

**United States Small Business Administration
Office of Hearings and Appeals**

REDACTED DECISION FOR PUBLIC RELEASE

SIZE APPEALS OF:

Medical Comfort Systems, Inc., and
B&B Medical Services, Inc.,

Appellants,

RE: First Community Care, LLC

Appealed From
Size Determination Nos. 04-2015-011, -
012, -013, -014, and -015

SBA No. SIZ-5640

Decided: February 18, 2015

APPEARANCES

Jessica C. Abrahams, Esq., Alejandro L. Sarria, Esq., Sandeep N. Nandivada, Esq.,
McKenna Long & Aldridge LLP, Washington, D.C., for Medical Comfort Systems, Inc.

Richard L. Moorhouse, Esq., Ryan C. Bradel, Esq., Jozef S. Przygodzki, Esq.,
Greenberg Traurig, LLP, McLean, Virginia, for B&B Medical Services, Inc.

Michael A. Hordell, Esq., Kristopher Berr, Esq., Pepper Hamilton LLP, Washington,
D.C., for First Community Care, LLC.

DECISION¹

I. Introduction and Jurisdiction

These appeals arise from a size determination concluding that First Community Care, LLC (FCC) is a small business under the \$30 million size standard associated with Request for

¹ This decision was initially issued under a protective order. Pursuant to 13 C.F.R. § 134.205, OHA afforded counsel an opportunity to file a request for redactions if desired. OHA received one or more timely requests for redactions and considered any requests in redacting the decision. OHA now publishes a redacted version of the decision for public release.

Proposals (RFP) No. VA249-14-R-0173. B&B Medical Services, Inc. (B&B) and Medical Comfort Systems, Inc. (MCS) (collectively “Appellants”), which had protested FCC's size, maintain that the size determination is flawed, and request that it be reversed or remanded. For the reasons discussed *infra*, the appeals are denied, and the size determination is affirmed.

The U.S. Small Business Administration (SBA) Office of Hearings and Appeals (OHA) decides size determination appeals under the Small Business Act of 1958, 15 U.S.C. § 631 *et seq.*, and 13 C.F.R. Parts 121 and 134. Appellants filed the instant appeals within fifteen days of receiving the size determination, so the appeals are timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. RFP and Protests

On March 11, 2014, the U.S. Department of Veterans Affairs (VA) issued RFP No. VA249-14-R-0173 seeking a contractor to provide home oxygen services to beneficiaries in Veterans Integrated Service Network (VISN) 9. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 532291, Home Health Equipment Rental, with a corresponding size standard of \$30 million average annual receipts.

On October 24, 2014, VA announced that FCC was the apparent awardee. On October 30, 2014, B&B protested FCC's size. B&B observed that FCC has two mailing addresses, with one in Amherst, New York, and the other in Midland, Michigan. B&B alleged that FCC is “affiliated with other ‘First Community Healthcare’ entities,” including First Community Care of Bassett, LLC; First Community Care of Niagara, Inc.; First Community Care, LLC of Springfield, Illinois; First Community Care, LLC of Chillicothe, Illinois; and First Community Care, LLC of Westland, Michigan. (B&B Protest at 2-3.) B&B noted that both FCC and First Community Care, LLC of Westland, Michigan identify Ms. Betty Watts as vice president. (*Id.* at 3.)

On October 26, 2014, MCS, through its president, Mr. Joseph S. White, also filed a protest of FCC's size. MCS contended that FCC “is an affiliate of a larger network known as Community Care Partners,” which includes Americoast Maine and Tri-County Home Care Services. (MCS Protest at 1.) MCS stated that, although it is difficult to determine FCC's ownership, FCC is affiliated with at least three other companies: Community Care Holdings, LLC (CCH); Care For You Home Medical Equipment (Care For You); and Community Care Partners (CCP). MCS argued that FCC is affiliated with Care For You and CCP because they have a common manager, Mr. Peter D. Cummiskey. MCS asserted that Mr. Cummiskey is Director of FCC, Director of Care For You, and President/CEO of CCP. From 2009-2012, Mr. Cummiskey was also Chairman, President, and Partner of CCH. (*Id.* at 2.)

MCS went on to allege that FCC is affiliated with Finger Lakes Regional Health System, Inc. (Finger Lakes), and that this affiliation runs through CCP. To support this claim, MCS asserted that CCP is a joint venture between Finger Lakes and CCH, and Finger Lakes and FCC

are affiliated based on Mr. Cummiskey's common management of CCP and FCC. Mr. Cummiskey, in addition to being director of FCC, is also president, chairman, and partner of CCP. (*Id.*) MCS contended that that Finger Lakes' "revenues exceeded \$136 million in 2009, \$136 million in 2011, and \$142 million in 2012." (*Id.* at 3.) Therefore, because FCC is affiliated with Finger Lakes through CCP, FCC is not an eligible small business.

On November 6, 2014, the CO informed MCS that its protest had been forwarded to SBA, and that SBA's decision would "include a review of the Finger Lakes information." (Email from M. Thompson to J. White (Nov. 6, 2014).) MCS responded the next day, stating that MCS had "made abundantly clear . . . that FCC's affiliation with any one or all of the following entities renders it other than small and ineligible for award of [RFP No.] VA249-14-R- 0173:

1. Finger Lakes Health
2. Community Care Partners
3. Community Care Holdings, LLC
4. Care For You Home Medical Equipment
5. Tri-County Home Care Services
6. Rotech Medical Corporation, and
7. Americoast LLC."

(Letter from J. White to M. Thompson (Nov. 7, 2014) (emphasis in original).) MCS stated further that "[t]o the extent any of your communications with SBA have been inconsistent with MCS's [protest], we request that you immediately correct and/or clarify those communications." (*Id.*)

B. Response to Protests

On November 10, 2014, FCC responded to the protests and submitted its SBA Form 355 and other information. FCC acknowledged affiliation with CCH, but denied any affiliation with Finger Lakes or CCP. (SBA Form 355 Supp. at 1-2.) FCC further explained that Mr. Cummiskey's employment with, and minority ownership interest in, CCH were terminated in 2012, and that "Mr. Cummiskey has had no ongoing connection or relationship with CCH or any of its affiliated entities since then." (*Id.* at 1.)

C. Size Determination

On November 21, 2014, the Area Office issued Size Determination Nos. 04-2015-011,-012, -013, -014, and -015, concluding that FCC is a small business.²

The Area Office found that FCC is a wholly-owned subsidiary of CCH, which is in turn owned by Home Health Investments, LLC (HHI). The Area Office stated that Rotech Medical

² In addition to the size protests filed by B&B and MCS, three other companies also brought size protests against FCC in conjunction with this procurement: Eagle Home Medical Corp.; Ed Medical, Inc.; and SS Medical, Inc. The Area Office issued a single size determination addressing all five size protests.

Corporation (RMC) owns HHI and is majority owner of First Community Care of Basset, LLC (FCC Bassett) and Rotech Medical Corp. (RCorp). In addition to its ownership of FCC, CCH also holds a controlling interest in Americoast Holdings, LLC (Americoast Holdings); Americoast Services, LLC (Americoast Services); Americoast Maine, LLC (Americoast Maine); and Tri-County Home Care Services, LLC (Tri-County). As a result of this common ownership, the Area Office determined, FCC is affiliated with CCH, HHI, RMC, FCC Bassett, RCorp, Americoast Holdings, Americoast Services, Americoast Maine, and Tri-County. (Size Determination at 2, citing 13 C.F.R. § 121.103(c).)

The Area Office found that FCC is not affiliated with Rotech Healthcare, Inc. (RHI) because, although RHI once had substantive ties with FCC's ultimate parent, RMC, this is no longer the case. The Area Office explained that RMC underwent a Chapter 11 bankruptcy reorganization, which led to RHI being incorporated as a new entity in 2002, and RMC transferred much of its assets to RHI. RMC and RHI do not have common management or ownership, and they do not share facilities or personnel. As a result, RMC and RHI are not affiliated, and FCC is not affiliated with RHI, either. (*Id.* at 2-3.)

The Area Office then explained that RMC is controlled by its president and board of directors and not by its stockholders, because RMC's stock is widely held. (*Id.* at 3, citing 13 C.F.R. § 121.103(c)(3).) The Area Office noted that the record contained no evidence that RMC's president or board members controlled any other entity. As a result, the Area Office concluded, “FCC is affiliated with RMC (and its subsidiaries) and the other entities named above only.” (*Id.* at 3.) The Area Office did not discuss whether or not FCC is affiliated with Finger Lakes, as was alleged in MCS's protest.

The Area Office addressed B&B's contention that FCC is affiliated with other ““First Community Healthcare” entities. This allegation lacked support, the Area Office stated, because B&B only provided a list of names, and “[m]ere similarity of names does not demonstrate affiliation.” (Size Determination at 3-4, citing *Size Appeal of Global, A 1st Flagship Co.*, SBA No. SIZ-5462, at 12-13 (2013). The Area Office also determined that FCC's addresses in New York and Michigan “do not denote different entities. One is a mailing address, one a physical address, for the same firm.” (*Id.* at 4.)

The Area Office then calculated the combined average annual receipts for FCC and its affiliates, and found that they do not exceed the size standard. Accordingly, FCC is an eligible small business. (*Id.* at 4-5.)

D. MCS's Appeal

On December 4, 2014, MCS appealed the size determination. MCS argues that the Area Office “failed entirely to consider or address the principal allegation in MCS's size protest—*i.e.*, that FCC is ineligible for award because it is affiliated with [Finger Lakes] and a host of other interdependent concerns through a complex maze of corporate ownership, common management, identity of interest, and the totality of the circumstances.” (MCS Appeal at 1.) MCS urges that the size determination should be reversed.

MCS restates its protest allegation that Finger Lakes and FCC are affiliated through CCP. On this point, MCS argues that Finger Lakes owns 50% of CCP and therefore has the power to control based on ownership. (*Id.* at 15.) CCP and FCC are affiliated based on common ownership and management because, MCS argues, CCH has a controlling ownership interest in both firms and Mr. Cummiskey manages CCP and FCC. MCS also states that Mr. Cummiskey's longtime business associate, Ms. Elizabeth Watts-Gormley, is Vice President of FCC and CCH. (*Id.* at 15, n.16.) Mr. Cummiskey and Ms. Watts-Gormley also manage Americoast Maine and Tri-County. (*Id.* at 16.)

MCS then argues that FCC, Finger Lakes, CCP, CCH, Americoast Maine, and Tri-County are affiliated through identity of interest, 13 C.F.R. § 121.103(f), because these firms are in the same line of business and share resources, facilities, and phone numbers. MCS argues these firms are also affiliated based on the totality of the circumstances, 13 C.F.R. § 121.103(a)(5). (*Id.* at 17-18.)

E. B&B's Appeal

On December 12, 2014, B&B appealed the size determination.³ B&B argues that the size determination is flawed in several respects. First, although the Area Office determined that FCC is affiliated with FCC Bassett, it did not address whether FCC also is affiliated with First Community Care of Niagara, Inc.; First Community Care, LLC of Springfield, Illinois; First Community Care, LLC of Chillicothe, Illinois; and First Community Care, LLC of Westland, Michigan. (B&B Appeal at 2.) Had the Area Office included these firms' receipts in the size calculation, it may have determined that FCC exceeds the size standard. (*Id.* at 2-4.)

B&B contends that FCC is owned by CCH, and that there may be connections between CCH and the Illinois entities. Thus, the size determination “apparently failed to thoroughly investigate all possible affiliates of FCC.” (*Id.* at 3.)

B&B observes that the size determination is addressed to Mr. James Allison of FCC. B&B asserts that Mr. Allison is also a principal of Essential Home Health Care, Inc. and Bravo Home Health Care, Inc., two concerns that are not mentioned in the size determination. Accordingly, the Area Office should have explored whether FCC is affiliated with these firms, too. (*Id.* at 4-5.)

B&B references an “Avention One-Stop Report” for FCC, which B&B provided with its protest. The report identifies several RHI branches as “Rotech Medical Corp.” B&B urges that, on remand, the Area Office should determine whether any of these branches are affiliated with RMC and FCC. (*Id.* at 5-6.)

³ Because B&B and MCS challenge the same size determination, OHA consolidated the appeals.

F. MCS's Supplemental Appeal

On December 29, 2014, after reviewing the Area Office file under the terms of a protective order, MCS moved to supplement its appeal. MCS observed that the record had not yet closed, and noted that the other parties do not oppose this motion. For the reasons MCS cites, I find there is good cause to admit the supplemental appeal. *E.g.*, *Size Appeal of Harbor Servs, Inc.*, SBA No. SIZ-5576, at 5 (2014) (accepting timely supplemental appeal upon review of the area office file under a protective order). Accordingly, the motion is GRANTED and the supplemental appeal is ADMITTED.

MCS argues that the Area Office did not adequately examine whether FCC is affiliated with Finger Lakes. MCS notes that FCC's only response to this allegation was to claim that "RMC and its affiliates have no affiliation" with Finger Lakes or CCP. (MCS Supp. Appeal at 3, quoting SBA Form 355 Supp. at 1.) MCS argues that this response is conclusory and is contradicted by MCS's protest.

MCS contends that the SBA Form 355 contains an inconsistency that the Area Office should have investigated. In one place, FCC claimed it has "no affiliation" with CCP, but elsewhere identifies "Care For You Home Medical Equipment LLC (Community Care Partners)" as an acknowledged affiliate. (*Id.* at 5, citing SBA Form 355 Supp. at 1, 7.)

MCS takes issue with FCC's statement that "Mr. Cummiskey has had no ongoing connection or relationship with [CCH] or any of its affiliated entities since [[2012]." MCS argues to the contrary that Mr. Cummiskey is president of FCC entities in Indianapolis, Urban, and Chillicothe, and Americoast Maine, and these firms are subsidiaries of CCH and share resources with CCH. (*Id.*) MCS repeats the allegation that Mr. Cummiskey is the president and director of CCP, which MCS argues is jointly owned by Finger Lakes and CCH. Thus, MCS contends, the Area Office should have investigated "both the allegations *and* FCC's failure to address them." (*Id.* at 3, citing *Size Appeal of PRO SERVICES-Teltara Joint Venture, LLC*, SBA No. SIZ-5115, at 6 (2010) (emphasis in original).

MCS then charges that "the Area Office made virtually no effort to investigate the facts and ignored conflicting and ambiguous evidence regarding the identity, nature, and resources of the proposed awardee." (*Id.* at 6.) The Area Office concluded that FCC is based in Midland, Michigan, even though the CO identified the awardee's address in Amherst, New York. MCS argues that FCC's SBA Form 355 casts doubt on the Area Office's conclusion that FCC's physical address is in Michigan and its mailing address in New York, because FCC represented that it is "located in Erie [C]ounty." (*Id.* at 8, quoting SBA Form 355 at 1.) MCS explains that Amherst, New York is located in Erie County but Midland, Michigan is located in Midland County. MCS argues that because the Area Office failed to properly identify the apparent awardee, it necessarily could not determine all of its affiliates or perform an accurate size calculation. (*Id.* at 7-9.)

MCS emphasizes that Mr. Cummiskey has longstanding ties to Bassett Regional Corporation; his business partner for over 20 years, Ms. Watts-Gormley, is Vice President of CCH and FCC Bassett; and Bassett Healthcare Network is in the same line of business as FCC

and its affiliates. Given these facts, the Area Office should have investigated whether FCC is affiliated with firms in the Bassett Healthcare Network, other than FCC Bassett. (*Id.* at 10.)

MCS draws attention to discrepancies in the record regarding FCC's resources, too. FCC stated in its SBA Form 355 that it currently has 31 employees. (*Id.* at 11, citing Form 355, Q.10.a-b.) Elsewhere, “FCC stated that a ‘First Community Care, LLC’ entity” with the same Amherst, New York address has zero employees. (*Id.*, citing SBA Form 355 Supp. at 6.)

G. B&B's Supplemental Appeal

On December 30, 2014, upon reviewing the Area Office file under a protective order, B&B moved to supplement its appeal. B&B notes that the record has not yet closed and that MCS and FCC do not oppose the motion. (Motion at 1.) B&B's motion is therefore GRANTED and the supplement is ADMITTED.

Like MCS, B&B contends that FCC's Form 355 is inconsistent, particularly FCC's response to Question 16. The supplemental form states that Care For You Home Medical Equipment LLC (Community Care Partners) is not affiliated with RMC, but later states that CCP is a subsidiary of CCH for which Americoast Holdings provides billing and compliance services. (B&B Supp. Appeal at 2, citing SBA Form 355 Supp. at 1 and 7.) B&B argues that if CCP is a subsidiary of CCH, then CCP must be affiliated with FCC. (*Id.* at 3.)

B&B emphasizes that, according to FCC's Form 355, Mr. James Allison, the sole officer and director of RMC, and his wife own [***] of RMC's stock, but RMC has more than 100 shareholders. (*Id.*, citing Form 355 Supp. at 2, 4.) B&B argues the Area Office should have investigated the remaining stock to ascertain whether any of these shareholders has a controlling interest in RMC.

H. FCC's Response to Initial Appeals

On December 30, 2014, FCC responded to the appeals. FCC argues that the appeals should be denied because they are “based upon erroneous factual assertions that are wholly lacking in merit.” (FCC Response at 2.) Furthermore, according to FCC, Appellants rely upon “outdated and, in many cases, outright erroneous information to imply connections where none exist.” (*Id.* at 7.)

FCC states that, contrary to Appellants' suggestions, there are not several First Community Care entities affiliated with FCC. Rather, FCC is a single entity with multiple present and former locations, including Springfield, Illinois; Chillicothe, Illinois; Midland, Michigan; and Westland, Michigan, among others. (*Id.* at 8, 20.)

FCC then goes on to explain that its ultimate parent, RMC, previously owned 50% of CCP, and CCH used to employ Mr. Cummiskey. The other 50% of CCP was owned by an affiliate of Finger Lakes. In 2012, however, RMC's connections with CCP and Mr. Cummiskey were severed, Mr. Cummiskey's employment with CCH was terminated, and RMC transferred all of its ownership interest in CCP to Mr. Cummiskey in exchange for his minority interest in

CCH. (*Id.* at 5, 11.) “As a result of these transactions, neither Cummiskey nor CCP (and by extension, Finger Lakes and its other affiliated entities) were affiliated with RMC in any manner after 2012.” (*Id.* at 11.) FCC emphasizes that “[Mr.] Cummiskey does not currently (and did not as of the size determination date) have any ownership interest in, and is not employed by, any concern that is affiliated with FCC.” (*Id.* at 19.)

With regard to MCS's allegations, FCC maintains that the Area Office found that FCC is not affiliated with Finger Lakes when it stated that “FCC is affiliated with RMC (and its subsidiaries) and the other entities names above **only**.” (*Id.* at 15, citing Size Determination at 3, emphasis added by FCC.) FCC states that FCC submitted sufficient documentation to enable the Area Office to conclude that FCC has no affiliates other than RMC and its subsidiaries. Accordingly, FCC argues, it should not be penalized for the fact that the Area Office did not expressly state that FCC is not affiliated with Finger Lakes. (*Id.* at 16.)

FCC addresses the merits of MCS's contention that FCC is affiliated with Finger Lakes. According to FCC, MCS offers the following reasoning: FCC is associated with CCP, which is owned by Finger Lakes; Mr. Cummiskey manages these firms; and Ms. Watts-Gormley's connections to FCC and Mr. Cummiskey confirm this purported affiliation. This allegation falls apart, FCC maintains, because although Mr. Cummiskey is president of CCP, he no longer works for, or has an interest in, any concern that is affiliated with FCC. At best, then, MCS can establish only that CCP and Mr. Cummiskey are former affiliates of FCC. (*Id.* at 18-19.) “Simply put, RMC cut ties with CCP and Cummiskey in 2012, and each has been merely a ‘former affiliate’ of FCC since that date.” (*Id.* at 19.)

As for Ms. Watts-Gormley, FCC asserts that she was a long-time officer and employee of FCC and CCH until retiring in November 2013. Since then, she has served as a consultant for FCC. FCC insists that “Ms. Watts-Gormley has never in the past been, and is not now, affiliated with Finger Lakes.” (*Id.* at 12.) Further, as part of her consulting arrangement, she is bound by a non-compete agreement that precludes her from working with any of FCC's competitors. (*Id.* at 7, 12, 21.) She has no connections to CCP or Finger Lakes, and her noncompete agreement precludes her from having any. (*Id.*)

FCC also addresses MCS's contention that FCC, Finger Lakes, CCP, CCH, and Americoast Maine share office space, addresses, telephone numbers, and management. FCC argues that there is no common management because Mr. Cummiskey no longer works for FCC or its affiliates. The fact that FCC and CCH share a mailing address, FCC argues, does not demonstrate error in the size determination because FCC acknowledged affiliation with CCH. (*Id.* at 19-20.) Conversely, Finger Lakes and CCP “are not affiliated with RMC in any respect and do not share addresses or resources with FCC.” (*Id.* at 20.)

FCC then turns to B&B's appeal. FCC argues that the record contradicts B&B's contention that the Area Office did not address the allegations in B&B's protest. The record demonstrates that FCC is a single entity with locations in Springfield, Illinois; Chillicothe, Illinois; Midland, Michigan; and Westland, Michigan. FCC Bassett is an affiliate, but as the Form 355 makes plain, “First Community Care of Niagara is wholly unaffiliated with FCC or with RMC or its subsidiaries.” (*Id.* at 23.) FCC argues that the Area Office correctly found no

merit to B&B's protest allegations, which were based primarily on similarity of names. (*Id.*, citing Size Determination at 3-4, n.6.)

Next, FCC addresses B&B's contention that, in addition to his role at FCC, Mr. Allison is also a principal of Essential Home Health Care, Inc. and Bravo Home Health Care, Inc. FCC points out that B&B raises this issue for the first time on appeal. Because OHA “will not decide substantive issues for the first time on appeal,” FCC argues, OHA must dismiss this argument. (*Id.* at 24, quoting 13 C.F.R § 134.316(c).) In any event, the charge is meritless because these two companies are “shell entities” leftover from the bankruptcy reorganization; they “have no revenues whatsoever, and have not operated in over a decade.” (*Id.* at 25.)

According to FCC, B&B likewise is raising for the first time on appeal the allegation that FCC is affiliated with entities with the name “Rotech.” In addition to being procedurally improper, this argument fails because the Area Office thoroughly considered FCC's relationship with RHI, RMC, and RCorp. (*Id.* at 26, citing Size Determination at 2-3.) FCC argues that B&B offers no evidence to contradict these findings.

I. FCC's Response to Supplemental Appeals

On January 16, 2015, OHA requested that FCC respond to the supplemental appeals. Specifically, OHA asked that FCC address the alleged inconsistency identified by Appellants in FCC's response to Question 16 of the SBA Form 355.

On January 27, 2015, FCC responded to the supplemental appeals. FCC argues the supplemental appeals assert baseless claims that do not show clear error in the size determination. Further, the sworn statements in FCC's SBA Form 355 should be afforded greater evidentiary weight than Appellants' unsupported allegations. (Supp. Response at 4-5.)

Addressing whether CCP is an acknowledged affiliate, FCC allows that its response to Question 16 “may have been inartfully worded.” (*Id.* at 5.) Question 16 asked, “have any services been performed by any business for any alleged, acknowledged or possible affiliate or vice versa?” In response, FCC stated “Yes with regard to acknowledged affiliates - Americoast Holdings provides certain billing and compliance services for other CCH subsidiaries, FCC Bassett and Care For You Home Medical Equipment LLC (Community Care Partners).” (*Id.*, quoting Form 355 Supp. at 7.) FCC argues that this statement contained a typographical error. Instead, the response should have begun with the phrase: “with regard to *alleged and to* acknowledged affiliates.” (*Id.* at 6, emphasis added by FCC.) Nevertheless, in FCC's view, this error did not create ambiguity because FCC's acknowledged affiliates are fully disclosed in narrative and chart form in the supplemental pages, as well as graphically in the corporate organization chart. (*Id.*) It therefore is evident from the document as a whole that FCC does not admit affiliation with CCP.

FCC contends that CCP is not a subsidiary of FCC, and that B&B's contrary conclusion does not follow from the Form 355. Further, FCC maintains, B&B's argument that the Area Office should have determined the identity of all of RMC's stockholders contravenes the

instructions in the SBA Form 355, whereby FCC was directed only to list those shareholders with a 10 percent or greater interest. (*Id.* at 6-7.)

J. MCS's Motion to Reply

On January 29, 2015, after the close of record, MCS moved to reply in support of its supplemental appeal. MCS argues that FCC's response to the supplemental appeals "is not supported by any contemporaneous evidence and consists entirely of arguments that are unresponsive to both the allegations in MCS's Supplemental Pleading and OHA's Order." (Motion at 1.) MCS argues there is good cause to admit the reply because it clarifies relevant issues and does not enlarge or unduly delay the decision. FCC opposes the motion.

K. New Evidence

Accompanying its initial appeal, MCS moved to introduce new evidence. Specifically, MCS seeks to admit 22 exhibits. This evidence consists of (1) the October 24, 2014 notification that FCC was the apparent awardee; (2) MCS's protest; (3) letters dated November 5, 2014 from the CO to MCS; (4) a letter from the Area Office to FCC notifying FCC of the size protests; (5) an email dated November 6, 2014 from the CO to MCS; (6) Size Determination Nos. 04- 2015-011, -012, -013, -014, and -015; (7) letter from MCS's President to the CO dated November 7, 2014; (8) Email of November 28, 2014 from MCS to the CO; (9) Email of December 1, 2014 from the CO to the MCS; (10) National Plan & Provider Enumeration System (NPPES) search results for FCC; (11) Hoover's Quick Report for CCH; (12) LinkedIn profile of Mr. Cummiskey; (13) Mr. Cummiskey's resume; (14) NPPES search results for Americoast Springfield LLC; (15) Hoover's Quick Report for Americoast LLC; (16) NPPES search results on Americoast Maine; (17) Hoover's Quick Report on Americoast Maine and Tri-County; (18) NPPES search results on CCP; (19) Information from Finger Lakes' website; (20) Tax Form 990 for Soldiers and Sailors Memorial Hospital of Yates County and Combined Financial Statements for Finger Lakes for 2012; (21) Information from CCP's website; and (22) Finger Lakes' 2010 Report to the Community.

MCS argues there is good cause to admit this evidence because MCS could not have anticipated that the Area Office would "ignore its principal argument" that FCC is affiliated with Finger Lakes and other concerns. (MCS Appeal at 3.) Had MCS known, it would have presented additional evidence to demonstrate the ties between these firms. MCS argues further that this evidence does not enlarge the issues and clarifies pertinent facts on appeal. (*Id.*, citing *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).) FCC did not oppose this motion.

B&B also attached several exhibits to its appeal. This information, however, is already in the record.

In its response to the initial appeals, FCC moved to introduce six documents as new evidence. The evidence consists of (1) Employment Agreement Termination Letter from CCH to Mr. Cummiskey dated April 18, 2012; (2) Transfer of Membership Interest in CCP by RMC to Mr. Cummiskey dated April 6, 2012; (3) Securities Purchase Agreement dated February 15,

2012; (4) Consulting Agreement between FCC and Ms. Watts-Gormley dated November 1, 2013; (5) Management Services Agreement between Americoast and CCP dated April 6, 2012; and (6) Agreement between Mr. Cummiskey and CCH dated August 1, 2012. FCC argues there is good cause to admit this evidence because Appellants raise new arguments and present new evidence in their appeals. FCC argues it is entitled to offer documentary proof to refute these arguments and evidence. (Response at 4.)

MCS opposes FCC's motion, and B&B concurs with this opposition. MCS argues there is not good cause to admit the proffered documents because they are not new or newly discovered. These documents, MCS argues, were available to FCC during the course of the size investigation, but FCC did not submit them to the Area Office despite knowing that its relationship with Finger Lakes and Mr. Cummiskey were at issue. (MCS Opposition at 2.) MCS contends further that FCC's belated attempt to introduce this evidence only bolsters MCS's claim that the Area Office did not adequately consider FCC's relationship with Finger Lakes. (*Id.* at 3.)

On January 12, 2015, FCC responded to MCS's opposition. FCC argues that it is absurd to argue that FCC should have submitted this evidence earlier because it is necessary only to combat “the litany of *new* arguments, *new* evidence, and *new* factual allegations that were raised for the first time in Appellants' respective appeals.” (Response to MCS Opposition at 3, emphasis in original.) MCS's appeal, FCC argues, relies on purported connections between Mr. Cummiskey and Ms. Watts-Gormley, a theory absent from the protest. The section entitled “Factual Background” makes many incorrect statements about the corporate structure and management of FCC and its affiliates, which also were absent from the protest. FCC argues it should not be penalized for its inability to predict undisclosed future arguments. (*Id.* at 5-6, citing *Size Appeal of Strata-G Solutions*, SBA No. SIZ-5563, at 4 (2014).)

On January 20, 2015, MCS notified OHA that CCP's website is no longer accessible, and included a screen shot. MCS argues that information on this website was directly probative of whether CCP is an affiliate of FCC, so its inaccessibility raises spoliation issues.

L. Motion for Sanctions

In its response to MCS's opposition to FCC's new evidence, FCC argues that OHA should sanction MCS and B&B under 13 C.F.R. § 134.219 for “attempt[ing] to circumvent OHA's Rules by asserting new arguments in Reply to FCC's Response.” (Response to MCS Opposition at 7.) Specifically, FCC requests that OHA strike their opposition pleadings. (*Id.* at 8.)

B&B argues the request for sanctions is meritless, because “[i]t is all but impossible to argue the question of the relevance and admissibility of proposed new evidence without touching upon the substance of the underlying litigation and addressing the core question whether the proposed new evidence will either further illuminate, or further cloud, the factual record.” (B&B Opposition to Sanctions, at 3.)

MCS also opposes the request for sanctions. MCS argues that the statements FCC objects to “go directly to whether ‘good cause exists’ to consider the documents for the first time on appeal.” (MCS Opposition to Sanctions, at 2.)

III. Discussion

A. Standard of Review

Appellants have the burden of proving, by a preponderance of the evidence, all elements of the appeals. Specifically, Appellants must prove the size determination is based upon a clear error of fact or law. 13 C.F.R. § 134.314. OHA will disturb an area office's size determination only if, after reviewing the record, the administrative judge has a definite and firm conviction that the area office erred in making its key findings of fact or law. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 11 (2006).

B. Preliminary Matters

1. New Evidence

OHA's review is based upon the evidence in the record at the time the Area Office made its determination. *Size Appeal of Taylor Consultants, Inc.*, SBA No. SIZ-4775, at 10-11 (2006). As a result, evidence that was not previously presented to the Area Office is generally not admissible and will not be considered by OHA. *E.g.*, *Size Appeal of Maximum Demolition, Inc.*, SBA No. SIZ-5073, at 2 (2009) (“I cannot find error with the Area Office based on documents the Area Office was unable to review.”). New evidence may be admitted on appeal at the discretion of the administrative judge if “[a] motion is filed and served establishing good cause for the submission of such evidence.” 13 C.F.R. § 134.308(a). The proponent must demonstrate, however, that “the new evidence is relevant to the issues on appeal, does not unduly enlarge the issues, and clarifies the facts on the issues on appeal.” *Size Appeal of Vista Eng'g Techs., LLC*, SBA No. SIZ-5041, at 4 (2009).

All parties in this case seek to admit new evidence into the record. I will address each party's submissions in turn. Some of the material MCS seeks to admit is already in the record (Attachments 1, 2, 4, and 6) and therefore is not new evidence. *Size Appeal of Radant MEMS, Inc.*, SBA No. SIZ-5600, at 6 (2014). Other evidence bears on MCS's enunciation of its protest grounds to the CO and deals specifically with the clarity of MCS's allegation that FCC is affiliated with Finger Lakes (Attachments 3, 5 and 7). This evidence is relevant and clarifies the facts and issues on appeal, as MCS argues that the Area Office disregarded its allegation that FCC is affiliated with Finger Lakes. Moreover, MCS could reasonably not submit these documents earlier in the process because MCS had not yet received the size determination, which did not specifically address whether FCC is affiliated with Finger Lakes. *See Size Appeal of Strata-G Solutions, Inc.*, SBA No. SIZ-5563, at 5 (2014) (admitting evidence probative of an issue unknown to the proponent before receiving the size determination). Attachments 8 and 9, however, do not clarify issues on appeal because they show only that MCS planned to appeal the size determination, a fact that is not at issue. The remaining documents (Attachments 10-22) are submitted for the purpose of showing that FCC is affiliated with the firms alleged in the protest. Unlike the documents addressing the clarity of MCS's allegation that FCC is affiliated with Finger Lakes, there is not a compelling justification for why MCS could not have submitted these earlier in the process. These documents relate directly to the protest grounds, and MCS has

not persuasively shown that it could not have submitted the new evidence to the Area Office with the protest. OHA has long held that it “will not accept new evidence when the proponent unjustifiably fails to submit the material to the Area Office during the size review.” *Size Appeal of Project Enhancement Corp.*, SBA No. SIZ-5604, at 9 (2014). Accordingly, Attachments 1-7 are ADMITTED and Attachments 8-22 are EXCLUDED.

I find good cause to admit the evidence submitted by FCC because the evidence responds specifically to arguments made on appeal that were absent from the protests. *Size Appeal of VMX Int'l, LLC*, SBA No. SIZ-5427, at 6 (2012) (admitting evidence relevant to new questions raised for the first time on appeal.) The evidence, then, is relevant, clarifies issues on appeal, and could not have been submitted earlier in the process. FCC's motion is therefore GRANTED and the six proffered documents are ADMITTED into the record.

As noted in Section II.K above, B&B seeks to introduce material that is already included in the record. Accordingly, these documents are not new evidence.

2. Sanctions

FCC's motion to strike MCS's opposition to FCC's new evidence is DENIED. SBA regulations provide that an OHA judge “may impose appropriate sanctions, except for fees, costs, or monetary penalties, which he or she deems necessary to serve the ends of justice” if a party or its attorney fails to comply with OHA's rules or orders, submits false information, or otherwise acts unethically or in bad faith. 13 C.F.R. § 134.219. Potential sanctions include the striking of a pleading. *Id.* FCC argues that MCS's opposition to its motion to submit new evidence is actually a reply that OHA did not direct, so MCS violated the rule prohibiting replies unless authorized by OHA. I find that MCS's opposition does not warrant the application of sanctions under 13 C.F.R. § 134.219. Although the opposition contains argument that is wider in scope than that presented by FCC in favor of admitting its proffered evidence, the arguments relate to the evidence presented. Accordingly, I decline to strike MCS's filing.

3. Reply

MCS's motion to reply is DENIED. In OHA practice, a reply to a response is not ordinarily permitted, unless the judge directs otherwise. 13 C.F.R. § 134.309(d). Further, OHA does not entertain evidence or argument filed after the close of record. *Id.* § 134.225(b). Here, OHA did not direct MCS to file a reply, and the reply was filed after the close of record. Accordingly, the reply is EXCLUDED from the record. *E.g., Size Appeal of Profl Security Corp.*, SBA No. SIZ-5548, at 7 (2014).

C. Analysis

Appellants have not demonstrated clear error in the size determination, and have not established that FCC is affiliated with Finger Lakes or CCP. The appeals therefore are denied.

MCS's appeal points to connections between FCC and CCH, Americoast Maine, and Tri-County. These arguments are misplaced, however, because the Area Office already determined

that FCC is affiliated with these firms, and FCC concedes that it is affiliated with these firms. Section II.C, *supra*. Thus, FCC's relationships with CCH, Americoast Maine, and Tri-County are not at issue in this case.

The argument that FCC is affiliated with other entities using the name “First Community Care” lacks support. The Area Office found no such affiliation, with the exception of FCC Bassett and other locations of FCC itself. Appellants offer no evidence to contradict these findings. Further, as the Area Office recognized, “[t]he fact that two companies have similar names ‘is no indicia of affiliation, as many firms may have similar names.’” *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462, at 12 (2013) (quoting *Size Appeal of McLendon Acres, Inc.*, SBA No. SIZ-5222, at 7 (2011)).

FCC persuasively refutes MCS's contention that Finger Lakes is affiliated with FCC through CCP. Although the record indicates that FCC and CCP previously were affiliated through common ownership and possibly common management, this is no longer the case. FCC presents sufficient evidence demonstrating that all such ties terminated in 2012—two years prior to the date for determining size—when FCC's parent, RMC, transferred its ownership interest in CCP to Mr. Cummiskey and terminated his employment at CCH. SBA regulations make clear that a concern's former affiliates are excluded from the size determination “if affiliation ceased before the date used for determining size.” *See* 13 C.F.R. §§ 121.104(d)(4) and 121.106(b)(4)(ii). Similarly, OHA has repeatedly held that historic ties between a challenged firm and an alleged affiliate do not establish current affiliation when the historic ties no longer exist as of the date to determine size. *Size Appeal of MCH Corp.*, SBA No. SIZ-5622, at 8 (2014), *recons. denied*, SBA No. SIZ-5635 (2015) (PFR); *Size Appeals of Real Estate Resource Services, Inc., et al.*, SBA No. SIZ-5522, at 8-9 (2013). MCS's repeated contentions that FCC remains affiliated with CCP and Finger Lakes are unsupported and thus unpersuasive.

Similarly, I find no merit to the charge that the Area Office disregarded the protest allegation that FCC is affiliated with Finger Lakes through CCP and Mr. Cummiskey. FCC addressed this issue in its response to the protests, denying any affiliation with Finger Lakes or CCP, and explaining that Mr. Cummiskey no longer has any connection with FCC and its affiliates. Section II.B, *supra*. By regulation, the sworn statements in FCC's SBA Form 355 are afforded greater evidentiary weight than a protester's unsupported allegations. 13 C.F.R. § 121.1009(d). Accordingly, there was sufficient information in the record for the Area Office to conclude that FCC is not affiliated with Finger Lakes or CCP. While it is true that the Area Office did not specifically discuss this issue in the size determination, OHA has held that “[t]he mere fact that the Area Office did not specifically comment on [a] protest allegation does not establish that the Area Office committed any error.” *Real Estate Resource Services*, SBA No. SIZ-5522, at 10; *see also Size Appeal of iGov Technologies, Inc.*, SBA No. SIZ-5359, at 13-14 (2012) (area office's failure to comprehensively discuss all available documents did not constitute reversible error).

MCS also contends that FCC is affiliated with CCP and Finger Lakes through Ms. Watts-Gormley. The record demonstrates, however, that although Ms. Watts-Gormley used to be an officer of FCC and CCH, she retired in November 2013, well before the date for determining size, and now works exclusively for FCC as a consultant. Whether she and Mr. Cummiskey are

former business associates is not relevant to whether FCC, CCP, and Fingers Lakes are currently affiliated.

MCS mistakes the law in arguing that FCC is affiliated with Finger Lakes and CCP based on identity of interest because it shares resources with them. The applicable regulation states:

Affiliation may arise among two or more persons with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests (such as family members, individuals or firms with common investments, or firms that are economically dependent through contractual or other relationships) may be treated as one party with such interests aggregated. Where SBA determines that such interests should be aggregated, an individual or firm may rebut that determination by showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). OHA has interpreted this regulation as creating a rebuttable presumption that family members, entities with common investments, and economically dependent firms are affiliated. Here, the Area Office properly did not apply the presumption because there was no evidence of economic dependence or firms being owned by family members or common investors.

MCS's allegations do not establish affiliation based on the totality of the circumstances, either. 13 C.F.R. § 121.103(a)(5). Under this regulation, SBA may find businesses affiliated where the interactions between them are so suggestive of reliance as to render the businesses affiliates.” OHA has repeatedly held, though, that “[a]s in all affiliation analysis, the touchstone issue is control. A connection between two concerns does not necessarily cause affiliation. There must be an element of control present.” *Size Appeal of Carwell Prods., Inc.*, SBA No. SIZ-5507, at 11 (2013). Stated differently, in order to find affiliation through the totality of the circumstances, “an area office must find facts and explain why those facts caused it to determine one concern had the power to control the other.” *Size Appeal of Faison Office Products, LLC*, SBA No. SIZ-4834, at 11 (2007). Here, there is no evidence that Finger Lakes and CCP have the ability to control FCC, or *vice versa*. As discussed above, the ties between FCC and the other companies ended in 2012, years before the date for determining size. Accordingly, MCS has not demonstrated affiliation under the totality of the circumstances.

B&B's arguments that FCC is affiliated with Essential Home Health Care, Inc., Bravo Home Health Care, Inc., and entities with the name “Rotech” are procedurally improper because these issues were not included in the protest and were not before the Area Office. Pursuant to 13 C.F.R § 134.316(c), OHA “will not decide substantive issues raised for the first time on appeal.” *See also Size Appeal of Fuel Cell Energy, Inc.*, SBA No. SIZ-5330, at 5 (2012).

I find no merit in Appellants' contentions that there are meaningful inconsistencies in the Form 355 with respect to FCC's employee count and the affiliation status of CCP. The size standard for the instant procurement is measured in dollars, not employees, so to the extent the discrepancy in employee count is not simply a typographical mistake, it is harmless error. *E.g.*, *Size Appeal of WG Pitts Co.*, SBA No. SIZ-5575, at 7, n.4 (2014) (finding an area office's

mistake immaterial to the decision and therefore harmless error). Similarly, I find FCC's response to Question 16 in the Form 355, "Yes with regard to acknowledged affiliates" incomplete. Reading this statement in context of the entire document, it is clear that FCC did not intend to acknowledge affiliation with CCP. *E.g., Matter of Reese Servs, Inc.*, SBA No. VET-231, at 8 (2013) (using the document's context to determine an erroneous statement was a typographical error). For instance, FCC gives information on its acknowledged affiliates in its response to Question 13.a, and CCP is not among those companies.

B&B's argument that CCP is a subsidiary of CCH, and therefore affiliated with FCC, is wrong for two reasons. First, the record is clear that CCP is not a subsidiary of CCH. Second, this conclusion does not follow from a fair reading of FCC's response to Question 16, which stated: "Americoast Holdings provides certain billing and compliance services for other CCH subsidiaries, FCC Bassett and Care For You Home Medical Equipment LLC (Community Care Partners)." B&B reads the comma following subsidiaries as setting off an appositive. Such a reading, though, is not reasonable because FCC Bassett also is not a subsidiary of CCH.

Lastly, I find that the Area Office had no duty to determine the identity of all of RMC's stockholders. The Area Office found RMC's stock is widely held, so no stockholder has the ability to control RMC based on stock ownership. *See* 13 C.F.R. § 121.103(c)(3).

IV. Conclusion

Appellants have not demonstrated reversible error in the size determination. Accordingly, the appeals are DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge