

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

MDS America Incorporated)

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

To: The Commission

**INITIAL OPPOSITION TO APPLICATION FOR REVIEW AND FOR STAY PENDING
REVIEW OF MDS AMERICA INCORPORATED**

I. INTRODUCTION

MDS America Incorporated ("MDS America"), through counsel, hereby files its Initial Opposition ("Initial Opposition") to the "Application for Review and for Stay Pending Review" ("Review Application" or "RA") filed with respect to the grant of the above-referenced application ("MDSA Application") by Northpoint Technology, Ltd. ("Northpoint").¹ MDS America was prepared today to file its pleading opposing the Review Application. In view of the issuance of the January 8 Letter by the Commission yesterday, which mooted certain issues, and which gave

¹ This pleading is being filed this date pursuant to a grant of MDS America's request for an extension of time to which Northpoint had graciously consented. See *Electronic Message* from Charles Iseman to Helen Disenhaus and J. C. Rozendaal, Dec. 27, 2002, 12:08 P.M. Given the Commission's action yesterday giving Northpoint 30 days in which to supplement its Review Application, MDS America is limiting this response to the stay request issues it has previously addressed, and the implications of the recent Commission letter, but MDS America reserves the right to supplement this Initial Opposition as appropriate following review of any supplement filed by Northpoint or notice that Northpoint is not filing such a supplement. See *Letter from Charles Iseman to J.C. Rozendaal, et al.*, dated Jan. 8, 2003 ("January 8 Letter"). MDS America submits, however, that, as a matter of fairness to MDS America, any supplemental filing by Northpoint should be limited to matter raised in the January 8 Letter.

Northpoint an opportunity to supplement its Review Application, to avoid unnecessary pleadings, MDS America is limiting this Initial Opposition to the stay requests and the implications thereof of the January 8 Letter.

To the extent that a request for stay requires a demonstration of the likelihood of success on the merits of the Review Application, MDS America submits that the Review Application satisfies none of the criteria for review or reversal of a staff decision by the full Commission.² Merely second-guessing the action of the Office of Engineering and Technology (“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.³ MDS America reserves the right to provide further support for this view either following a supplemental pleading by Northpoint or notice by Northpoint that it will not be supplementing the Review Application.⁴

² MDS America had prepared an augmented showing on this issue which it defers filing pending receipt from Northpoint of a supplemental pleading or a statement that no supplement will be filed. MDS America respectfully requests that, should the full Commission contemplate entry of a stay pending review, MDS America be given an opportunity to submit this information.

³ Indeed, given that OET considered even the untimely new information included in the Review Application, *January 8 Letter* at 5, yet made no change in the terms of the license, OET has also determined that such information did not raise a serious or material question of fact requiring substantive changes in the terms and conditions of the license. In the January 8 Letter OET also rejected Northpoint’s contention that Northpoint’s patent infringement allegations warrant adverse action against MDS America’s experimental license application. *January 8 Letter* at 4.

⁴ To the extent that Northpoint’s Review Application was predicated on the absence of a separate OET document other than the license that addressed the issues raised in Northpoint’s earlier pleading, which the staff has treated as an informal objection, that issue is mooted by the issuance of the January 8 Letter. While MDS America does not necessarily agree that such a document was required, given that the Commission’s rules governing experimental licensing contemplate the filing of neither petitions to deny nor informal objections, following issuance of the January 8 Letter, there can be no doubt that the OET has rejected all the issues previously raised against the application by Northpoint.

Because OET has not stayed the effectiveness of the license grant,⁵ and the “pleading cycle” stay to which MDS America had agreed in return for an extension until today of the filing date for its opposition has expired, no stay of the license grant is in place. MDS America urges the full Commission also to decline to enter a stay pending further pleadings in this matter or any attempt by Northpoint to obtain judicial review of the experimental license grant.

II. NO BASIS FOR STAY OF THE LICENSE GRANT PENDING ACTION ON THE REVIEW APPLICATION

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.⁶ As demonstrated in those responses, and as recognized by OET in the January 8 Letter,⁷ the pleadings submitted by Northpoint do not make a showing under the applicable criteria warranting a stay of the OET license grant.

More specifically, as MDS America has previously shown, Northpoint has not made a sufficient showing of a likelihood of success on the merits of its efforts to overturn the license modification grant. In this connection, it should be noted that the Commission staff 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

⁵ See *January 8 Letter* at 5.

⁶ On December 27, 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 attached as Exhibit 1 for the convenience of the Commission, 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 is attached as Exhibit 2.

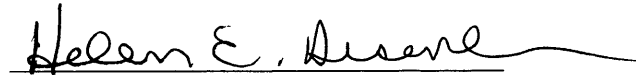
program. Enough is enough. At issue is *merely a six month experimental license modification issued on a non-interference basis* and subject to multiple operational and coordination procedures developed by the OET staff and accepted as sufficient to permit the testing to go forward by DIRECTV, Inc. and EchoStar Satellite Corporation (collectively, the “DBS Operators”). Further, the OET staff reviewed the information included in the Review Application, and, even without having received the comments of MDS America on that information, found it did not require any modification of the terms and conditions of the license, much less that OET rescind the grant. Finally, in the January 8 Letter the OET staff expressly rejected Northpoint’s allegations that the license grant should be rescinded to avoid infringement of Northpoint’s patents.

Not only has Northpoint failed to demonstrate a likelihood of success on the merits, but also Northpoint has failed to show that it would suffer irreparable injury without a stay of the MDS America experimental license grant. Further, Northpoint has not shown 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. Finally, as previously demonstrated, MDS America would suffer irreparable harm by a stay that delayed its ability to commence its Phase II testing program.

CONCLUSION

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 or pending any effort made by Northpoint to obtain judicial review of Commission action dismissing or denying the Review Application.

Respectfully submitted,



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RECV'D & INSPECTED

JAN 23 2003

FCC-GBG MAILROOM

Dated: January 9 , 2003

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of January, 2003, a true and correct copy of the foregoing was served via hand delivery (*) or e-mail (**) on the following individuals:

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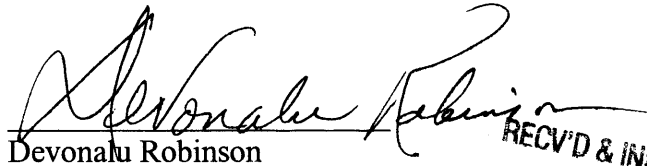
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