

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications of)
)
SBC Communications Inc. and)
BellSouth Corporation)
)
For Consent to Transfer Control of)
or Assign Domestic Mobile Wireless)
Authorizations to Alloy, LLC)
_____)

WT Dkt. No. 00-81

ORIGINAL

**APPLICANTS' RESPONSE TO
PETITION TO DISMISS OR DENY**

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Dated: June 29, 2000

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SUMMARY

The Petition to Dismiss or Deny filed by Thumb Cellular Limited Partnership does not challenge any aspect of the proposed CMRS joint venture of SBC and BellSouth. Indeed, Thumb's Petition does not even relate to a license or interest that is the subject of the instant applications. Rather, Thumb complains only about a pro forma filing made by SBC following the consummation of the SBC/Ameritech merger to reflect the transfer of control of a minority partnership interest in Thumb held by a subsidiary of Ameritech. Thumb asserts that Ameritech does not own any such partnership interest and that SBC's pro forma filing reconfirming to the Commission such an interest therefore raises a question as to SBC's character.

Thumb's claims are completely without merit. Although it asserts, without providing any factual support, that Ameritech did not own a partnership interest in it, it is beyond dispute that Ameritech signed the original partnership agreement as a partner, that it also signed a subsequent amendment to the partnership agreement, and that Thumb's filings with the State of Michigan list Ameritech as a partner. While Thumb attempted unilaterally to oust Ameritech as a partner, Ameritech rebuffed that effort. Thus, SBC had more than ample grounds for making the pro forma filing regarding Ameritech's partnership interest.

In any event, this transfer of control proceeding is not the appropriate forum to consider Thumb's claims. Its assertion that Ameritech was not a partner raises state law issues that, under well-established Commission policy, are to be left to the courts. Moreover, Thumb has already raised these issues in the context of the pro forma grant by filing a Petition for Reconsideration. The proper place for the Commission to deal with

Thumb's complaints about the pro forma filing is in that proceeding, not in a completely unrelated transfer of control proceeding. Accordingly, Thumb's petition should be denied, and the applications of SBC and BellSouth should be granted expeditiously.

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**APPLICANTS' RESPONSE TO
PETITION TO DISMISS OR DENY**

Applicants SBC Communications Inc. ("SBC") and BellSouth Corporation ("BellSouth") hereby respond to the Petition to Dismiss or Deny (the "Petition") filed by Thumb Cellular Limited Partnership ("Thumb"). As explained in detail below, Thumb's Petition is devoid of any mention or explanation of the basis for its claims, and it concerns a dispute with SBC that raises state law issues that, under long-established Commission policy, are left to the state courts to decide. Moreover, even if this dispute did involve any issues that are within the jurisdiction of the Commission to resolve, it has already been raised by Thumb before the Commission in a different matter. Accordingly, Thumb's Petition should be dismissed because this transfer of control proceeding is not the appropriate forum in which to consider Thumb's baseless claims.

Even more importantly, Thumb has seriously misrepresented the facts regarding its underlying dispute with SBC. Thumb asserts that SBC falsely represented to the Commission that Ameritech has a partnership interest in it. However, Thumb never mentions the facts that (1) in August 1990, Ameritech entered into a partnership agreement with respect to the market for which Thumb is licensed to provide cellular service; (2) this partnership agreement was subsequently amended at least one time in December 1990; (3) Ameritech signed that amendment as a partner; and (4) Ameritech was listed as a partner in Thumb's filings with the State of Michigan in October 1990 and February 1991. Ameritech continued to be so listed as of March 31, 2000. Yet, each of these facts is true.

While this proceeding is not the place to litigate the existence of Ameritech's limited partnership interest in Thumb, it is necessary to set the record straight. Thumb has wrongfully, and without any foundation, attempted to raise questions as to SBC's character to hold FCC licenses.

Thumb's Petition is utterly without merit and should be summarily dismissed.

BACKGROUND

On May 4, 2000, SBC and BellSouth filed applications with the Commission to transfer or assign virtually all of their current interests in domestic mobile wireless voice and data operations to a newly created limited liability company. This transaction will create a near national, facilities-based wireless carrier that will compete with the other major providers and help meet the increasing demand for national wireless service and national pricing plans.

Thumb is the only party that has opposed the SBC/BellSouth applications. Its opposition, however, has absolutely nothing to do with the merits of the proposed joint venture. Rather, Thumb complains about a pro forma filing made by SBC following the consummation of the SBC/Ameritech merger¹ to reflect the transfer of control of a 23% limited partnership interest held by an Ameritech subsidiary² in Thumb.

While reviewing Ameritech's non-controlling minority partnership interests, SBC learned that Ameritech holds a 23 percent limited partnership interest in Thumb. Although there is, and has been for many years prior to the merger of SBC and Ameritech, a dispute between Ameritech and Thumb as to Thumb's attempt unilaterally to terminate that partnership interest, SBC believed, and continues to believe, that the interest was valid and that it was therefore appropriate to make a pro forma filing pursuant to Section 1.948(c)(1) of the Commission's Rules.³

To comply with that section, SBC manually filed a pro forma transfer of control application on November 8, 1999. SBC filed manually because it did not have Thumb's TIN or ULS password and believed – given the dispute over whether Ameritech has an interest in Thumb – that Thumb would refuse to provide that information. The

¹ Pursuant to an Order of the Commission, SBC acquired control over Ameritech Corporation ("Ameritech") on October 8, 1999. *In re Applications of Ameritech Corp. and SBC Communications Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712 (1999).

² The subsidiary at issue, Ameritech Mobile Communications, Inc., is being transferred to the SBC/BellSouth joint venture. Since Ameritech owns a minority non-controlling interest in Thumb, the cellular and microwave call signs owned by Thumb are not part of the SBC/BellSouth applications.

³ The facts discussed herein are set forth in the Declaration of Bruce Beard, which is attached as Exhibit A hereto.

Commission assigned ULS File Number 0000052981 to the application, and the Bureau granted it by public notice on January 19, 2000.⁴

Following the release of the public notice announcing the pro forma filing, Thumb filed a Petition for Reconsideration asking the Commission to rescind the pro forma grant of the transfer of the Ameritech minority partnership interest.⁵ SBC filed an opposition to the Petition for Reconsideration, and Thumb filed a reply to that opposition. The Commission has not yet acted on Thumb's Petition for Reconsideration.

ARGUMENT

I. THUMB HAS SERIOUSLY MISREPRESENTED THE FACTS REGARDING ITS DISPUTE WITH SBC

As will be discussed in Part II below, Thumb's Petition must be dismissed because it raises state law issues that are beyond the Commission's jurisdiction and because Thumb's allegations have been raised in another matter before the Commission. While it should not be necessary even to discuss the substance of Thumb's allegations due to these procedural bars, SBC simply cannot allow Thumb's unsubstantiated claims to go un rebutted. It is particularly important to respond because Thumb has seriously

⁴ See *Wireless Telecomm. Bureau Assignment of Authorization and Transfer of Control Applications Action*, Public Notice, Rept. No. 437, 2000 WL 35800 (rel. Jan. 19, 2000). ULS File Number 0000052981 covers all four call signs that belonged to Thumb as of October 8, 2000, when SBC acquired Ameritech's interest in Thumb. For reasons that are unclear, the Commission created a second application in ULS (ULS File Number 0000063348) for two of the microwave call signs (WML231 and WML232) that already were covered by ULS File Number 0000052981. The Bureau granted this redundant application by public notice on February 23, 2000. Thumb did not file its Petition for Reconsideration until March 20, 2000 – 61 days after the initial Public Notice. See 47 U.S.C. § 405.

⁵ Thumb's Petition for Reconsideration, and SBC's and Thumb's subsequent filings, were filed under File Nos. 0000063348 and 0000052981.

misrepresented the facts, and omitted material facts of which it is obviously aware, regarding its dispute with SBC over the Ameritech partnership interest. Indeed, as the following discussion will make clear, there is no basis for Thumb's attack on SBC's character qualifications.

Despite the vehemence of its accusations against SBC, Thumb's petition alleges virtually no facts. Specifically, Thumb claims that Ameritech does not have a partnership interest in it, that an old Form FCC 430 filed by Thumb did not list Ameritech as a partner, and that SBC did not actually ask it to supply its TIN and password before making the pro forma filing. However, these vague and conclusory allegations do not come anywhere near the kind of specific facts that must be introduced – by affidavit – to support a petition to deny.⁶ Indeed, the only “fact” that Thumb cites in support of its claim that Ameritech is not a partner is that Thumb did not list Ameritech on its FCC Form 430. However, this proves nothing other than that Thumb previously took the same position before the Commission that it is taking now. This self-serving omission fails to establish that Ameritech does not have a partnership interest.

Despite its failure to introduce a single probative fact to support its claim, Thumb insists so strenuously that Ameritech is not a partner that the Commission might be inclined to wonder whether there is any basis for SBC/Ameritech's claim to have an interest in Thumb. Indeed, in its zeal to create out of whole cloth a “character” issue out

⁶ See 47 U.S.C. § 309(d)(1); 47 C.F.R. § 1.939(d) (requiring petitions to deny to set forth “specific allegations of fact sufficient to make a prima facie showing that ... a grant of the application would be inconsistent with the public interest, convenience and necessity”).

of a partnership dispute, Thumb's Petition reads as if SBC simply fabricated its claim that Ameritech is a partner and that Thumb knows of no evidence that SBC could cite to support its position.

Quite to the contrary, SBC has ample evidence to support its claim. It is beyond dispute that Ameritech was one of the original partners in Thumb, with a 23% limited partnership interest. The only issue, then, is whether Thumb was successful in a subsequent attempt to oust Ameritech unilaterally from the partnership. Attached as Exhibit 1 to the Beard Declaration is a copy of the partnership agreement from August 1990 creating Thumb. That agreement, which is signed by Ameritech and lists Ameritech as a 23% limited partner, demolishes Thumb's suggestion that Ameritech was a stranger to Thumb. Indeed, the partnership agreement was subsequently amended in December 1990 to reflect the withdrawal of one of the other limited partners. Ameritech signed that amendment as a partner.⁷

Moreover, Ameritech was – and still is – listed as a limited partner on Thumb's Certificate of Limited Partnership filed by Thumb in October 1990 with the State of Michigan.⁸ The records that SBC has obtained from the state show that that certificate was amended in February 1991 to reflect the withdrawal of one of the other limited partners, but there is nothing on file to reflect any change in Ameritech's status. Thus, as

⁷ This amendment to the Thumb partnership agreement is attached as Exhibit 2 to the Beard Declaration.

⁸ Attached as Exhibit B hereto are certified copies of Thumb's Certificate of Limited Partnership, and one amendment thereto, obtained from the Michigan Department of Commerce and certified as of March 31, 2000.

far as the State of Michigan is concerned, Ameritech remains a duly recorded limited partner of Thumb.

Thumb's Petition offers no evidence whatsoever to show that Ameritech's status under the partnership agreement, as confirmed by Thumb's partnership registration with the State of Michigan, has ever changed. Indeed, Thumb does not even suggest any reason to believe that any such change ever occurred in fact. In view of the complete lack of any evidentiary basis to challenge Ameritech's status as a partner, Thumb's claim that SBC's pro forma filing reflecting the transfer of control of that partnership interest raises a character question is utterly baseless.⁹

Because Thumb has chosen not to provide any explanation for its claims, SBC will briefly describe the basis for the dispute. In 1991, Thumb apparently wished to provide interLATA service but believed it could not do so because Ameritech was subject to the constraints of the Modification of Final Judgment (the "MFJ"). Although nothing in the partnership agreement gives it any right to do so, Thumb's general partner sent a letter to Ameritech attempting unilaterally to oust Ameritech from the partnership so that Thumb's actions would not be constrained by the MFJ. Ameritech rebuffed this unilateral effort to deprive it of its undisputed status as a limited partner, and that refusal

⁹ Thumb's claim that SBC made a false statement regarding the reasons for making the pro forma filing on paper is equally meritless. Based on the history of the dispute between Thumb and Ameritech, SBC believed that there was no chance at all that Thumb would provide its TIN and password for a ULS filing. Nothing in the Commission's Rules would have required SBC to undertake such a futile act. Thumb's reaction to the pro forma filing shows that SBC was absolutely right in concluding that any such request to Thumb would have been futile.

has continued to this day.¹⁰ In fact, Thumb's basis for attempting to evict Ameritech dissolved in February, 1996 with the passage of the Telecom Act, which specifically permitted interLATA Wireless Operations by RBOCs.

As the foregoing demonstrates, Thumb's unsupported claim that Ameritech did not have a partnership interest is completely false. As shown by the fact that Ameritech executed the partnership agreement and the filings with the state of Michigan, Ameritech was one of the original partners. Ameritech rejected Thumb's effort to remove it from the partnership. No court has ever ruled on Thumb's claim. Thumb did not bring any of these facts to the attention of the Commission and did not offer an affidavit containing probative evidence that Ameritech was deprived of its interest, as the statute and rules governing petitions to deny require. Accordingly, Thumb's claim that there is a character issue regarding SBC must be rejected and the Petition should be summarily denied.

II. THE SBC/BELLSOUTH APPLICATION PROCEEDING IS NOT THE APPROPRIATE FORUM TO CONSIDER THUMB'S CLAIMS

Even putting aside its total lack of merit, Thumb's Petition should be dismissed for two other reasons. First, Thumb's allegation that Ameritech did not own a partnership interest in it – which is at the core of Thumb's claims – improperly lies before the Commission because it is well-settled that the Commission is not the proper forum for resolving such state law disputes. The U.S. Courts of Appeals have endorsed

¹⁰ Copies of correspondence between the parties reflecting the attempt to oust Ameritech and Ameritech's absolute refusal to acquiesce are attached as Exhibits 3-4 to the Beard Declaration.

the Commission's "longstanding policy of refusing to adjudicate" such questions¹¹ and have held that the Commission is not a "tribunal equipped to do so."¹²

Thumb's objection to SBC's pro forma filing raises just such a state law question. Its claim that SBC did not have a basis for making that filing is based entirely on its allegation that Ameritech, as a matter of state law, did not have a partnership interest in Thumb. As discussed above, however, SBC has more than ample grounds for claiming such an interest; indeed, in light of the documented facts discussed above, it is difficult to see how Thumb can assert otherwise. However, whether Thumb has any basis for its claim is a matter of state law that is best left to the courts with proper jurisdiction; it is not appropriate for consideration by the Commission.

In any event, there is no basis for the Commission to consider Thumb's claims in this proceeding. The Commission has repeatedly admonished parties challenging a

¹¹ See *Listeners' Guild, Inc. v. FCC*, 813 F.2d 465, 469 (D.C. Cir. 1987) (endorsing "the Commission's longstanding policy of refusing to adjudicate private contract law questions"); accord, e.g., *In re Applications of Centel Corp. and Sprint Corp., and F W Sub, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd. 1829, ¶¶ 9-10 (CCB 1993) ("[The petitioner] contends that the applications for the proposed transfers of control should be denied because [the transferor's] decision to merge [with the transferee] violates the partnership agreements to which [the petitioner] and [the transferor] are signatories [The petitioner's] arguments are unavailing. First, the alleged violation of the partnership agreements amounts to a contractual dispute between [the petitioner] and [the transferor], and, therefore, a matter for resolution by a private cause of action, rather than resolution by the Commission. The Commission has repeatedly stated that it is not the proper forum for the resolution of private contractual disputes, noting that these matters are appropriately left to the courts or to other fora that have the jurisdiction to resolve them." (notes omitted)).

¹² See *KAKE-TV and Radio, Inc. v. United States*, 537 F.2d 1121, 1123 (10th Cir. 1976) (holding, with respect to whether a cable television franchise was validly issued under Kansas law, "It is not the function of the F.C.C. to provide a forum to litigate such an issue, and, furthermore, the Commission is not a tribunal equipped to do so.").

proposed merger that oppositions based on extraneous claims that have nothing to do with the merger and are the subject of other Commission proceedings are improper and will not be entertained. As recently as its order approving the Bell Atlantic/GTE merger less than two weeks ago, the Commission stated that

it will not consider in merger proceedings “matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability.” Alternatively, some of these allegations are best addressed in enforcement proceedings brought by aggrieved parties under section 208 of the Act. Accordingly, we do not consider such issues in determining whether the proposed transfers are in the public interest.¹³

These principles govern here. Thumb has already raised these issues in the context of the pro forma grant by filing its Petition for Reconsideration. While SBC believes that the Petition for Reconsideration has no merit, and that the Commission’s policy should preclude it from deciding Thumb’s underlying state law claims, the proper place for the Commission to deal with Thumb’s complaints about the pro forma filing is

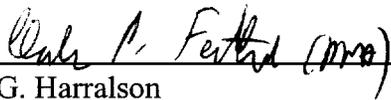
¹³ See *In re Applications of GTE Corp. and Bell Atlantic Corp. For Consent to Transfer of Domestic and Int’l Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, CC Docket No. 98-184, FCC 00-221, 198, ¶432 (released June 16, 2000) (quoting *In re Applications for Consent to the Transfer of Control of Licenses and Authorizations from Southern New England Telecommunications Corp. to SBC Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306 ¶29 (1998)). See also *In re Applications of Ameritech Corp. and SBC Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd. 14712, 14950 ¶ 571 (1999), *In re Applications of NYNEX Corp. and Bell Atlantic Corp.*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, 20083 ¶ 210 (1997), *In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, 18149 ¶ 215 (1998), *In re Applications of Craig O. McCaw and American Tel. & Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd. 5836, 5904 ¶ 123 (1994).

in that proceeding, not in a completely unrelated transfer of control proceeding.

Accordingly, Thumb's Petition should be dismissed.

CONCLUSION

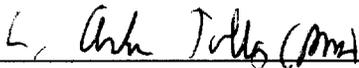
For the reasons set forth above, Thumb's Petition should be summarily dismissed, and the applications of SBC and BellSouth should be granted expeditiously.



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DECLARATION OF BRUCE E. BEARD

1. My name is Bruce E. Beard. I am the Vice President, General Attorney and Assistant Secretary of Ameritech Mobile Communications, Inc. ("AMCI"). My business address is 2000 W. Ameritech Center Drive - 3H78, Hoffman Estates, Illinois 60195-5000. My work phone number is (847) 765-5715.

2. Prior to the closing of the merger of SBC Communications Inc. ("SBC") and Ameritech Corporation ("Ameritech") on October 8, 1999, AMCI was an indirect, wholly owned subsidiary of Ameritech. As of such closing, AMCI became (and remains) an indirect, wholly owned subsidiary of SBC.

3. AMCI believes that it had a 23 percent limited partnership interest in Thumb Cellular Limited Partnership ("Thumb") prior to the SBC/Ameritech merger and that it continues to have such an interest today. Thumb does not recognize AMCI's interest in Thumb.

4. SBC learned of AMCI's interest in Thumb and of Thumb's refusal to recognize such an interest in the course of SBC's review of Ameritech's non-controlling minority partnership interests in Federal Communications Commission licensees.

5. Attached hereto as Exhibits 1-4, respectively, are the following documents from AMCI's files regarding Thumb: (1) Articles of Partnership of Thumb Cellular Limited Partnership; (2) First Amendment to Articles of Partnership of Thumb Cellular Limited Partnership; (3) Letter dated August 30, 1991 from Edwin Eichler of Thumb to John Cusak of AMCI; and (4) letter dated September 16, 1991 from John Cusak to Edwin Eichler.

I declare under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on this 28th day of June, 2000.


Bruce E. Beard

ARTICLES OF PARTNERSHIP
OF
THUMB CELLULAR LIMITED PARTNERSHIP
(A MICHIGAN LIMITED PARTNERSHIP)

GENERAL PARTNER:

AGRI-VALLEY COMMUNICATIONS, INC.
(A MICHIGAN CORPORATION)

THUMB CELLULAR LIMITED PARTNERSHIP

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THESE ARTICLES OF PARTNERSHIP are made and entered into as of this _____ day of _____, 1990 (the "Effective Date"), by and between:

AGRI-VALLEY COMMUNICATIONS, INC., a Michigan corporation with its principal place of business at 7585 Pigeon Road, Pigeon, Michigan 48755 ("Agri-Valley" or "General Partner");

CENTURY CELLUNET OF MICHIGAN RSAs, INC., a Louisiana corporation with its principal place of business at 520 Riverside Drive, Monroe, Louisiana 71201 ("Century" or "Limited Partner"); and

GTE MOBILNET, INCORPORATED, a Delaware corporation with its principal place of business at 616 FM 1960 West, Suite 400, Houston, Texas 77090-3097 ("GTE" or "Limited Partner"); and

AMERITECH MOBILE COMMUNICATIONS, INC., a Delaware corporation with its principal place of business at 1515 Woodfield Road, Schaumburg, Illinois 60173 ("Ameritech" or "Limited Partner").

RECITALS

WHEREAS, Agri-Valley, Ameritech, GTE and Century desire to participate in providing Cellular Service in Michigan RSA 10; and

WHEREAS, the Federal Communications Commission ("FCC") has granted Pigeon Telephone Company, Ameritech and Century collectively the right to provide Cellular Service within RSA 10; and

WHEREAS, Pigeon Telephone Company has assigned any rights it has acquired from the FCC to provide Cellular Service within RSA 10 to Agri-Valley;

NOW, THEREFORE, in consideration of the rights, duties, privileges and obligations hereunder assumed or accorded, the

General Partner **and** Limited Partners do hereby declare, stipulate and agree to these **Articles** of Limited Partnership.

ARTICLE ONE

ORGANIZATIONAL MATTERS

Section 1.01 - Articles. The parties hereto hereby enter into these Articles of Partnership of Thumb Cellular Limited Partnership under the provisions of the Michigan Revised Uniform Limited Partnership Act (MCL 449.1101 et seq) and the rights and liabilities of the Partners shall be as provided by law except as herein otherwise stated.

Section 1.02 - Name. The name of the Partnership shall be **THUMB CELLULAR LIMITED PARTNERSHIP**, and its business shall be carried on in this name with such variations and changes in the name as the General Partner deems necessary to comply with requirements of the jurisdictions in which operations are conducted or as the General Partner deems necessary to change for any reasonable business purpose.

Section 1.03 - Registered Agent and Principal Office. The principal office and registered agent for service of process in Michigan is Edwin H. Eichler, 7585 Pigeon Road, Pigeon, Michigan 48755.

Section 1.04 - Change of Office. The General Partner may change the locations described in this Article from time to time and shall give written notice of such change to the Limited Partners.

Section 1.05 - Specific Purpose. The purpose of the Partnership shall be to own and operate cellular telephone systems and to provide Cellular Service in RSA 10, including the direct sale, installation and maintenance of subscriber equipment to the customer, but may, subject to the provisions of these Articles, be expanded to include other areas.

Section 1.06 - Installment Sale. If the property of the Partnership is sold on an installment basis, the Partnership will remain in existence and a purpose of the Partnership will include the receipt of proceeds of such installment obligations of the purchaser of the property and the servicing of any remaining debts of the Partnership.

ARTICLE TWO

TERM

The Partnership commenced operations upon execution of these Articles of Partnership and shall continue until December 31, 2050, unless sooner terminated in accordance with these Articles. If the Partnership is continued after one or more events of termination, it shall continue until December 31, 2050.

ARTICLE THREE

DEFINITIONS

Section 3.01 - Affiliate. A person, association, co-partnership, partnership, corporation or joint-stock company or trust ("Person") that directly or indirectly, through one or more intermediaries, controls, is controlled by, or is under common