

without losing this protection. This does not relieve current point-to-point licensees of their obligation to protect BSS operations in the subject frequency band. All point-to-point applications, including low-power operations, for new licenses, major amendments to pending applications, or major modifications to existing licenses for the 12.2-12.7 GHz band are no longer accepted except for renewals and changes in ownership. See §1.929 of this chapter for definitions of major and minor changes.

§ 101.1411 Regulatory status and eligibility.

(a) MVDDS licensees are permitted to provide one-way video programming and data services on a non-common carrier and/or on a common carrier basis. MVDDS is not required to be treated as a common carrier service unless it is providing non-Internet voice and data services through the public switched network.

(b) MVDDS licensees in the 12.2-12.7 GHz band are subject to the requirements set forth in §101.7.

(c) Any entity, other than one precluded by §§ 101.7 and 101.1412, is eligible for authorization to provide MVDDS under this part. Authorization will be granted upon proper application filing in accordance with the Commission's rules.

§ 101.1412 MVDDS eligibility restrictions for cable operators.

(a) Eligibility for MVDDS license. No cable operator, nor any entity owning an attributable interest in a cable operator, shall have an attributable interest in an MVDDS license whose geographic service area significantly overlaps such cable operator's service area, as defined in paragraph (d) of this section.

(b) Definition of cable operator. For the purposes of paragraph (a) of this section, the term "cable operator" means a company that is franchised to provide cable service.

(c) Waiver of restriction. Upon completion of the initial award of MVDDS licenses, a cable operator may petition for a waiver of the restriction on eligibility based upon a showing that the petitioner no longer has market power

in its service area as the result of the entry of new competitors, other than an MVDDS licensee, into such service area.

(d) Significant overlap with service area. For purposes of paragraph (a) of this section, significant overlap occurs when cable operator's subscribers in a CEA make up thirty-five percent or more of the households in that CEA.

(e) Definition of attributable interest. For purposes of paragraph (a) of this section, an entity shall be considered to have an attributable interest in a cable operator or MVDDS licensee pursuant to the following criteria:

(1) A controlling interest shall constitute an attributable interest. Controlling interest means majority voting equity ownership, any general partnership interest, or any means of actual working control (including negative control) over the operation of the entity, in whatever manner exercised.

(2) Any general partnership interest in a partnership;

(3) Partnership and similar ownership interests (including limited partnership interests) amounting to 20 percent or more of the total partnership interests, calculated according to both the percentage of equity paid in and the percentage of distribution of profits and losses;

(4) Any stock interest amounting to 20 percent or more of the outstanding voting stock of an entity;

(5) Any stock interest, (including non-voting stock) amounting to 20 percent or more of the total outstanding stock of an entity;

(6) Stock interests held in trust that exceed the limit set forth in paragraph (e) of this section shall constitute an attributable interest of any person who holds or shares the power to vote such stock, of any person who has the sole power to sell such stock, and, in the case of stock held in trust, of any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust shall constitute an attributable interest of such grantor or beneficiary, as appropriate.

(7) Debt and interests such as warrants and convertible debentures, options, or other interests (except non-voting stock) with rights of conversion to voting interests shall not constitute attributable interests unless and until conversion is effected.

(8) An interest in a Limited Liability Company (LLC) or Registered Limited Liability Partnership (RLLP) amounting to 20 percent or more, shall constitute an attributable interest of each such limited partner.

(9) Officers and directors of a cable operator, an MVDDS licensee, or an entity that controls such cable operator or MVDDS licensee, shall be considered to have an attributable interest in such cable operator or MVDDS licensee.

(10) Ownership interests that are held indirectly by any party through one or more intervening corporations or other entities shall be determined by successive multiplication of the ownership percentages for each link in the vertical ownership chain and application of the relevant attribution benchmark to the resulting product, except that, if the ownership for any interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

(11) Any person who manages the operations of a cable operator or an MVDDS licensee pursuant to a management agreement shall be considered to have an attributable interest in such cable operator or MVDDS licensee, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine, or significantly influence:

(i) The nature or types of services offered by such entity;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(12) Any person or its affiliate who enters into a joint marketing arrangement with a cable operator, an MVDDS licensee, or an affiliate of such entity, shall be considered to have an attributable interest in such cable operator, MVDDS licensee, or affiliate, if such person or its affiliate has authority to make decisions or otherwise engage in practices or activities that determine:

(i) The nature or types of services offered by such entity;

(ii) The terms upon which such services are offered; or

(iii) The prices charged for such services.

(f) Divestiture. Any cable operator, or any entity owning an attributable interest in a cable operator, that would otherwise be barred from acquiring an attributable interest in an MVDDS license by the eligibility restriction in paragraph (a) of this section, may be a party to an MVDDS application (i.e., have an attributable interest in the applicant), and such applicant will be eligible for an MVDDS license, pursuant to the divestiture procedures set forth in paragraphs (f)(1) through (f)(6) of this section.

(1) Divestiture shall be limited to the following prescribed means:

(i) An MVDDS applicant holding an attributable interest in a cable operator may divest such interest in the cable company.

(ii) Other MVDDS applicants disqualified under paragraph (a) of this section, will be permitted to:

(A) Partition and divest that portion of the existing service area that causes it to exceed the overlap restriction in paragraph (a) of this section, subject to applicable regulations of state and local governments; or

(B) Partition and divest that portion of the MVDDS geographic service area that exceeds the overlap restriction in paragraph (a) of this section.

(iii) Divestiture may be to an interim trustee if a buyer has not been secured in the required period of time, as long as the MVDDS applicant has no interest in or control of the trustee and the trustee may dispose of the license as it sees fit.

(2) The MVDDS applicant shall certify as an exhibit to its short form application that it and all parties to the application will come into compliance with paragraph (a) of this section.

(3) If such MVDDS applicant is a successful bidder in an auction, it must submit with its long-form application a signed statement describing its efforts to date and future plans to come into compliance with the eligibility restrictions in paragraph (a) of this section.

(4) If such an MVDDS applicant is otherwise qualified, its application will be granted subject to a condition that the applicant shall come into compliance with the eligibility restrictions in paragraph (a) of this section, within ninety (90) days of final grant of such MVDDS license.

(5) An MVDDS applicant will be considered to have come into compliance with paragraph (a) of this section if:

(i) In the case of the divestiture of a portion of an MVDDS license, it has successfully completed the assignment or transfer of control of the requisite portion of the MVDDS geographic service area.

(ii) In all other cases, it has submitted to the Commission a signed certification that it has come into compliance with paragraph (a) of this section by the following means, identified in such certification:

(A) By divestiture of a disqualifying interest in a cable operator, identified in terms of the interest owned, the owner of such interest (and, if such owner is not the applicant itself, the relationship of the owner to the applicant), the name of the party to whom such interest has been divested, and the date such divestiture was executed; or

(B) By divestiture of the requisite portion of the cable operator's existing service area, identified in terms of the name of the party to whom such interest has been divested, the date such divestiture was executed, the name of any regulatory agency that must approve such divestiture, and the date on which an application was filed for this purpose with the regulatory agency.

(6) If no such certification or application is tendered to the Commission within ninety (90) days of final grant of the initial license, the Commission may cancel or rescind the license automatically, shall retain all monies paid to the Commission, and, based on the facts presented, shall take any other action it may deem appropriate.

NOTE TO PARAGRAPH (F): Waivers of § 101.1014(e) may be granted upon an affirmative showing: that the interest holder has less than a fifty percent voting interest in the licensee and there is an unaffiliated single holder of a fifty percent or greater voting interest; that the interest holder is not likely to affect the local market in an anti-

competitive manner; that the interest holder is not involved in the operations of the licensee and does not have the ability to influence the licensee on a regular basis; and that grant of a waiver is in the public interest because the benefits to the public of common ownership outweigh any potential anti-competitive harm to the market.

§ 101.1413 License term and renewal expectancy.

(a) The MVDDS license term is ten years, beginning on the date of the initial authorization grant.

(b) Application of a renewal expectancy is based on a showing of substantial service at the end of five years into the license period and ten years into the license period. The substantial service requirement is defined as a service that is sound, favorable, and substantially above a level of mediocre service which might minimally warrant renewal. At the end of five years into the license term and ten years into the license period, the Commission will consider factors such as:

(1) Whether the licensee's operations service niche markets or focus on serving populations outside of areas serviced by other MVDDS licensees;

(2) Whether the licensee's operations serve populations with limited access to telecommunications services; and

(3) A demonstration of service to a significant portion of the population or land area of the licensed area.

(c) The renewal application of an MVDDS licensee must include the following showings in order to claim a renewal expectancy:

(1) A coverage map depicting the served and unserved areas;

(2) A corresponding description of current service in terms of geographic coverage and population served or transmitter locations in the served areas; and

(3) Copies of any Commission Orders finding the licensee to have violated the Communications Act or any Commission rule or policy and a list of any pending proceedings that relate to any matter described by the requirements for the renewal expectancy.

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