



Federal Communications Commission
Washington, D.C. 20554

October 7, 2009

DA 09-2182

Wayne D. Johnsen, Esquire
Wiley Rein LLP
1776 K Street, N.W.
Washington, D.C. 20006

Re: DTV Norwich, LLC, licensee of MVDDS license WQBD526, MVD001-New York;
ULS File No. 0003908576

Dear Mr. Johnsen:

On July 22, 2009, DTV Norwich, LLC (DTVN) filed a Further Request for Waiver and Extension of Divestiture Deadline (*Sixth Request*) of Section 101.1412(g)(4) of the Commission's Rules with respect to call sign WQBD526, MVD001-New York.¹ For the reasons set forth below, we grant DTVN's *Sixth Request*.

Background. DTVN is the licensee of 45 Multichannel Video Distribution and Data Service (MVDDS) licenses including the above-referenced license for the New York service area. Cablevision Systems Corporation (Cablevision) holds an attributable interest in DTVN that is impermissible under Section 101.1412(a) of the Commission's Rules² because Cablevision operates a cable system with a service area that significantly overlaps the license area of DTVN's New York MVDDS license.³ However, Section 101.1412(g) provides that an entity that would otherwise be barred from acquiring an attributable interest in an MVDDS license by the cross-ownership restriction of Section 101.1412(a) may be a party to an MVDDS application pursuant to the divestiture procedures specified in the rule.⁴ Moreover, if the applicant is otherwise qualified, the application will be granted subject to a condition that the applicant shall come into compliance with the eligibility restriction within 90 days of the final grant of the license.⁵ The purpose of the MVDDS/cable cross-ownership rule is to prevent cable operators from precluding the entry of new Multichannel Video Program Distributors (MVPDs) and thereby limiting competition in the MVPD marketplace.⁶

¹ Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, ULS File No. 0003908576 (*Sixth Request*) at 1 citing 47 C.F.R. § 101.1412.

² 47 C.F.R. § 101.1412(a).

³ Under Section 101.1412(e), "significant overlap" occurs when a cable operator's subscribers in the MVDDS license area make up 35 percent or more of the Multichannel Video Program Distributor (MVPD) households in that MVDDS license area. 47 C.F.R. § 101.1412(e). *See also Sixth Request* at 2, n.5, citing [ULS] File No. 0002022365 and FCC Form 602, Ownership Disclosure Report, Indirect Disclosable Interest Holders, [ULS] File No. 0003134269 (describing Cablevision's 90 percent indirect interest in DTVN).

⁴ 47 C.F.R. § 101.1412(g).

⁵ 47 C.F.R. § 101.1412(g)(4).

⁶ 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,

On September 23, 2004, the Broadband Division (Division), Wireless Telecommunications Bureau, granted DTVN the above-referenced license for the New York service area subject to the condition that DTVN “shall come into compliance with 47 C.F.R. § 101.1412(a) [the MVDDS/cable cross-ownership limits] within three hundred and sixty (360) days of the final grant of this authorization (MVD001).”⁷ The Division granted this conditional authorization in response to DTVN’s first request for waiver to extend the 90-day deadline to comply with the cross-ownership rule by 270 days to allow Cablevision time to spin off its direct broadcast satellite (DBS) assets, including its interest in DTVN, to its shareholders as a new company.⁸ The spin off described in the *First Request* did not occur as planned and DTVN subsequently filed four successive requests for 360-day extensions.⁹ The Division granted each request¹⁰ after concluding that each extension would encourage DTVN to continue its efforts to foster the development of MVDDS, especially considering the lack of MVDDS equipment in the market, and would serve the purpose of the cross-ownership rule by promoting competition.¹¹

On August 7, 2009, the Division issued a Public Notice seeking comment on the *Sixth Request*.¹² Comments were due on August 28, 2009. Reply Comments were due on September 8, 2009. In response, we received only one comment, filed by DTVN, supporting grant of its request.

In the *Sixth Request* now before us, DTVN states that it has continued to move forward with planning and preparation for the initiation of MVDDS operations.¹³ DTVN states that it is conducting

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*, 17 FCC Rcd 9614, 9679-80 ¶ 164 (2002) (*MVDDS Second R&O*).

⁷ DTV Norwich, LLC, Application for Multichannel Video Distribution and Data Service License, MVD001, ULS File No. 0001618606-MVD001-New York, Request for Waiver and Extension of Divestiture Deadline of Section 101.1412(g)(4) of the Commission’s Rules, *Order*, 19 FCC Rcd 18701, 18707 ¶ (WTB, BD 2004) (*2004 Order*).

⁸ Request for Waiver and Extension of Divestiture Deadline of DTV Norwich, LLC, ULS File No. 0001618606-MVD001 (filed on June 10, 2004) (*First Request*). Following the then-planned spin-off, and with ownership of Cablevision’s cable and other assets resolved, DTVN expected to take such additional steps as might be necessary to address the MVDDS/cable cross-ownership limit with respect to the New York market. *See, e.g.*, Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on August 17, 2005 at 4-6 (*Second Request*).

⁹ *See Second Request* at 5. *See also* Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 18, 2006 (*Third Request*); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 7, 2007 (*Fourth Request*); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on September 5, 2008 (*Fifth Request*).

¹⁰ *See* Letter to James R. Bayes, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, dated October 13, 2005 (*2005 Letter*); Letter to Wayne D. Johnsen, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, WTB, dated October 18, 2006 (*2006 Letter*); Letter to Wayne D. Johnsen, Esq., from John J. Schauble, Deputy Chief, Broadband Division, WTB, dated October 5, 2007 (*2007 Letter*); Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 14, 2008 (*2008 Letter*).

¹¹ *See, e.g.*, *2007 Letter* at 4; *2005 Letter* at 3-4.

¹² *Public Notice*, WTB Seeks Comment on Request of DTV Norwich, LLC for Waiver and Extension of Divestiture Deadline for New York Multichannel Video Distribution and Data Service License, DA 09-1764 (rel. Aug. 7, 2009).

¹³ *Sixth Request* at 3-6.

two technical field trials for MVDDS service using prototype equipment.¹⁴ In particular, DTVN notes that it is continuing technical trials of different system configurations in Florida and New York.¹⁵ DTVN states that these trials are providing valuable information which DTVN is using to validate its signal coverage models and to determine the best configurations for deploying MVDDS services to consumers in its licensed areas.¹⁶ Based on its testing over the past year, DTVN explains that it has taken steps to improve system performance and has been working with multiple equipment suppliers to develop additional MVDDS equipment options, including a new antenna that provides better performance for specific deployment methodologies.¹⁷

DTVN argues that it needs additional time to complete its field testing, evaluate the results, verify equipment performance and commercialize equipment designs, in addition to developing full-scale deployment plans which would include the identification and acquisition of transmitter sites in accordance with the Commission's interference coordination rules.¹⁸ DTVN submits that the interests of consumers would be best served by granting the extension of time to allow DTVN sufficient time to develop a fully-tested and commercially-viable MVDDS system.¹⁹

DTVN further asserts that an extension of the deadline will not harm competition but rather will enhance DTVN's efforts to establish viable MVDDS operations.²⁰ While MVDDS licenses are issued for ten year terms, the Commission's rules currently require licensees to provide "substantial service" within five years of the license grant.²¹ DTVN points out the Commission has noted that the entire MVDDS industry is facing similar problems with regard to the lack of commercially available equipment,²² and for that reason, virtually every MVDDS licensee is seeking an extension of the five-year substantial service requirement.²³ Furthermore, DTVN states that to the best of its knowledge no MVDDS licensee has yet initiated full-scale service, nor has any announced a specific business model or rollout schedule for the

¹⁴ *Sixth Request* at 4-5. To obtain MVDDS prototype equipment, DTVN states that it has had to commit to buy a certain amount of equipment and pay in advance for the supplier's non-recoverable engineering expenses incurred in developing the prototype equipment. *Id.* at 5.

¹⁵ *Id.* at 4.

¹⁶ *Id.* at 4; DTVN Comments at 2.

¹⁷ *Sixth Request* at 4-5.

¹⁸ *Id.* at 5.

¹⁹ *Id.*

²⁰ *Id.* at 5-7.

²¹ See 47 C.F.R. § 101.1413(a)-(b).

²² *Sixth Request* at 6; DTVN Comments at 1-2.

²³ *Sixth Request* at 6; citing *Public Notice*, Wireless Telecommunications Bureau Seeks Comment on Applications by Multichannel Video Distribution and Data Service (MVDDS) Licensees for Waiver and Extension of Time to Demonstrate Substantial Service, DA 09-1306 (rel. June 10, 2009) (*Public Notice*). MVDDS licensees generally are seeking a five year extension of the substantial service provision to make it commensurate with the ten-year term for MVDDS licenses. See *Public Notice* at 2. See also DTV Norwich, LLC Petition for Waiver and Extension of Time to Comply with the Commission's MVDDS Substantial Service Requirements in Section 101.1413, ULS File Nos. 0003516339 *et al.*, (filed July 25, 2008).

still nascent service.²⁴ Thus, DTVN argues, granting the extension will not preclude entry or limit competition in the New York market.²⁵ In addition, DTVN asserts that the ongoing uncertainty regarding the continued viability of MVDDS licenses in the aggregate, coupled with DTVN's continuing efforts to determine the best method(s) of deploying MVDDS service, impacts DTVN's efforts to achieve compliance with the cross-ownership rule. DTVN points out that although DTVN may ultimately seek to achieve compliance by, partitioning its New York DMA MVDDS license, partitioning may not be the best compliance option once it is determined how best to deploy MVDDS service in the New York area.²⁶

For these reasons, DTVN requests an additional 360 days to achieve compliance with the cable/MVDDS cross-ownership limits with respect to the New York market.²⁷

Discussion. Section 1.925(b)(3) of the Commission's rules permits us to grant a request for waiver if it is shown that: (i) the underlying purpose of the rule would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) in view of unique or unusual factual circumstances of the instant case, application of the rule would be inequitable, unduly burdensome, or contrary to the public interest, or the applicant has no reasonable alternative.²⁸

We find that granting DTVN's *Sixth Request* is warranted under 47 C.F.R. § 1.925(b)(3)(i). The purpose of the MVDDS/cable cross-ownership rule is to prevent cable operators from precluding market entry by new MVPD providers thereby limiting competition in the MVPD marketplace. Since commercial MVDDS equipment is not available and no one has yet commercially deployed MVDDS elsewhere in the United States, we conclude that granting the request will not preclude entry or limit competition in the New York market. In addition, DTVN indicates that it continues to work to foster the development of MVDDS and to work to deploy the service and to test the viability of operational prototypes.²⁹ In light of these efforts to foster the development of MVDDS, which may be particularly important given that MVDDS equipment is still under development,³⁰ we find that a further extension of DTVN's deadline to comply with the Commission's MVDDS/cable cross ownership rule will serve the purpose of the rule by promoting competition and therefore is in the public interest. We note in this regard that there was no opposition to DTVN's request. Because we find that extending DTVN's deadline is warranted under 47 C.F.R. § 1.925(b)(3)(i), we need not address whether DTVN's request meets the requirements of 47 C.F.R. § 1.925(b)(3)(ii).

Finally, we note that granting DTV Norwich's *Sixth Request* in no way alters or delays the date for DTVN's requirement to provide substantial service or otherwise prejudices the outcome of the

²⁴ *Sixth Request* at 6.

²⁵ *Id.* at 6.

²⁶ *Sixth Request* at 6; DTVN Comments at 2-3.

²⁷ *See Sixth Request* at 7; DTVN Comments at 3.

²⁸ 47 C.F.R. § 1.925(b)(3); *see also* 47 C.F.R. § 101.23.

²⁹ *See Sixth Request* at 3-6; DTVN Comments at 1-2.

³⁰ *See* notes 22, 23, *supra* and accompanying text. We also note that, although in full force and effect, the MVDDS service rules did not become final, *i.e.*, no longer subject to judicial review, until 2005. *See Northpoint Technology, Ltd. v. FCC*, 414 F.3d 61 (D.C. Cir. 2005).

decision on DTVN's pending request for an extension of time to meet the substantial service requirements³¹ or other requests.

Accordingly, IT IS ORDERED that, pursuant to the authority in sections 1, 2, 4(i) and 4(j) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154(i) and 154(j), and Section 1.925(a) of the Commission's Rules, 47 C.F.R. § 1.925(a), the Further Request for Waiver and Extension of Divestiture Deadline filed by DTV Norwich, LLC, on July 22, 2009, ULS File No. 0003908576, IS GRANTED to the extent indicated herein.

IT IS FURTHER ORDERED that the first three SPECIAL CONDITIONS appearing on the license, call sign WQBD526, MVD001-New York shall be modified in accordance with this ruling to read as follows.³²

- DTV Norwich LLC shall come into compliance with 47 C.F.R. § 101.1412(a) [the MVDDS/cable cross-ownership limits] by October 4, 2010.
- Failure to satisfy this condition shall result in automatic cancellation of this license, whereupon the Commission shall retain all monies paid to the Commission and, based on the facts presented, shall take any other action it may deem appropriate. *See generally* 47 C.F.R. § 101.1412(g)(6).
- This authorization is granted to DTV Norwich pursuant to *Order*, 19 FCC Rcd 18701, 18707 (WTB, BD 2004). *See also* Letter to James R. Bayes, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, Wireless Telecommunications Bureau, dated October 13, 2005, Letter to Wayne D. Johnsen, Esq., from Joel D. Taubenblatt, Chief, Broadband Division, WTB, dated October 18, 2006; Letter to Wayne D. Johnsen, Esq., from John J. Schauble, Deputy Chief, Broadband Division, WTB, dated October 5, 2007; Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 14, 2008; Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, DA 09-2182 (rel. October 7, 2009).

This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

Blaise A. Scinto
Chief, Broadband Division,
Wireless Telecommunication Bureau

³¹ The five-year deadline date was July 26, 2009, for each of DTVN's MVDDS licenses, except for WQBD526, MVD001-New York, which had a five-year deadline date of September 23, 2009. As noted above, however, DTVN has pending requests to extend these deadlines. *See* note 23, *supra*.

³² Prior to the instant ruling, DTVN's deadline was October 9, 2009. Adding 360 days to that date extends the deadline to Monday October 4, 2010.

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October 7, 2009

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