

§ 90.1019 Eligibility for partitioned licenses.

(a) *Eligibility.* Parties seeking approval for partitioning and disaggregation shall request authorization for partial assignment of a license pursuant to § 1.948 of this chapter. The Commission will consider applications that propose combinations of partitioning and disaggregation.

(1) Phase I non-nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing their systems and placing their in operation or commencing service in accordance with the provisions in § 90.725(f) of this part.

(2) Phase I nationwide licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum after constructing at least 40 percent of the geographic areas designated in their applications in accordance with the provisions in § 90.725(a) of this part.

(3) Phase II licensees may apply to partition their licensed geographic service area or disaggregate their licensed spectrum at any time following the grant of their licenses.

(4) Phase I and Phase II licensees authorized to operate on Channels 161 through 170 or Channels 181 through 185 are not eligible to partition their geographic service area or disaggregate their licensed spectrum.

(b) *Partitioning.* In the case of partitioning, applicants and licensees must file FCC Form 603 pursuant to § 1.948 and list the partitioned service area on a schedule to the application. The geographic coordinates must be specified in degrees, minutes, and seconds to the nearest second of latitude and longitude and must be based upon the 1983 North American Datum (NAD83). In the case where an FCC-recognized service area or county lines are utilized, applicants need only list the specific area(s) through use of FCC designations or county names that constitute the partitioned area.

(c) *License term.* The license term for a partitioned license area and for disaggregated spectrum shall be the remainder of the original licensee's license term.

(d) *Construction requirements.* (1) Requirements for partitioning. Parties seeking authority to partition must meet one of the following construction requirements:

(i) The partitionee may certify that it will satisfy the applicable construction requirements set forth in §§ 90.767 or 90.769 of this part, as applicable, for the partitioned license area; or

(ii) The original licensee may certify that it has or will meet its five-year construction requirement and will meet the ten-year construction requirement, as set forth in §§ 90.767 or 90.769 of this part, as applicable, for the entire license area. In that case, the partitionee must only satisfy the requirements for "substantial service," as set forth in § 90.743(a)(1) of this part, for the partitioned license area by the end of the original ten-year license term of the licensee.

(iii) Failure by any partitionee to meet its respective construction requirements will result in the automatic cancellation of the partitioned license without further Commission action (*see* § 1.946).

(2) *Requirements for disaggregation.* Parties seeking authority to disaggregate spectrum must certify in FCC Form 601 which of the parties will be responsible for meeting the five-year and ten-year construction requirements for the particular market as set forth in § 90.767 or § 90.769, as applicable. Parties may agree to share responsibility for meeting the construction requirements. If one party accepts responsibility for meeting the construction requirements and later fails to do so, then its license will cancel automatically without further Commission action. If both parties accept responsibility for meeting the construction requirements and later fail to do so, then both their licenses will cancel automatically without further Commission action.

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§ 90.1021 Definitions concerning competitive bidding process.

(a) *Scope.* The definitions in this section apply to §§ 90.1001 through 90.1025,

unless otherwise specified in those sections.

(b) *Small business; very small business; consortium of small businesses or very small businesses.* (1) A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$15 million for the preceding three years.

(2) A very small business is an entity that, together with its affiliates and controlling principals, has average gross revenues that are not more than \$3 million for the preceding three years.

(3) For purposes of determining whether an entity meets either of the definitions set forth in paragraph (b)(1) or (b)(2) of this section, the gross revenues of the entity, its affiliates, and controlling principals shall be considered on a cumulative basis and aggregated.

(4) A consortium of small businesses (or a consortium of very small businesses) is a conglomerate organization formed as a joint venture between or among mutually independent business firms, each of which individually satisfies the definition in paragraph (b)(1) of this section or each of which individually satisfies the definition in paragraph (b)(2) of this section. Where an applicant (or licensee) is a consortium of small businesses (or very small businesses), the gross revenues of each small business (or very small business) shall not be aggregated.

(c) *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). Gross revenues are evidenced by audited financial statements for the relevant number of calendar or fiscal years preceding the filing of the applicant's short-form application (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 state-

ments, its gross revenues may be certified by its chief financial officer or its equivalent.

(d) *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, or

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

(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 (d)(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 his/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 (d)(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/her 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, 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 (d)(3)(ii). A owns a controlling interest in Corporation X. A’s sister-in-law, B, has a controlling interest in a 220 MHz service geographic area 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 he/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/she owns, controls, or has the power to control less than 50 percent of the concern’s voting stock, if the block of stock he/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 (d)(5). If company B holds an option to purchase a controlling interest in company A, who holds a controlling interest in a 220 MHz service geographic area license application, 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 (d)(5). If a large company, BigCo, holds 70% (70 of 100 outstanding shares) of the voting stock of company A, who holds a controlling interest in a 220 MHz service geographic area license application, 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 (d)(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 and/or the management of another entity.

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

(10) *Affiliation under joint venture arrangements.* (i) A joint venture for size determination purposes is an association of concerns and/or individuals, 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.

(ii) The parties to a joint venture are considered to be affiliated with each other.

§ 90.1023 Certifications, disclosures, records maintenance and audits.

(a) *Short-form applications: Certifications and disclosure.* In addition to certifications and disclosures required in part 1, subpart Q, of this chapter, each applicant for a 220 MHz service geographic area license which qualifies as a small business, very small business, consortium of small businesses, or consortium of very small businesses, shall append the following information as an exhibit to its FCC Form 175:

(1) The identity of the applicant's affiliates and controlling principals, and, if a consortium of small businesses (or consortium of very small businesses), the members of the joint venture; and

(2) The applicant's gross revenues, computed in accordance with § 90.1021.

(b) *Long-form applications: Certifications and disclosure.* In addition to the requirements in § 90.1013, each applicant submitting a long-form application (FCC Form 601) for a 220 MHz service geographic area license and qualifying as a small business or very small