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Federal Communications Commission
Office of Secretary

February 7, 2003

VIA HAND DELIVERY

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

**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:

Enclosed for filing please find an original and nine copies of *Northpoint Technology, Ltd. 's Supplement to Application for Review* in the above-captioned matters.

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

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

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Federal Communications Commission
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In the Matter of)
)
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MDS America Inc. Application for Modified)
Radio Station Under Part 5 of FCC Rules –)
Experimental Radio Service)
_____)

File No. 0005-EX-ML-2002

File No. 0063-EX-RR-2002

Call Sign WC2XPU

**NORTHPOINT TECHNOLOGY, LTD.'S
SUPPLEMENT TO APPLICATION FOR REVIEW**

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February 7, 2003

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
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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
	)	

**NORTHPOINT TECHNOLOGY, LTD.'S
SUPPLEMENT TO APPLICATION FOR REVIEW**

Northpoint Technology Ltd. (“Northpoint”) hereby supplements its pending Application for Review in accordance with a January 8 letter order of the Commission’s Office of Engineering and Technology (“OET”). On November 18, 2002, the OET had granted an application 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. On December 18, 2002, Northpoint Technology Ltd. (“Northpoint”) filed an Application for Review of the OET’s decision. On January 8, 2003, the OET on its own motion rescinded its action of November 18. The OET then formally rejected Northpoint’s objections (which it had previously implicitly rejected by granting MDSA’s experimental license) and re-issued MDSA’s experimental license. The January 8 letter order granted Northpoint leave to supplement its pending Application for Review within 30 days, which Northpoint is doing by this present filing.

Introduction and Summary

In its Petition to deny, Northpoint challenged MDSA's application based on, among other things, (1) the material misstatements in MDSA's original application and (2) MDSA's foreign ownership. Subsequent Commission action obviated those objections, so Northpoint did not raise either of these points in its Application for Review. Northpoint did raise three other issues in its Application for Review, however, which the January 8 letter order fails to ameliorate.

First, the January 8 letter order states that questions of patent infringement are not for the OET to decide, yet the experimental license requires MDSA to orient its antenna so that the maximum signal strength is directed southwards, thereby infringing claims in at least two of Northpoint's patents. The attempt simultaneously to avoid involving the OET in questions of patent infringement and to require infringement as a condition of MDSA's experimental license renders the decision under review internally inconsistent and, therefore, arbitrary and capricious. In addition, the decision departs from more than 40 years of Commission precedent by requiring the use of patented material over the objections of the patentee and in the absence of any agreement by Northpoint to license its technology to MDSA.

Second, the January 8 letter order says that the decision to issue MDSA's license was based on OET's review of MDSA's application and experimental test report. But this conclusory statement is insufficient in light of the specific deficiencies Northpoint has identified in the application and report, including MDSA's complete failure to quantify the effect of its transmissions on DBS reception. This is not a minor defect; it renders the test report meaningless and thereby deprives the Commission of any

evidentiary basis in the record to suppose that MDSA can operate without causing harmful interference with DBS operations. Absent that evidence, there is no legitimate ground for liberalizing the terms of MDSA's experimental license.

Third, the January 8 letter order failed to provide any explanation for the mysterious choice of maximum power level for MDSA's test. Once again, the absence of an explanation makes the decision arbitrary and capricious in light of the so far un rebutted evidence Northpoint has placed in the record indicating that the power limit is underprotective and leaves thousands of residents in areas where they are likely to be unable to receive DBS broadcasts even in clear air.

Regardless of whether OET agrees or disagrees with Northpoint's analysis of these problems, it must at least acknowledge the thus far uncontroverted evidence Northpoint has placed into the record. It cannot simply grant MDSA's license without providing any explanation.

In addition to being arbitrary and capricious, the decision under review raises questions about patent procedures that should be decided by the full Commission. The decision also rests on erroneous findings as to the likelihood that MDSA's broadcasts will cause harmful interference. For all these reasons, the grant of MDSA's modified experimental license should be reversed.

Background

1. Northpoint's Petition to Deny. The declared purpose of the January 8 letter order was to rule formally upon issues raised in the "Petition to Deny" that Northpoint had filed on March 18, 2002, in response to MDSA's application for modification of its experimental license. In that Petition, Northpoint argued that the MDSA's existing

experimental license should be revoked for at least three reasons: First, the license had been procured based on material misstatements by MDSA. Second, MDSA was likely not qualified to hold a license for Multichannel Video and Data Distribution Service (“MVDDS”) because it is 71.3% foreign owned. Third, MDSA’s experimental tests indicated that its operations infringed several of Northpoint’s patents, and the Commission should not aid and abet further infringement of Northpoint’s rights by authorizing continued terrestrial operations by what appeared to be, at best, a flawed copy of Northpoint’s inventions. Northpoint argued further that, even if the Commission did not revoke MDSA’s then-existing license, it should decline to liberalize the terms of the license because MDSA had failed to obtain data tending to support the proposition that MDSA could operate in the 12 GHz band without causing harmful interference to DBS. At the very least, Northpoint argued, the Commission should require that adequate experimental data be collected under the existing terms of the license before authorizing the increased antenna height and signal strength that MDSA sought.

2. The Second Report and Order in ET Docket 98-206. While MDSA’s application and Northpoint’s Petition to Deny were pending before the OET, the Commission issued its Second Report and Order (“SR&O”) ¹ in ET Docket 98-206, which established service rules for the newly created Multichannel Video and Data Distribution Service in the 12 GHz band. The SR&O addressed and resolved two of the issues raised in Northpoint’s Petition to Deny. Specifically, with respect to the misstatements MDSA made to the Commission in connection with ET Docket 98-206

¹ Memorandum Opinion and Order and Second Report and Order, *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*, 17 FCC Rcd 9614 (2002) (“SR&O”).

and in connection with its original application for an experimental license, the Commission determined that the facts in question were “a complex matter of *bona fide* dispute between MDSA and Northpoint.” SR&O, 17 FCC Rcd at 9622, ¶ 9. The Commission explained that it did “not consider this dispute to constitute a case that rises to the level of a possible misrepresentation before the Commission.” *Id.* Although Northpoint believes that the record of MDSA’s repeated material misstatements is incontrovertible, Northpoint did not seek reconsideration of the Commission’s resolution of this issue and does not currently challenge the grant of MDSA’s experimental license on this basis. Also in the SR&O, the Commission determined that foreign ownership would not constitute a bar to obtaining an MVDDS license. The Commission’s resolution of this issue obviates Northpoint’s objection based on MDSA’s foreign ownership. Once again, Northpoint does not currently challenge the grant of MDSA’s experimental license on this ground.

3. The January 8 Letter Order. Most of the January 8, 2003, letter order (“Order”) is devoted to the two issues in Northpoint’s Petition to Deny that the SR&O had, in effect, rendered moot. The Order did, however, also briefly address Northpoint’s allegations of patent infringement and MDSA’s lack of adequate experimental data. The OET expressed its view that the issue of patent infringement is “properly pending before the U.S. District Court for the Southern District of Florida and is not an issue for us to decide.” Order at 4. With respect to MDSA’s failure to obtain meaningful data from its first set of experimental tests, the Order said that, having reviewed MDSA’s “experimental reports and the technical basis for, and engineering supplements to, its

modification application,” the OET was granting MDSA’s application “with conditions designed to prevent the occurrence of interference to DBS operations.” *Id.*

The Order concludes by noting that the OET had reviewed Northpoint’s pending Application for Review but decided not to alter its decision.² *Id.* at 5. Notably, the Order did *not* specifically address any of the three main criticisms of its decision that Northpoint raised in its Application for Review, namely:

- One of the very license conditions imposed in order to avoid interference with DBS specifically requires MDSA (if it is to broadcast at all) to infringe Northpoint’s patents by orienting its antenna “so that the maximum ERP is directed towards 180 degrees.” (Special Condition 13). Far from avoiding involvement with the patent infringement issue, this condition places the Commission at the very heart of MDSA’s inevitable infringement.
- The terms of MDSA’s experimental license were modified to permit operations from a much higher elevation and in the rain, thus dramatically increasing MDSA’s potential for harmful interference despite the fact that MDSA’s previous test report not only revealed methodological errors and unexplained anomalies in the test data but also failed to make any attempt to quantify the effect of MDSA’s transmissions on DBS reception. This action was arbitrary and capricious, as was the decision to grant the modified license without obtaining adequate assurances that MDSA would generate usable data in future tests.

² 47 C.F.R. § 1.115(c) provides that “[n]o application for review will be granted if it relies on question of fact or law upon which the designated authority has been afforded no opportunity to pass.” The January 8 letter order makes it plain that the OET has had an opportunity to pass on all the arguments raised in Northpoint’s Application for Review.

- The license sets MDSA's maximum power limit at 23.8 watts ERP – a figure that (1) was not advocated by any party to the proceeding, (2) is not in any way explained in the record, and (3) leaves thousands of Clewiston residents at risk of harmful interference due to the absence of an EPFD limit on MDSA's transmissions. The lack of any explanation for this aspect of its decision renders the grant of MDSA's license arbitrary and capricious.

Because it declined either to alter its decision or even to point out the respects in which it disagrees with Northpoint's analysis, the OET in its January 8 letter order did nothing to ameliorate the flaws Northpoint has identified in the decision under review.

Status of Prior Filings

The OET's decision to rescind its action of November 18, 2002, and re-institute the same decision effective January 8, 2003, creates some uncertainty as to the status of the various filings submitted in this matter. The arguments presented in Northpoint's December 18, 2002, Application for Review and January 2, 2003, Separate Request for Stay Pending Review, both of which were directed to the OET's November 18, 2002, action, apply with equal force to the identical action taken January 8, 2003. In the interest of administrative economy and to prevent unnecessary repetition, Northpoint strongly believes that the Commission should treat these submissions (and MDSA's various oppositions thereto) as applying to the January 8, 2003, OET action, rather than requiring that the arguments and stay request be re-submitted. This approach appears to be consistent with the expectations of the OET, which described Northpoint's Application for Review as "pending" despite the fact that the November 18 decision under review had just been rescinded. Order at 5. It also appears to be consistent with

the expectations of MDSA, which has suggested that Northpoint's present supplement be "limited to matter raised in the January 8 Letter." Initial Opposition of MDSA America at 1 n.1 (FCC filed Jan. 9, 2003).

In the alternative, to the extent the Commission finds that any aspect of Northpoint's previously filed Application for Review or stay request should be regarded as moot due to the rescission of the November 18, 2002, action, Northpoint respectfully requests leave to file a complete Application for Review and/or stay request directed particularly at the January 8, 2003, decision.

This supplement incorporates by reference Northpoint's Application for Review and Separate Request for Stay as if fully set forth herein. The facts and arguments recited in those pleadings will not be needlessly repeated here.

Argument

The OET's decision in this case warrants review and reversal by the full Commission because it (1) violates the statutory obligation to conduct reasoned decisionmaking; (2) involves a question of law or policy that has not previously been resolved by the Commission – namely, whether it is proper to impose special conditions on experimental licenses that require the infringement of one or more specific patent claims of which the Commission is aware – and (3) contains an erroneous finding as to an important or material question of fact – specifically, whether MDSA's broadcasts are likely to cause harmful interference to DBS subscribers. *See generally* 47 C.F.R. 1.115(b)(2)(i), (ii), & (iv) (describing factors warranting Commission consideration of question presented in an Application for Review).

The OET benefits from an eminently qualified technical staff. But these undoubted qualifications do not affect the obligation for reasoned decisionmaking imposed by the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 *et seq.* Indeed, the very purpose of the APA is to prevent administrative agencies, including this Commission, from making decisions – even well-intentioned ones – arbitrarily, based on nothing more than the *ipse dixit* of the decisionmaker. In view of the specific deficiencies Northpoint identified in MDSA’s experimental report and application, and the detailed analysis of the potential for harmful interference that Northpoint provided, the OET’s statement in its January 8 letter order that it granted MDSA’s application after having reviewed MDSA’s “experimental reports and the technical basis for, and engineering supplements to, its modification application,” Order at 4, does not adequately explain the basis for its decision. This absence of an adequate explanation is reason enough for the Commission to reverse the grant of MDSA’s modified experimental license. *Cf., e.g., Illinois Pub. Telecomms. Ass’n v. FCC*, 117 F.3d 555, 564 (D.C. Cir. 1997) (“The FCC’s *ipse dixit* conclusion, coupled with its failure to respond to contrary arguments resting on solid data, epitomizes arbitrary and capricious decisionmaking.”) (citing *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46-57 (1983)).

As discussed briefly below, the decision under review is impermissibly arbitrary, capricious and unexplained in at least three key respects. *First*, the January 8 letter order was internally inconsistent in that it simultaneously refused to address the patent infringement issues raised in the record but imposed a special condition that specifically requires MDSA to infringe certain claims of Northpoint’s patents. This condition

represents a dramatic departure from the Commission's traditional refusal to incorporate patented material into license terms. *Second*, the decision neglected to address MDSA's failure to measure (or promise to measure) the C/I ratio for DBS signals in its test report or otherwise quantify the effect of its operations on DBS signals. *Third*, the decision failed to explain why the 23.8-watt ERP limit – which was never proposed or discussed in the record before the decision issued – is sufficiently protective, given the grave risk of harmful interference Northpoint documented in the record.

1. Inconsistent Approach Towards Patent Infringement Issues. The January 8 letter order asserts that the issue of MDSA's infringement of Northpoint's patents is "not an issue for [OET] to decide." Order at 4. In the very next paragraph, though, the Order claims to be granting MDSA's application "with conditions designed to prevent the occurrence of interference to DBS operations." *Id.* One of those conditions, however – Special Condition 13 – requires that MDSA orient its antenna "so that the maximum ERP is directed towards 180 degrees." As discussed in Northpoint's Application for Review, this requirement that MDSA direct its strongest transmissions in a southerly direction unambiguously commands MDSA, if it is to broadcast at all, to infringe at least two of Northpoint's patents.

It is a basic principle of administrative law that internally inconsistent reasoning is necessarily arbitrary and capricious. *See, e.g., General Chem. Corp. v. United States*, 817 F.2d 844, 846 (D.C. Cir. 1987) (per curiam) ("We find the Commission's analysis . . . to be internally inconsistent and inadequately explained, and thus we conclude that its ultimate finding . . . was arbitrary and capricious."). It is manifestly inconsistent simultaneously to disclaim any interest in considering patent issues and to *require* the use

of a technique that the Commission knows to be patented – and to do so where the patentee has specifically declined to license the technique for use by MDS America.

Traditionally, the Commission has been concerned that private parties might try to have aspects of their patented technologies written into Commission standards for communications apparatus or techniques in an effort to gain an unfair competitive advantage. Accordingly, the Commission’s consistent policy has been *not* to incorporate patented materials into license requirements – or at least not to do so absent an express commitment from the patentee to license the use of the invention to others on reasonable terms. *See, e.g.,* Second Report and Order, *Revision of the Commission’s Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 14 FCC Rcd 10954, 10984, ¶ 66 (1999) (“no manufacturer or carrier is required to employ any specific patented technology”); Report and Order, *Amendment of the Commission’s Rules to Establish a Single AM Radio Stereophonic Transmitting Equipment Standard*, 8 FCC Rcd 8216, 8221, ¶ 29 (1993) (“we are conditioning the selection of Motorola’s system as the AM stereo standard by requiring Motorola to license its patents to other parties under fair and reasonable terms”); *see generally*, Public Notice, *Revised Patent Procedures of the Federal Communications Commission* (Dec. 1961), *reprinted*, 3 FCC 2d 26 (1966).

In the present case, rather than having Northpoint attempt to write its technology into the licensing standard, the Commission is faced with a situation where its own staff has incorporated patented material into a licensing standard *over the objections of the patentee*, Northpoint.³ The Commission should reject this radical new departure from

³ The Commission’s use of Northpoint’s patented material in this way is particularly troubling in this case because the Commission previously took a license to Northpoint’s patented technology that was expressly limited to use “solely in connection with the

more than 40 years of Commission practice and should refuse to encourage or require infringement of Northpoint's duly issued patent rights through the terms of the broadcast licenses that it issues.

2. No Basis For Believing MDSA Can Operate Without Causing Harmful Interference. Northpoint has raised very specific deficiencies in MDSA's application, and particularly in the test report produced after MDSA's initial round of experiments. MDSA has failed to address, much less to rebut, the specific issues raised, including MDSA's *utter failure to quantify the effect of MDSA's transmissions on DBS reception*. This is not a minor oversight; it is a yawning gap in the test protocol that has caused MDSA's initial tests to fail in their essential purpose. It is as if MDSA had developed a new refrigerator and produced a test report in support of the proposition that it could keep objects cool but neglected to measure the temperature of the objects in the refrigerator. For MDSA to claim that it can operate co-frequency with DBS operations before it has measured the impact of its signal on DBS operations is incoherent. And the failure of the January 8 letter order to address this incoherency (or to explain why MDSA's failure to measure the effect of its broadcasts on the DBS signal is somehow excusable or unnecessary) renders the resulting decision arbitrary and capricious. If the Commission is to let the decision stand, it must have some basis in the record for believing that MDSA has collected useful data – or at least may do so in the future. Right now that evidence is missing from the record. Without that evidence, there is no legitimate ground for liberalizing the terms of MDSA's experimental license.

applications of Northpoint's Broadwave USA affiliates." License Agreement between Northpoint Technology, Ltd. and the Federal Communications Commission at 1, ¶ (1) (eff. Feb. 6, 2001).

3. **Arbitrarily Chosen and Inadequate Power Limit.** Similarly

problematic is the mysterious imposition of a 23.8-watt ERP limit in an apparent attempt to limit harmful interference to DBS operations. Using MDSA's own antenna pattern, Northpoint calculated the equivalent power flux density ("EPFD") of MDSA's signal around its proposed test site and documented that thousands of people lived in areas at risk of harmful interference up to and including complete loss of DBS signal in clear air. MDSA has provided no record evidence to challenge Northpoint's calculations.

Apparently in response to the grave risk of harmful interference Northpoint documented, the OET imposed a power limit that shaved 2 dB off of MDSA's equivalent isotropically radiated power ("EIRP"). As noted in Northpoint's Application for Review, however, the resulting EIRP is still 32 dB in excess of the EIRP limit that the Commission recently established for MVDDS operators and 7 dB higher than MDSA itself advocated as a limit for MVDDS operations in ET Docket 98-206. The January 8 letter order gives no explanation for why OET believes its power limit is sufficient in light of Northpoint's thus-far un rebutted demonstration that potentially thousands are at risk of losing their DBS signal completely. If the OET thinks Northpoint's calculation is flawed, it should say so. If the OET thinks the calculations are accurate but the risk is acceptable, it should say so. What OET may *not* do is simply to ignore the evidence in the record indicating that its power limit is seriously underprotective and ask the public to trust in its expertise without providing any reasoned explanation for its decision.

Nor does it suffice to remind the public, as the January 8 letter order does, that "all Experimental Radio licenses are issued only on condition that harmful interference will not be caused to regular services, and are subject to immediate cancellation if the

authorized experimental operations cause such harmful interference.” Order at 4. Where the so far uncontroverted evidence in the record indicates that thousands of people live in zones where DBS reception is likely to be impossible, the OET has an obligation to protect the public by declining to issue licenses without adequate safeguards.

To the extent that the grant of MDSA’s experimental license constitutes an implicit finding that the ERP limit is sufficiently protective and that DBS customers are not at substantial risk of harmful interference, that finding is erroneous and unsupported by substantial evidence in the record as a whole. This provides an independent reason for the Commission to reverse the OET’s decision and deny MDSA’s application – or at least to remand the matter for proper findings.

Conclusion

For the foregoing reasons, the OET’s grant of MDSA’s experimental license should be reversed.

Dated: February 7, 2003

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Respectfully submitted,

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Counsel for Northpoint Technology, Ltd.

CERTIFICATE OF SERVICE

I hereby certify that, on this 7th day of February, 2003, I caused copies of the foregoing *Northpoint Technology Ltd.'s Supplement to Application for Review* 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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