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

To: The Commission

CONSOLIDATED OPPOSITION OF MDS AMERICA, INCORPORATED TO APPLICATION FOR REVIEW AND SUPPLEMENT TO APPLICATION FOR REVIEW

Nancy K. Spooner
Helen E. Disenhaus
Swidler Berlin Shereff Shereff Friedman, LLP
3000 K Street, NW, Suite 300
Washington, D.C. 2007
(202) 424-7500 (phone)
(202) 424-7645 (fax)

Counsel for
MDS America, Incorporated

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EXECUTIVE SUMMARY

Northpoint's Review Application and Supplement must be dismissed or denied because they merely second-guess the decision of OET, concurred in by two bureaus, to grant MDS America's modified experimental license application. The Review Application fails to make any of the showings required to warrant review of a staff decision by the full Commission under the Commission's Rules. In particular, the Review Application never demonstrates that the claimed OET erroneous actions are in conflict with statute, regulation, case precedent, or established Commission policy; that the licensing decision presents a novel question of law or policy as to which the full Commission has not ruled; reflects an erroneous finding as to an important or material question of fact; or involves a prejudicial procedural error. The Supplement does nothing more than reiterate arguments already rejected by OET, relying on specious reasoning derived from false premises to reach unfounded conclusions, and therefore it utterly fails to remedy the deficiencies of the Review Application.

MDS America is concerned that delay of a potential competitor's development activities, not the fear of patent infringement or protection of DBS reception, is the motivating factor behind the Review Application. In order to mitigate the harm already caused MDS America, the Commission should promptly dismiss or deny the Review Application.

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I. INTRODUCTION

MDS America, Incorporated ("MDS America"), through counsel, hereby files its Consolidated Opposition to the "Application for Review" ("Review Application") filed by Northpoint Technology, Ltd. ("Northpoint") on December 18, 2002, and to the "Supplement to Application for Review" ("Supplement or S.") filed by Northpoint on February 7, 2003.[1] This Consolidated Opposition incorporates by reference the "Initial Opposition" filed by MDS America on January 9, 2003, which addressed Northpoint's request for a stay of the order

[1] Because the Commission staff issued a letter on January 8, 2003, one day before MDS America's Opposition to the Application for Review was due to be filed, *Letter from Charles Iseman to J.C. Rozendaal, et al.* ("*January 8 Letter*"), to avoid unnecessary duplication, MDS America on January 9 filed only an "*Initial Opposition to Application for Review and For Stay Pending Review*" addressing only Northpoint's request for a stay and the implications of the *January 8 Letter* therefor and reserved the right to file a pleading following any supplementation of the Northpoint *Review Application.*

granting the above-referenced experimental license ("License").[2] It also incorporates by reference MDS America's earlier oppositions to Northpoint's requests for stay.[3]

Significantly, in its *January 8 Letter*, the Commission's Office of Engineering and Technology ("OET") *sua sponte* considered and rejected all the substantive arguments raised by Northpoint not only in its Informal Objection[4] but also in its Application for Review.[5] OET's decision stated:

> In taking the above action, we have taken note of the Application for Review filed on December 18, 2002 and the "Request for Stay Pending Review" filed on January 2, 2003 (corrected by erratum filed January 3, 2003) by Northpoint Technology, Ltd. These pleadings are directed to the Commission. Nevertheless, we have reviewed them to determine whether we should, on our own motion, alter our decision and/or stay the effectiveness of our decision pending review. We have determined that neither of these alternatives is warranted based on our evaluation of the merits of the pleadings.

The Supplement does no more than repeat the arguments made in the Application Review and already rejected by OET for lack of merit. Northpoint's Review Application, both alone and in combination with the Supplement, satisfies none of the criteria for review or reversal of a staff

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[2] A copy of the Initial Opposition is included in this docket..

[3] On December 26, 2002, because of the expedited procedural schedule applicable to stay requests, MDS America filed a separate "Motion to Dismiss and Opposition to Stay Request" ("Motion and Opposition"), a copy of which is included in this docket, with specific respect to the request for a stay ("Stay Request") included in the Review Application. On January 7, 2002, MDS America filed its Opposition ("Opposition") to the subsequent "Northpoint Technology, Ltd.'s Separate Request for Stay Pending Review" ("Separate Request") for a stay. A copy of the Opposition, a filing distinct from the Initial Opposition as well as from the Motion and Opposition, is also included in this docket.

[4] OET deemed what Northpoint termed a petition to deny to be an informal objection. *January 8 Letter* at 1 n.1. Not only does there appear to be no express provision in the Commission's Rules providing for petitions to deny experimental license applications, there also appears to be no mention even of informal objections with respect to such applications.

[5] The only argument not rejected out of hand was the procedural claim that OET had erred in not issuing a formal letter rejecting Northpoint's Petition to Deny. As MDS America has stated previously, this may not have been required. *Initial Opposition* at 2 n.4. In any event, the issue was mooted by the *January 8 Letter*.

decision by the full Commission. Merely second-guessing the action of OET, taken with the concurrence of the Wireless Telecommunications Bureau and the International Bureau (collectively, the "Bureaus"), is not grounds for either staying or rescinding the license grant.

The Commission has given Northpoint every opportunity to raise at excruciating length Northpoint's purported concerns about the MDS America testing program, and as a consequence MDS America has already endured substantial harmful delays in the commencement of its Phase II experimental license testing program. Enough is enough. At issue is *merely a six month experimental license modification issued on a non-interference basis* and subject to multiple operational and coordination procedures developed by the OET staff and accepted as sufficient to permit the testing to go forward by DIRECTV, Inc. and EchoStar Satellite Corporation (collectively, the "DBS Operators").

Northpoint's real fear is not of patent infringement, nor of harm to DBS subscribers, nor of harm to Multichannel Video Distribution and Data Service ("MVDDS") as a service.[6] Northpoint's real fear is that MDS America's tests will be as highly successful as operations abroad using the same technology, and that the potential for MVDDS competition will be enhanced. Further delay of the testing would serve only to advance Northpoint's private interest in limiting competition in MVDDS, while depriving the public of the benefits of the radio service technology development that is the *raision d'être* of the experimental licensing program.[7]

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[6] *See* RA at 12 (where Northpoint asserts the legitimacy of its concerns about MDS America's planned operations derives from Northpoint's "[h]aving staked out a position as the creator and leader of the nascent MVDDS industry in the United States").

[7] *See Diversified Communications Engineering, Inc.*; Experimental Radio Station WA2XMY; Modification of License Austin, TX and King Ranch, TX; Special Temporary Authority Washington, DC, 15 FCC Rcd 2547, 2000 FCC LEXIS 486 (Feb. 4, 2000) ("Diversified"), 15 FCC Rcd at 2554, ¶ 14 ("Experimental Radio is a success because it 'encourages the larger and more effective use of radio in the public interest.'"); *see also Amendment of Part 5 of the Commission's Rules to Revise the Experimental Radio Service*

Rather than bolstering the Review Application by rebutting the specific findings of the *January 8 Letter*, at most the Supplement serves to demonstrate that Northpoint relies on nothing more than specious reasoning based on false premises, and that the Northpoint pleadings represent a transparent attempt to delay the development of competition in the MVDDS industry. The Commission should therefore affirm OET's decision in all respects and dismiss the Application for Review and Supplement as procedurally insufficient or deny them on the merits as providing no basis for either staying or reversing the OET decision to grant the subject experimental license to MDS America. The Commission should also deny Northpoint's stay request.[8]

II. DISCUSSION

A. The Review Application Does Not Raise Material Issues under the Applicable Review Criteria.

Northpoint's Review Application must be denied *in toto* because it does not satisfy any of the criteria for review by the full Commission. It therefore fails to demonstrate any valid basis

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Regulations, 13 FCC Rcd 21391, 14 CR 1 (Oct. 27, 1998), at ¶ 1 (stating the Experimental License Rules were being revised in part to promote technical innovation).

[8] This Opposition incorporates by reference MDS America's previously-filed responses to Northpoint's request that the grant of the license be stayed pending action on the Review Application. As demonstrated in those responses, there is no basis to stay the OET license grant. Northpoint has not made a sufficient showing of a likelihood of success on the merits. Northpoint has not shown that it would suffer irreparable injury without a stay, nor that the public interest would be served by a stay. Moreover, Northpoint's initial Stay Request failed to comply with the Commission's procedural requirement that it be filed as a separate pleading. Given that a stay would cause irreparable harm to MDS America, the request for stay must be promptly dismissed or denied. The Commission should also make clear that it is not interposing a stay either pending its own action on the Review Application and Supplement or pending any Northpoint request for judicial review of Commission action on the Review Application. The Commission may also wish to take this opportunity to remind the general public that it will not countenance pleadings that fail to satisfy the minimum standards of the Commission's rules and whose justification is so flimsy as to make self-evident that the filing was intended primarily for delay. *Cf.* 47 C.F.R. § 1.52 ("the signature . . . by an attorney constitutes a certificate by him that . . . the document . . . is not interposed for delay.").

for reversal of the decision by OET, in consultation with the Bureaus, to grant the MDS America Application.

Under Section 1.115 of the Commission's Rules, to justify full Commission review of a staff action taken pursuant to delegated authority, an application for review must show at least 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.[9]

The Review Application, even as supplemented, makes not one of the required showings.

Northpoint summarized the bases for the Review Application in its Separate Request by stating that OET made "serious factual, procedural, and policy errors" and that it "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." (SR at 4.)[10] In essence, however, aside from complaining that there was no statement of reasons for granting the application, the Review Application merely reiterates arguments and conclusory allegations previously rejected by the technically expert staff of OET

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[9] 47 C.F.R. § 1.115.

[10] In its Conclusion, the Review Application identifies the OET errors as mandating infringement of Northpoint's patents and failing to require MDS America to demonstrate its operations will avoid harmful interference to DBS and that they will provide useful data. RA at 13.

and the Bureaus in granting the license despite Northpoint's opposition.[11] The Supplement merely repeats this reiteration.

Nor does the Review Application even attempt to "specify with particularity" which of the types of error listed above Northpoint claims are present, despite the directive to do so in Section 1.115 (b)(2).[12] This leaves to MDS America and the Commission staff the task of figuring out to which categories of potential error Northpoint would ascribe its vague claims. Given the difficulty of this exercise, MDS America is concerned that, rather than trying to ensure correction of some material error by the staff, Northpoint may have filed the Review Application purely to delay MDS America's operations under the license in an effort to preclude MDS America from participating in MVDDS auctions or having its technology used by auction applicants.

B. The Review Application Does Not Raise Any Issues with Respect to Conflicts between the License Grant and Applicable Law, Regulation, Precedent, or Policy.

Since no law, rule, precedent, or policy is cited, the Review Application's only asserted ground for review of the OET license grant that could possibly be construed as raising a claim of inconsistency with law or policy is the unwarranted assertion that the license conditions imposing certain antenna pattern restrictions are unlawful because they require MDS America to infringe Northpoint patents. (RA at 2, 3 - 6.) Whatever reverence Northpoint may feel for its technology, that technology is not "enshrined"[13] in either the Commission's MVDDS rules or MDS America's experimental license.

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[11] Because Northpoint has offered no support in the Commission's Rules or elsewhere for its apparent but obviously unfounded view that OET is supposed to make sure experiments are successful (see RA at 10 – 12; Supplement at 4, 12), one of the claimed grounds for review – that OET failed to ensure the experiment would produce meaningful results – is irrelevant, warrants no further discussion, and should be dismissed out of hand.

[12] 47 C.F.R. § 1.115 (b)(2).

[13] *See* RA at 6.

In the first place, it is ludicrous to characterize a license that *permits* MDS America to conduct certain experimental activities as mandating use of Northpoint's technology, much less as mandating patent infringement. The Commission isn't *requiring* MDS America to do anything. The license merely provides that if MDS America conducts experiments, there are certain restrictions on those operations. MDS America must conduct any experiments at its own risk with respect to patent infringement as well as everything else.

Moreover, as MDS America has repeatedly shown, as a matter of federal law, the Commission cannot be liable as an "aider and abettor" of any infringement of Northpoint patents, even if they are upheld and MDS America is found to have infringed them by conducting operations under the experimental license.[14] Northpoint has cited no authority to the contrary, despite repeated opportunities to do so. Moreover, Northpoint is well aware that it has a judicial remedy for patent infringement claims.[15] The Commission is not the proper forum for their consideration, however much Northpoint wants to transform the Commission into Northpoint's private patent watchdog.

Leaving aside the question of validity of the patents, as to which there is substantial doubt,[16] even fulfillment of Northpoint's "worst fears" that establishment of an MVDDS service

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[14] *See* Motion and Opposition at 5 – 6; Opposition at 8 – 9.

[15] See *Northpoint Technology, Ltd. v. MDS America, Inc.*, Case No. 01-14207-CIV (So. D. Fla., W. Palm Beach Div., filed Jul. 18, 2001).

[16] 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." The Commission may wish to take official notice of the following facts: patent applicants are required to disclose only "prior art" of which they are aware, not to conduct a thorough search for such art; patent examiners have limited opportunity and resources to conduct their own searches; and patents are issued *ex parte*, without giving third parties an opportunity to present facts that would show the patent should not be issued. According to a recent law review article, judges conclude patent claims are invalid approximately 36% of the time and juries conclude patents are invalid 29% of the time. *Judges, Juries and Patent Cases - An Empirical Peek Inside The Black Box*, 99 Mich. L. Rev. 365, 391 (2000). Thus, while patents carry a presumption of validity, they are extremely vulnerable to

would lead to infringement of Northpoint's patents does not demonstrate the need to revisit OET's experimental license grant as contrary to applicable law, regulation, precedent, or policy. Significantly, Northpoint has not managed to find a single statute, regulation, precedent, or policy to support its patent-based argument.

C. The License Grant Involves No Novel Question of Law or Policy.

Nor has Northpoint identified any novel question of law or policy that is before the Commission for the first time in the context of this experimental license grant. All that is before the Commission is a non-exclusive six-month experimental license that is issued on a non-interference basis, that contains numerous specially crafted prophylactic operating and coordination procedures addressing the specific potential interference environment at issue, and that deprives no third party of the use of spectrum. Moreover, this is a modification of an earlier experimental license that covered similar experiments and that resulted in not a single complaint of interference that could be attributed to the experiments. Additionally, the technology to be used has already been successfully deployed in commercial operations in various other parts of the world without causing harmful interference to DBS reception.

The words of the Commission in dismissing a challenge by one of the DBS Operators to the grant of an experimental license application by a Northpoint affiliate are equally applicable here:

> Based on our review of the record, we find that DirecTV has not provided any evidence to support its claims. In particular, given the limited time period and temporary nature of the experimentation, the limited number of transmit sites authorized, the collaborative efforts put forth by the three parties, and especially

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successful challenge on invalidity grounds. Therefore, that Northpoint has patents is not dispositive of the question of their validity, much less of the question of whether any particular activities by MDS America would infringe them. The Commission has no obligation to rescind MDS America's experimental license "[a]s a matter of simple respect for the decision of the U.S. Patent and Trademark Office in granting Northpoint's patents." (RA at 2.)

> the conditions that govern Diversified's obligations in the event of any harmful interference, we see no reason to modify the staff's action. Moreover, Diversified's operating history supports the staff's judgment as to the necessary conditions for the experimental license. In the Texas experimentation, which is now about one year old, no reports of any DBS subscriber complaints of harmful interference have been filed with the Commission.[17]

OET, the Commission's delegated authority for experimental licensing, routinely grants experimental license applications on an *ex parte* basis every week, and its expert staff is competent to analyze any potential interference issues and to ensure the public is protected. Determining what technical conditions are appropriate to minimize the risk of harmful interference from experimental operations is what OET does every day. If there is any novelty here, it is that OET also had the benefit of input from the Bureaus, as well as from Northpoint. The OET staff also took the exceptional step of obtaining sign-off on the special operating conditions and coordination procedures from the DBS Operators,[18] who would be most affected by any disruption in DBS service reception, a highly relevant fact conveniently ignored by Northpoint.

Now Northpoint asks the full Commission to completely second-guess the OET decision to issue a license incorporating conditions specifically designed by OET to address the unique circumstances of the MDS America experiments. The Commission is being asked to replace the judgment of its expert and unbiased staff with that of Northpoint, a potential MVDDS industry competitor of MDS America, which claims there will be harmful interference to DBS reception. Northpoint's disagreement with the technical analysis of OET staff, however, does not constitute the presentation of a novel issue of law or policy that only the full Commission can resolve.

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17 *Diversified,* 15 FCC Rcd at 2550, ¶ 8.

18 *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. ("DBS Letter").

D. Northpoint Demonstrates No Procedural Errors.

Nor has Northpoint managed to find anything to cite as support for Northpoint's apparent view that there was an obligation on the part of OET to issue a detailed explanation of the license grant, although, in issuing the *January 8 Letter*, OET has nonetheless done so and thereby mooted any such claim. None of the citations included in the Review Application even addresses experimental licenses, much less requires a special order.[19] There is no Commission rule requiring a statement of reasons for issuing an experimental license even when a third party opposes the application.[20]

Given that the license is specially drafted for the proposed experiment, the included terms and conditions document the interference protection criteria OET staff deemed appropriate. That OET imposed a power limitation lower than that requested by MDS America or higher than desired by Northpoint is evidence of OET analysis, not of OET arbitrariness.

E. Northpoint Demonstrates No Material Error of Fact by OET.

Much of Northpoint's Review Application seems to be focused on what it claims is the failure of OET to protect the public from "a serious threat of harmful interference to DBS" reception[21] that would be caused by MDS America operations pursuant to the terms of the modified experimental license. Northpoint's self-serving analysis, however, has already been

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[19] *See* RA at 9 (citing only cases addressing Administrative Procedure Act ("APA") requirements for rulemaking); RA at 1 (asserting non-compliance by OET with the APA "reasoned decisionmaking" obligation).

[20] In contrast, for example, Section 73. 3591(c) requires a staff statement setting forth the reasons for granting a broadcast license application that had been the subject to a petition to deny. 47 C.F.R. § 73.3591(c). If the Commission wanted to require such a statement in the case of the grant of an experimental license, the Commission could have adopted a rule to that effect, but, significantly, it did not do so. Nor, for that matter, does it even have a rule indicating that it will entertain petitions to deny experimental license applications. In fact, in issuing *the January 8 Letter*, OET went out of its way to treat the Northpoint filing even as an informal objection.

[21] RA at 2.

found by OET to be insufficient to warrant review of the OET license grant.[22] Further, Northpoint failed to show why any new technical information it supplied was not first presented to OET prior to the license grant, or at the latest in a petition for reconsideration addressed to OET.[23]

In the first place, whatever Northpoint would wish, there is no requirement that MDS America's experimental operations "respect" the equivalent isotropically radiated power ("EIRP") and equivalent power flux density ("EPFD") limits of the recently adopted MVDDS technical rules.[24] (*Cf.* RA at 2, 6 -7.)[25] As Northpoint knows from first-hand experience,

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[22] To the extent that Northpoint revisited its earlier critiques of MDS America engineering and claims they underestimated the problem (RA at 8), or offered critiques (RA at 9 – 10), Northpoint has not shown any reason why it could not have submitted these objections prior to the license grant. It has certainly never been shy about presenting its objections to the Commission in the past. This too raises concern that delay, not correction of error or prevention of interference, is the real motivation behind the Review Application.

[23] Rule 1.115(b)(5) expressly states that "[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass." 47 C.F.R. § 1115(b)(5). Of course, even in the context of a petition for reconsideration addressed to OET, under Section 1.106(b)(2), Northpoint would have had to demonstrate that any newly-discovered facts or circumstances on which it relies were not previously known to Northpoint and would not have been discovered with the exercise of reasonable diligence. 47 C.F.R. § 1.106(b)(2). Here, Northpoint has failed to show why it did not earlier discover the cited errors in its own analysis. To the extent the new fact is the precise ERP limit imposed by the Commission, the reduced limit presumably was the result of Northpoint's challenges to the level requested by MDS America. This indicates not that the Commission has been arbitrary but that it paid attention to Northpoint. That Northpoint was unsuccessful in getting the limit reduced as far as Northpoint recommended is hardly new evidence. Indeed, given the untimeliness of the data when presented to OET (which, nonetheless considered and rejected that data as a basis for license rescission), the Commission should strike the data from the record and give no further consideration to the allegations to which it relates. Northpoint's Supplement provides no basis for the Commission to rely on this untimely data to rescind the license grant.

[24] MDS America filed its modification application several months before the Commission issued its decision establishing technical rules for MVDDS operations.

[25] Northpoint itself agrees that the MVDDS EIRP limit is too restrictive. (RA at 7.)

experimental licenses are by their very nature issued to allow operations not otherwise contemplated by the Commission's Rules.

Moreover, to the extent that MDS America wishes to seek a waiver of the MVDDS rules, or to demonstrate that the technical rules may be relaxed without causing harmful interference, testing may be helpful or essential. Indeed, the Commission expressly stated that it would entertain applications requesting waiver of the MVDDS technical rules, subject to compliance with the requirement of testing to demonstrate non-interference with DBS reception.[26] This can only hurt MDS America while benefiting Northpoint.

The only outside support Northpoint can muster for its view that MDS America should not be allowed to exceed the EPFD limits of the Commission's MVDDS technical rules, however, is a comment filed in March 2001 in the MVDDS docket by DIRECTV, Inc. that recommended exclusive reliance on EPFD limits to prevent interference with DBS reception. Significantly, however, both the DBS Operators agreed in September 2002 to the issuance of the experimental license modification with the prophylactic operating conditions and coordination procedures incorporated by OET.[27] If Northpoint's concern for DBS subscribers has a substantial basis, rather than being a pretext for objection, one would expect there to have been equally vehement opposition from the DBS Operators. They, however, despite being far more likely than Northpoint to be adversely affected by any potential interference, agreed to the

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[26] *See 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, 26 CR 1192, 17 FCC Rcd 9614 (2002) ("MVDDS Order") at ¶ 236.

[27] *See DBS Letter.*

limited operations now authorized and did not file a petition to deny, a petition for reconsideration, or an application for review of the experimental license grant.[28]

Further, if Northpoint thinks OET lacked sufficient data to make its decision, Northpoint can have only itself to blame, since it had eight months during which to present it. The Commission must reject Northpoint's attempt to bolster its last-ditch effort to further delay MDS America's testing by raising a new potential interference issue now, before the full Commission. For example, Northpoint is for the first time now presenting information as to the number of people that have DBS service within an area that might receive MDS America's test signal. Yet this analysis relies on data Northpoint acknowledges was filed with OET more than two weeks before the license was issued. (RA at 9 and n.14.) Northpoint never explains why, if this information is so material to the licensing decision, Northpoint did not provide it to OET before the license grant, or at least in a reconsideration petition. In addition, Northpoint's persistent misunderstanding of the LCC test report either is deliberate or is further evidence of the limitations of Northpoint's own engineering analysis. In neither case does it give reason for review of the license grant.

Northpoint's Review Application affords no basis for the full Commission to revisit OET's license grant. Not only is there no merit to Northpoint's allegations of likely interference, but to second-guess OET in this context would be to frustrate radio experimentation by inviting wholesale license challenges by competitors of experimental license applicants, however meritless, with ensuing delay and added expense to the Commission and to the applicants. This delay frustrates the very essence of the experimental licensing program, whose procedures were

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[28] Northpoint also claims that a failure of MDS America's tests would harm rather than benefit Northpoint, by somehow tarnishing *Northpoint's* reputation, but it makes no effort to support this speculative claim. *See* RA at 10.

recently modified to expedite the licensing process and accelerate the development of new technology.

F. The Supplement Employs Fallacious Reasoning Based on False Premises and Does Not Remedy the Deficiencies of the Review Application.

Nothing in the Supplement bolsters Northpoint's arguments. It relies on false premises, which naturally lead it to unfounded conclusions. The gist of the arguments in the Supplement is that if Northpoint disagrees with OET's decision and doesn't like its explanation, the decision is arbitrary and capricious.

A brief review of Northpoint's reasoning demonstrates that it affords no basis for rescission of the MDS America experimental license:

1. Imposing a license condition is the same thing as requiring patent infringement. Northpoint claims the OET decision to be "internally inconsistent and, therefore, arbitrary and capricious" because of its "attempt simultaneously to avoid involving the OET in questions of patent infringement and to require infringement as a condition of MDSA's experimental license." (S. at 2.) Northpoint also claims this to be inconsistent with established law and policy as well as to raise a question not previously decided by the Commission. (S. at 8.). Unfortunately, Northpoint's assumption that OET has required MDS America to infringe Northpoint's patents is simply not true, and the conclusions Northpoint derives from this erroneous assumption[29] are equally fallacious. OET, as was proper, and like the Commission in the *MVDDS Order*, never formed an opinion as to whether MDS America's experiments would constitute patent infringement. *Ipso facto*, OET could not have *required* MDS America to infringe Northpoint's patents. As shown above, the risk of infringement is MDS America's to

accept if it chooses; a finding of infringement can be made only by the courts. Since OET never required patent infringement in the first place, the conclusions Northpoint attempts to reach from that premise are unfounded. There is nothing impermissible in the license conditions imposed by OET.

2. MDS America was required to quantify potential interference from its experiments on DBS subscribers. Northpoint attempts to re-write the Commission's Rules to establish "straw man" standards to impose on MDS America's application. Northpoint claims that OET erred in granting the license "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." (S. at 2; *see also* S. at 6.) As Northpoint well knows, however, to receive a license grant MDS America only had to satisfy OET (and, here, while ignored by Northpoint, it also satisfied the DBS Operators) that the experiments would not have an unreasonable risk of causing harmful interference. Despite Northpoint's contrary assertions, MDS America was not specifically required to quantify anything, whether it be the number of DBS subscribers in the area or the C/I ratio for DBS signals, and OET was not required to accept Northpoint's views of the matter. Northpoint can conduct its own experiments, but it cannot dictate how MDS America will conduct its testing. That MDS America did not do something it was not required to do is hardly a reason to rescind its license. Similarly, whatever Northpoint's views of the merits or completeness of MDS America's test program or report, OET was not required to deny the license modification just because the report was not to Northpoint's liking.[30]

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[29] For example, if OET has not mandated infringement, then the question of "whether it is proper to impose special conditions on experimental licenses that require the infringement of one or more patent claims of which the Commission is aware" (S. at 8) does not arise.

[30] Northpoint is certainly not above mischaracterizing the record for its own purposes. Only by, for example, ignoring the concurrence with the test procedures by the DBS Operators, can

3. Because Northpoint re-calculated the number of people it believes would be affected by MDS America's transmissions, those people are likely to suffer harmful interference. OET properly rejected Northpoint's conclusory allegation that there would be harmful interference to all the DBS subscribers about whom Northpoint purports to be concerned.[31] Regardless of the accuracy of Northpoint's computation of the area that could receive an MDS America test signal, or the number of people residing within that area, there is certainly no basis for assuming they would suffer harmful interference. Indeed, the DBS Operators certainly did not find cause for significant concern.

4. The Commission is required to rebut Northpoint's arguments on a line-by-line basis. Now that OET has gone out of its way and issued a formal letter dismissing all of Northpoint's arguments against the MDS America license grant, Northpoint is still not satisfied. However, even if such a letter was appropriate, there is certainly no requirement that it address every point made by Northpoint, however specious, and however repetitive, on a line-by-line basis.[32] Even in services whose rules make specific reference to informal objections, there is no

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Northpoint assert that there is no "evidentiary basis in the record to suppose that MDSA can operate without causing harmful interference with DBS operations." (S. at 2 –3.) Apparently in Northpoint's view the only evidence on which the Commission can legitimately rely is that supplied by Northpoint.

[31] *See* S. at 14 ("the so far uncontroverted evidence in the record indicates that thousands of people live in zones where DBS reception is likely to be impossible"). Here, it is quite a leap from a calculation of the number of residents of a given area to the conclusion that DBS reception is likely to be impossible there. Similarly, it is only Northpoint's view that OET's license has inadequate safeguards. The DBS Operators were satisfied with them.

[32] In support of its claim that the *January 8 Letter* was arbitrary and capricious, Northpoint erroneously asserts that the Commission was obligated to "acknowledge the thus far uncontroverted evidence Northpoint has placed into the record" (S. at 3) that the power limit provides insufficient protection. As noted above, if anything, that OET imposed a limit lower than that requested by MDS America is evidence that it took into account Northpoint's concerns. OET is certainly entitled to exercise its independent judgment in deciding appropriate power limits, and it does not have to spell out in detail why it declined to follow Northpoint's recommendation.

obligation on the part of Commission staff to provide such detailed refutations.[33] Here, OET made clear that it had considered Northpoint's allegations, and no more is required. Just because OET rejected Northpoint's arguments does not mean it did not engage in "reasoned decisionmaking." (S. at 8.)

5. The only record evidence to be considered by OET is that submitted by Northpoint. Northpoint presumes that any evidence submitted by Northpoint is dispositive, and that, like Northpoint, the Commission need not consider any other evidence in reaching a decision. Apparently, in Northpoint's view, any finding that disagrees with Northpoint is "an erroneous finding as to an important or material question of fact." (S. at 8.) Only Northpoint, however, would find it perfectly reasonable to ignore the views of the DBS Operators with respect to the degree of potential harm likely to be caused by the MDS America tests, just because Northpoint alleges serious harm would result. That OET acted reasonably is amply documented in the *January 8 Letter*:

> Finally, the engineering staff of the Experimental Licensing Branch has carefully reviewed MDS America's experimental reports and the technical basis for, and engineering supplements to, its modification application. Based on this evaluation, we are granting the application with conditions designed to prevent the occurrence of interference to DBS operations. We note that the DBS licensees, which are the only licensees who could arguably suffer harmful interference from MDS America's experimental radio operations, have not interposed any objections to grant of the modification and renewal applications.[34]

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[33] *See, e.g.*, 47 C.F.R. § 21.30 (Domestic Public Fixed Radio Services) (Commission will consider informal objections, but will not necessarily discuss them specifically in a formal opinion).

[34] By letter dated September 18, 2002, the DBS licensees, DIRECTV, Inc. and EchoStar Satellite Corporation, expressed "concern[s] with the harmful interference effects to DBS service that could be engendered by the revisions proposed by MDS [America] to its experimental authorization." But they correctly recognized that the Commission has a "general desire from a policy perspective to accommodate the licensing of experimental operations" and admitted that "the choice of a relatively remote Clewiston, Florida location, combined with the procedures that MDS [America] has specified in [a] recently-filed supplement . . . will provide enough protection

> Most importantly, 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.

See 47 C.F.R. ¶¶ 5.85(c), 5.83, and 5.111(a)(2).

Northpoint may not like the evidence on which OET relied, but that does not make it error for OET to rely on it. Contrary to Northpoint's assertions, OET identified the information it found relevant, and its explanation was adequate. (*Cf.* S. at 9.) Northpoint may not be satisfied with OET's conclusions or the explanation of what led to them, but that does not mean that the explanation was so inadequate as to require rescission of the experimental license grant, or that the conclusions were wrong. OET acted reasonably, and the Commission should act promptly to affirm its decision.

CONCLUSION

As has been the case throughout this docket, Northpoint is not interested in free and fair competition; it will seek any means to avoid a head-to-head contest in the marketplace and obtain scarce spectrum for its private purposes, free of charge. Delaying potential competitors' experimental operations can be an important means to this end. Yet eliminating competition would deny the public the benefits of a choice of MVDDS operators and equipment. The Commission is charged with protection of the public interest, not of Northpoint's private interest.

If MDS America is forced to further delay the Phase II testing, it will suffer irreparable harm because of the adverse impact on its ability to complete its testing program well in advance of the auctions currently scheduled for late summer. Northpoint's Review Application does no

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to proceed with a time-limited test of its technology." They concluded by requesting the Commission to "carefully monitor and enforce the parameters of the testing."

more than second-guess the OET license grant decision, and it does not satisfy the criteria for an application for review.

MDS America therefore respectfully requests that the Commission, on an expedited basis, dismiss the application for review, as well as the Stay Request and the Separate Request. Moreover, the Commission should declare, in rejecting Northpoint's Review Application, Supplement, and stay requests, that it will not grant any stay to Northpoint pending any judicial review of the denial of the review application.

Respectfully submitted,

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

Dated: February 24 , 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of February, 2003, 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

Jennifer Manner**
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