

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

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In the Matter of

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

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NORTHPOINT TECHNOLOGY, LTD.'S
REPLY IN SUPPORT OF APPLICATION FOR REVIEW

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**NORTHPOINT TECHNOLOGY, LTD.'S
REPLY IN SUPPORT OF APPLICATION FOR REVIEW**

The opposition filed by MDS America, Inc. ("MDSA") on February 24, 2003, singularly fails to rebut the three key concerns Northpoint Technology, Ltd. ("Northpoint") has raised regarding the modification of MDSA's experimental license. The decision to grant that modification (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.¹ Rather than confronting these serious issues, MDSA contents itself with setting up and then knocking down a series of straw-man arguments of its own devising, thus leaving Northpoint's actual contentions largely unanswered.

A. Patent Issues: At least since the Commission announced its Revised Patent Procedures in 1961, the Commission's policy has been to *avoid* incorporating patented material into license requirements without first obtaining an express commitment from the patentee to license the use of the invention to others on reasonable terms.² Northpoint challenges the decision under review on the basis of internal inconsistency in its approach to patent issues and because it departs from more than 40 years of Commission practice.³

¹ Northpoint seeks review of these three points on the basis of 47 C.F.R. § 1.115(b)(2)(i), (ii), & (iv), respectively, as is clear from its previous filings. *See, e.g.*, Supplement at 8.

² *See Revised Patent Procedures of the Federal Communications Commission* (Dec. 1961), *reprinted*, 3 FCC 2d 26 (1966).

³ *See* Supplement at 10-12.

Nowhere in its opposition does MDSA even address the Commission's longstanding patent policy, let alone attempt to show how the decision under review could possibly be squared with it. Instead, MDSA's response on the patent issues boils down to two arguments, one of which is irrelevant and one of which is an insubstantial point about semantics. The first argument is that 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." Opp. at 7. Even if true, this would be entirely beside the point. Whether the FCC is liable to pay damages has no bearing on whether the decision under review was internally consistent or whether the Commission should throw 40 years of patent policy out the window.

MDSA's second argument is that the Commission has not, strictly speaking, *required* MDSA to infringe Northpoint's patents because "[t]he license merely provides that if MDS[A] conducts experiments, there are certain restrictions on those operations." *Id.* at 7; *see also id.* at 14-15. It is, of course, true that MDSA could obtain an experimental license yet decline to make any broadcasts under the license – and in those circumstances, it would not infringe Northpoint's patents. Because a licensee is free not to use its license, MDSA is correct that the mere issuance of the license does not, without more, literally "require" infringement. But this semantic nicety is beside the point because MDSA clearly does intend to use its license. And if MDSA broadcasts in accordance with the terms of the license, then it *will* be obliged by Special Condition 13 to infringe at least two patents owned by Northpoint of which the Commission has been made aware.⁴ That is the problem.

⁴ According to 35 U.S.C. § 282, "[a] patent shall be presumed valid." The Commission is bound by this statutory presumption and need *not* undertake its own evaluation of whether any given claim of any given patent is valid.

As noted in Northpoint's Application for Review, Northpoint believes that *any* tests MDSA may carry out will infringe Northpoint's patents in various ways, just as MDSA's previous round of testing did.⁵ But it is one thing for the Commission to issue an experimental license that the recipient happens to employ in carrying out an infringing use of a patented invention, and it is quite another thing for the Commission to directly incorporate into a license condition specific material that it knows to be patented – and to do so over the objection of the patentee. For more than 40 years, Commission policy has been proactively to identify and address patent issues before issuing license conditions. MDSA wishes the Commission to change course completely and to willfully blind itself to the concrete patent issues that Northpoint has placed before it.⁶ To make such a radical shift in policy with no prior warning would be unwise, unfair, and unlawful.

B. Harmful Interference. The Commission should take note that this is *not* MDSA's first experimental license. The decision under review is not just to extend the terms of the license but to modify those terms in ways that significantly increase the potential for harmful interference to DBS operations. At the core of Northpoint's objection to this modification is the fact that MDSA failed to quantify the effect of its signal on DBS reception under its existing license, and that it should be required to do so before the terms under which it operates are liberalized. If MDSA is to claim through these tests that it can operate without causing harmful interference, then it must produce some measurement of the interference – yet it has not done so. The point is not, as MDSA clumsily puts it, that "OET is supposed to make sure experiments are

⁵ Application for Review at 5.

⁶ By inviting the Commission to ignore specific patent issues that have been called to its attention, MDSA is, in effect, asking the Commission to treat all patents as presumptively *invalid*, in direct contradiction to presumption of validity in 35 U.S.C. § 282.

successful.”⁷ Rather, the point is that experiments should be conducted in a manner that makes it possible to evaluate whether they have been successful or not. This MDSA has failed to do.

Astonishingly, MDSA *concedes* in its opposition that it has made no effort to quantify the effect of its signal on DBS operations: “MDS[A] was not specifically required to quantify anything,” it says. Opp. at 15. Furthermore, according to MDSA, the fact that MDSA “did not do something it was not required to do is hardly a reason to rescind its license.” *Id.* Apparently, MDSA either does not appreciate the seriousness of the deficiencies in its test report or it is deliberately thumbing its nose at the Commission. “Raise the EIRP and EPFD limits and the tower-height and rain restrictions,” MDSA in effect tells the Commission, “we can operate without causing interference!” But when invited to point to an interference measurement to back up its bluster, MDSA changes tack and claims it doesn’t have to quantify anything. MDSA cannot have it both ways. If it refuses to quantify the interference it is causing, then it has no basis for claiming that it is not causing harmful interference. And if its experiment will not allow it to demonstrate that it either is or is not causing harmful interference, then allowing the tests to proceed creates a risk of harmful interference with no corresponding scientific benefit. Given MDSA’s admission that it has not measured (and, apparently, will not measure) the interference that its signal causes to DBS operations, the modification to its experimental license should be denied.⁸

⁷ Opp. at 6 n.11.

⁸ MDSA makes much in its opposition of the fact that, although the DBS operators unsuccessfully sought an emergency stay of MDSA’s experimental license when it was originally issued, they have not opposed the particular modification at issue in the decision under review. Yet, far from signaling their expectation that no harmful interference will occur, the DBS operators may be withholding their opposition precisely in the cynical hope that some harmful interference *does* occur, which could yet provide a pretext for derailing the entire MVDDS licensing process in the 12.2-12.7 GHz band. At the very least, the Commission must proceed with caution in interpreting the tactical decisions of the DBS industry.

C. Power Limit. The ERP limit imposed in the decision under review did not come from MDSA, which claims that it “presumably was the result of Northpoint’s challenges to the level requested by MDS[A].”⁹ But the resulting ERP limit is not the product of Northpoint’s analysis, either. The limit is significantly underprotective, in Northpoint’s view. So the question arises, where did it come from? The record contains no answer to this question. The OET should provide an answer, if for no other reason than assure the Commission that the limit was the product of reasoned analysis rather than some sort of arbitrary compromise. Northpoint agrees with MDSA that the OET staff is competent, conscientious, and dedicated. But MDSA goes one step further and suggests that, because of these undoubted qualities, the OET’s decisions are completely unreviewable. *See* Opp. at 9-10 (arguing that the Commission should not “second-guess” OET’s decision and that OET need not give “a statement of reasons for issuing an experimental license even when a third party opposes the application”). Where, as here, an experimental license issues on a non-interference basis even though the record indicates a substantial risk of harmful interference, the Commission can and should demand an explanation of the apparent inconsistency.

Conclusion

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

⁹ Opposition at 11 n.23.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 6th day of March, 2003, I caused copies of the foregoing *Northpoint Technology, Ltd. 's Reply in Support Of 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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