United States Small Business Administration
Office of Hearings and Appeals

SIZE APPEAL OF: SolarCity Corporation, Appellant, Appealed From Size Determination Nos. 6-2011-052 & 053	SBA No. SIZ-5257 Decided: August 1, 2011

APPEARANCES

Amy L. O'Sullivan, Esq., and Derek R. Mullins, Esq., Crowell & Moring LLP, Washington, D.C., for Appellant

Richard B. Oliver, Esq., and Steffen G. Jacobsen, Esq., McKenna Long & Aldridge LLP, Los Angeles, California, for Pacific Energy Solutions, LLC

DECISION [1]

I. Introduction & Jurisdiction

On May 13, 2011, the U.S. Small Business Administration (SBA) Office of Government Contracting, Area VI (Area Office) issued a size determination in case numbers 6-2011-052 and 6-2011-053 finding SolarCity Corporation (Appellant) other than small. On May 31, 2011, Appellant appealed the size determination. For the reasons discussed below, the appeal is denied, and the size determination is affirmed.

SBA's 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. Appellant filed the instant appeal within fifteen days of receiving the size determination, so the

[1] This Decision was initially issued on July 12, 2011, under a Protective Order to prevent the disclosure of confidential or proprietary information. I also issued an Order for Redactions directing each party to file a request for redactions if that party desired to have any information redacted from the published Decision. 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.

appeal is timely. 13 C.F.R. § 134.304(a). Accordingly, this matter is properly before OHA for decision.

II. Background

A. Solicitation and Protest

On March 31, 2010, the U.S. Department of the Navy, Naval Facilities Engineering Command Pacific issued Solicitation No. N62742-10-R-1190 seeking to award multiple contracts for solar power generation in Hawaii. The Contracting Officer (CO) set aside the procurement entirely for small businesses and designated North American Industry Classification System (NAICS) code 221119, Other Electric Power Generation. Under this NAICS code, "[a] firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." 13 C.F.R. § 121.201 n.1. Initial proposals were due July 22, 2010. With its proposal, Appellant self-certified as a small business.

On March 1, 2011, offerors were notified that Appellant was an apparent successful offeror. On March 7, 2011, two disappointed offerors, Photon Finance and Hawaii 5-0 Photon JV, filed protests challenging Appellant's size.

B. Size Determination

On May 13, 2011, the Area Office issued its size determination. The Area Office explained that no single shareholder owns more than 50% of Appellant. [XXX] shareholders, each owning less than [XXX]% of Appellant's stock, hold an aggregate share of [XXX]%. The remaining [XXX]% is owned by the following eight parties: (1) Mr. Elon Musk, (2) Draper Fisher Jurvetson Fund IX, LP (3) First Solar, Inc., (4) Draper Fisher Jurvetson Growth Fund 2006, LP, (5) Generation IM Climate Solutions Fund, LP, (6) Bay Area Equity Fund I, LP, (7) Mr. Lyndon Rive, and (8) Mr. Peter Rive. The Area Office refers to Draper Fisher Jurvetson Fund IX, LP and Draper Fisher Jurvetson Growth Fund 2006, LP jointly as "DFJ."

The Area Office explained that Mr. Musk and DFJ are Appellant's two largest minority shareholders, with approximately equal holdings ([XXX]% and [XXX] %, respectively). Mr. Musk and DFJ also own stock in Tesla Motors, Inc. (Tesla) and Space Exploration Technologies (SpaceX). Based upon these three common investments, the Area Office concluded that Mr. Musk and DFJ share an identity of interest because they share economic interests. Additionally, the Area Office concluded that Mr. Musk and DFJ have the power to control Appellant because, taken together, Mr. Musk's and DFJ's shareholding is large (approximately [XXX]%) compared to other shareholders. Therefore, the Area Office determined that any entity in which either Mr. Musk or DFJ holds a controlling interest is an affiliate of Appellant.

The Area Office also found that Mr. Musk shares an identity of interest with his cousins, Lyndon and Peter Rive. Lyndon and Peter Rive are brothers who founded Appellant and serve as high-level corporate officers at the firm. The Area Office acknowledged that the presumption of an identity of interest between family members does not ordinarily extend to cousins, but

determined that the extent of Mr. Musk's involvement in the Rives' business affairs warranted such a finding. The Area Office reasoned that Mr. Musk is not estranged from his cousins and is Chairman of Appellant's Board of Directors, as well as one of its largest owners. The Area Office also explained that because Mr. Musk's holding of preferred stock in Appellant exceeds [XXX]%, Mr. Musk alone could block any action by the remaining owners of preferred stock pursuant to Appellant's Certificate of Incorporation, which requires [XXX]% preferred stockholder approval for certain corporate actions.

The Area Office rejected Appellant's argument that it is controlled by Appellant's management. The Area Office concluded that although Appellant's stock is widely held, the combined holdings of Mr. Musk and DFJ (treated as one due to the identity of interest between those parties) create a block of stock that is large as compared to all other shareholdings. Furthermore, the Area Office determined that Mr. Musk and DFJ also have the power to control Appellant's Board of Directors. Based upon their holdings, the Area Office calculated that Mr. Musk has the power to elect three directors and DFJ has the power to elect two directors to the board of no more than ten directors. The Area Office also explained that as of the date to determine size, Appellant had eight directors, five of whom are Mr. Musk, the Rive brothers, Mr. John Fisher (of DFJ), and Mr. J.B. Straubel.[2] Thus, due to the identity of interest between these parties, Appellant concluded "[t]he same individuals that control the single largest block of voting shares are the same individuals who control [Appellant's] Board." (Size Determination 7.)

The Area Office noted that Appellant and its approximately thirty-three acknowledged affiliates are primarily engaged in the generation and transmission of electric energy for sale. However, the Area Office explained that it attempted to investigate whether Appellant had any other affiliates based upon the identity of interest between Mr. Musk and DFJ. When the Area Office asked Appellant if Mr. Musk and DFJ have other common investments, Appellant responded that it was not aware of any other common investments and that it could not provide investment information regarding the investments of its shareholders. The Area Office therefore was unable to determine whether Appellant had additional affiliates because Appellant failed to provide the requested information. Absent such data, the Area Office could not determine the primary industry of Appellant and its affiliates and instead concluded Appellant is other than a small concern for the applicable size standard.

C. Appeal Petition

On May 31, 2011, Appellant filed the instant appeal claiming the size determination contains numerous errors of fact and law. Appellant first contends the Area Office erred in finding an identity of interest between Mr. Musk and DFJ, a venture capital firm, based upon three common investments. Appellant complains that those three investments comprise only a fraction of each party's business interests and that Mr. Musk and DFJ have no other ties.

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[2] The Area Office found an identity of interest between Mr. Musk and Mr. Straubel because both are directors of Appellant, and both hold ownership interests in Appellant and Tesla. Appellant does not contest this finding, and correctly observes that this issue is not material to the outcome of the case. Accordingly, the identity of interest between Mr. Musk and Mr. Straubel will not be discussed further here.

Appellant asserts that finding affiliation between an individual and a venture capital firm based upon minimal common investments is contrary to SBA's stated policy of fostering the economic interests of small businesses because the very purpose of a venture capital firm is to provide capital to nascent companies like Appellant.

Appellant also contends the three common investments between Mr. Musk and DFJ are insufficient to constitute an identity of interest because they do not rise to the level of "identical or substantially identical" business or economic interests. 13 C.F.R. § 121.103(f). Appellant explains that venture capital firms generally make high-risk/high-reward investments in small enterprises and thus seek to diversify their investment portfolios. Appellant emphasizes that DFJ has a vast portfolio that includes investments in 272 companies across a wide range of industries and that the Area Office found common investments in only three of these firms. Appellant notes that Mr. Musk is not an employee or shareholder of DFJ and that DFJ's minority stakes in Appellant, Tesla, and SpaceX do not give DFJ any power to control those firms.

Appellant cites *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008), to support its argument. In *Novalar*, OHA found an identity of interest between an individual and a venture capital firm when the individual had common investments in seven of the thirty-seven companies in which the venture capital firm was invested. Additionally, the individual was a key employee of the venture capital firm and had founded ten of the companies in the venture capital firm's portfolio. Appellant also cites *Size Appeal of Hartsville Oil Mill*, SBA No. SIZ-3129 (1989), where OHA determined common investments in three entities were insufficient to establish an identity of interest. Appellant challenges the Area Office's reasoning that Mr. Musk and DFJ share and identity of interest simply because they both seek to protect and earn a return on their investments.

Appellant next disputes the Area Office's conclusion that Appellant's Board of Directors does not control Appellant. Appellant asserts the Area Office was required to apply the widely held stock rule, which provides that a firm's Board of Directors and CEO controls the firm if the firm's stock is widely held and there is no single block of stock that is large compared to other stock holdings. 13 C.F.R. § 121.103(c)(3). Because Appellant contends there is no identity of interest between Mr. Musk and DFJ, Appellant disputes the Area Office's approach of aggregating Mr. Musk's stock with DFJ's stock to conclude that those holdings represent a single block that is large compared with other holdings. Instead, Appellant asserts, based upon OHA case law, that Mr. Musk's [XXX]% share and DFJ's [XXX]% share (the two largest shares) are essentially equal in size, so neither can be considered large as compared to other holdings. Appellant concludes its stock is widely held and no single block is large compared to the other holdings, so the Area Office was obligated to conclude that Appellant's Board and CEO control the firm.

Appellant also disputes the Area Office's finding that Mr. Musk shares an identity of interest with the Rive brothers. Appellant highlights that OHA has previously stated that the presumption of a familial identity of interest does not apply to cousins in the absence of evidence of another type of identity of interest. *See Size Appeal of Lajas Indus., Inc.*, SBA No. SIZ-4258 (1998); *Size Appeal of E. Huttenbauer & Son, Inc.*, SBA No. SIZ-3865 (1993). Appellant claims the Area Office erroneously applied the presumption of a familial identity of interest and

determined it had not been rebutted. Appellant contends the Area Office failed to identify a separate basis for an identity of interest between Mr. Musk and the Rive brothers, as OHA precedent requires. Appellant argues that the Area Office found limited business ties between Mr. Musk and the Rives: their common investment in Appellant and the fact that they all sit on Appellant's Board of Directors. Appellant contends these ties are inadequate to justify an identity of interest because they do not evince an effort by Mr. Musk and the Rives to act in concert or unite their interests.

Finally, Appellant asserts no individual or group of individuals controls Appellant's Board of Directors. Appellant contends it has demonstrated that Mr. Musk does not share an identity of interest with Mr. Lyndon Rive, Mr. Peter Rive, or DFJ and, taken individually, none of these parties can control Appellant's Board of Directors. Appellant reiterates that the widely held stock rule mandates a finding that Appellant's Board of Directors and CEO control Appellant. Appellant argues the Area Office should have looked only at Appellant and its acknowledged affiliates to determine whether Appellant met the applicable size standard. Appellant asserts it satisfies the size standard because it and its affiliates are primarily engaged in the generation of power and produce less than four million megawatt hours annually. Appellant concludes the Area Office's determination is factually and legally insupportable and asks OHA to reverse it.

D. PES's Opposition

On June 20, 2011, Pacific Energy Solutions, LLC (PES), a contract awardee under the subject solicitation and an intervenor in these proceedings, filed its opposition to the appeal petition. PES claims the Area Office made no clear errors in its findings of affiliation and control. PES recognizes that Appellant and its acknowledged affiliates apparently are primarily engaged in the generation or transmission of electric energy, but emphasizes that if Appellant is affiliated with other entities, that conclusion would have to be reexamined. PES thus asserts it was essential for the Area Office to examine whether Appellant has other affiliates.

PES notes that Appellant's argument that Mr. Musk and DFJ do not share an identity of interest is predicated upon the notion that they share only three common investments. However, PES calls attention to the fact that the Area Office was unable to verify this premise because Appellant refused to provide further information about the investments of Mr. Musk and DFJ, claiming it did not have access to such information. PES argues that it “strains credulity” to believe that Appellant could not provide the requested information, particularly with regard to Mr. Musk, the Chairman of Appellant's Board of Directors and its largest shareholder. (Opposition 4.) PES emphasizes that, under SBA regulations, Appellant has the burden to establish that it is a small business and contends that Appellant's responses to the Area Office's requests for information were wholly inadequate. PES concludes that the Area Office was fully justified in drawing an adverse inference against Appellant and concluding that it could not confirm the primary industry in which Appellant and its affiliates are engaged.

PES also supports the Area Office's conclusion that Mr. Musk shares an identity of interest with the Rive brothers. PES contends Appellant's reading of OHA case law is incorrect, and the presumption that family members share an identity of interest may apply to cousins if

there is additional evidence that the parties should be treated as one. PES claims that in each case cited by Appellant, the business relationships between cousins were too remote to support a finding of an identity of interest. In contrast, PES claims Mr. Musk and the Rives share significant business connections. PES points out that the Rives founded Appellant with an investment from Mr. Musk, Mr. Musk remains Appellant's largest shareholder, the Rives both own stock in Appellant, Mr. Peter Rive is Appellant's Chief Executive Officer, Mr. Lyndon Rive is Appellant's Chief Operating Officer, and Mr. Musk is Chairman of Appellant's Board of Directors. PES argues these business ties, combined with the family relationship, amply demonstrate an identity of interest.

Consequently, PES concludes Mr. Musk has the power to control Appellant because when his stock ([XXX]%) is aggregated with the stock of the Rive brothers ([XXX]%), the combined block of stock ([XXX]%) is large compared to other stock holdings. 13 C.F.R. § 121.103(c)(1). PES compares Mr. Musk's block of stock to the next largest holding, [XXX]% held by DFJ, in terms of percentage difference between the holdings. According to PES, the percentage difference between these holdings falls well within the range where OHA considers the largest shareholding to be "large" as compared with other holdings. *See, e.g., Size Appeal of Forterra Sys., Inc.*, SBA No. SIZ-5029 (2009); *Size Appeal of H.L. Turner Group, Inc.*, SBA No. SIZ-4896 (2008). PES thus asserts Mr. Musk's shareholding is large, Mr. Musk can control Appellant, and Mr. Musk is affiliated with Appellant.

Based upon this analysis, PES concludes that Appellant is also affiliated with any other firms Mr. Musk can control. PES claims the record indicates that, at a minimum, Mr. Musk can control both Tesla and SpaceX. Mr. Musk co-founded Tesla, is its largest investor, and acts as the firm's CEO, Product Architect, and Chairman. Mr. Musk owns [XXX]% of SpaceX and acts as its CEO and Chief Technology Officer. According to PES, once the revenues of Tesla and SpaceX are considered, Appellant can no longer certify that it is primarily engaged in the generation or transmission of electrical energy and, therefore, is not a small business for this procurement.

PES next contends the Area Office properly concluded that Appellant's Board of Directors and CEO do not control Appellant. PES acknowledges that Appellant's stock is widely held, but contends the Area Office correctly aggregated the shares of Mr. Musk and DFJ to determine that the combined block of stock is large as compared to other holdings. In the alternative, PES explains that even if Mr. Musk and DFJ are not affiliated, Mr. Musk's holding is still large as compared to other holdings due to his identity of interest with the Rive brothers, as discussed above. PES thus concludes that, under any scenario, Appellant's management does not control the firm.

Finally, PES supports the Area Office's determination that a group of individuals with an identity of interest controls Appellant's Board of Directors. PES asserts the Area Office correctly determined that Mr. Musk shares an identity of interest with the Rives and DFJ, and Mr. Musk has the power to control the Board through these affiliations. PES concludes the size determination is not based on clear error and urges OHA to deny the appeal.

III. Discussion

A. Standard of Review

Appellant has the burden of proving, by a preponderance of the evidence, all elements of its 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 the 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

This case turns upon whether Mr. Musk—the Chairman of Appellant's Board of Directors and Appellant's single largest shareholder, with [XXX]% ownership— has the power to control Appellant. The issue is crucial because Mr. Musk has controlling interests in at least two other entities, SpaceX and Tesla. If Mr. Musk controls Appellant, these other concerns are affiliated with Appellant, and the firms must be treated as a group for purposes of determining whether or not Appellant qualifies as a small business. Furthermore, Appellant did not divulge to the Area Office complete information about Mr. Musk's other investments. As a result, the Area Office was unable to consider all of Appellant's potential affiliates, and had "no alternative but to find that [Appellant] has not proven that it is a small business concern." (Size Determination 8.)

The Area Office found that Mr. Musk can control Appellant on several grounds. First, the Area Office determined that Mr. Musk shares an identity of interest with DFJ, a venture capital firm holding [XXX]% of Appellant's stock, because Mr. Musk and DFJ share common investments beyond their joint interest in Appellant. Combined, Mr. Musk and DFJ hold a large block of stock as compared with other investors, thereby affording them control over the company. In addition, the Area Office found that Mr. Musk's interest should be aggregated with those of his cousins, the Rive brothers, who have extensive ties with Appellant. Even aside from his potential ties with DFJ, Mr. Musk would still control Appellant if his interest is combined with the Rive brothers. Lastly, the Area Office determined that Mr. Musk and DFJ have approximately equal minority interests which collectively are large as compared with other shareholders; as a result, both Mr. Musk and DFJ could be deemed to control Appellant.[3]

As discussed below, I agree with Appellant that the available record establishes only that Mr. Musk and DFJ have three common investments (one of which is in Appellant itself). Given that DFJ holds a portfolio of literally hundreds of investments and that DFJ holds only minority stakes in the firms in question, three common investments was not a sufficient basis to find that Mr. Musk and DFJ share an identity of interest. The issue is clouded, however, because Appellant did not provide complete information about the investments of Mr. Musk and DFJ. As

[3] This final theory is in the nature of an alternative argument, because it evidently assumes that Mr. Musk does not share an identity of interest with either DFJ or the Rive brothers.

a result, I am unable to determine whether Mr. Musk and DFJ share only three common investments, or whether the missing information would have revealed a more extensive relationship between them.

Ultimately, the issue is immaterial, because the record does support the conclusion that Mr. Musk has an identity of interest with his cousins, the Rive brothers. Therefore, leaving aside his potential association with DFJ, Mr. Musk controls Appellant because he and the Rives have "a block of voting stock which is large compared to other outstanding blocks of voting stock." 13 C.F.R. § 121.103(c)(1).

1. Legal Principles of Affiliation

Firms are affiliated when one has the power to control the other or when a third party has the power to control both.13 C.F.R. § 121.103(a)(1). A person who owns or controls at least 50% of a concern, or who controls a block of stock that is "large compared to other outstanding blocks," has the power to control that concern. 13 C.F.R. § 121.103(c)(1). Furthermore, even if one party alone does not own a controlling share of a firm, that party may still have the ability to control the firm if their interest is aggregated with the interests of another party. *See, e.g., Size Appeal of McLendon Acres, Inc.*, SBA No SIZ-5222, at 6-7 (2011) (finding affiliation between the appellant and a number of other firms after aggregating the interests of a married couple); *Size Appeal of Cypress Pharm., Inc.*, SBA No. SIZ-5078, at 2-3 (PFR) (2009) (refusing to aggregate the ownership shares of the appellant's founders, but explaining that if the founders' shares were aggregated, they would own a majority controlling block of stock). One basis for aggregating the interests of two or more parties is an "identity of interest" between those parties:

> 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 with evidence showing that the interests deemed to be one are in fact separate.

13 C.F.R. § 121.103(f). An identity of interest is found where common interests establish "a relationship that bespeaks a concert of purpose and effort" and "cause the parties to act in union for their common benefit." *Size Appeal of The H.L. Turner Group., Inc.*, SBA No. SIZ-4896, at 6 (2008) (quoting *Size Appeal of Bend Research, Inc.*, SBA No. SIZ-4369, at 7 (1999)); *Size Appeal of Cytel Software, Inc.*, SBA No. SIZ-4822, at 5 (2006) (citing *Size Appeal of Ridge Instrument Co., Inc.*, SBA No. SIZ-4207 (1996)).

2. Mr. Musk & DFJ

In this case, the Area Office determined that Mr. Musk and DFJ share an identity of interest based upon three common investments. Appellant argues three common minority shareholdings are insufficient to create an identity of interest between an individual investor and

a venture capital firm with a vast portfolio. PES counters that there may actually be more than three common investments, but because Appellant refused to provide detailed information about the investments of Mr. Musk and DFJ, the Area Office was unable to fully examine the extent of their common investments.

OHA has previously recognized that an identity of interest may arise between an individual and a venture capital firm. *Size Appeal of Novalar Pharmaceuticals, Inc.*, SBA No. SIZ-4977 (2008). In *Novalar*, the individual shareholder was a key employee of the venture capital firm, founded several of the start-up entities in which the venture capital firm invested, and shared seven common investments with the venture capital firm. In contrast with *Novalar*, Mr. Musk is not an employee of DFJ, and the Area Office did not discuss any other ties between the parties. Rather, the Area Office found an identity of interest based solely upon common holdings in only three companies.

I agree with Appellant that three common investments are insufficient to justify a finding of an identity of interest between these parties. As the Area Office was aware, DFJ is a venture capital firm with many varied investments. The sole fact that DFJ shares minority investments in three firms with Mr. Musk, without evidence of other ties or business cooperation, does not support the conclusion that these parties share identical or substantially identical business or economic interests.

On the other hand, PES is correct that it is impossible to verify whether the common investments in Appellant, Tesla, and SpaceX are Mr. Musk's and DFJ's only shared investments.[4] Thus, on these facts, I cannot find that there is no identity of interest between Mr. Musk and DFJ. Rather, I conclude that it was erroneous for the Area Office to base its identity of interest finding upon three common minority investments, without evidence of any further ties between them.

3. Mr. Musk & The Rive Brothers

The Area Office also determined that Mr. Musk shares an identity of interest with his cousins, the Rive brothers, who founded Appellant and together hold [XXX]% of Appellant's stock. Appellant contends that the ties between Mr. Musk and the Rives are insufficient to justify an identity of interest. PES supports the Area Office's finding. I conclude the Area Office properly found an identity of interest between Mr. Musk and the Rives.

Both Appellant and PES cite to *Size Appeal of Lajas Industries, Inc.*, SBA No. SIZ-4285 (1998) in support of their respective positions. In *Lajas*, OHA determined that "the family tie between cousins is far removed and not within the scope of the [identity of interest] regulation, unless sufficient additional evidence establishes another type of identity of interest, such as extensive involvement with each other's business affairs." *Lajas* at 7 (citing *Size Appeal of E. Huttenbauer & Son, Inc.*, SBA No. SIZ-3865 (1993); *Size Appeals of JL Assocs., Inc. and HLJ Mgmt. Group, Inc.*, SBA No. SIZ-3102 (1989)). Appellant argues that OHA's use of the phrase

[4] It is notable that, in its appeal, Appellant makes no attempt to conclusively establish that these three investments are the only common investments between Mr. Musk and DFJ.

"unless sufficient additional evidence establishes another type of identity of interest" establishes that there can be no identity of interest between cousins, unless independent grounds exist for such a finding. Because the Area Office did not identify any independent grounds here, Appellant urges that OHA must conclude, as a matter of law, that Mr. Musk and the Rives do not share an identify of interest. Meanwhile, PES emphasizes the phrase "such as extensive involvement with each other's business affairs." According to PES, this language plainly indicates that, when added to a family relationship, extensive involvement with one another's business affairs is sufficient to find identity of interest. Further, the *Lajas* case itself involved cousins who had no economic ties at all; thus, *Lajas* may be understood as holding that, given the non-existent ties shown in that particular case, some entirely different basis would have been necessary in order to find identity of interest.

In addition to *Lajas*, OHA considered the potential identity of interest between cousins in *JL Associates* and *E. Huttenbauer & Son.* In *JL Associates*, OHA found no identity of interest "in this instance," but remarked that "[t]his is not to be construed as precedent that we would never make such a holding. We simply hold that Appellants have not provided sufficient additional evidence which, combined with the relationship of second cousin, would justify a finding of affiliation." *JL Assocs.*, at 16 n.6. In *E. Huttenbauer & Son*, the only tie between the cousins, apart from their family relationship, was "*de minimus*" subcontracting. OHA opined that:

> With respect to the level of consanguinity, in *Size Appeals of JL Associates, Inc. and HLJ Management Group, Inc.*, No. 3102 (1989) we declined to extend the presumption [of identity of interest between family members] to second cousins where 'sufficient additional evidence' suggestive of an identity of interests did not exist. While subcontracting arrangements might constitute such additional evidence, we find that the *de minimus* amount of subcontracting at issue here is insufficient to create an identity of interests between the two firms.

E. Huttenbauer & Son, at 11-12.

In light of these various precedents, I am not persuaded by Appellant's contention that there can be no identity of interest between cousins unless independent grounds exist for such a finding. Rather, OHA case law indicates that there may be an identity of interest between cousins when the family relationship is combined with "additional evidence suggestive of an identity of interests" such as "extensive involvement with each other's business affairs."

Here, the Area Office and PES are correct that Mr. Musk and the Rives share business connections significant enough to constitute an identity of interest. The Rives founded Appellant with an investment from Mr. Musk; Mr. Musk is Appellant's largest shareholder, and the Rive brothers also own substantial stock in Appellant; all three men sit on Appellant's Board of Directors; and all hold senior-level positions with the company. Thus, Mr. Musk is extensively involved in the business affairs of the Rives and, when also considering their family relationship, can be expected to act in concert with them with regard to those affairs.

Accordingly, the Area Office properly aggregated the shareholdings of Mr. Musk and the

Rive brothers when determining who controls Appellant. When combined, Mr. Musk and the Rives own [XXX]% of Appellant. This is "large" compared to the other holdings of Appellant's stock, as the next largest holding is only [XXX]%, rendering the Musk/Rive holding 1.71 times larger than the size of the next largest holding. *See, e.g., Novalar*, at 17-18 (finding one firm's ownership interests in ten different companies—where the interests ranged from 1.36 to 3.71 times the next largest holding—were each large compared to all other holdings in those companies); *H.L. Turner Group*, at 5 (finding an ownership interest 1.36 times the next largest holding was large compared to other holdings). Thus, the Area Office correctly concluded that Mr. Musk and the Rives have the power to control Appellant under 13 C.F.R. § 121.103(c)(1).

4. Control Under 13 C.F.R. § 121.103(c)(2)

Even if Mr. Musk did not share an identity of interest with DFJ or the Rives, the Area Office also found a separate basis upon which to conclude that Mr. Musk can control Appellant. The regulation governing affiliation based upon stock ownership provides, in pertinent part:
If two or more persons (including any individual, concern or other entity) each owns, controls, or has the power to control less than 50 percent of a concern's voting stock, and 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, SBA presumes that each such person controls or has the power to control the concern whose size is at issue. This presumption may be rebutted by a showing that such control or power to control does not in fact exist. 13 C.F.R. § 121.103(c)(2). Here, Mr. Musk and DFJ each own minority holdings that are approximately equal in size ([XXX]% and [XXX]%, respectively). When aggregated, these holdings are large as compared to the next largest holding ([XXX]% compared to [XXX]% for the Rive brothers). Thus, the Area Office reasoned that Mr. Musk and DFJ each would have the power to control Appellant pursuant to 13 C.F.R. § 121.103(c)(2). Appellant argues that the Area Office erred in applying 13 C.F.R. § 121.103(c)(2), and that 13 C.F.R. § 121.103(c)(3), which deals with widely held stock, takes precedence over 13 C.F.R. § 121.103(c)(2).

I find it unnecessary to decide this issue in light of the above conclusion that Mr. Musk has the ability to control Appellant through his identity of interest with the Rives. By its terms, 13 C.F.R. § 121.103(c)(3) is applicable only when "no single block of stock is large as compared with all other stock holdings." Because Mr. Musk and the Rive brothers do control a large block of stock, 13 C.F.R. § 121.103(c)(3) does not apply to this case.

5. Adverse Inference

Because the Area Office correctly determined that Mr. Musk and the Rives can control Appellant, Appellant would be considered an affiliate of any other entity that Mr. Musk or the Rives control. 13 C.F.R. § 121.103(a)(1). The SBA Form 355 asks whether the challenged firm itself or any of the firm's owners, partners, principal stockholders, members, officers, or directors acts as the owner, partner, director, officer, member, employee, or principal stockholder in another business. (SBA Form 355 ¶ 9a.) Appellant answered "yes" to this question. The Form 355 also requires the challenged firm to identify any such persons, the businesses in which they are involved, and their role in each business. (SBA Form 355 ¶ 9b.) Here, Appellant responded, in pertinent part: "[Appellant] is unable to provide the information requested regarding

investments in other entities by the members of our Board of Directors. [Appellant] does not possess this information as such information is kept confidential and is not disclosed to us."

After concluding that Mr. Musk can control Appellant, the Area Office again attempted to determine whether Mr. Musk could control any other entities. In an email dated April 21, 2011, the Area Office specifically asked Appellant to "provide detailed information regarding both Mr. Musk and DFJ's other business interests." The Area Office warned Appellant that 13 C.F.R. § 121.1008(d) permits the Area Office to draw an adverse inference against any firm that fails to provide requested information and requires a challenged firm to provide information about its alleged affiliates. In addition, the Area Office indicated that Mr. Musk could send the information directly, rather than through Appellant, to preserve confidentiality. In response, Appellant answered that it:

> does not have access to non-public investment information regarding *any* of its shareholders and thus cannot provide any of the other information you have requested. Furthermore, while we acknowledge your suggestion that Mr. Musk and DFJ can submit the information directly to you in order to maintain confidentiality, [Appellant] also cannot compel such disclosure.

Thus, Appellant declined to provide information about Mr. Musk's investments to the Area Office.

The adverse inference rule provides that if a concern fails to provide requested information within the time allowed by the Area Office, the Area Office may presume that the requested information would demonstrate that the concern is other than a small business. 13 C.F.R. §§ 121.1008(d), 121.1009(d). When evaluating the Area Office's application of the adverse inference rule, OHA applies a three part test: (1) the information the Area Office sought must have been relevant to an issue in the size determination; (2) there must have been a level of connection between the challenged concern and the party from which the Area Office sought information; and (3) the Area Office's request for information must have been specific. *See, e.g., Size Appeal of USA Jet Airlines, Inc.*, SBA No. SIZ-4919, at 13 (2008). "If all of these criteria are met, the challenged business must submit the information to the area office or suffer an adverse inference that the information would show that the challenged business was other than small." *Size Appeal of Firewatch Contracting of Fla., LLC*, SBA No. SIZ-4994, at 7 (2008).

In this case, the Area Office requested information regarding the investments of Mr. Musk. Because the Area Office determined that Mr. Musk can control Appellant, this information is highly relevant to identifying all of Appellant's affiliates. There is a clear connection between Appellant and Mr. Musk, as he is Appellant's largest shareholder and Chairman of Appellant's Board of Directors. Finally, the Area Office's request was specific because the Area Office asked only about the investments its two largest shareholders. Consequently, the Area Office properly drew an adverse inference against Appellant to conclude that it could not determine all of Appellant's potential affiliates or ascertain whether Appellant and its affiliates are primarily engaged in the generation, transmission, and/or distribution of electric energy for sale. A firm cannot escape an adverse inference merely by claiming that the

requested information is not readily available. *E.g.*, *Size Appeal of Safe Workers of Am., Inc.*, SBA No. SIZ-4437, at 4 (2001).

IV. Conclusion

Appellant has not demonstrated that the size determination is clearly erroneous. Instead, the record establishes that the Area Office correctly determined that Mr. Musk and the Rive brothers control Appellant. Furthermore, because Appellant refused to disclose information about Mr. Musk's other interests, the Area Office properly invoked an adverse inference that the missing information would have been unfavorable to Appellant. Accordingly, this 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