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January 3, 2003

RECEIVED

VIA HAND DELIVERY

ERRATUM

JAN - 3 2003

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

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: MDS America Inc. Application for Modified Radio Station Under Part 5 of
FCC Rules -- Experimental Radio Service, Call Sign WC2XPU,
File No. 0005-EX-ML-2002; MDS America Inc. Application for Renewal of
Radio Station License in Specified Services, Call Sign WC2XPU, File No.
0063-EX-RR-2002**

Dear Ms. Dortch:

Yesterday Northpoint Technology, Ltd. filed a *Separate Request for Stay Pending Review* in the above-referenced matters. On page 6 of that filing, Northpoint mistakenly said that the Commission's auction of licenses for Multichannel Video Distribution and Data Service ("MVDDS") had been postponed until November 2003. In fact, the auction has been postponed until August 2003.

An original and 9 copies of the corrected filing are enclosed for the Commission's convenience.

I have enclosed an additional copy for date-stamp and return in the self-addressed envelope provided. Please contact me if you have any questions. Thank you for your assistance in this matter.

Yours truly,



J.C. Rozendaal

Counsel for Northpoint Technology, Ltd.

Enclosures

CERTIFICATE OF SERVICE

I hereby certify that, on this 3rd day of January, 2003, I caused copies of the foregoing *Erratum* to be served upon the parties on the attached service list by e-mail (indicated by asterisk) and by hand-delivery.

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/s/ Shonn Dyer

Shonn Dyer

Before the
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File No. 0005-EX-ML-2002

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Call Sign WC2XPU

**NORTHPOINT TECHNOLOGY, LTD.'S
SEPARATE REQUEST
FOR STAY PENDING REVIEW**

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January 2, 2003

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**NORTHPOINT TECHNOLOGY, LTD.'S
SEPARATE REQUEST
FOR STAY PENDING REVIEW**

Introduction and Summary

Northpoint Technology, Ltd. ("Northpoint"), through its counsel, hereby requests that the Commission exercise its discretion under 47 C.F.R. § 1.102 to stay the effect of the November 18, 2002, decision of the Commission's Office of Engineering and Technology ("OET") in the above-captioned matter while the Commission considers a pending Application for Review of the OET's decision. The decision in question granted certain requests by MDS America, Inc. ("MDSA") for modification and extension of MDSA's experimental license to make terrestrial broadcasts in the 12.2-12.7 GHz spectrum (the "12 GHz band"), which is currently used chiefly for Direct Broadcast Satellite ("DBS") service.

Northpoint previously suggested that a stay would be appropriate in its December 18, 2002, Application for Review. MDSA opposed the stay in part on procedural grounds, arguing that Northpoint should have presented its stay request as a separate pleading. Although MDSA was not prejudiced by the inclusion of the stay request in the

Application for Review, and although the Commission has, to Northpoint's knowledge, never denied a meritorious stay request purely on the ground that it was not filed as a separate pleading, Northpoint is filing this stay request as a separate pleading to obviate MDSA's procedural objections. The current request is timely and does not prejudice MDSA, which has already agreed to a stay until at least January 9, 2003.

In its application for review, Northpoint has raised serious factual, procedural, and policy errors in the OET's decision. The OET failed adequately to protect DBS subscribers from harmful interference, failed to ensure that meaningful data will be gathered in MDSA's experimental broadcasts, failed to explain its arbitrary and inadequate choice of broadcast power limit, and affirmatively required MDSA to infringe Northpoint's patents. The effect of the decision should be stayed pending review by the full Commission in order to prevent irreparable harm to Northpoint, to many DBS subscribers near the test site, to the nascent MVDDS industry, and to the public interest. Northpoint has made a strong showing on the merits that the OET's decision was arbitrary and capricious, and MDSA, which has not begun broadcasting under its modified license, will not be harmed by staying the OET's decision until the Commission has an opportunity to rule upon Northpoint's Application for Review.

Procedural Background

On November 18, 2002, the OET granted MDSA's application for modification and extension of its experimental license to make terrestrial broadcasts in the 12 GHz band. On December 18, 2002, Northpoint filed a timely Application for Review of this decision. The Commission's rules provide that "[i]f an application for review of a non-hearing or interlocutory action is filed . . . the Commission may in its discretion stay the effect of any such action until its review of the matters at issues has been completed." 47

C.F.R. § 1.102(b)(3). Accordingly, Northpoint suggested in its December 18 Application that the Commission should stay the effect of the OET's order pending review. *See* Application at 3.

MDSA sought and obtained an extension of time in which to respond to Northpoint's Application and, in doing so, agreed not to conduct any broadcasts under its modified experimental license until at least January 9, the date on which its response will be due. *See* Order Granting Extension of Time (OET issued Dec. 26, 2002). To Northpoint's surprise, however, on December 26, 2002, MDSA filed a "Motion to Dismiss and Opposition to Stay Request," in which MDSA took issue with Northpoint's suggestion that the Commission exercise its unquestioned discretion to stay the effect of the OET's decision pending review. MDSA argued in part that the Commission should not even consider Northpoint's stay suggestion because it was included in its application for review and not filed as a separate pleading.

The Commission has never enforced its rule requiring that stay requests be filed as a separate pleading in the rigid and draconian fashion MDSA espouses in its opposition. In fact, in each of the cases cited by MDSA (at page 2 of its Opposition) in which the Commission invoked the rule in the course of denying a stay request, the Commission also found the stay requests to be deficient or lacking in merit on other grounds. *See Jerry Szoka*, 14 FCC Rcd 20147, 20148 (1999); *Peninsula Communications, Inc.*, 17 FCC Rcd 2838, 2841 n.12 (2002); *ClearComm, L.P.*, 16 FCC Rcd 18627, 18629 n.14 (2001). Northpoint is aware of no instance in which the Commission has declined to consider a meritorious stay request solely on the ground that it was not filed separately.

Northpoint has no desire, however, to quibble over such procedural matters. In order to avoid any doubt about the propriety of the Commission's consideration of Northpoint's suggestion that the Commission exercise its discretion to stay the effect of the OET's decision in this matter, Northpoint hereby files this separate request for a stay. The Commission's rules provide no specific timetable for the Commission's exercise of its discretion to stay a decision pending review, *see* 47 C.F.R. § 1.102(b)(3), so this separate request for a stay is timely. MDSA cannot claim any prejudice from the fact that this separate request for a stay was not filed sooner, since MDSA has yet to conduct any broadcasts under the modified experimental license in question and has already consented to a stay until at least January 9, 2003. *See* MDSA Opposition at 3 n.2.

Factors Supporting Stay

In evaluating a stay request, the Commission traditionally considers the following four factors: likelihood of success on the merits, irreparable injury, no harm to other interested parties, and the public interest. *See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 842- 43 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). Each of these factors favors a stay in the current case.

1. Likelihood of Success on the Merits

In considering a stay application, the Commission "is not required to find that ultimate success by the movant is a mathematical probability, and indeed . . . may grant a stay even though its own approach may be contrary to movant's view of the merits." *Holiday Tours*, 559 F.2d at 843. In the present matter, Northpoint has made out a strong case on the merits. The errors in the OET's decision have been detailed in Northpoint's

Application for Review and will not be repeated in full here. To summarize briefly, OET issued a modified experimental license to MDSA even though it (1) lacked sufficient data in the record to conclude that MDSA could operate without causing harmful interference to DBS, (2) failed to ensure that any future tests by MDSA would yield useful data, (3) set an inadequate ERP limit for MDSA's operations (thus risking harmful interference to DBS operations), (4) neglected to provide any explanation of its decision regarding the ERP limit in the record, and (5) specifically required MDSA to use an antenna configuration that will infringe patents owned by Northpoint. These problems reflect erroneous findings as to important and material questions of fact and prejudicial procedural errors that render OET's decision arbitrary and capricious and otherwise not in accordance with law. In addition, the license conditions raise policy questions appropriate for resolution by the full Commission. *See generally* 47 C.F.R. § 1.115(b)(2).

2. Irreparable Injury

Northpoint will be directly harmed not only by MDSA's planned infringement of Northpoint's patents – indeed Northpoint has already sued MDSA for its past infringement – but also from the OET's apparent acceptance of the principle that it can condition broadcast licenses on the use of an antenna pattern that infringes Northpoint's patents. But the harm to Northpoint does not stop there. Having staked out a position as the creator and leader of the nascent MVDDS industry in the United States, Northpoint is legitimately concerned not only about the protection of its patent rights but also about the potential for harmful interference posed by MDSA's proposed tests and the quality of the data to be gathered. The DBS operators are continuing their efforts to strangle MVDDS

in its crib, and they are pressing their claims both before the Commission and in federal court. The DBS industry will seize on any harmful interference generated in the Clewiston tests, any infelicities in the test plan, and any anomalies in the data gathered (or the analysis thereof) as a pretext to thwart the deployment of any MVDDS service. Once MDSA's broadcasts have caused a problem, it will not be possible to "unring the bell." The damage to the nascent MVDDS industry's reputation and prospects will already have been done.

3. No Harm to MDSA from Stay

MDSA will not be harmed by a stay pending the Commission's review of the OET's decision. MDSA has not yet broadcast under its experimental license and has already agreed to a stay until at least January 9, so there will be no interruption of ongoing activities. A stay pending review will prevent the public's being exposed to potentially harmful interference under an arbitrary ERP standard and will prevent carrying out of an ill-considered instruction by the OET for MDSA to infringe Northpoint's patents. Nor will a stay pending review in any way affect MDSA's ability to participate in the Commission's planned auction of MVDDS licenses. Nothing prevents MDSA from participating in any auction regardless of whether it has fully completed its experimental tests. In any event, the MVDDS auctions have already been postponed until August 2003 – some 7 months away – and further postponements are likely as the Commission continues its reconsideration of (and as the courts ultimately review) the MVDDS regulations that emerged from ET Docket 98-206.

4. Stay Is in the Public Interest

Any harmful interference MDSA's broadcasts may cause will of course represent irreparable injury to the estimated 40,000 members of the public who are at risk of such interference. The public interest would be jeopardized by allowing MDSA to broadcast in a manner likely to cause interference to DBS subscribers, without gathering useful data, and while acting under an FCC mandate to infringe Northpoint's patents before the full Commission has had an opportunity to consider the issues raised on review. Furthermore, allowing broadcasts to proceed, even temporarily, under OET's arbitrary, inadequate, and unexplained power limit is contrary to the public interest. The public is entitled by law to reasoned decisionmaking and an explanation for the choices that regulators make. The OET has failed to provide the required reasoning in the present case, and this failure may undermine public confidence in the Commission's motives, competence, and judgment.

Conclusion

For the foregoing reasons, the effect of the OET's decision should be stayed pursuant to 47 C.F.R. § 1.102 pending review by the full Commission.

Dated: January 2, 2003

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Respectfully submitted,

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