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April 11, 2002

William Caton, Acting Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte Submission of MDS America, Incorporated
ET Docket No. 98-206; RM-9147; RM-9245

Dear Mr. Caton:

MDS America, Incorporated (“MDS America”), submits this *ex parte* filing in response to Northpoint Technology, Ltd.’s (“Northpoint”) application to the Commission through its subsidiary, Compass Systems, Inc. (“CSI”; Northpoint and CSI are hereafter collectively referred to as “Northpoint”), in order to become a Direct Broadcast Satellite (“DBS”) service provider.¹ Northpoint states that it intends to launch two satellites in order to provide DBS.

Northpoint’s DBS application should come as no surprise to anyone familiar with the tortured history of this docket. As becomes evident on the second page of the application,² its main purpose is not the receipt of authority to launch two satellites. Instead, the application is a pretext for fulfilling Northpoint’s most cherished goal: a monopoly over 500 MHz of free *terrestrial* spectrum in the 12 GHz band, no matter what it takes.

Having been unable (thus far) to obtain a sort of retroactive “pioneer’s preference,” for the terrestrial spectrum in the 12 GHz band—whether by Commission rulemaking or by

¹ Application of Compass Systems, Inc., for Authority to Construct a Direct Broadcast Satellite System, dated March 20, 2002 (“the *Northpoint DBS Application*”). To the best of MDS America’s knowledge, this application has not been made part of ET Docket 98-206.

² In the *Northpoint DBS Application*, Northpoint states that it is entitled to “operate a nationwide integrated terrestrial platform . . . using its assigned DBS spectrum.” *Id.* at 2.

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Congressional fiat³—Northpoint has decided to try yet another avenue. Unfortunately, Northpoint ignores a critical point: the FCC has yet to decide whether DBS providers are entitled to receive Multichannel Video Distribution and Data Service (“MVDDS”) terrestrial 12 GHz licenses. Even if DBS providers are allowed to obtain MVDDS spectrum, the Commission has indicated that the “traditional” approach would be to request applications for MVDDS licenses through their own separate (yet to be announced) filing window, with mutually exclusive applications requiring a spectrum auction.⁴

MDS America is highly skeptical that Northpoint actually intends to launch DBS space stations. Given that its proposed MVDDS technology, with its faulty “northpointing” mitigation methodology, has not been demonstrated in a real-world setting, it seems unlikely that Northpoint would take this extremely costly step. Of course, the devil lies in the details. The *Northpoint DBS Application* proposes that the Commission permit Northpoint to immediately begin its terrestrial operations—after all, Northpoint need not operate its satellites for six years. And, under the Commission’s Rules, Northpoint need not provide any financial demonstration for its capability to actually launch satellites. So, despite all evidence (and law) to the contrary, Northpoint still believes it is entitled to 500 MHz of free terrestrial spectrum.

Although it hardly bears repeating, Northpoint’s proposal to—yet again—obtain terrestrial spectrum in the 12 GHz band, for free, should not be countenanced, simply because it is wrapped up in the form of a DBS spectrum application. If not for the cost to the public, the Commission might be tempted to give Northpoint this spectrum, just for trying so hard. However, the Commission should not provide Northpoint with this spectrum through a back door, when Northpoint could not get in through the front.

In the *MVDDS NPRM*, the Commission requested comment

on whether there is a significant likelihood that incumbent cable operators and DBS firms may substantially harm competition by acquiring MVDDS licenses. Based on our initial preliminary analysis, incumbent local cable operators and

³ One example of such draft legislation advocated by Northpoint is: “Notwithstanding the provisions of section 309(j) of the Communications Act of 1934 (47 U.S.C. 309(j)), and in light of the Federal Communications Commission’s decision to license or otherwise assign frequencies in the 12.2 – 12.7 GigaHertz band to applicants for the provision of satellite services by means other than competitive bidding, the Commission shall not have the authority to utilize competitive bidding to license or otherwise assign such frequencies to applicants for the provision of fixed terrestrial services.”

⁴ 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, *First Report and Order and Further Notice of Proposed Rule Making*, ET Docket No. 98-206, 16 FCC Rcd 4096, ¶¶ 327, 335 (2000) (“*MVDDS NPRM*”).

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existing DBS service providers may have both the ability and incentive to acquire MVDDS licenses in order to anticompetitively foreclose entry by a new . . . competitor. MVDDS licensees will likely be entrants into [DBS and cable] markets. . . . We also seek comment on whether to restrict DBS carriers or distributors from obtaining or investing in a MVDDS license. . . .

Leaving aside the issue of whether incumbent cable operators and DBS providers should be permitted to apply for MVDDS licenses due to competitive reasons,⁵ the salient point here is that *DBS providers are expected to apply for separate MVDDS licenses just like everybody else.*

The Commission has already tentatively concluded that it will segregate the terrestrial spectrum in the 12 GHz band, for the provision of MVDDS, and the debate now centers on whether the DBS providers should be allowed to *apply for* (let alone receive) MVDDS licenses. Once the Commission receives MVDDS applications—whether from DBS providers or private cable operators—the Commission has indicated that mutually exclusive MVDDS licenses should be auctioned.⁶ With the contorted interpretation that Northpoint has given to the ORBIT Act, the LOCALTV Act, and Sections 309(j) and 310(b) of the Communications Act, it is not extraordinary that Northpoint should choose to ignore a core premise of the Commission's *MVDDS NPRM*.

If Northpoint is granted its coveted terrestrial spectrum, it is easy to foresee a situation where Northpoint finds that its proposed Compass terrestrial platform does not work so well. In that case, Northpoint will likely not have the funds to launch two satellites. Under such circumstances, it would make the most sense for Northpoint to hold a *private* auction for the spectrum (or to sell the company, together with its spectrum assets). As the Commission has recognized in its secondary spectrum markets proceeding, one way or another, spectrum is paid for, whether the FCC itself holds the initial auction, or a licensee sells its spectrum assets obtained for free.

⁵ Given the proposed merger of EchoStar and DirecTV, there appears to be even more evidence that DBS providers could exercise market power, particularly in rural areas, than when the *MVDDS NPRM* was issued in December 2001.

⁶ See, e.g., *MVDDS NPRM* at ¶ 329, where the Commission flatly states an auction would be required if the existing Ku-band terrestrial applications on file were to be found to be mutually exclusive.

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The Commission will no doubt recognize Northpoint's brazen proposal for what it is. Northpoint should not be permitted, years after the pioneer's preference has been eliminated, to receive this spectrum for free, particularly when it has never once demonstrated that it should be so entitled. While the Commission might see fit to grant Northpoint's application to become a DBS provider, Northpoint's request for a monopoly MVDDS license should be rejected.

Respectfully submitted,



Nancy K. Spooner

Counsel for MDS America, Incorporated

cc: Kirk Kirkpatrick
Helen Disenhaus, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of April, 2002, a true and correct copy of the foregoing was served via electronic filing or first class United States mail, postage prepaid, on the following individuals:

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