

## § 101.1112 Definitions.

(a) *Scope.* The definitions in this section apply to §§ 101.1101 through 101.1112, unless otherwise specified in those sections.

(b) *Very small business.* A very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of not more than \$15 million.

(c) *Small business.* A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than \$15 million but not more than \$40 million.

(d) *Entrepreneur.* An entrepreneur is an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than \$40 million but not more than \$75 million.

(e) For purposes of determining whether an entity meets the definition of very small business, small business or entrepreneur, the gross revenues of the applicant, its affiliates and controlling principals shall be considered on a cumulative basis and aggregated.

(f) *Consortium.* A consortium of very small businesses, small businesses or entrepreneurs is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition of a very small business, small business or entrepreneur. Each individual member must establish its eligibility as a very small business, small business or entrepreneur. Where an applicant (or licensee) is a consortium of very small businesses, small businesses or entrepreneurs, the gross revenues of each business shall not be aggregated.

(g) *Gross revenues.* Gross revenues shall mean all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., cost of goods sold), as evidenced by audited financial statements for the relevant number of most recently completed calendar years, or, if audited financial statements were not prepared on a calendar-year basis, for the most recently completed fiscal years preceding the filing of the applicant's short-form applica-

tion (FCC Form 175). If an entity was not in existence for all or part of the relevant period, gross revenues shall be evidenced by the audited financial statements of the entity's predecessor-in-interest or, if there is no identifiable predecessor-in-interest, unaudited financial statements certified by the applicant as accurate. When an applicant does not otherwise use audited financial statements, its gross revenues may be certified by its chief financial officer or its equivalent.

(h) *Affiliate—(1) Basis for affiliation.* An individual or entity is an affiliate of an applicant if such individual or entity:

(i) Directly or indirectly controls or has the power to control the applicant;

(ii) Is directly or indirectly controlled by the applicant;

(iii) Is directly or indirectly controlled by a third party or parties who also control or have the power to control the applicant; or

(iv) Has an "identity of interest" with the applicant.

(2) *Nature of control in determining affiliation.* (i) Every business concern is considered to have one or more parties who directly or indirectly control or have the power to control it. Control may be affirmative or negative and it is immaterial whether it is exercised so long as the power to control exists.

*Example for paragraph (h)(2)(i).* An applicant owning 50 percent of the voting stock of another concern would have negative power to control such concern since such party can block any action of the other stockholders. Also, the bylaws of a corporation may permit a stockholder with less than 50 percent of the voting stock to block any actions taken by the other stockholders in the other entity. Affiliation exists when the applicant has the power to control a concern while at the same time another person, or persons, are in control of the concern at the will of the party or parties with the power of control.

(ii) Control can arise through stock ownership; occupancy of director, officer, or key employee positions; contractual or other business relations; or combinations of these and other factors. A key employee is an employee who, because of her position in the concern, has a critical influence in or substantive control over the operations or management of the concern.

(iii) Control can arise through management positions if the voting stock is so widely distributed that no effective control can be established.

*Example for paragraph (h)(2)(iii).* In a corporation where the officers and directors own various size blocks of stock totaling 40 percent of the corporation's voting stock, but no officer or director has a block sufficient to give him control or the power to control and the remaining 60 percent is widely distributed with no individual stockholder having a stock interest greater than 10 percent, management has the power to control. If persons with such management control of the other entity are controlling principals of the applicant, the other entity will be deemed an affiliate of the applicant.

(3) *Identity of interest between and among persons.* Affiliation can arise between or among two or more persons with an identity of interest, such as members of the same family or persons with common investments. In determining if the applicant controls or is controlled by a concern, persons with an identity of interest will be treated as though they were one person.

(i) *Spousal affiliation.* Both spouses are deemed to own or control or have the power to control interests owned or controlled by either of them, unless they are subject to a legal separation recognized by a court of competent jurisdiction in the United States.

(ii) *Kinship affiliation.* Immediate family members will be presumed to own or control or have the power to control interests owned or controlled by other immediate family members. In this context "immediate family member" means father, mother, husband, wife, son, daughter, brother, sister, father-or mother-in-law, son-or daughter-in-law, brother-or sister-in-law, step-father or -mother, step-brother or -sister, step-son or -daughter, and half-brother or -sister. This presumption may be rebutted by showing that:

- (A) The family members are estranged;
- (B) The family ties are remote; or
- (C) The family members are not closely involved with each other in business matters.

*Example for paragraph (h)(3)(ii).* A owns a controlling interest in Corporation X. A's sister-in-law, B, has a controlling interest in an LMDS license application. Because A and B have a presumptive kinship affiliation, A's interest in Corporation X is attributable to

B, and thus to the applicant, unless B rebuts the presumption with the necessary showing.

(4) *Affiliation through stock ownership.*

(i) An applicant is presumed to control or have the power to control a concern if she owns or controls or has the power to control 50 percent or more of its voting stock.

(ii) An applicant is presumed to control or have the power to control a concern even though he owns, controls, or has the power to control less than 50 percent of the concern's voting stock, if the block of stock she owns, controls, or has the power to control is large as compared with any other outstanding block of stock.

(iii) If two or more persons each owns, controls or has the power to control less than 50 percent of the voting stock of a concern, such minority holdings are equal or approximately equal in size, and the aggregate of these minority holdings is large as compared with any other stock holding, the presumption arises that each one of these persons individually controls or has the power to control the concern; however, such presumption may be rebutted by a showing that such control or power to control, in fact, does not exist.

(5) *Affiliation arising under stock options, convertible debentures, and agreements to merge.* Stock options, convertible debentures, and agreements to merge (including agreements in principle) are generally considered to have a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements will generally be treated as though the rights held thereunder had been exercised. However, neither an affiliate nor an applicant can use such options and debentures to appear to terminate its control over another concern before it actually does so.

*Example 1 for paragraph (h)(5).* If company B holds an option to purchase a controlling interest in company A, which holds a controlling interest in an LMDS applicant, the situation is treated as though company B had exercised its rights and had become owner of a controlling interest in company A. The gross revenues of company B must be taken into account in determining the size of the applicant.

*Example 2 for paragraph (h)(5).* If a large company, BigCo, holds 70 percent (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in an LMDS license applicant, and gives a third party, SmallCo, an option to purchase 50 of the 70 shares owned by BigCo, BigCo will be deemed to be an affiliate of company A, and thus the applicant, until SmallCo actually exercises its options to purchase such shares. In order to prevent BigCo from circumventing the intent of the rule, which requires such options to be considered on a fully diluted basis, the option is not considered to have present effect in this case.

*Example 3 for paragraph (h)(5).* If company A has entered into an agreement to merge with company B in the future, the situation is treated as though the merger has taken place.

(6) *Affiliation under voting trusts.* (i) Stock interests held in trust shall be deemed controlled by any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will.

(ii) If a trustee has a familial, personal or extra-trust business relationship to the grantor or the beneficiary, the stock interests held in trust will be deemed controlled by the grantor or beneficiary, as appropriate.

(iii) If the primary purpose of a voting trust, or similar agreement, is to separate voting power from beneficial ownership of voting stock for the purpose of shifting control of or the power to control a concern in order that such concern or another concern may meet the Commission's size standards, such voting trust shall not be considered valid for this purpose regardless of whether it is or is not recognized within the appropriate jurisdiction.

(7) *Affiliation through common management.* Affiliation generally arises where officers, directors, or key employees serve as the majority or otherwise as the controlling element of the board of directors or the management (or both) of another entity.

(8) *Affiliation through common facilities.* Affiliation generally arises where one concern shares office space, employees, or other facilities (or any combination of the foregoing) with another concern, particularly where such concerns are in the same or related indus-

try or field of operations, or where such concerns were formerly affiliated, and through these sharing arrangements one concern has control, or potential control, of the other concern.

(9) *Affiliation through contractual relationships.* Affiliation generally arises where one concern is dependent upon another concern for contracts and business to such a degree that one concern has control, or potential control.

(10) *Affiliation under joint venture arrangements.* A joint venture for size determination purposes is an association of concerns or individuals (or both), with interests in any degree or proportion, formed by contract, express or implied, to engage in and carry out a single, specific business venture for joint profit for which purpose they combine their efforts, property, money, skill and knowledge, but not on a continuing or permanent basis for conducting business generally. The determination whether an entity is a joint venture is based upon the facts of the business operation, regardless of how the business operation may be designated by the parties involved. An agreement to share profits/losses proportionate to each party's contribution to the business operation is a significant factor in determining whether the business operation is a joint venture.

(11) *Exclusion from affiliation coverage.* For purposes of this section, Indian tribes or Alaska Regional or Village Corporations organized pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 *et seq.*), or entities owned and controlled by such tribes or corporations, are not considered affiliates of an applicant (or licensee) that is owned and controlled by such tribes, corporations or entities, and that otherwise complies with the requirements of this section, except that gross revenues derived from gaming activities conducted by affiliated entities pursuant to the Indian Gaming Regulatory Act (25 U.S.C. 2701 *et seq.*) will be counted in determining such applicant's (or licensee's) compliance with the financial requirements of this section, unless such applicant establishes that it will not receive a substantial unfair

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competitive advantage because significant legal constraints restrict the applicant's ability to access such gross revenues.

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## Subpart N—Competitive Bidding Procedures for the 38.6–40.0 GHz Band

SOURCE: 63 FR 6106, Feb. 6, 1998, unless otherwise noted.

### § 101.1201 38.6–40.0 GHz subject to competitive bidding.

Mutually exclusive 38.6–40.0 GHz initial applications are subject to competitive bidding. The general competitive bidding procedures found in 47 CFR Part 1, Subpart Q will apply unless otherwise provided in this part.

### § 101.1202 Competitive bidding design for 38.6–40.0 GHz licensing.

The following competitive bidding procedures generally will be used in 38.6–40.0 GHz auctions. Additional, specific procedures may be set forth by public notice. The Commission also may design and test alternative procedures. See 47 CFR §§ 1.2103 and 1.2104. The Commission will employ simultaneous multiple round bidding when choosing from among mutually exclusive initial applications to provide 38.6–40.0 GHz service, unless otherwise specified by the Wireless Telecommunications Bureau before the auction.

### § 101.1203 Competitive bidding mechanisms.

(a) *Sequencing.* The Commission will establish and may vary the sequence in which 38.6–40.0 GHz licenses will be auctioned.

(b) *Grouping.* The Commission will conduct a series of sequential auctions of three channels at a time within each BTA unless the Wireless Telecommunications Bureau announces, by Public Notice prior to the auction, an alternative auction scheme.

(c) *Minimum bid increments.* The Commission will, by announcement before or during an auction, require minimum bid increments in dollar or percentage terms.

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(d) *Stopping rules.* The Commission will establish stopping rules before or during multiple round auctions in order to terminate an auction within a reasonable time.

(e) *Activity rules.* The Commission will establish activity rules which require a minimum amount of bidding activity. In the event that the Commission establishes an activity rule in connection with a simultaneous multiple round auction, each bidder will be entitled to request and will be automatically granted a certain number of waivers of such rule during the auction.

### § 101.1204 Bidding application procedures.

All applicants to participate in competitive bidding for 38.6–40.0 GHz licenses must submit applications on FCC Forms 175 pursuant to the provisions of § 1.2105 of this Chapter. The Wireless Telecommunications Bureau will issue a public notice announcing the availability of 38.6–40.0 GHz licenses and, in the event that mutually exclusive applications are filed, the date of the auction for those licenses. This public notice also will specify the date on or before which applicants intending to participate in a 38.6–40.0 GHz auction must file their applications in order to be eligible for that auction, and it will contain information necessary for completion of the application as well as other important information such as the materials which must accompany the forms, any filing fee that must accompany the application or any upfront payment that need to be submitted, and the location where the application must be filed. In addition, each applicant must identify its status as a small business or rural telephone company.

### § 101.1205 Submission of upfront payments and down payments.

(a) Each bidder in the 38.6–40.0 GHz auction will be required to submit an upfront payment. This upfront payment will be based upon a formula established by the Wireless Telecommunications Bureau and announced by public notice prior to the auction.

(b) Each winning bidder in the 38.6–40.0 GHz auction shall make a down