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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In The Matter of	)	
	)	
Amendment of the Commission's	)	GEN Docket No. 90-314
Rules to Establish New	)	ET Dockent No. 92-100
Narrowband Personal	)	
Communications Services	)	

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

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SUMMARY

As currently drafted, the narrowband multiplier rule will discourage, and in some cases effectively preclude, investment in PCS by certain institutional investors, which represent an important source of growth capital -- particularly for the privately held, entrepreneurial companies that will seek PCS licenses. Because this result would be contrary to the FCC's goal of encouraging the rapid deployment of PCS services, the Morgan Stanley Partnerships propose several modifications to the Commission's rules.

First, the Commission should not attribute the interests in narrowband licensees held by limited partners that are not materially involved, directly or indirectly, in the management or operation of the PCS licensee. The broadcast attribution rules include such an exception, and the Commission should import this limitation on the multiplier into the PCS arena as well. In the interest of equity, however, one addition to the broadcast rule is necessary: for those partnerships that pre-date the Commission's new rule, there should be a "grandfathering" provision that permits the general partner to certify substantial compliance with the "no material involvement standard" of the broadcast attribution rules.

Second, the Commission should adopt a higher attribution threshold for certain institutional investors that invest <u>indirectly</u> in PCS licensees. The investors

eligible for this relaxed attribution standard should include pension funds and university endowment funds. These entities invest widely, through a number of investment vehicles, including private equity funds, such as the Morgan Stanley Partnerships. Such institutional investors rely on their professional managers to choose, manage and dispose of investments; by their nature, these investors do not seek to control or influence the management or operations of licensees in which they hold indirect interests. Moreover, because the investments at issue are indirect, there is little opportunity to exert influence over the licensee. A relaxation of the attribution rules is warranted.

Third, the Morgan Stanley Partnerships urge the Commission not to attribute those interests held by minority or non-controlling shareholders, where a single entity or group of affiliated entities either holds a majority of a licensee's voting interests or can effectively control a company through a voting agreement. For the same reason that majority and controlling interests in an ownership chain are counted at 100% to reflect their effective command over a licensee, non-controlling and non-majority interests should be entitled to avoid attribution. This kind of modified, single-majority shareholder rule would also avoid pointless double counting of attributable interests and better reflect the underlying economic realities of a licensee's ownership. In the alternative, the Commission may choose to abandon the "control" rationale, in which case a simple multiplier should be used to calculate all indirect interests, regardless of control or majority ownership.

Finally, the Morgan Stanley Partnerships request that the Commission clarify that the multiplier rules (along with any additional rules that result from this petition) will not be applied (for any purposes) to investments in nationwide, narrowband PCS licensees made prior to the original adoption of the multiplier rule.

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Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services	))))	GEN Docket No. 90-314 ET Docket No. 92-100

To: The Commission

PETITION FOR RECONSIDERATION AND CLARIFICATION

The Morgan Stanley Leveraged Equity Fund II, L.P., Morgan Stanley Capital Partners III, L.P., Morgan Stanley Venture Capital Fund, L.P., and Morgan Stanley Venture Capital Fund II, L.P. (collectively, the "Morgan Stanley Partnerships"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. § 1.429, respectfully submit this petition for reconsideration and clarification of the Commission's Second Memorandum Opinion and Order in the above-captioned proceeding.[1/]

1/ Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, Second Memorandum Opinion and Order, GEN Docket No. 90-314, FCC 94-218 (released Aug. 25, 1994), 59 Fed. Reg. 46,195 (Sept. 7, 1994).

I. INTRODUCTION

The Morgan Stanley Partnerships are limited partnerships, in which institutional investors hold limited partnership interests, and the general partners (affiliates of Morgan Stanley Group, Inc.) have exclusive control over the partnership assets. The Morgan Stanley Partnerships' existing and future investments (both direct and indirect) in companies that seek to participate in personal communications services ("PCS") will be affected by the Commission's decision to apply a "multiplier" to determine attributable interests in narrowband PCS licensees for purposes of the multiple ownership rules.[2/]

The Morgan Stanley Partnerships urge the Commission to reconsider and clarify its rules governing the application of the multiplier in the narrowband PCS context. The current rule will discourage or preclude investment in PCS by certain institutional investors. The Commission should therefore moderate the rule's harshness with provisions similar to those adopted in the broadcast

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[2/] Two of the Morgan Stanley Partnerships have filed a petition seeking reconsideration of the Commission's decision to adopt a multiplier for the broadband PCS multiple and cellular cross-ownership rules. Petition for Reconsideration and Clarification, GEN Docket 90-314 (filed Sept. 6, 1994).

context. The Morgan Stanley Partnerships also request that the Commission clarify the prospective nature of its multiplier rule to eliminate any ambiguities regarding attribution of interests in nationwide narrowband licenses.

II. THE COMMISSION SHOULD NOT ATTRIBUTE INTERESTS IN LICENSEES HELD BY INSULATED LIMITED PARTNERS THAT ARE NOT MATERIALLY INVOLVED IN THE MANAGEMENT OR OPERATION OF THE LICENSEE.

A. The Attribution Rules Should Not Inhibit The Flow Of Capital To PCS.

The multiple ownership attribution rules are designed to provide the Commission with a tool to assess accurately the involvement of entities that hold indirect interests in PCS licensees. Obtaining accurate measures of such involvement is important to ensure a robustly competitive PCS market. However, the Commission's attribution rules must not be crafted over broadly, such that they unduly constrain the flow of capital into the nascent PCS industry. As ample evidence in the record demonstrates, a competitive PCS market will emerge only if sufficient capital is made available to entrepreneurial PCS firms.[3/]

[3/] See, e.g., Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Third Memorandum Opinion And Order, PP Docket No. 93-253, FCC 94-219, ¶¶ 37-41 (released Aug. 17, 1994).

B. Insulated Limited Partners Should Not Be Attributed Because They Lack Control And Attribution Will Limit The Capital Available For PCS.

As currently crafted, the Commission's rules cause the attribution of the interests of all entities that hold a direct or indirect stake in a PCS licensee, even if such entities are completely insulated from the management and operation of the licensee. The Morgan Stanley Partnerships urge the Commission to reconsider this rule, because it is overly stringent, is inconsistent with the Commission's experience in the broadcast arena, and (most importantly) will deter investment in PCS.

Fundamentally, insulated limited partners should be treated differently because they do not seek and plainly cannot exert control or influence over the management or operation of a licensee. The limited partners cede all such control to the professional manager (the general partner), who is paid to perform these tasks. Because such limited partners are passive, their interests in licensees do not raise the same anticompetitive concerns present in the case of non-passive investors.[4/] In the broadcast context, the

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[4/] It might be suggested that competitive concerns persist even in the case of passive investors because oligopoly market conditions prevail. This argument assumes that (continued...)

Commission long ago recognized the virtue of exempting insulated limited partners from attribution, stating that such an exemption "furthers the public interest" because it "facilitates the infusion of capital into broadcasting

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[4/] (...continued)
an entity that controls some licensees and has a passive interest in others would be inclined to direct the licensees it controls to compete less vigorously so as to enhance the value of its passive investments in other market participants. This hypothesis is misleading.

If a controlling investor owns less than 100 percent of a licensee, it has a fiduciary obligation to the minority shareholders to compete vigorously in the marketplace. It would be a violation of that fiduciary duty to permit the conflict of interest created by a passive investment in another licensee to dictate the business decisions affecting the controlled licensee.

If a controlling investor is also the only shareholder, its economic interest in the success of the controlled licensee would be greater than its interest in the success of any non-controlled, partly-owned entity. Thus, the oligopolistic incentives are dramatically reduced.

Finally, the argument that passive ownership undermines competition assumes that the relevant market is only PCS. However, other wireless providers -- cellular, E/SMR, mobile satellite service, traditional paging, and perhaps other services -- will also be competing for business. Thus, even oligopolistic behavior among all PCS market participants would not be possible because of the competitive threat posed by other services.

enterprises" and "eliminates unnecessary and potentially costly regulation."[5/]

This same logic applies to PCS -- an industry that will require significant capital for its success. In the case of private equity funds like the Morgan Stanley Partnerships, the limited partners rely as a matter of necessity on the general partner to select, manage and dispose of investments. If these limited partners (often conservative institutions such as pension plans or university endowments) face the risk of attribution, and consequently a violation of the Commission's multiple ownership rules, the message to portfolio managers will be unambiguous: "steer clear of PCS."[6/]

The Commission should thus import from the broadcast context its rules excepting insulated limited partners from attribution. These rules include specific

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[5/] Corporate Ownership Reporting and Disclosure By Broadcast Licensees 58 R.R.2d 604, FCC 85-252, ¶ 27 (released June 24, 1985).

[6/] Although each outside manager might be able to ensure that its investments alone would not subject attributed limited partners to violations of the Commission's rules, the limited partners (institutional investors) cannot rely on <u>all</u> of their outside managers to coordinate jointly the investor's entire portfolio of holdings. Thus, institutions that invest through multiple vehicles -- which nearly all do to maximize diversification -- would risk violating the rules.

criteria for determining whether a limited partner is insulated from material involvement in the licensee's management or operation.[7/] For reasons discussed below, however, the Commission should allow certain limited partnerships to qualify for "grandfathered" treatment with respect to insulation.

C. Partnerships That Predate The Commission's Decision Should Be Eligible For A "Grandfathered" Exemption.

The adoption of the insulated limited partnership rules from the broadcast context will resolve many of the difficulties confronted by potential PCS investors that wish to use limited partnership structures. However, existing

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[7/] These criteria require that the limited partnership agreement: (i) prohibit limited partners from acting as employees of the limited partnership if responsibilities relate to the carrier activities of the licensee; (ii) bar the limited partners from serving as independent contractors as in (i), above; (iii) restrict communication among limited partners and the general partner regarding day-to-day activities of the licensee; (iv) empower the general partner to veto admissions of new general partners; (v) restrict the circumstances in which the limited partners can remove the general partner; (vi) prohibit the limited partners from providing services to the partnership related to the carrier activities of the licensee; and (vii) state that the limited partners may not become involved in the management or operation of the licensee. <u>See</u> <u>Memorandum Opinion and Order</u>, MM Docket No. 83-46, FCC 85-252, 58 R.R.2d 604, 619-620 (released June 24, 1985), <u>modified on reconsideration</u>, <u>Memorandum Opinion and Order</u> MM Docket 83-46, FCC 86-410, 1 FCC.Rcd. 802 (released Nov. 28, 1986).

limited partnerships that were established prior to the promulgation of the Commission's rules, such as the Morgan Stanley Partnerships, would not be helped if the broadcast rules were directly applied to PCS. These pre-existing partnership agreements were obviously not drafted with the insulation rules in mind and thus do not include the specific recitals required by the broadcast insulated limited partnership rules.

It would be both inequitable and unrealistic at this late stage to require these entities to amend their limited partnership agreements to comply with the insulation rules. The Morgan Stanley Partnerships, for example, have nearly 100 limited partners, many of whom (as is noted above) are large, risk-averse institutional investors that move slowly. It would be impossible for the Morgan Stanley Partnerships to renegotiate their agreements with these institutions, particularly over the next few months when PCS investment decisions must be made. If renegotiation were required, capital from the Morgan Stanley Partnerships would simply not be available for PCS. Accordingly, the Morgan Stanley Partnerships urge the Commission to permit the general partner(s) of limited partnerships that exist[8/] as of the date the Commission's new rule is adopted to certify to the Commission that the limited partners are not materially involved, directly or indirectly, in the management or operation of the PCS licensee.[9/]

III. INSTITUTIONAL INVESTORS THAT HOLD INDIRECT INTERESTS IN LICENSEES SHOULD BE SUBJECT TO A HIGHER ATTRIBUTION THRESHOLD.

A. Institutions Hold Many Indirect Investments And Cede Control Over Such Investments To Professional Managers.

Institutions typically invest widely in an attempt to minimize the risks associated with asset concentration. A corollary of this investment philosophy is that relatively small, indirect equity positions are often held through a range of investment vehicles. One of the large pension investors in the Morgan Stanley Partnerships, for example, has over 100 outside managers investing money on its behalf. Because of this diversification, most of the large pension

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8/ Determining the date on which a limited partnership came into existence is relatively easy. Both the Revised Uniform Limited Partnership Act and its predecessor require the filing of a certificate of limited partnership with the appropriate state official.

9/ This phrasing is borrowed from the general standard of insulation in the broadcast attribution rules. See 47 C.F.R. § 73.3555(f) n.2(g)(1).

funds and similar institutions, such as university endowment funds, do not (indeed, probably could not) keep a constant, completely accurate record of the size of all their indirect holdings. Instead, these institutions monitor generally the investment decisions of their outside managers and exercise oversight based primarily on investment style, asset allocation and manager performance.[10/]

The Morgan Stanley Partnerships are typical private equity funds that attract investment by institutions that seek professional portfolio management. The bulk of the limited partnership interests are held by pension funds and university endowments. This kind of limited partnership structure is a common investment vehicle, because many institutional investors do not have the necessary staff or expertise to make investment decisions in-house. In this sort of partnership, the limited partners have no control over the partnership's investments. They do not select, manage, or dispose of investments, nor do they vote the

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10/ Under these circumstances, it seems unreasonable to require pension funds -- which are largely removed from the management and operations of the companies in which they are <u>indirectly</u> invested -- to monitor constantly the size of all their indirect holdings. Instead, this presents another justification for adoption of an exemption from the attribution rules for insulated limited partners.

securities held by the partnership. These constraints on the powers of the limited partners are intentional; the limited partners have invested in funds such as the Morgan Stanley Partnerships precisely because they relieve the investors of responsibility for managing their investments.[11/]

B. Institutional Investors That Hold Interests Attributable By Application Of The Multiplier Should Benefit From A Higher Attribution Threshold.

In the broadcast context, the Commission saw fit to relax the attribution threshold for certain kinds of passive institutional investors. The Commission reasoned that these investors "play passive roles" and a relaxed attribution threshold would strengthen "the economic foundation of the broadcasting and cable industries."[12/] It also acknowledged that the record did not reveal any "actual cases of institutional investors using their minority interest in widely held . . . companies to exert

[11/] Indeed, because these investors do not monitor the day-to-day activities of the businesses in which they are indirectly invested, most would not even be aware of FCC radio licenses acquired by these companies. This further compounds the coordination problem raised in footnote 6, above.

[12/] Report and Order, FCC 84-115, ¶ 32 (ellipses in original) (citations and quotations omitted) (released Apr. 30, 1984).

influence on the management of such companies." The Commission went on to state, however, that not all passive investors are the same: some such investors are not "active" in the traditional sense, but their roles in the management and operation of licensees should preclude them from the benefits of a higher, passive investor attribution threshold.[13/]

Taking this distinction at face value, it remains true that certain institutional investors (specifically, pension funds and university endowment funds), though not entirely passive, do not play a significant role in the management and operation of the companies in which they are invested. When such investors' interests in a licensee are further diluted because they are held indirectly through an intervening private equity fund,[14/] as was shown above, the possibility of such indirect investors asserting control over a licensee is even more remote.[15/]

13/ Id. ¶¶ 35- 37.

14/ For example, consider a case in which a pension fund is a limited partner in a partnership that invests in a licensee.

15/ In the indirect investment case, the level of the investor's interest in the licensee is calculated by use of the multiplier -- an inexact measure of a party's actual control over and economic interest in (continued...)

In PCS context -- where the attribution rules have less far-reaching goals than those used for broadcast -- control is the fundamental element that the attribution rules seek to track.[16] Thus, while none of these factors alone may be sufficient to warrant special treatment for pension funds or endowment funds, in combination there is a strong case for raising the attribution threshold for such investors to ten percent. Pension funds and university endowment funds are inherently passive, and when they invest indirectly, they are not seeking a strategic position in the telecommunications industry, but only a financial return. In such circumstances, a ten percent attribution threshold would be consistent with the Commission's policy goals and would encourage PCS investment.

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[15] (...continued)
the licensee. In the broadcast setting, the Commission assumed that the "problems encountered by pension funds [that is, investments in two or more portfolio companies with investments in broadcast companies] will be relieved in most instances by the multiplier. *See Report and Order*, FCC 84-115, ¶ 37 (emphasis added) (released Apr. 30, 1984). As the discussion in the text indicates, this assumption is simply incorrect in the PCS context.

[16] Unlike many broadcast stations, PCS providers will, from the very beginning, face vigorous competition from other wireless services. Likewise, the diversity concerns of broadcasting are simply not present in PCS.

IV. MINORITY INTERESTS SHOULD NOT BE ATTRIBUTED WHERE A SINGLE ENTITY HOLDS EITHER A MAJORITY OF THE LICENSEE'S VOTING STOCK OR CAN OTHERWISE CONTROL THE LICENSEE.

In applying its multiplier rule, the Commission counts as 100 percent a controlling or majority interest in an ownership chain, based on the assumption that the control represented by such interests is not diluted by the presence of an intervening entity. At the same time, however, the attribution rules do not provide an exception for minority and non-controlling shareholders, meaning that a licensee can have attributable interests that significantly exceed 100 percent. Effectively, the Commission wants to have the control issue both ways: count all controlling and majority interests in an ownership chain as 100 percent, while still attributing minority and non-controlling interests.

This is plainly unfair and internally inconsistent. The rule prejudices investors that hold both direct and indirect investments[17/] and results in the attribution of minority shareholders that are effectively excluded from the management and operation of the company. Based on its "control" logic, the Commission should

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[17/] For example, an entity that owns 49% of the licensee's controlling shareholder and also owns 25% of the licensee directly has an attributable interest of 74% (49% x 100% + 25%), even though its economic interest was closer to 50%.

recognize the need for a single-majority or controlling shareholder exception to its attribution rules. Where a single entity either owns a majority voting interest <u>or</u> can otherwise control the licensee, the interests of minority or non-controlling shareholders in the same licensee should not be attributed.[18]

Conversely, if the Commission concludes that minority and non-controlling shareholders still have influence that warrants attribution, it should not count as 100% attributed a majority or controlling shareholder in an intervening entity. Instead, a flat multiplier should be applied in all cases.

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[18] In the broadcast context, the Commission recognized the wisdom of adopting a single majority shareholder exception to the attribution rules. However, before this rule is imported into the PCS setting, it should be modified. The broadcast exception does not include those instances in which a single entity holds less than a majority of the licensee's voting interests, but still controls the entity (through, for example, a shareholder voting agreement). The Morgan Stanley Funds recommend that the Commission alter the single majority shareholder exception to include the control concept, because it further serves the rationale of not attributing minority shareholders where they have no effective control over an entity.

V. THE COMMISSION SHOULD CLARIFY THAT THE MULTIPLIER ONLY APPLIES PROSPECTIVELY.

It is apparent from the text of the Order that the Commission intended to apply the multiplier prospectively.[19/] This is only sensible, given that the participants in the nationwide narrowband auction bid under the assumption that certain types of indirect interests are attributable, whereas others are not. Unfortunately, the Commission's new rule is ambiguous in its application.[20/] The current text could be read to apply the multiplier to find attributable interests in nationwide licenses for purposes of determining whether subsequently acquired licenses put an entity over the multiple ownership limit.

This would plainly be a retroactive application of the rule, contrary to the explicit intentions of the Commission.[21/] The Commission should clarify that its prospective application of the multiplier (whatever the

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19/ See Second Memorandum Opinion and Order, FCC 94-218, ¶ 14 n. 17 (released Aug. 25, 1994).

20/ See 47 C.F.R. § 24.101.

21/ Such a retroactive modification of the rules would be especially unfair given that the Commission adopted to multiplier on its own motion, without opportunity for public comment. It might also be a violation of the Administrative Procedure Act. See 5 U.S.C. § 551 et seq.

licenses that were not attributable under the old rule, will remain such even under the new rule, for all purposes.[22]

VI. CONCLUSION

The Morgan Stanley Partnerships have shown that, as currently drafted, the Commission's narrowband multiplier rule is unduly harsh in its effects on certain prospective investors in PCS. Fortunately, the Commission can mitigate this harshness with a handful of reasonable adjustments to the rule.

First, the Commission should exempt certain insulated limited partners from attribution, based on their lack of material involvement with the licensee. Second, it should adopt a higher attribution threshold for indirect, institutional investors, whose control over the licensee is diluted by intervening entities and the inherently passive nature of such investors. Third, the Morgan Stanley Partnerships urge that minority shareholders should not be attributed where there exists a controlling or single

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22/ In other words, if an entity holds an indirect interest in a nationwide narrowband PCS licensee that was not attributable under the old rule, adoption of the multiplier will not convert that interest into an attributable one.

majority shareholder. Finally, the prospective-only application of the multiplier should be clarified.

Respectfully submitted,

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