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

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

To: The Commission

MOTION TO DISMISS AND OPPOSITION TO STAY REQUEST

MDS America Incorporated ("MDS America"), through counsel, hereby files its Motion to Dismiss and Opposition ("Motion and Opposition") to the request for a stay ("Stay Request") included in the "Application for Review and for Stay Pending Review" ("Review Application") filed by Northpoint Technology, Ltd. ("Northpoint")with respect to the grant of the above-referenced experimental license application ("MDSA Application").[1]

In brief, Northpoint's Stay Request does not satisfy the Commission's procedural requirements and therefore must be dismissed with prejudice. Moreover, even if the Stay Request is given substantive review, it fails to satisfy the Commission's standards for grant of a stay. Given the likelihood of denial of the Review Application on its merits there is no basis for

[1] MDS America previously requested an extension of time to file, until January 9, 2003, its Opposition to the Review Application, to which Northpoint graciously consented, and which the Commission staff granted today. MDS America therefore limits this pleading to addressing the procedural defects in the Stay Request requiring its outright dismissal with prejudice as well as the failure of the Stay Request to meet the applicable standards for grant of stays. MDS America will be filing its Opposition to the Review Application on or before January 9, 2003.

imposing the extraordinary relief of a stay of the effectiveness of the experimental license application grant, an action which would cause substantial harm to MDS America without providing any public interest benefit.

I. STAY REQUEST'S FAILURE TO COMPLY WITH REQUIREMENTS OF § 1.44(e) REQUIRES DISMISSAL

Section 1.44(e) of the Commission's Rules, 47 C.F.R. § 1.44(e) requires that all requests for stay of a Commission decision be filed in a separate pleading. It further provides that, "Any such request which is not filed as a separate pleading will not be considered by the Commission."

Given the short time periods required for oppositions to stay requests, and the possibility that they may be granted on an *ex parte* basis, under Sections 1.45 (d) and (e) of the Commission's Rules, 47 C.F.R. §§ 1.45 (d), (e), there is ample reason for requiring that interested parties receive the special alert provided by a separate pleading requesting this extraordinary remedy. This warrants strict implementation of the rule and dismissal of stay requests when this required procedure is not followed. If the Commission had not been serious about requiring strict compliance, it need not have added the quoted language to the rule – its inclusion demonstrates that the Commission will take the rule seriously. Strictly implementing the rule, the Commission therefore dismissed a stay request filed as part of a petition for reconsideration in *Jerry Szoka,* 14 FCC Rcd 20147 (1999); *see also Peninsula Communications, Inc.*, 25 CR 1096, 17 FCC Rcd 2838 (2002)*; ClearComm, L.P.*, 16 FCC Rcd 18627(2001).

Here, the Stay Request was merely tacked on to the end of the caption of Northpoint's Application for Review, and mentioned only in a single sentence on the fifth page of the pleading, in a single sentence in the conclusion of the pleading, and in the service list's recital of the title of the pleading being served. Because Northpoint did not file a separate pleading providing a justification for the stay, MDS America has been put to the additional burden of trying to construe Northpoint's arguments supporting its Review Application also as argument for a stay. As discussed more fully below, there is absolutely no statement of reasons, much less discussion of the facts and circumstances, or of the legal basis, for the stay request. The only possible conclusion is that the stay is interposed for delay alone, as another element of Northpoint's strategy for grabbing scarce spectrum resources, free of charge, rather than facing competition in Commission auctions or in the marketplace. In this connection, it should be noted that Section 1.52 of the Commission's Rules, 47 C.F.R. § 1.52, expressly prohibits the filing of pleadings interposed solely for the purpose of delay.

MDS America therefore submits that, given the failure of Northpoint to file the Stay Request as a separate pleading, as well as to include any justification whatsoever for its grant, the Stay Request should be dismissed with prejudice forthwith. The Commission should immediately and expressly so rule so that there can be no doubt as to MDS America's entitlement to proceed with operations under the Experimental License pending a Commission decision on Northpoint's Review Application.[2]

II. STAY REQUEST'S FAILURE TO SATISFY STANDARDS FOR GRANT

A. No Rationale Given to Support Stay Request

MDS America is somewhat handicapped in substantively responding to the stay request because, as noted above, there is absolutely no discussion of the justification for this request for

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2 In this connection, MDS America submits that the license became effective upon grant, and that MDS America is entitled to act pursuant to its authority until such time as the grant is stayed or rescinded. In requesting the extension of time for filing the Opposition, however, MDS America did represent that, if an extension of time was granted (as it was), MDS America would not commence experimental license operations before January 9, 2002. MDS America has, therefore, consented to a limited stay until that date, which should give the Commission ample time to reject the Stay Request.

extraordinary relief. This alone should be sufficient to demonstrate that the stay should not be granted and warrants outright dismissal of the Stay Request.

A brief review of the applicable standards for grants of a stay, and Northpoint's failure to satisfy them, will also demonstrate the insufficiency of the Stay Request.[3] As a general matter, a stay of Commission action will not be granted absent satisfaction of all aspects of a four-factor test. Grant of a stay requires a showing by the moving party that:

1. There would be irreparable harm to the moving party if a stay was not granted.

2. The moving party is likely to succeed on the merits of its claim that the order should be rescinded or reversed.

3. Grant of the stay would be in the public interest.

4. The stay would not be harm to other parties.

See, e.g., Access Charge Reform (Request for Stay), 8 CR 514 (1997); *Local Competition Provisions of the 1996 Telecommunications Act (Request for Stay),* 4 CR 890 (1996); *Local Competition Provisions of the 1996 Telecommunications Act (Request for Stay),* 4 CR 890 (1996); *Arnold L. Chase*, 66 RR 2d 1312 (M. Med. Bur. 1989); *Pocahontas Cable TV, Inc.,* 40 RR 2d 891 (1977). Here, Northpoint, which has provided no justification for the stay request whatsoever, has failed to satisfy any of these factors.

B. No Showing of Irreparable Injury to Northpoint

First, Northpoint has not demonstrated that it would be irreparably injured if a stay is not granted. That alone requires dismissal of the Stay Request. *Local Competition Provisions of the 1996 Telecommunications Act (Request for Stay of Rural*

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[3] As noted above, MDS America is filing a separate Opposition that will demonstrate that there is no basis for the Commission to review, much less reverse, the decision of the Office of

Exemption Rules), 5 CR 1149 (1996). Even assuming that the arguments made in the pleading to support reversal of the grant of the experimental license are also supportive of a stay (which assumption should not be made because Northpoint never even asserted this, much less demonstrated it), it is clear that Northpoint has no cognizable claim of irreparable injury. To the extent that it fears that MDS America could infringe its patents, Northpoint can seek redress for patent infringement in the courts, which can award monetary damages to compensate Northpoint for its injury.[4] Any harm to Northpoint from any possible patent infringement is therefore not irreparable. Moreover, the Commission has previously found that its rules are technology-neutral and do not specify use of a particular technology.[5] Grant of the Experimental License to MDS America to conduct Multichannel Video Distribution and Data Service ("MVDDS") operations therefore does not ineluctably lead to infringement of Northpoint patents. Finally, while Northpoint has failed to respond to or acknowledge the existence of the cited case law, MDS America has repeatedly shown in this proceeding that the Commission cannot be an "aider and abettor" of patent infringement. *See* MDS

Engineering and Technology, made in consultation with several bureaus, to issue the experimental license.

4 Northpoint and MDS America are already before the United States District Court for the Southern District of Florida on patent claims. *See Northpoint Technology, Ltd. v. MDS America, Inc.*, Case No. 01-14207-CIV (West Palm Beach Div.) (filed Jul 18, 2001). Northpoint is therefore clearly aware of the availability of this remedy. MDS America on December 11, 2002, filed a "Motion for Summary Judgment of Invalidity of U.S. Patent Nos. 5,761,605 and 6,169,878).

5 *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; Amendment of the Commission's Rules to Authorize Subsidiary Terrestrial Use of the 12.2-12.7 GHz Band by Direct Broadcast Satellite Licensees and Their Affiliates; and Applications of Broadwave USA, PDC Broadband Corporation, and Satellite Receivers, Ltd. to Provide A Fixed Service in the 12.2-12.7 GHz, Band,* ET Docket No. 98-206, Memorandum Opinion And Order And Second Report And Order (released May 23, 2002) ("MVDDS Order") at ¶¶ 37 – 39.

America's *Opposition to Petition to Deny of Northpoint Technology, Ltd.*, File No. 0005-EX-ML-2002 (filed Apr. 23, 2002); *Ex Parte Letter of Nancy K. Spooner*, dated October 26, 2001, to Magalie Roman Salas (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)). Thus, grant of the experimental license by the Commission has absolutely no impact on Northpoint's rights, whatever they may be, with respect to its patents.

C. Public Interest Harmed, not Promoted, by a Stay

Northpoint also suggests that MDS America's experimental operations could cause harm to third parties by causing interference, although if Northpoint believes this would harm Northpoint, that is never explained. Given that the only third parties that could suffer interference are Direct Broadcast Satellite ("DBS") subscribers, and the DBS operators have not opposed the grant of the license,[6] Northpoint fails to satisfy the test that the public interest would be served by grant of the stay. If the DBS operators are comfortable with the power limits and other conditions imposed on the license by the expert Commission staff in the Office of Engineering and Technology, that Northpoint disagrees with them affords no basis for finding them deficient. In fact, the public interest in technology innovation and competitive choice of potential technologies would be harmed by a stay.

[6] While the DBS Operators had previously opposed a grant of MDS America's initial experimental license, they did not oppose grant of this modification. *See Letter to James Burtle*, dated Sept. 18, 2002, from Gary M. Epstein, Counsel for DIRECTV, Inc., and Pantelis Michalopoulos, Counsel for EchoStar Satellite Corporation. Nor did the DBS Operators file petitions for reconsideration or applications for review.

D. No Demonstration of Likelihood of Prevailing on the Merits

Further, Northpoint fails to demonstrate that it will prevail on the merits of its claim. When there is any doubt, a stay should not issue. *Arnold L. Chase*, 66 RR 2d 1312 (M. Med. Bur. 1989. As will be shown in MDS America's Opposition, the Review Application does not meet the requirement that it show one of the following:

> (i) The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.
>
> (ii) The action involves a question of law or policy which has not previously been resolved by the Commission.
>
> (iv) An erroneous finding as to an important or material question of fact.
>
> (v) Prejudicial procedural error.

It is extremely unlikely that Northpoint could prevail with respect to the merits of its Review Application. Even leaving aside the fact that experimental licensing is rarely a multi-party proceeding, the Commission issues experimental licenses specifically to promote the development of innovative technologies, and the presumption is in favor of grants. Moreover, Northpoint's arguments have already been rejected by the Commission's expert staff in the Office of Engineering and Technology ("OET"), following consultation with at least two bureaus. That Northpoint disagrees with the conditions imposed by OET is hardly a conflict with a rule or statute or an unresolved question of law or policy. Northpoint has been allowed ample opportunity to participate in the matter, so it is hard to see that it could establish a prejudicial procedural error. That leaves only the possibility of a significant factual error. With respect to any possible interference concerns, experimental licenses are awarded on a non-interference basis,[7] and the MDS America license in particular contains numerous prophylactic conditions addressing interference issues. Thus, it is unlikely that Northpoint will be able to establish that OET made a material error of fact.

E. Failure to Show No Likelihood of Harm to Third Parties by Grant of Stay

Finally, Northpoint's pleading never even addresses whether a stay would harm any third parties, including MDS America, much less demonstrates that harm would not occur. It is however, apparent from the status of the MVDDS docket that MDS America would suffer irreparable injury from further delay in its testing program, which Northpoint has already held up for nearly a year. The Commission has already issued a schedule for the MVDDS auctions. *See Public Notice,* DA 02-3293, Auction of Multichannel Video Distribution and Data Service licenses (MVDDS) is Rescheduled (released November 26, 2002). Further, the Commission's MVDDS Order requires operators proposing operations at variance from the Commission's MVDDS rules to demonstrate non-interference with DBS Operations.[8] MDS America has previously petitioned for reconsideration of certain technical rules, and it is important that its testing program proceed so that MDS America can demonstrate non-interference when called upon to do so should it decide to operate with parameters varying from those in the current rules, and so that potential auction participants contemplating auction participation and considering use of MDS America's technology may take into account when making their proposals and bids the potential service areas that may be feasible.

CONCLUSION

This is yet one more installment of Northpoint's endless saga of efforts to obtain free spectrum without competitive consideration of potential competing applicants. Apparently

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[77] 47 C.F.R. §5.85(c).

Northpoint is afraid to compete in the marketplace, and it is therefore trying to use all possible legislative, judicial, and administrative proceedings to foreclose competition. Northpoint has already substantially harmed MDS America by the protracted delay in grant of the modification of the experimental license caused by Northpoint's unique opposition, notably not seconded by the DBS Operators. To accede to Northpoint's Stay Request would be to place Northpoint's private interest above the public interest in the development of innovative services and technologies, and it would favor one potential applicant at the expense of another.

Northpoint has been given full opportunity to demonstrate its technology, and MDS America is asking for no more. This is particularly important because MDS America, the sole participant in the MVDDS proceedings to use technology already proved in commercial field operations abroad, was denied the opportunity to participate in the MITRE Corporation tests. MDS America is merely seeking the opportunity to demonstrate that implementation of its technology is equally feasible in the U.S. At a time when rural America, in particular, has limited choices of multi-channel video providers, there is certainly no basis for limiting the choice of MVDDS providers by denying MDS America the opportunity to demonstrate its technology in advance of the Commission's licensing process.

Northpoint's Stay Request, like its Review Application, must therefore be dismissed by the Commission and/or denied on its merits. Not only has Northpoint failed to comply with the Commission's Rules specifying the procedures for filing requests for stay, but also it has failed to satisfy the criteria that are prerequisites for grants of stays of Commission orders. The

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8 MVDDS Order at ¶¶ 231, 236.

Commission should therefore immediately dismiss or deny the Stay Request so that MDS America may proceed forthwith to demonstrate the feasibility of its proven MVDDS technology in the U.S.

Respectfully submitted,

Helen E. Disenhaus

Nancy K. Spooner
Helen E. Disenhaus
Swidler Berlin Shereff Friedman
3000 K Street, N.W., Suite 300
Washington, D.C. 20007
(202) 424-7500 (phone)
(202) 424-7645 (fax)

Counsel for
MDS America Incorporated

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of December, 2002, a true and correct copy of the foregoing was served via hand delivery (*) or e-mail (**) on the following individuals:

Marlene H. Dortch* **(Orig. + 4)**
Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW-B204
Washington, D.C. 20554

James R. Burtle**
Chief, Experimental Licensing Branch
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Bryan Tramont**
Office of Chairman Powell
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Sam Feder**
Office of Commissioner Martin
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Paul Margie**
Office of Commissioner Copps
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

John Branscome**
Office of Commissioner Abernathy
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Barry Ohlson**
Office of Commissioner Adelstein
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Charles Iseman**
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Michael K. Kellogg*
J.C. Rozendaal
Kellogg, Huber, Hansen,
Todd & Evans, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036

Douglas Young**
Office of Engineering & Technology
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Devonalu Robinson

Devonalu Robinson