

DA 98-307

Released: February 17, 1998

Ms. Brenda Neidigh
Virginia Tech Foundation, Inc.
310 Burrus Hall
Virginia Tech
Blacksburg, Virginia 24061

Re: Virginia Tech Foundation, Inc. Request for Waiver in Auction No. 17

Dear Ms. Neidigh:

This letter confirms the telephone conversation with Commission staff, in response to the waiver request of Virginia Tech Foundation, Inc. ("VTF") filed in conjunction with its FCC Form 175 application to participate in the Local Multipoint Distribution Service ("LMDS") auction. To qualify as an "entrepreneur", VTF requests a waiver of Section 101.1112(g) to exclude certain revenues from its gross revenues calculation. In the alternative, a waiver of Sections 101.1112(g) and 101.1112(h) to exclude revenues of a particular affiliate. For the reasons explained below, we deny VTF's request.

Section 101.1112(d) defines "entrepreneur" for the LMDS auction as "an entity that, together with its affiliates and controlling principals, has average gross revenues for the three preceding years of more than \$40 million but not more than \$75 million." For purposes of attributing gross revenues under Section 101.1112(d), Section 101.1112(g) defines gross revenues as "all income received by an entity, whether earned or passive, before any deductions are made for costs of doing business (e.g., costs of goods sold)." Section 101.1112(h)(1) defines "affiliate" as, among other things, "directly or indirectly controlling" the applicant and having an "identity of interest" with the applicant.

In its application, VTF states that it is a not-for-profit corporation, organized under the laws of Virginia, which receives, manages and disburses private gifts in support of Virginia Polytechnic Institute and State University ("Virginia Tech") and its programs. It also states Virginia Tech is a public university organized and funded under the laws of Virginia. VTF argues that under the Financial Accounting Standards Board (FASB) rules, not-for-profit organizations have three recognized categories of revenues: (1) unrestricted revenue; (2) temporarily restricted revenue; and (3) permanently restricted revenue. VTF argues that only unrestricted revenues, one of the three categories described, should be included in its gross revenues calculation, because only those revenues are the equivalent of revenues of a business. VTF states that the other two categories of revenues should not be included in its gross revenues calculation because VTF does not have full discretion to use those revenues. Specifically, the revenues are either controlled by the donor or restricted by the nature of the contribution itself ("restricted revenues") or pledges made but which have not yet been received ("contributions receivable"). As a result of excluding these revenues, VTF claims it would qualify as an entrepreneur. VTF also requests a waiver of

the affiliation and

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attribution rules for its gross revenues calculation to exclude the gross revenues of its affiliate, Virginia Tech because Virginia Tech has neither *de jure* nor *de facto* control of VTF, and has not been authorized by the Commonwealth of Virginia to expend funds in the LMDS auction.

A request for a waiver of the Commission's rules must "set forth the reasons in support thereof including a showing that unique circumstances are involved and that there is no reasonable alternative within existing rules." 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). On the basis of the record before us, we are not persuaded that VTF has presented unique circumstances sufficient to justify grant of its waiver request and exclude the identified revenues from its gross revenues calculation.

With regard to VTF's first basis for seeking a waiver, we conclude that its "restricted revenues" and "contributions receivable" must be counted. As discussed above, Section 101.1112(d) requires applicants to include all income, whether earned or passive, in their gross revenues calculation, including that of its affiliates or controlling principals. This rule does not create an exception for restricted revenues or contributions receivable, and the Commission has not adopted any special exemptions for not-for-profit entities. Further, while the Commission's rules generally do not distinguish between categories of revenues for gross revenues calculation, the Commission relies upon generally accepted accounting practices, including the standards established by the FASB which, as VTF points out, categorize "contributions receivable" as "revenues." We find that the Commission rules require VTF to include its restricted revenues and contributions receivable in its calculation of gross revenue, and that VTF fails to demonstrate unique circumstances for waiving these rules.

We also disagree with VTF's second basis for waiver of the Commission's rules -- namely, that it is unfair to include the gross revenues of a separate entity, a public university, in its gross revenues calculation. Although VTF states that it is a separate not-for-profit entity organized under the laws of Virginia, and Virginia Tech has neither control of VTF nor authorization to expend funds on the LMDS auction, the record indicates that VTF and Virginia Tech are affiliated in a number of ways. For example: The two entities share common facilities;¹ the express purpose of VTF is to support Virginia Tech through the solicitation and promotion of gifts and contributions; VTF is comprised of individuals or entities that have made gifts, at or above a specified level, to support Virginia Tech's programs; VTF's bylaws require that the thirty-five member governing board of directors include the Rector of the Board of Visitors of Virginia Tech, the President of the Alumni Association, the President of the Athletic Fund of Virginia Tech, and the President of the University; and VTF's bylaws also require that two of the six named officers holding positions as vice presidents of the board of directors be from Virginia Tech. The Commission's definition of "entrepreneur" as an entity that, together with its affiliates, has

¹ Affiliation generally arises where one concern shares office space, employees, or other facilities (or any combination of the foregoing) with another concern. See 47 C.F.R. § 101.1112(h)(8).

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gross revenues for the three preceding years of more than \$40 million but not more than \$75 million. In light of the affiliation between the two entities, VTF does not meet the gross revenue requirements to qualify as an entrepreneur, and we do not find sufficient cause to grant VTF's waiver of the Commission's affiliation rules.

For the reasons stated above, VTF's request for a waiver of the affiliation and attribution rules set forth in Sections 101.1112(d), 101.1112(g) and 101.1112(h) IS HEREBY DENIED. This action is taken under delegated authority pursuant to Section 0.331 of the Commission's Rules.

Sincerely,

Kathleen O'Brien Ham
Chief, Auctions and Industry Analysis Division
Wireless Telecommunications Bureau

cc: John Branscome, Esquire