwidth.⁸ Until these anomalies in the data are both explained and quantified, the MDS report is useless.

Perhaps most significant, MDS fails to provide any quantitative analysis of the levels of MDS interference present or of its impact on DBS. MDS has not revealed the equivalent power flux density (“epfd”) of its signal, or the actual carrier-to-interference ratio (“C/I”), or the increase in unavailability of DBS reception estimated to be caused by its operations. MDS’s most recent filing neither fills in this missing data nor attempts to give a reason why the data might not be needed. This silence merely underscores the fact that the report fails to provide any data relevant to the decision whether MDS might be capable of sharing the spectrum with DBS. And this lack of data has become all the more glaring in light of the Commission’s recently announced licensing plan for MVDDS operations in the 12.2-12.7 GHz band. The Commission plans to allow sharing based on regional epfd limits that correspond to specific increases in unavailability of DBS.⁹ MDS has provided no information that would allow the Commission to evaluate its

⁷ LCC Engineering Report at 15.

⁸ See Northpoint Nov. 2, 2001 Ex Parte (attached to Petition to Deny) at 5 & n. 7.

⁹ See MVDDS Press Release at 2.

compatibility with DBS within the Commission's chosen framework of analysis.

Furthermore, as Northpoint has already pointed out, MDS's claim to have a "mitigation zone" around its transmitter as small as 100 meters is devoid of meaning, since MDS nowhere explains what it means by a "mitigation zone."

Northpoint's interest in MDS's license modification is not merely academic. The DBS operators are continuing their long campaign to prevent the launch of MVDDS service in the 12.2-12.7 GHz band. The DBS lobby would doubtless seize on any harmful interference that MDS might cause to fuel its arguments for restricting terrestrial wireless competition to DBS and cable. Even if the DBS lobby does not succeed in stopping deployment altogether, it might attempt to smother the new service with onerous rules that hamper the development of effective terrestrial competition. In order to avoid inadvertently adding fuel to the DBS industry's fire, the Commission should decline to grant the modification MDS now seeks. In fact, as discussed below, the Commission should suspend or revoke MDS's existing experimental authorization entirely.

II. MDS's Existing Experimental License Should Be Revoked

In its Petition to Deny, Northpoint identified three grounds on which MDS's existing experimental license should be revoked: MDS's flagrant violation of Northpoint's patents, MDS's predominantly foreign ownership, and MDS's material misstatements in its application for an experimental license. Certainly, MDS's Opposition offers no explanation as to why its system does not infringe Northpoint's patents and does not elucidate the extent of MDS's foreign ownership – and these factors should give the Commission pause. But the heart of Northpoint's argument is and has

always been that MDS obtained its experimental license based in part on certain specific representations that, in Northpoint's view, are not supported by facts in the record.

In its application, MDS represented to the Commission, among other things, (1) that "MDS International systems identical to this one are already functional in many places around the world where there exist ubiquitous DBS satellite customers,"¹⁰ (2) that "[i]n years of commercial operation MDS International has not faced interference problems with existing DBS systems,"¹¹ and (3) that "[a]t the present time, MDS's technology is the only commercially functioning MVDDS system in the world with more than 20 installations worldwide."¹² Taken together, the statements in MDS's application and similar statements made in other filings with the Commission were clearly designed to convey the impression that MDS International ("MDSI") either operated or licensed technology to operators who shared spectrum with DBS on a commercial basis at more than 20 points around the world.

Far from supporting 20 instances of co-frequency operations with DBS, however, MDS has now admitted that, although MDSI claims to have shipped microwave equipment on more than 20 occasions, it "could not verify the current operational status or usage of every MDSI system."¹³ Northpoint believes that there is insufficient evidence in the record to demonstrate that MDSI's technology has *ever* operated successfully on a commercial basis on the same frequencies, at the same time, in the same place as DBS.

¹⁰ Application of MDS America, Inc., for Radio Station Under Part 5 of FCC Rules – Experimental Radio Service, File No. 0095-EX-PL-2001, Exhibit 2, at 1 (FCC filed Apr. 20, 2001) ("MDS Application").

¹¹ *Id.*

¹² *Id.*

¹³ MDS July 16 Ex Parte at 2.

Maybe there were some terrestrial systems, maybe some operated commercially, maybe some operated frequencies close to those used by DBS. But the suggestion that multiple *commercial* systems shared the *exact same frequencies* with DBS *simultaneously* at various locations around the globe has yet to be documented. That suggestion was at the heart of MDS's original experimental license application, is at the heart of this present proceeding, and goes to heart of the Docket 98-206 proceeding. As recently as March of this year, MDS America stated in ET Docket 98-206 that "[o]f the parties to this docket, MDS America alone has the real world experience on which to base its proposal for MVDDS/DBS sharing criteria."¹⁴ That same suggestion has been repeated in its current application for modification of its experimental license: In its Opposition, MDS refers grandly to "the evidence it has provided of the long-term operational experience of its technology licensor . . . that under real-world conditions, MVDDS can in fact co-exist with DBS operations without causing harmful interference."¹⁵

Not to put too fine a point on it, Northpoint regards MDS's evidence as unconvincing. To this MDS responds that "[w]hether or not *Northpoint* can confirm that MDS International systems co-exist with co-frequency DBS operations . . . is irrelevant."¹⁶ Fine. Northpoint cheerfully acknowledges that what ultimately counts is whether the *Commission* can confirm that MDS International systems co-exist with co-frequency DBS operations around the world. But Northpoint's point is that, on the record before it, the Commission has no basis on which to confirm MDS's claim. In support of

¹⁴ Ex parte Letter from Nancy K. Spooner, Swidler Berlin Shereff Friedman LLP, to William Caton, Acting Secretary, FCC, at 1, ET Docket 98-206 et al. (FCC filed Mar. 13, 2002).

¹⁵ MDS Opposition at 6.

¹⁶ MDS Opposition at 9.

its case, Northpoint has attached hereto the full record of the correspondence submitted to the General Counsel's Office and the Enforcement Bureau on this topic – not just Northpoint's allegations but MDS's responses as well.¹⁷ Northpoint invites the Office of Engineering and Technology to evaluate for itself on the basis of this material whether MDS's misstatements are indeed serious enough to justify suspension of its experimental license at least until the Commission has concluded its formal investigation of these issues.

Conclusion

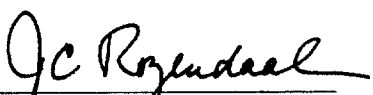
For the foregoing reasons, MDS's application for a modification of its experimental license should be denied and the license should be suspended or revoked.

Respectfully submitted,
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May 8, 2002

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¹⁷ Six letters are attached, with a table of contents identifying them.

CERTIFICATE OF SERVICE

I, Shonn Dyer, hereby certify that on this 8th day of May, 2002, copies of the foregoing were served by hand delivery* and/or first class United States mail, postage prepaid, on the following:

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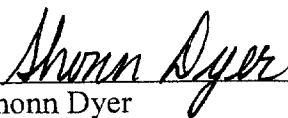

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