

FEDERAL COMMUNICATIONS COMMISSION

Office of Engineering and Technology
Electromagnetic Compatibility Division

January 8, 2003

J. C. Rozendaal, Esq.
Kellogg, Huber, Hansen, Todd & Evans, P.L.L.C.
Sumner Square
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209

Antoinette Cook Bush, Esq.
Northpoint Technology, Ltd.
444 North Capitol Street, N.W., Suite 645
Washington, D.C. 20001

Nancy K. Spooner, Esq.
Helen E. Disenhaus, Esq.
Swidler Berlin Shereff Friedman, L.L.P.
The Washington Harbor
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116

Re: MDS America, Incorporated
Call Sign WC2XPU
Application for Modification of
Experimental License
File No. 0005-EX-ML-2002
Application for Renewal of
Experimental License
File No. 0063-EX-RR-2002

Northpoint Technology, Ltd. "Petition to Deny"
dated March 18, 2002

Dear Counsel:

On November 18, 2002, the Experimental Licensing Branch granted the above-referenced application for modification of the Experimental Radio license of Station WC2XPU and dismissed the associated renewal application as moot. In taking this action, however, the Branch, as a result of an administrative oversight, did not rule on the pending "Petition to Deny" filed on March 18, 2002 by Northpoint Technology, Ltd.¹ We therefore rescind the Branch's action of November 18. Nonetheless, our review of the referenced applications, the petition, and the responsive pleadings is now complete. For the reasons

¹ We shall treat the "petition to deny" as an informal objection pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. § 1.41. See Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. § 309.

set forth below, we find that the petition does not raise a substantial and material question of fact regarding MDS America's qualifications to remain an Experimental Radio licensee and that grant of the modification application will service the public interest, convenience, and necessity. We therefore will re-grant that application.

Northpoint argues that the existing license for Station WC2XPU "should be revoked for at least three reasons": (1) MDS America made material misrepresentations in its original license application (File No. 0095-EX-PL-2001); (2) MDS America "is likely not qualified to hold a . . . license because it is 71.3% foreign owned"; and (3) MDS America's "experimental tests to date indicate strongly that its operations infringe several of Northpoint's patents." Northpoint adds, in the alternative, that "[e]ven if the Commission does not revoke the existing license, . . . it should decline to modify the terms of the license as requested" because MDS America has failed to obtain adequate experimental data indicating that the proposed operations would not cause harmful interference to DBS operations.

We deny Northpoint's objections. First, the Commission has reviewed the same allegations of material misrepresentations lodged by Northpoint against MDS America, in the context of the 12.2-12.7 GHz band rulemaking proceeding (ET Docket No. 98-206), and has recently ruled that:²

[The] issue of determining the scope and type of the MDS [International] foreign installations, along with the character of the overlapping DBS signals provided by other operators and the locations of the associated DBS subscribers, is a complex matter of *bona fide* dispute between MDS [America] and Northpoint. We thus do not consider this dispute to constitute a case that rises to the level of a possible misrepresentation before the Commission. Accordingly, on the record before us, we conclude that further action on our part based on Northpoint's allegations in connection with this rule making is not warranted.

The Commission's determination that the dispute in issue does not "constitute a case that rises to the level of a possible misrepresentation" is controlling here. In addition, we have reviewed MDS America's description of MDS International's foreign installations³ and find that, though it constitutes general

² *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, et al.*, ET Docket No. 98-206, *Memorandum Opinion and Order and Second Report and Order*, FCC 02-116 at ¶9, released May 23, 2002.

³ For instance, Exhibit 2 to MDS America's original application (File No. 0095-EX-PL-2001) stated:

Introduction and Objectives

The objective of this experimental license is to demonstrate for the Commission the non-interference characteristics of MDS America transmitter systems as they impact the reception of DBS satellite signals. . . .

MDS International systems identical to this one are already functional in many places around the world where there exist ubiquitous DBS satellite customers. In years of commercial operation MDS International has not faced interference problems with existing DBS systems. . . .

Contribution to the Radio Art

background information concerning the applicant and the technology it intends to test, the information therein provided is not material to our determination of whether to grant the instant experimental radio applications. This is so, because the Experimental Radio rules do not require an applicant to have any specific experience with the technology it intends to test. Were it otherwise the case, much of the point and purpose of experimental radio licensing, to develop and test new technologies, would be vitiated. Such a result would be inconsistent with the Commission's mandates "to encourage the provision of new technologies and services to the public"⁴ and to "[s]tudy new uses of radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."⁵

Second, Northpoint alleges that MDS America is at least 71.3% owned by foreign nationals and states that "such a high percentage of foreign ownership would render MDS ineligible for a domestic DBS license or broadcast license under current Commission regulations."⁶ It then urges that the "same policy considerations animating these foreign ownership restrictions should likewise disqualify MDS [America] from holding an MVDDS license, thus making the current experimental license, at best, superfluous."⁷ MDS America responds, and we agree, that its foreign ownership complies with Commission requirements applicable to Experimental Radio licensees.⁸ That is, MDS America complies with the requirements that it not be owned or controlled by a foreign government or its representative.⁹ Moreover, the question of what service rules, including what ownership restrictions if any, should apply to the MVDDS is being considered by the Commission in a pending rulemaking proceeding¹⁰ and will not be

At the present time, MDS's technology is the only commercially functioning MVDDS system in the world with more than 20 installations worldwide. MDS's technology has allowed MDS to develop turn-key internet and video distribution systems using terrestrial transmission technology.

As is well known to anyone involved with this technology, questions have been raised as to whether this spectrum is usable concurrently with DBS downlink. Part of the reason for this debate is that until just recently the terrestrial arguments were being made by those with *no operational MVDDS experience* in the field and using "off-the-shelf" equipment. This experimental license will allow MDS America to utilize the extensive experience and expertise developed by MDS International to add authority to arguments currently being made, as well as establish the viability of the unique MDS International technology.

The exhibit also set forth MDS America's test plan and technical parameters. The Experimental Licensing Branch has found the technical information submitted by MDS America, as later supplemented, sufficient to warrant a grant of the application.

⁴ Section 7(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 157(a). Section 7(a) further provides that any "party . . . who opposes a new technology or service proposed to be permitted under this Act shall have the burden to demonstrate that such proposal is inconsistent with the public interest."

⁵ Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(g).

⁶ Northpoint Petition at 3-4.

⁷ *Id.* at 4.

⁸ See MDS America Opposition to Petition at 3-5.

⁹ See 47 U.S.C. § 310(a); 47 C.F.R. § 5.51(c). MDS America correctly points out that the additional ownership restrictions that apply to broadcast and common carrier licensees, which are set forth in 47 U.S.C. § 310(b), do not apply to Experimental Radio licensees.

¹⁰ See ET Docket No. 98-206, *supra* note 2.

considered here. In any event, the ownership rules applicable to any given regular service do not *per force* apply to Experimental Radio licenses.

Third, we do not find that Northpoint's assertion of patent infringement by MDS America constitutes a reason for our taking any adverse action against the latter's Experimental Radio applications. The issue of patent infringement is, as MDS America points out, properly pending before the U.S. District Court for the Southern District of Florida and is not an issue for us to decide.¹¹

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.¹² 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.¹³

Accordingly, IT IS ORDERED that the November 18, 2002 action of the Experimental Licensing Branch granting the modification application (File No. 0005-EX-ML-2002) and dismissing as moot the renewal application (File No. 0063-EX-RR-2002) of MDS America, Incorporated IS RESCINDED; that the "Petition to Deny" filed by Northpoint Technology, Ltd. on March 18, 2002 IS DENIED; that the "Emergency Petition for a Cease and Desist Order and for a Freeze Order" filed jointly by EchoStar Satellite Corporation and DirecTV, Inc. on June 15, 2001 with respect to File No. 0095-EX-PL-2001 IS DISMISSED as moot; that the *ex parte* letter from counsel for Northpoint Technology, Ltd. to the General Counsel of the Commission, dated May 9, 2001, alleging "misrepresentation by MDS America," and the responsive correspondence of the parties, ARE DISMISSED; and the application of MDS America, Incorporated for modification of license (File No. 0005-EX-ML-2002) for Experimental Radio Station WC2XPU IS GRANTED with conditions and the application of MDS America, Incorporated for renewal of license (File No. 0063-EX-RR-2002) IS DISMISSED as moot. The instrument of authorization will be sent to the applicant under separate cover.¹⁴

¹¹ By avoiding consideration of matters pending in courts of competent jurisdiction, we avoid adjudicative duplication while preserving the basic fairness of our proceedings to participating litigants. *Cf. Policy Regarding Character Qualifications In Broadcast Licensing*, 102 FCC 2d 1179 at ¶ 44 (1986).

¹² 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 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."

¹³ See 47 C.F.R. §§ 5.85(c), 5.83, and 5.111(a)(2).

¹⁴ Condition number seven (7) of the MDS America license sets forth a procedure for identifying and resolving interference issues, if any, between MDS America and the DBS licensees. The procedure includes a provision for MDS America to cease operations immediately if harmful interference is detected.

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. As a matter of basic administrative fairness, however, we find that Northpoint should be afforded an opportunity to supplement its Application for Review in light of the actions we are taking by this letter ruling.

THEREFORE, IT IS FURTHER ORDERED that Northpoint Technology, Ltd. is granted leave to supplement its pending Application for Review with respect to this matter within thirty (30) days of the date of this letter.

Sincerely,

A handwritten signature in black ink, appearing to read "Charles Iseman", with a long horizontal flourish extending to the right.

Charles Iseman
Deputy Chief
Electromagnetic Compatibility Division

cc: Gary M. Epstein, Esq.
Pantelis Michalopoulos, Esq.