



PUBLIC NOTICE

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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

Comment Date: September 15, 2010

Reply Comment Date: September 22, 2010

DTV Norwich, LLC (DTVN) holds 45 Multichannel Video Distribution and Data Service (MVDDS) licenses. By this *Public Notice*, the Wireless Telecommunications Bureau (Bureau) seeks comment on DTVN's Further Request for Waiver and Extension of Divestiture Deadline (Seventh Request)¹ with respect to call sign WQBD526, MVD001-New York.² DTVN seeks a further waiver and extension of its October 4, 2010 deadline for compliance in the New York market with Section 101.1412 of the Commission's Rules,³ the MVDDS/cable cross-ownership rule.

This request for further waiver and extension is occasioned by Cablevision Systems Corporation's (Cablevision) attributable interest in DTVN. Cablevision's interest is impermissible under Section 101.1412(a) of the Commission's Rules⁴ because it operates a cable system with a service area that significantly overlaps the license area of DTVN's New York MVDDS license.⁵ 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.⁶ Moreover, if the applicant is otherwise qualified, the application will be granted subject to a condition that the applicant

¹ See ULS File No. 0004353040, Further Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on August 13, 2010 (Seventh Request).

² MVDDS service areas are based on the Designated Market Areas (DMAs) delineated by Nielsen Media Research, Inc. ("Nielsen Media"), in its publication entitled "U.S. Television Household Estimates" dated September 2002. See 47 C.F.R. § 101.1401. Designated Market Area (DMA®) is a registered trademark of Nielsen Media.

³ See 47 C.F.R. § 101.1412 (MVDDS eligibility restrictions for cable operators).

⁴ 47 C.F.R. § 101.1412(a).

⁵ 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 ULS File No. 0003908576, Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on July 22, 2009 (Sixth Request) at 2, n5, citing ULS File No. 0002022365 and FCC Form 602, Ownership Disclosure Report, Indirect Disclosable Interest Holders (File No. 0002220772) (describing Cablevision's 90 percent indirect interest in DTVN).

⁶ 47 C.F.R. § 101.1412(g).

shall come into compliance with the eligibility restriction within 90 days of the final grant of the license.⁷ 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.⁸

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).”⁹ 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.¹⁰ The spin off described in the *First Request* did not occur as planned and DTVN subsequently filed five successive requests for 360-day extensions.¹¹ The Division granted each request¹² 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.¹³ DTVN’s current deadline date to come into compliance with 47 C.F.R. § 101.1412(a) is October 4, 2010,¹⁴ and, at this time, DTVN seeks an extension through the end of the current term.¹⁵

⁷ 47 C.F.R. § 101.1412(g)(4).

⁸ 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, 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*).

⁹ DTV Norwich, LLC, Application for Multichannel Video Distribution and Data Service License, MVD001, 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*).

¹⁰ Request for Waiver and Extension of Divestiture Deadline of DTV Norwich, LLC, ULS File No. 0001618606-MVD001 (filed on June 10, 2004) (First Request).

¹¹ See Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on August 17, 2005 at (Second Request); 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); Request for Waiver and Extension of Divestiture Deadline, filed by DTV Norwich, LLC, on June 23, 2009 (Sixth Request).

¹² 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*); Letter to Wayne D. Johnsen, Esq., from Blaise A. Scinto, Chief, Broadband Division, WTB, dated October 7, 2009 (*2009 Letter*).

¹³ See, e.g., *2007 Letter* at 4; *2005 Letter* at 3-4.

¹⁴ See, e.g., call sign WQBD526 (special condition).

¹⁵ Seventh Request at 1. In the alternative, if the Commission decides not to grant a waiver extension through the end of the current license term, DTVN requests an additional 360-day extension. Seventh Request at 6 n.19.

DTVN alleges that an extension will not harm competition but rather will enhance DTVN's ongoing efforts to establish viable MVDDS operations. Since October 2009, DTVN states that it has made progress towards developing the 12 GHz equipment and service configurations needed to successfully deploy wireless broadband, video, voice, and data services to businesses and consumers but that additional time is needed.¹⁶

DTVN argues that regulatory uncertainty has hindered further development of MVDDS systems. As in 2009, MVDDS has not been deployed commercially in any market and DTVN asserts that this is largely due to the regulatory uncertainty that has surrounded MVDDS licenses. Specifically, DTVN points out that although the Commission recently granted the request for waiver of the Commission's substantial service requirement, while the *DTVN Construction Waiver and Extension Request* remained pending, DTVN and virtually all other MVDDS licensees were in regulatory limbo.¹⁷ Until the uncertainty surrounding the status of its licenses was removed, DTVN contends that it was hindered in its ability to foster MVDDS service and could not reasonably be expected to determine which course of action to follow with respect to achieving compliance with the Commission's cable/MVDDS divestiture rule.¹⁸

DTVN asserts that it has continued to devote significant resources to conduct a series of trials that confirm the technical feasibility of MVDDS service.¹⁹ DTVN states that, although its technical trials have provided significant feedback regarding the technical viability of the service, MVDDS equipment is still not commercially available and, to DTVN's knowledge, no MVDDS licensee has commenced commercial operations.²⁰ Based on its testing, DTVN has continued to take steps to improve system performance and to work with multiple equipment suppliers to develop additional MVDDS equipment options.²¹ Moreover, given the recent grant of its request for extension of the substantial service showing, DTVN states it is in a position to take steps designed to implement a full market trial.²²

DTVN argues that given the current state of the MVDDS marketplace, granting this further extension of time will not preclude entry or limit competition in the New York market and that an extension would also create demonstrable public benefits.²³ DTVN states that although it may ultimately seek to achieve compliance by, for example, partitioning its NY DMA MVDDS license, such an approach may not be the best compliance option once it is determined how best to deploy MVDDS service.²⁴ Thus,

¹⁶ Seventh Request at 3.

¹⁷ See *id.* at 3-4 citing 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.*, at 12-13 (July 25, 2008) ("DTVN Construction Waiver and Extension Request). DTVN notes that virtually all MVDDS licensees filed similar requests. See *Seventh Request* at 4 citing In the Matter of Requests of Ten Licensees of 191 Licenses in the Multichannel Video and Data Distribution Service for Waiver of the Five-Year Deadline for Providing Substantial Service, File Nos. 0003516339 *et. al.*, Order, DA 10-1378 (rel. July 28, 2010) ("MVDDS Extension Order").

¹⁸ Seventh Request at 4-5.

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.* at 6-7.

²⁴ *Id.* at 7.

grant of the requested extension, DTVN believes, will benefit the public by facilitating the efficient and effective long-term deployment of MVDDS services.²⁵

We hereby seek comment on the Seventh Request.

Section 1.925(b)(3) of the Commission's Rules provides that a waiver of the Commission's Rules may be granted if it is shown that: "(i) the underlying purpose of the rule(s) 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; (ii) or in view of unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative."²⁶

Interested parties may file comments on the waiver requests on or before the comment date shown on the first page of this public notice. Parties interested in submitting reply comments must do so on or before the reply comment date shown on the first page of this public notice. All filings should reference the DA number of this *Public Notice* and may be filed electronically in ULS²⁷ under file number 0004353040 using the following link: <http://wireless.fcc.gov/uls/index.htm?job=home> (on the left side of the webpage, click on "ULS Pleadings").²⁸

Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we continue to experience delays in receiving U.S. Postal Service mail). All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission, as follows:

-Effective December 28, 2009, all hand-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., S.W., Room TW-A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Envelopes must be disposed of before entering the building. The filing hours at this location are 8:00 a.m. to 7:00 p.m. **PLEASE NOTE:** This is the **ONLY** location where hand-delivered or messenger-delivered paper filings for the Commission's Secretary will be accepted. The Commission's former filing location at 236 Massachusetts Ave., N.E., is permanently closed.

-Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

-U.S. Postal Service first-class mail, Express Mail, and Priority Mail should be addressed to 445 12th Street, S.W., Washington, D.C. 20554.

Parties shall send one copy of their comments and reply comments to Best Copy and Printing, Inc., Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (800) 378-3160, e-mail FCC@BCPIWEB.com.

²⁵ *Id.*

²⁶ 47 C.F.R. § 1.925(b)(3).

²⁷ See Wireless Telecommunications Bureau Enhances the Commission's Universal Licensing System to Implement Electronic Filing for Pleadings, *Public Notice*, 21 FCC Rcd 424 (WTB 2006).

²⁸ The pleading filing module has three steps. In Step 1, the drop down list of pleading types does not include "Comments." If you are filing comments (rather than a pleading type that is listed on the drop down list) please select "Reply" from the drop down list, *i.e.*, select "Reply" as the pleading type for comments and reply comments. Enter the ULS file number in Step 2. Step 3 of the pleading file module has a free-text field where you can more accurately describe your filing, *e.g.*, as comments.

The request, and comments and reply comments filed in response to this *Public Notice*, will be available for public inspection and copying online via the Universal Licensing System by entering application File No. 0004353040. They may also be purchased from Best Copy and Printing, Inc., telephone (800) 378-3160, facsimile (301) 816-0169, e-mail FCC@BCPIWEB.com.

Alternate formats of this *Public Notice* (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting the Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY), or send an e-mail to fcc504@fcc.gov.

Unless otherwise provided, requests for waiver of the Commission's Rules are subject to treatment by the Commission as restricted proceedings for *ex parte* purposes under Section 1.1208 of the Commission's Rules, 47 C.F.R. § 1.1208. Because of the policy implications and potential impact of this proceeding on persons not parties to the waiver requests, we believe it would be in the public interest to treat this case as a permit-but-disclose proceeding under the *ex parte* rules. See Sections 1.1200(a), 1.1206 of the Commission's Rules, 47 C.F.R. §§ 1.1200(a), 1.1206. Therefore, subsequent to the release of this *Public Notice*, *ex parte* presentations that are made with respect to the issues involved in the subject waiver requests will be allowed but must be disclosed in accordance with the requirements of Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b).²⁹ Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.³⁰

For further information, contact Mary Woytek, Esq., Broadband Division, Wireless Telecommunications Bureau, at (202) 418-1899, TTY (202) 418-7233, or via e-mail to Mary.Woytek@fcc.gov.

By the Chief, Broadband Division, Wireless Telecommunications Bureau, Federal Communications Commission.

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²⁹ 47 C.F.R. §§ 1.1200, 1.1206.

³⁰ 47 C.F.R. § 1.1206(b).