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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 95-92

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish New Personal Personal Communications Services in the 2 GHz Band	)	GEN Docket No. 90-314
	)	ET Docket No. 92-100
	)	
	)	RM-7617, RM-7760, RM-7782, RM-7860,
Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services	)	RM-7977, RM-7978, RM-7979, RM-7980
	)	

MEMORANDUM OPINION AND ORDER

Adopted: March 2, 1995 Released: March 3, 1995

By the Commission:

INTRODUCTION

1. By this action we amend sections 24.101 and 24.204 of our rules governing ownership attribution of licenses in the narrowband and broadband personal communications services (PCS), see 47 C.F.R. §§ 24.101, 24.204, to refine and clarify them in light of our decisions to use a "multiplier" when assessing indirect ownership interests. Specifically, we amend our rules to: (1) exempt from attribution certain insulated limited partnership interests held by institutional investors; and (2) increase from five to ten percent the level at which institutional investors' PCS license ownership interests will be attributed. We also clarify that, if an entity holds an indirect interest in a nationwide narrowband PCS licensee that was not attributed prior to the adoption of our narrowband "multiplier" rule, then the interest will remain a non-attributable interest and will not be counted toward the three licenses per market limit. We clarify, however, that this exemption will expire with respect to a particular interest in a license if in the future that exempt interest is transferred or assigned to another entity. These rule amendments will encourage investment in PCS, particularly by institutional investors, and thus promote the rapid deployment of such new services in the public interest. We take this action in response to petitions for reconsideration filed in the above-captioned

proceedings by the Morgan Stanley Partnerships (Morgan Stanley).[1] The petitions are unopposed.

BACKGROUND

2. In order to promote competition and safeguard against anti-competitive activities in PCS, our rules impose certain limitations on the ownership of narrowband and broadband PCS licenses. In narrowband PCS we permit common ownership of up to three of the twenty-six 50 kHz channels that are available in each area,[2] while in broadband PCS a "spectrum cap" generally precludes an entity from holding an attributable ownership interest in licenses totalling more than 45 MHz of combined PCS, cellular and specialized mobile radio spectrum in the same geographic area. In addition, no entity may hold attributable interests in more than 40 MHz of broadband PCS spectrum in the same geographic area.[3] Our rules also prohibit cellular carriers from holding an attributable interest in more than one 10 MHz BTA PCS license within their cellular service area.[4] Since it is not uncommon for multiple entities to hold interests in the same license, our rules define those interests that are considered "attributable" for purposes of determining compliance with ownership limitations.[5]

3. To account for situations in which an entity holds an ownership interest in a license indirectly, such as through an intervening corporation, we apply a "multiplier" to determine the effective ownership interest of that entity. This aspect of our attribution rules

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[1] Morgan Stanley's petitions for reconsideration were timely filed on September 6 and October 7, 1994, in response to orders in our broadband and narrowband PCS rulemaking proceedings in which we adopted the multiplier aspect of our PCS attribution rules. See Further Order On Reconsideration, GEN Docket No. 90-314, 9 FCC Rcd 4441 (1994) (Broadband PCS Multiplier Order); Second Memorandum Opinion and Order, GEN Docket No. 90-314, ET Docket No. 92-100, 9 FCC Rcd 4519 (1994) (Narrowband PCS Multiplier Order). Morgan Stanley is composed of Morgan Stanley Leverage 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..

[2] See First Report and Order, GEN Docket No. 90-314, ET Docket No. 92-100, 8 FCC Rcd 7162, 7167-68 ¶¶ 32-34 (1994).

[3] See Implementation of Sections 3(n) and 332 of the Communications Act, Regulatory Treatment of Mobile Services, GEN Docket No. 93-252, FCC 94-212, ¶¶ 238-283, released Sept. 23, 1994.

[4] 47 C.F.R. § 24.204

[5] For purposes of the narrowband PCS license limitation noted in the text above, for example, a licensee is any person or entity with an ownership interest of five or more percent. See 47 C.F.R. § 24.101; Narrowband PCS Multiplier Order, 9 FCC Rcd at 4521.

operates by multiplying intervening ownership interests together to determine the effective ownership level of the entity holding those interests. For example, if Party X owns a 25 percent non-controlling interest in Corporation Y, which in turn holds a 10 percent non-controlling interest in License Z, then Party X is deemed to have a 2.5 percent effective ownership interest in License Z (.25 x .10 =.025). The use of a multiplier allows us to account accurately for a party's actual involvement with the ultimate licensee, as well as the party's ability to exert substantial influence over that license.

PLEADINGS

4. Morgan Stanley argues in its petitions for reconsideration that application of a multiplier to PCS license ownership interests held by institutional investors does not serve the public interest. According to Morgan Stanley, institutions invest widely in relatively small equity amounts in an attempt to minimize risks associated with asset concentration.[6] A corollary of this investment philosophy, according to Morgan Stanley, is that indirect investment in multiple PCS licensees may result without any intention to obtain control of or influence over a licensee, or any ability to exercise control or influence.[7] Morgan Stanley argues that applying a multiplier under such circumstances does not accurately reflect an institution's involvement with a licensee and will have a deleterious effect on investment in PCS. Rather than run the risk of inadvertently violating the Commission's PCS license ownership limitation rules, institutional investors will simply avoid direct or indirect PCS investments. Thus, Morgan Stanley claims, application of the multiplier rule will have the effect of deterring PCS investment, contrary to the Commission's policy goal of promoting PCS deployment.[8]

5. In order to avoid this result, Morgan Stanley asks that we amend our rules so as not to attribute ownership interests in narrowband and broadband PCS licenses held by limited partners that are not materially involved, directly or indirectly, in the management or operation of the licensee. Morgan Stanley argues that the current rule is overly stringent, is inconsistent with the Commission's experience in the broadcast area, and will deter investment in PCS. Accordingly, Morgan Stanley requests that we import from the broadcast context the rules excepting insulated limited partnerships from attribution. Additionally, Morgan Stanley requests that, in the interest of equity, we "grandfather" partnerships that pre-date the adoption of the multiplier rule even though they would not comply with the partnership insulation criteria it proposes. Morgan Stanley suggests that a general partner be permitted to

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[6] See Morgan Stanley Petition, filed Sept. 6, 1994, at 3.

[7] Id. at 3-4.

[8] Id. at 5-6.

certify substantial compliance with the "no material involvement standard" of the broadcast attribution rules.[9]

6. Morgan Stanley also requests that we adopt a higher attribution threshold for certain institutional investors, such as pension funds and university endowment funds, that invest indirectly in PCS licensees. Morgan Stanley argues that such institutional investors do not seek to control or influence the management or operations of licensees in which they hold indirect interests and that, moreover, because the investments are indirect there is little opportunity to exert influence over the licensee.

7. Morgan Stanley also requests that we not 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 effectively controls a company through a voting agreement. Morgan Stanley argues that because the majority or controlling interests are counted at 100% when applying the multiplier, this amendment would eliminate pointless double counting of attributable interests and would better reflect the underlying economic realities of a licensee's ownership. Alternatively, Morgan Stanley requests that we abandon the control rationale and use a simple multiplier to calculate all indirect interests, regardless of control or majority ownership. Finally, Morgan Stanley requests that we clarify that the multiplier rules, along with any additional rules resulting from its reconsideration petitions, will not be applied to investments in nationwide narrowband PCS licensees that were granted such licenses or obtained them at auction prior to August 16, 1994.

8. The National Venture Capital Association (NVCA), Accel Telecom L.P., Accel III L.P. and Accel Investors '89 L.P. (Accel), and The Capital Group Companies, Inc. (Capital Group) support Morgan Stanley's petition.[10] NVCA states the multiplier rule is an unacceptable, additional risk that is a hazard to capital and that subjects genuinely passive investors in PCS licensees to potential violations of Commission rules, including all the attendant sanctions. Gurman, Kurtis, Blask & Freedman (Gurman) also filed in support of Morgan Stanley's petition and additionally requested that we amend Section 24.813(a)(1) and (2) of the Commission's rules to clarify that the reporting requirements of these sections apply only to those indirect interest holders who either (a) hold a majority of the ownership interests or other direct controlling interest in a holder of a direct attributable interest in the applicant

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[9] See 47 C.F.R. § 73.3555 at note 2(g)(2).

[10] See NVCA's Comments, dated October 14, 1994; Accel's Comments, dated October 20, 1994; and Capital Group's Comments, dated November 21, 1994. Capital Group's Comments were 18 days late. In the interest of considering a full record in this matter, we are accepting Capital Group's Comments as a permissible ex parte submission.

or (b) have a direct attributable interest in an entity holding a direct controlling interest in the applicant.[11]

9. Accel states that limited partnerships are commonly used by institutional investors and will be an important vehicle for financing PCS. Accel asserts that limited partners in such structures do not play a material role in the businesses in which the partnerships invest, and therefore should not have their indirect interests in PCS licenses attributed. Accel agrees with Morgan Stanley that certain provisions of the broadcast attribution rules, modified as suggested by Morgan Stanley, should be incorporated into the PCS rules. Accel states that these amendments will soften the impact of the multiplier rule. Without the modification proposed by Morgan Stanley, Accel states that limited partnerships will be deterred from investing in PCS because Accel's limited partners may otherwise face possible violations of the Commission's Rules. Accel argues that this will especially harm PCS entrepreneurs since they will rely on entities such as Accel for the capital to acquire and build out systems.

DISCUSSION

10. Our PCS proceedings are designed to promote four primary goals: competitive delivery, a diverse array of services, rapid deployment, and wide-area coverage.[12] The ability of PCS entrants to attract capital is essential to achieving these goals. In essence, Morgan Stanley argues that our PCS attribution rules do not promote this ability sufficiently. We note that while promoting PCS investment is an important public interest component of our PCS policies, our attribution rules are designed principally to operate in conjunction with ownership limits to maintain a competitive PCS industry.[13] The real question, therefore, is whether treating institutional investors differently under our PCS attribution rules will improve investment incentives without undercutting those rules' primary goal of serving as anticompetitive safeguards. We answer that question affirmatively.

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[11] See Gurman Request for Clarification of the Multiplier Rule, dated December 16, 1994.

[12] See Second Report and Order, GEN Docket No. 90-314, 8 FCC Rcd 7700 (¶ 5) (1993).

[13] See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, 9 FCC Rcd 5947 (1994); on reconsideration, FCC 94-265, ¶¶ 30-34, released Oct. 19, 1994.

11. This Commission and other regulatory agencies have long recognized a distinction between institutional investors and other investors.[14] This results, in part, because the term "institutional investors" identifies a category of investors that may be defined with some precision.[15] We agree with Morgan Stanley that institutional investors' market activities generally do not raise the type of "control" issues that led us to adopt "bright line" PCS attribution rules.[16] Indeed, we recently amended our rules in this regard to further clarify the definition of institutional investor under our PCS rules and to promote such investors' opportunities to serve as an important source of funding for designated entity PCS companies.[17] Modifying our narrowband and broadband PCS attribution rules in light of Morgan Stanley's request is consistent with our traditional policy and recent action regarding institutional investors. Moreover, we believe that these modifications will serve as an important means for encouraging increased passive investment in PCS. Accordingly, we will amend our PCS rules to: (1) exempt from attribution insulated limited partnership interests held by institutional investors, subject to those investors certifying to the Commission that they are not materially involved directly or indirectly in the management or operation of the carrier activities of the partnership;[18] and (2) increase from five to ten percent the level at

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[14] See, e.g., 47 C.F.R. § 73.3555 n.2(i) (relaxed treatment of institutional investors under broadcast attribution rule); 17 C.F.R. § 240.13d-1(b)(1)(ii) (reduced reporting requirements on certain institutional investors under regulations implementing the Securities and Exchange Act of 1934).

[15] See, e.g., 47 C.F.R. § 24.720(h) (definition of institutional investor).

[16] See, e.g., Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket 90-314, 9 FCC Rcd 4957, 5003 (¶¶ 105-122) (1994).

[17] See Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Fifth Memorandum Opinion and Order, PP Docket No. 93-253, FCC 94-285, ¶ 65 & n.162, released November 23, 1994.

[18] The criteria we adopt for purposes of this certification track those already in use in the mass media context. See 47 C.F.R. § 73.3555 Note 2(g)(2); Memorandum Opinion and Order in MM Docket No. 83-46, FCC 85--252 (released June 24, 1985), as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986). We recently sought comment on the effectiveness of these insulation criteria in that context, as well as on existing differences between broadcast and wireless telecommunications services. See Review of the Commission's Regulations Governing Attribution of Broadcast Interests, MM Docket No. 94-150, FCC 94-324, ¶¶ 26-36, 55 & n.110.

which institutional investors' PCS license ownership interests will be attributed.[19] We decline, however, to adopt the single majority shareholder exception requested by Morgan Stanley. We believe that such an exception is unnecessary to address the issues raised by Morgan Stanley with respect to application of the multiplier to indirect institutional investments. Moreover, we do not believe that such an exception is necessary to enable PCS applicants to attract capital from institutional investors given the above-described modifications to our attribution rules.

12. In addition, we conclude that institutional investors who held limited partnership interests prior to the adoption date of this order shall be granted one year from that date to amend their limited partnership agreements to comply with the insulation rules. During this transition period, affected licensees shall certify to the Commission that the limited partners are not materially involved, directly or indirectly, in the management or operation of a PCS licensee.

13. We have decided previously not to apply the multiplier rule to nationwide narrowband PCS licenses granted under our pioneer preference rules prior to August 16, 1994, or to nationwide narrowband PCS licenses auctioned before August 16, 1994 (the date on which we adopted the narrowband PCS multiplier rule).[20] As we noted in that order, we do not believe it would be equitable to apply the multiplier rule to those licensees.[21] In keeping with that rationale, however, we clarify that this exemption will expire with respect to a particular interest in a license if in the future that exempt interest is transferred or assigned to another entity.

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[19] Consistent with this change, we clarify that for purposes of the reporting requirements of section 24.813 of the Commission's rules institutional investors are not considered attributable investors in an applicant unless they hold an ownership interest of 10 percent or more in the applicant. We will amend section 24.813 (a)(2) to require applicants to report ownership interests held by institutional investors only if such ownership interests are 10 percent or more.

[20] See Narrowband PCS Multiplier Order, 9 FCC Rcd at 4522 n.17.

[21] Id.

ORDERING CLAUSES

14. IT IS FURTHER ORDERED THAT the petitions for reconsideration filed by Morgan Stanley on September 6 and October 7, 1994, in our broadband and narrowband PCS proceedings, respectively, ARE GRANTED to the extent discussed above.

15. Accordingly, IT IS ORDERED that Part 24 of the Commission's Rules IS AMENDED as specified in Appendix A, AND WILL BECOME EFFECTIVE immediately upon publication in the Federal Register.[22]

16. This action is taken pursuant to Sections 4(i), 7(a), 302, 303(c), 303(f), 303(g), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 157(a), 302, 303(c), 303(f), 303(g), and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton

Acting Secretary

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[22] Pursuant 5 U.S.C. § 553(d)(3), we conclude that "good cause" exists to have the rule changes take effect immediately because a delay would not provide applicants with sufficient time to attract investors and finalize their business plans for the upcoming broadband PCS auctions. Immediate implementation of the rule changes set forth herein also provides applicants with the required certainty to proceed with their bidding and business strategies, alleviating concerns about potential violations of our PCS ownership rules as a result of institutional investments.

Appendix A: Final Rules

Part 24 of Title 47 of the Code of Federal Regulations is amended to read as follows:

PART 24 – PERSONAL COMMUNICATIONS SERVICES

1. The authority citation in Part 24 continues to read as follows:

AUTHORITY: 47 U.S.C. §§ 154, 301, 302, 303, 309 and 332, unless otherwise noted.

2. Section 24.101 is amended to read as follows:

§ 24.101 Multiple ownership restrictions.

(a) Narrowband PCS licensees shall not have an ownership interest in more than three of the 26 channels listed in Section 24.129 in any geographic area. For purposes of this restriction, a narrowband PCS licensee is: (i) any institutional investor, as defined in Section 24.720(h) of this Part, with an ownership interest of ten or more percent in a narrowband PCS license; and (ii) any other person or entity with an ownership interest of five or more percent in a narrowband PCS license.

(b) In cases where a party has indirect ownership, through an interest in an intervening entity (or entities) that has ownership in the narrowband license, that indirect ownership shall be attributable if the percentages of ownership at each level, multiplied together, equal five or more percent ownership of the narrowband PCS license, except that if the ownership percentage for an interest in any link in the chain exceeds 50 percent or represents actual control, it shall be treated as if it were a 100 percent interest.

EXAMPLE: Party X has a non-controlling ownership interest of 25 percent in Company Y, which in turn has a non-controlling ownership interest of 10 percent in Company Z, the narrowband PCS licensee. Party X's effective ownership interest in Company Z is Party X's ownership interest in Company Y (25 percent) times Company Y's ownership interest in Company Z (10 percent). Therefore, Party X's effective ownership interest in Company Z is 2.5 percent, and is not attributable.

(c) Notwithstanding paragraph (b) of this Section, the following interests shall not constitute attributable ownership interests for purposes of paragraph (a) of this Section:

> A limited partnership interest held by an institutional investor (as defined Section 24.720(h) of this part) where the limited partner is not materially involved, directly or indirectly, in the management or operation of the PCS holdings of the partnership, and the licensee so certifies. The criteria which would assure adequate insulation for the purposes of this certification require: (i) Prohibiting limited partners from acting as employees of the limited partnership if responsibilities relate to the carrier activities of the licensee; (ii) Barring the limited partners from serving as independent contractors; (iii) Restricting communication among limited partners and the general partner