United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: Native Energy & Technology, Inc., Appellant, RE: Brown Point Facility Management Solutions, LLC Appealed From Size Determination No. 1-SD-2017-35	SBA No. SIZ-5858 Decided: October 4, 2017

APPEARANCES

John C. Dulske, Esq., Bryan L. Kost, Esq., Dykema Cox Smith, San Antonio, Texas, and Joan Kelley Fowler Gluys, Esq., San Antonio, Texas, for Appellant

Daniel P. Meyer, Esq., Christian R. Jenner, Esq., Duffy & Sweeney, LTD, Providence, Rhode Island, for Brown Point Management Solutions, LLC.

DECISION[1]

I. Introduction and Jurisdiction

On June 22, 2017, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area I (Area Office) issued Size Determination No. 1-SD-2017-35, finding that Brown Point Facility Management Solutions, LLC (Brown Point) is a small business under the size standard associated with the subject procurement. Native Energy & Technology, Inc. (Appellant), which had previously protested Brown Point's size, maintains that the size determination is clearly erroneous and requests that SBA's Office of Hearings and Appeals (OHA) reverse. For the reasons discussed *infra*, the appeal is denied and the size determination is affirmed.

[1] This decision was originally 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. No redactions were requested, and OHA now publishes the decision in full.

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. Appellant filed the appeal within fifteen days of receiving the size determination, so the appeal is timely.[2] Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On January 5, 2017, the U.S. Department of Homeland Security, U.S. Customs and Boarder Protection, issued Request for Proposals (RFP) No. HSBP1017R94741 for facility maintenance services. The Contracting Officer (CO) set aside the procurement entirely for small businesses, and assigned North American Industry Classification System (NAICS) code 561210, Facilities Support Services, with a corresponding size standard of $38.5 million average annual receipts. Brown Point submitted its proposal on February 15, 2017, self-certifying as a small business.

On May 3, 2017, the CO announced that Brown Point was the apparent awardee. Appellant, an unsuccessful offeror, timely protested Brown Point's size. The protest alleged that Brown Point is affiliated with Miner Fleet Management Group, LLC (Miner Fleet) and its affiliates based upon identity of interest, common management, stock ownership, the ostensible subcontractor rule, the newly organized concern rule, and the totality of the circumstances. The CO forwarded Appellant's protest to the Area Office for review.

B. Size Determination

On June 22, 2017, the Area Office issued Size Determination No. 1-SD-2017-35, concluding that Brown Point is a small business.

The Area Office explained that Brown Point was founded on November 15, 2016. Patricia M. Riendeau is President of Brown Point and owns 51% of the company; her son, Christopher P. Riendeau, is Chief Executive Officer of Brown Point and owns the remaining 49%. (Size Determination at 3.) At the time Brown Point was founded, Christopher Riendeau was director of the Government Services division of National Glass & Gate Service, Inc.

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[2] Appellant initially filed this appeal on July 7, 2017. The original appeal petition, though, was 31 pages in length, exceeding OHA's 20-page limit set forth at 13 C.F.R. § 134.203(d)(2). OHA directed Appellant either to submit a compliant appeal petition or to file a motion demonstrating good cause to exceed the page limit. On July 14, 2017, Appellant submitted an amended appeal petition that was 20 pages in length. Brown Point then moved to dismiss the appeal as untimely, contending that Appellant did not file a proper appeal petition within 15 days after receiving the size determination. OHA denied that motion in an Order dated August 4, 2017, explaining that, in *Size Appeal of Lukos-VATC JV, LLC*, SBA No. SIZ-5532, at 3 n. 4 (2014), OHA rejected a 31-page appeal petition as "impermissibly long" but later accepted a revised 20-page version notwithstanding that the revised petition was filed more than 15 days after receipt of the size determination.

(NG&G). (*Id.* at 10.) NG&G was 51% owned by Charles J. Vachon, and 49% owned by Alan P. Riendeau, husband of Patricia Riendeau and father of Christopher Riendeau. The Area Office found that Mr. Vachon controlled NG&G by virtue of his majority ownership interest. (*Id.* at 3.) Mr. Vachon is not related to any member of the Riendeau family. (*Id.*)

On November 17, 2016, two days after Brown Point was established, NG&G entered into an asset purchase agreement with Miner Fleet. Under this agreement, Miner Fleet acquired most of the assets of NG&G, except NG&G's Government Services division. (*Id.* at 3, 6.) The surviving portion of NG&G, consisting of the Government Services division and related assets and personnel, then changed its name to Lincoln Government Service, Inc. (LGS). (*Id.*) Christopher Riendeau became director of the Government Services division at LGS. (*Id.* at 8.) Alan Riendeau accepted full-time employment as General Manager, NG&G Facility Services for Miner Fleet, and held no position at LGS. (*Id.* at 3-4, 8.)

The Area Office found that NG&G's Government Services division, which became LGS, comprised "approximately 10% or less" of NG&G's assets before the asset sale. (*Id.* at 6.) Because the large majority of NG&G's assets were acquired by Miner Fleet, "Miner Fleet is determined to be the successor-in-interest of NG&G for size determination purposes." (*Id.*) The Area Office noted that Brown Point subsequently acquired LGS in June 2017. Although the merger was finalized well after the date to determine size, the Area Office found that Brown Point and LGS had reached an agreement in principle to merge several months earlier. Therefore, under SBA's "present effect rule", 13 C.F.R. § 121.103(d), the merger was deemed to have been in effect on February 15, 2017, the date to determine size, and LGS's receipts must be included in computing Brown Point's size. (*Id.* at 7.)

With regard to the protest allegation of affiliation through common management, the Area Office found that, as of February 15, 2017, neither Patricia Riendeau nor Christopher Riendeau was an officer, director, managing member, or partner of Miner Fleet or its affiliates. Alan Riendeau was General Manager of NG&G Facility Services for Miner Fleet, but he had no position with Brown Point or LGS, and his minority ownership interest in LGS did not enable him to control LGS. (*Id.* at 8.) In addition, Alan Riendeau was not an officer, director, managing member, or partner of Miner Fleet itself. (*Id.*) Therefore, the Area Office reasoned, Brown Point is not affiliated with Miner Point or its affiliates based on common management.

The Area Office presumed an identity of interest between Patricia Riendeau, Alan Riendeau, and Christopher Riendeau due to their close family relationships. (*Id.* at 8.) Other than Brown Point and LGS, though, the Riendeau family members did not control any additional concerns as of February 15, 2017. (*Id.* at 9-10.) The Area Office noted that, in March 2017, Patricia Riendeau, Alan Riendeau, and Christopher Riendeau established a new company known as 614 GWH, LLC. (*Id.* at 3, 9.) Because this company did not exist as of the date to determine size, it did not affect the size determination. (*Id.* at 9.)

The Area Office found that the newly organized concern rule, 13 C.F.R. § 121.103(g), is not applicable here. Brown Point is a relatively new concern, but it has not received contracts, bonding support, or other financial or technical assistance from Miner Fleet or its affiliates. (*Id.* at 10.) Further, the owners and founders of Brown Point — Patricia Riendeau and

Christopher Riendeau — "have never been former officers, principal stockholders, managing members or key employees" of Miner Fleet or its affiliates. (*Id.*)

The Area Office concluded that the ostensible subcontractor rule is "not an issue" because Brown Point will manage the instant contract and will self-perform a majority of the primary and vital contract requirements. (*Id.* at 11.) Lastly, the Area Office stated that it "cannot conclude that Brown Point, or the two family members that control Brown Point, have the power to control Miner Fleet or its affiliates [] or *vice versa*." (*Id.* at 12.) As a result, Brown Point is not affiliated with Miner Fleet under the totality of the circumstances.

The Area Office found that the combined average annual receipts of Brown Point and LGS do not exceed the size standard. Therefore, Brown Point is a small business.

C. Appeal

On July 7, 2017, Appellant appealed the size determination to OHA.[3] Appellant maintains that the Area Office committed four major errors in its review. Therefore, the size determination should be reversed.

Appellant first argues that the Area Office did not properly apply the successor-in-interest rule, 13 C.F.R. § 121.105(c). Appellant highlights that the Area Office considered both Brown Point and Miner Fleet successors-in-interest to various portions of NG&G. Under these circumstances, Appellant maintains, the successor-in-interest rule "requires that the annual receipts of all three entities be taken into account when determining Brown Point's size." (Appeal at 4.) The Area Office, though, only considered the receipts of Brown Point and LGS in calculating Brown Point's size. Appellant predicts that Brown Point "would have most assuredly exceeded the size standard" if the Area Office had included the receipts of Miner Fleet and its affiliates. (*Id.* at 5.)

Second, the Area Office erred in finding that Brown Point had no additional affiliates through common management. Appellant observes that, as of the date to determine size, Christopher Riendeau held managerial positions at both Brown Point and LGS, and Brown Point controlled LGS through application of the "present effect" rule. Because the majority of NG&G's assets had already been acquired by Miner Fleet, LGS was the surviving portion of NG&G. "Thus, Christopher Riendeau was the director over the only tangible items of value in NG&G/LGS at that time: the 'government clients and contracts' and its employees." (*Id.* at 6-7.) Appellant argues that the Area Office's analysis should have considered NG&G as a whole, not merely the portion of NG&G that became LGS.

Third, Appellant takes issue with the Area Office's findings pertaining to identity of interest. The Area Office found that Alan Riendeau and Patricia Riendeau are husband and wife, and that they are the parents of Christopher Riendeau. Therefore, these individuals share an identity of interest. There can be no clear line of fracture between them, due to their common

[3] As noted above, Appellant amended its initial appeal petition to comply with OHA's page limitation requirement. Citations are to the amended appeal petition filed July 14, 2017.

associations with Brown Point, NG&G, and LGS. In Appellant's view, "the Area Office committed a clear error of law by failing to find identity of interest among Alan, Patricia and Christopher to include the companies they control (Brown Point, NG&G/LGS, Miner Fleet/NG&G and its parents)". (*Id.* at 8-9.)

Fourth, the Area Office erred in its examination of the newly organized concern rule. Christopher Riendeau, a former key employee of NG&G, established Brown Point, a new company operating in the same or a related field of operations. Appellant disputes the notion that Brown Point does not receive subcontracts or assistance from Miner Fleet. According to Appellant, as a result of Brown Point's acquisition of LGS, NG&G's former government contracts were to be novated to Brown Point. However, "[n]othing in the record shows that the government agreed to the proposed novation or that the proper novation documents were executed." (*Id.* at 16.) Absent proof of novation, "NG&G/LGS remains the prime contractor with Brown Point presumably a subcontractor." (*Id.* at 17.)

D. Supplemental Appeal

On July 25, 2017, after reviewing the record under the terms of a protective order, Appellant moved to supplement its appeal. Appellant renews its contention that the Area Office should have found Brown Point and "NG&G/LGS" affiliated based on common management. (Supp. Appeal, at 3.) According to Appellant, the record clearly establishes that Christopher Riendeau "***is/was responsible for overseeing*** day-to-day operations and ***overall business strategy*** of [LGS]." (*Id.* at 4, emphasis Appellant's.) Appellant asserts that Brown Point conceded that "Christopher is a key employee of both NG&G/LGS and [Brown Point]" because Brown Point identified him as a key employee in its proposal. (*Id.*)

Appellant asserts that the record also contradicts the Area Office's findings related to identity of interest. (*Id.*, at 5.) Appellant maintains that the letter of intent/term sheet pertaining to Brown Point's acquisition of LGS "divests Charles [Vachon] of his 51% ownership in NG&G/LGS or all the assets of the government business division," thereby ceding control to Alan Riendeau. (*Id.* at 6, 7.) Moreover, in acquiring most of the assets of NG&G, Miner Fleet did not preclude Alan Riendeau and LGS from "providing Government Services," and Brown Point's SBA Form 355 identified Alan Riendeau as LGS's Chief Operating Officer. (*Id.* at 6.) Thus, Appellant reasons, Alan Riendeau had "the power to control NG&G/LGS through his 49% ownership and his position as COO." (*Id.* at 7-8.)

Appellant argues that the Area Office incorrectly found that Alan Riendeau has no role in Brown Point. (*Id.* at 7.) According to Appellant, "Alan [Riendeau] on behalf of himself '***individually***' and/or on behalf of [Brown Point] proposed to purchase either Charles [Vachon's] 51% ownership interest in NG&G or all of its 'Government Assets,"' denoting that Alan Riendeau had agency authority to bind Brown Point into a purchase agreement. (*Id.*, emphasis Appellant's.)

Appellant next contends that Brown Point failed to rebut the presumption of familial identity of interest "because all three Riendeaus continue to conduct business with one another before, at and after the date of certification." (*Id.* at 8.) Based on the absence of any clear line of

fracture and the present effect given to Brown Point's acquisition of LGS, Appellant asserts that Patricia Riendeau and Christopher Riendeau "in substance own and control NG&G/LGS together with Alan [Riendeau] who still owns minimally 49% of NG&G/LGS." (*Id.*)

Appellant also reiterates its claim that Brown Point should have been found affiliated "with both NG&G/LGS and Miner Fleet/NG&G under the newly-organized concern rule." (*Id.* at 9.) Appellant highlights that there is no evidence that NG&G's former government contracts have been novated to Brown Point. (*Id.* at 10.)

E. Brown Point's Response

On August 14, 2017, Brown Point responded to the appeal and the supplemental appeal. Brown Point maintains that Appellant's arguments lack merit and should be denied. (Response, at 4.)

Brown Point asserts that the bulk of Appellant's contentions are based on the incorrect premise that both Brown Point and Miner Fleet are successors-in-interest to the entirety of NG&G. (*Id.* at 3.) The Area Office, though, made no such finding, and on the contrary determined that Brown Point is the successor-in-interest of LGS whereas Miner Fleet is the successor-in-interest of NG&G and particularly of NG&G's non-government services division. (*Id.*) Under OHA precedent, "a firm which acquires most of the assets of a subsidiary or division of a larger firm is affiliated only with that subsidiary or division, and not with the entire parent company." (*Id.* at 8, quoting *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462, at 15 (2013).) Here, Brown Point stresses, "Brown Point acquired only [LGS], which business represents a mere fraction of former NG&GS's receipts" and the record "does not support a finding that Brown Point is NG&G 'reborn, with all of its assets, liabilities, and employees."' (*Id.* at 9, quoting *Size Appeal of Willowheart, LLC*, SBA No. SIZ-5484, at 5 (2013).) Brown Point argues that Appellant "goes even more astray" when it attempts to argue that Brown Point, by acquiring LGS, became affiliated with Miner Fleet. (*Id.*) Even assuming LGS were affiliated with Miner Fleet, "the successor-in-interest rule does not contemplate that, when the rule applies, the acquiring firm becomes affiliated not only with the predecessor company, but also with all affiliates of the predecessor company." (*Id.*, at 10 fn. 11, quoting *Global*, SBA No. SIZ-5462, at 15.)

Brown Point asserts that the Area Office correctly concluded that Brown Point has no additional affiliates through common management. (*Id.*, at 3-4, 10.) While Appellant devotes much of its appeal to discussing LGS and NG&G, "[t]he relevant question is whether Brown Point ***and Miner Fleet*** had common management as of February 15, 2017." (*Id.*, at 11, emphasis Brown Point's.) According to Brown Point, Patricia Riendeau and Christopher Riendeau "were not officers, directors, stockholders, or managing members of Miner Fleet" and Alan Riendeau was "not an officer, director, managing member or partner of Brown Point." (*Id.*, at 10-11.) Thus, there could be no affiliation through common management because one or more persons did not control both Brown Point and Miner Fleet as of February 15, 2017. In Brown Point's view, it is immaterial whether any of the Riendeaus were key employees in prior positions because OHA has "explicitly rejected including key employees in the categories of position which . . . can give rise to a finding of common management." (*Id.* at 10, quoting *Size Appeal*

of CTSI-FM, LLC, SBA No. SIZ-5809, at 11 (2017).) Brown Point also argues that Appellant improperly conflates the successor-in-interest and common management analyses in attempting to show that Riendeau family members controlled Brown Point and Miner Fleet as of February 2017. (*Id.*, at 11-12.) Appellant's argument is meritless, Brown Point asserts, as Christopher Riendeau lacked critical influence over the former NG&G as a whole, and Alan Riendeau is "merely an employee of Miner Fleet." (*Id.*, at 11 fn. 12.)

Brown Point contends that Appellant also fails to demonstrate that any of the Riendeau family members own or control Miner Fleet or its affiliates. (*Id.*, at 4, 13.) Patricia Riendeau and Christopher Riendeau own and control Brown Point, but Alan Riendeau is merely an employee of Miner Fleet and does not control Miner Fleet. (*Id.*, at 13.) According to Brown Point, Alan Riendeau "became legally barred from actively participating in the day-to-day operations or management of Brown Point" because he is "contractually obligated to dedicate his full time and efforts to fulfilling his employee obligations to Miner Fleet." (*Id.*) In addition, Brown Point asserts, Alan Riendeau could not control LGS following his employment agreement with Miner Fleet because Alan Riendeau is not among a list of "specific individuals whom LGS can employ in connection with providing the Government Services." (*Id.* at fn. 16.)

Brown Point argues that "even if one of the Riendeau family members 'controlled' LGS . . ., such control is irrelevant to showing identity of interest affiliation between Brown Point and *Miner Fleet*." (*Id.*, at 14, emphasis Brown Point's.) Further, there would be a clear line of fracture between Brown Point and Miner Fleet. (*Id.*, at 13.) Brown Point stresses that Patricia Riendeau and Christopher Riendeau founded Brown Point and compensated Charles Vachon and Alan Riendeau through an "earn out" so there is a clean break between them. (*Id.*, at 7, 14.)

Brown Point also maintains that the Area Office correctly concluded that the newly organized concern rule does not apply, as "Brown Point was not 'spun-off' from Miner Fleet." (*Id.*, at 16 fn. 19.) Brown Point highlights that "[t]he purpose of the Newly Organized Concern Rule 'is to prevent circumvention of the size standards by the creation of spin-off firms that appear to be small but are really the affiliates of large firms.'" (*Id.*, quoting *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 8 (2016).) Brown Point observes that Patricia and Christopher Riendeau were never officers, directors, principal stockholders, managing members, or key employees of Miner Fleet, and "disputes that a 'key employee' relationship with former NG&G is imputable to Miner Fleet based on the successor-in-interest rule." (*Id.*, at 17 fn. 20.) Even so, in Brown Point's view, Christopher Riendeau is not a former key employee of NG&G because he only managed the Government Services Division of NG&G, which comprised 10% or less of NG&G's total receipts. (*Id.*, at 17.) Moreover, Brown Point continues, "even if Christopher ultimately *became* key in November 2016 *after* Miner Fleet bought the bulk of NG&G's assets, that cannot establish that Christopher was key *prior* to the [t]ransaction." (*Id.* at 18, emphasis Brown Point's.)

Brown Point argues that Appellant also fails to demonstrate that Brown Point receives contracts, financial or technical assistance, or bonding assistance from Miner Fleet or its affiliates. (*Id.*) Any subcontracting between Brown Point and LGS is irrelevant, because even if true, this would not establish that Brown Point receives support from Miner Fleet. (*Id.*)

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of the appeal. Specifically, Appellant 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. Analysis

The principal issue presented here is whether the Area Office correctly applied the "successor-in-interest" rule. Under this rule, "[a] firm will not be treated as a separate business concern if a substantial portion of its assets and/or liabilities are the same as those of a predecessor entity." 13 C.F.R. § 121.105(c). OHA has explained that "the successor-in-interest rule is meant to apply to situations where a business reorganizes, and a new entity emerges with essentially the same assets and liabilities as the old concern." *Size Appeal of Willowheart, LLC*, SBA No. SIZ-5484, at 4 (2013). Thus, the successor-in-interest rule does not apply when "a challenged concern is purchasing only some of the assets of a concern which has ceased operations." *Id.* at 5. Similarly, "a firm which acquires most of the assets of a subsidiary or division of a larger firm is affiliated with only that subsidiary or division, and not with the entire parent company." *Size Appeal of Global, A 1st Flagship Company*, SBA No. SIZ-5462, at 15 (2013) (citing *Size Appeal of Mark Dunning Industries, Inc.*, SBA No. SIZ-5284, at 7-8 (2011) and *Size Appeal of Alex-Alternative Experts, LLC*, SBA No. SIZ-4974, at 5-6 (2008)).

In the instant case, the Area Office found that Miner Fleet acquired approximately 90% of the assets of NG&G. *See* Section II.B, *supra*. Therefore, Miner Fleet is the successor-in-interest to NG&G. *Id.* The remaining 10% of NG&G, consisting of NG&G's Government Services division and related assets, changed its name to LGS and later was acquired by Brown Point. *Id.* As a result, Brown Point is the successor-in-interest to LGS. *Id.*

Appellant maintains that, because LGS was once part of NG&G, and because LGS was the only surviving portion of NG&G after Miner Fleet acquired most of NG&G's assets, both Brown Point and Miner Fleet should be considered successors-in-interest to NG&G. This argument is meritless. As discussed above, Brown Point acquired only a relatively small portion of NG&G, not the entire company, and thus does not have "essentially the same assets and liabilities" as NG&G. *Willowheart*, SBA No. SIZ-5484, at 4. Accordingly, the Area Office did not err in concluding that Miner Fleet alone is the successor-in-interest to NG&G. Appellant also suggests that LGS is affiliated with Miner Fleet and, by acquiring LGS, Brown Point became affiliated with Miner Fleet. The Area Office, though, found no such affiliation between LGS and Miner Fleet, and in any event OHA has recognized that "[t]he successor-in-interest rule does not contemplate that, when the rule applies, the acquiring firm becomes affiliated not only with the predecessor company, but also with all affiliates of the predecessor company." *Global*, SBA No. SIZ-5462, at 15; *see also Mark Dunning*, SBA No. SIZ-5284, at 7-8; *Alex-Alternative Experts*,

SBA No. SIZ-4974, at 5. Even assuming that LGS were affiliated with Miner Fleet, then, this would not establish that Brown Point too became affiliated with Miner Fleet by acquiring LGS.

Appellant also contends that Brown Point is affiliated with Miner Fleet through common management. SBA regulations provide that common management affiliation "arises where one or more officers, directors, managing members, or partners who control the board of directors and/or management of one concern also control the board of directors or management of one or more other concerns." 13 C.F.R. § 121.103(e). Here, Brown Point is managed and controlled by Patricia Riendeau and Christopher Riendeau, and neither of these individuals is an officer, director, managing member, or partner of Miner Fleet or its affiliates. Section II.B, *supra*. Brown Point's sworn SBA Form 355 indicates that Patricia Riendeau and Christopher Riendeau are the only officers of Brown Point, and further states that Brown Point has no board of directors. Similarly, Alan Riendeau is employed by Miner Fleet, but the Area Office found that he is not an officer, director, managing member, or partner of Miner Fleet, and Alan Riendeau holds no position at all at Brown Point. *Id.* Because Brown Point and Miner Fleet have no common officers, directors, managing members, or partners, the Area Office correctly found that the two firms are not affiliated through common management.

Appellant also attacks the Area Office's findings on identity of interest. It is true, as Appellant emphasizes, that the Riendeau family members conduct business together and must be presumed to share an identity of interest due to their close family relationships. The ultimate effect of an identity of interest, though, is that persons or entities with common interests are "treated as one party with such interests aggregated." 13 C.F.R. § 121.103(f). A key question, therefore, is to determine what concerns were controlled by the Riendeau family members as of February 15, 2017, the date to determine size. Here, the Area Office explained that, other than Brown Point and LGS, the Riendeau family members did not control any additional concerns as of February 15, 2017. Section II.B, *supra*. More specifically, Patricia Riendeau and Christopher Riendeau held no interests or positions in any other concerns, and Alan Riendeau was an employee of Miner Fleet but could not control that company. *Id.* While the Riendeau family members arguably could control LGS, the Area Office already included LGS in calculating Brown Point's size. *Id.* Accordingly, Appellant has not shown that the Riendeau family members owned or controlled any additional concerns besides Brown Point and LGS as of February 15, 2017, and the Area Office did not err in its analysis of identity of interest.

Lastly, I find no error in the Area Office's discussion of the newly organized concern rule, 13 C.F.R. § 121.103(g). OHA has explained that the newly organized concern rule consists of four required elements: (1) the former officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern; (2) the new concern is in the same or related industry or field of operation; (3) the persons who organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and (4) the one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification on bid or performance bonds and/or other facilities, whether for a fee or otherwise. *Size Appeal of Rio Vista Mgmt., LLC*, SBA No. SIZ-5316, at 10 (2012); *Size Appeal of Sabre88, LLC*, SBA No. SIZ-5161, at 6-7 (2010). In the instant case, the Area Office found that at least two of these elements are not met. The first element is not met because the owners and founders of Brown Point — Patricia Riendeau and

Christopher Riendeau — are not former officers, directors, principal stockholders, managing members or key employees of Miner Fleet. Section II.B, *supra*. Although Appellant suggests that Christopher Riendeau is a former key employee of NG&G, this argument is unpersuasive due to the fact that NG&G's Government Services division, which Christopher Riendeau managed, comprised no more than 10% of NG&G's total revenues. *Size Appeal of Human Learning Sys., LLC*, SBA No. SIZ-5769, at 9 (2016) (individual was not a former key employee because the unit he managed was "only about 8%" of the concern's total revenues). Moreover, even if the first element of the test were met, the fourth element is not met because Miner Fleet does not provide contracts, financial or technical assistance, or bonding support to Brown Point. Section II.B, *supra*. Appellant maintains that, absent proof that NG&G's former government contracts have been novated to Brown Point, Brown Point is presumably subcontracting with LGS. This argument, though, is pure speculation, and even assuming Brown Point were subcontracting with LGS, it is unclear how this would establish that Brown Point receives assistance from Miner Fleet. Thus, Appellant has not shown that Brown Point is affiliated with Miner Fleet under the newly organized concern rule.

IV. Conclusion

Appellant has not shown any clear error of fact or law in the size determination. Accordingly, the appeal is DENIED and the size determination is AFFIRMED. This is the final decision of the Small Business Administration. *See* 13 C.F.R. § 134.316(d).

KENNETH M. HYDE
Administrative Judge