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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 of Control or)
Assignment of Domestic Mobile Wireless)
Interests to Alloy, LLC)

File No. 0000117778
et al.

DA- 00-1120
WT Docket No. 00-81

To: Wireless Telecommunications Bureau

REPLY TO APPLICANT'S RESPONSE TO PETITION TO DISMISS OR DENY

Thumb Cellular Limited Partnership (TCLP), by its attorney, hereby replies to the June 29, 2000 *Response* filed by SBC Communications, Inc. (SBC) and BellSouth Corporation (BSC). In reply thereto, the following is respectfully submitted:¹

1) SBC continues to maintain, falsely, that there is an ownership interest in TCLP which may be transferred using the Commission's transfer of control procedures. The *Response* does not deny that SBC and BSC intend to utilize the Commission's *pro forma* transfer of control procedures to

¹ The May 19, 2000 *Public Notice*, DA 00-1120, which established the pleading cycle in this proceeding does not provide a reply to opposition date for petitioners as required by the Commission's rules at 47 C.F.R. § 1.939(f). There is no explanation provided in the *Public Notice* for this omission and consequently the error would constitute reversible error for failing to justify an action which affects the due process rights of petitioners and which limits their ability to respond to claims made by the applicants. However, the omission of a reply date appears to be harmless error because the Commission is accepting *ex parte* documents under the "permit-but-disclose" rules; there is no time limit placed on the filing of such documents either in the *Public Notice* or in the rules.

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transfer “its claim that Ameritech is a partner.” *Response*, at 6. Of course, the Commission’s transfer process are not constituted to transfer “claims” to an ownership interest, the process is used to transfer cognizable ownership interests. Each side of this litigation agrees that the Commission’s processes are not used to resolve contractual disputes, including claims to ownership interests; such contractual claims are to be litigated in the appropriate judicial forum. *Response*, at 8-9.

2) After correctly stating the law, SBC and BSC fail to explain how it is that their “claim that Ameritech is a partner” is properly before the Commission and SBC/BSC fail to explain why the Commission should consider what they call “ample evidence to support [this] claim.” Mr. Beard’s certification recites Ameritech’s “belie[f] that it had a 23 percent limited partnership interest in” TCLP. *Response*, at 6; *Declaration of Bruce E. Beard*, at 1.² Clearly, SBC/BSC’s “belief” that it has a “claim” to an ownership interest in TCLP is not properly before the Commission. SBC/BSC’s “claim” to a non-controlling ownership interest is a contractual matter which is the proper subject of civil litigation. *Pueblo MSA Limited Partnership*, FCC 00-96, ¶ 4, released March 16, 2000 (the Commission’s assignment and transfer review process not the proper forum to resolve “disputes . . . based on their partnership agreements.”).

3) The Commission’s ownership records are clear, and have been since 1991, that neither Ameritech nor SBC hold any interest in TCLP. SBC/BSC’s attack on the copy of the 1991 FCC Form 430 Ownership Report filed with the *Petition to Dismiss or Deny* is limited to calling it “old”

² In support of their “claim” to an ownership interest SBC/BSC submit a copy of TCLP’s limited partnership agreement and various other contractual and state regulatory papers. For the purpose of this pleading, it shall be assumed that this information has been properly authenticated, however, Mr. Beard who signed a certification to the *Response* is not a signatory to any of the documents and does not explain the basis of his personal knowledge of them. Consequently, his certification is defective in this regard. *See* 47 C.F.R. § 1.939(f) (personal knowledge requirement).

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and “vague.” *Response*, at 5.³ The adjective “old” does nothing to detract from the fact that the report is an official record of TCLP’s.⁴ Moreover, there is nothing vague about the FCC Form 430, it accounts for 100% of the ownership in TCLP, it lists all of the owners of TCLP, and neither Ameritech nor SBC are listed as owners.⁵

4) As mentioned above, SBC/BSC acknowledge that the Commission is not the appropriate forum to resolve contractual partnership matters concerning a non-controlling limited partnership interest, yet SBC/BSC’s *Response* is entirely dependent upon burdening the Commission with various contract-related matters such as a copy of the limited partnership agreement, a partnership agreement amendment, various state filings, and correspondence between TCLP’s general partner and Ameritech.⁶ While Commission is not concerned with contractual matters, TCLP shall respond

³ SBC/BSC assert that TCLP did not provide “any factual support that Ameritech did not own a partnership interest.” *Response*, Summary, at 1. Gently stated, that comment amounts to nothing more than hyperbole given the fact that the FCC Form 430 was submitted with the *Petition to Dismiss or Deny*. Moreover, SBC/BSC’s states that the *Petition to Dismiss or Deny* “is based entirely on its allegation that Ameritech, as a matter of state law, did not have a partnership interest in Thumb.” *Response*, at 9. This statement obviously overlooks the ownership information contained in the Commission’s official license files.

⁴ Rather than become irrelevant over time, the age of the FCC Form 430 demonstrates that Ameritech failed to protect any claim for a decade. The Commission’s assignment and transfer of control processes are constituted for the purpose of permitting parties who sit on perceived rights to revive stale contract claims.

⁵ Ameritech/SBC/BSC’s ownership claim is similar to a hypothetical claim to ownership of an automobile made by one person to the registered owner of the automobile. If the claimant persists in his claim after being shown the title, little can be thought of his claim or his thought processes. Similarly, TCLP is the registered owner of the cellular and microwave licenses in the Commission’s records and the Commission’s records are clear, and have been for a decade, as to the identities of the partners in TCLP. The Commission’s transfer of control process is not the place for Ameritech/SBC/BSC to try to gain admission into TCLP.

⁶ The correspondence from 1991 contains information relating to settlement and its release to the public is a serious breach of the settlement process, even if those discussion occurred a decade

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to SBC/BSC's contract claims so that the Commission will be reminded why it does not become involved in such matters.⁷

5) Attached hereto is a copy of Ameritech's April 15, 1996 letter to TCLP in which Ameritech acknowledges that it was not a partner in TCLP because of the interLATA restrictions and which sought "to discuss with you the details of resuming Ameritech's interest in the partnership." Ameritech acknowledges in writing that it has no ownership interest in TCLP and all of Ameritech/SBC/BSC's arguments to the contrary made to the Commission are nothing but fabrications, falsehoods, and legal sophistry of the worst kind. Ameritech does not even have a "claim" to an ownership interest, much less possess an actual ownership interest.

6) SBC/BSC assert that Ameritech is "listed as a partner" in TCLP's state filings as of March 31, 2000. *Response*, at 2. Generally stated, the Commission ignores the technicalities of state law when examining ownership under its licensing rules. *See Algreg Cellular Engineering*, 9 FCC Rcd. 5098 ¶ 46 (Rev. Bc. 1994). SBC/BSC readily acknowledge that contractual matters are not the province of the Commission. Whether Ameritech is "listed" as a partner in a state filing regarding partnership formation merely goes to the contractual partnership issue "is Ameritech a partner?" The

⁶(...continued)

ago. While the documents relating to the partnership concern contract matters which are irrelevant to the Commission's licensing process and should not have been filed in the first place, SBC/BSC should have taken care to prevent release of the correspondence to the public.

⁷ While SBC/BSC correctly state that the law that the Commission is not interested in reviewing the contractual documents which they produced for the Commission, SBC/BSC make the bizarre claim that "even more importantly, Thumb has seriously misrepresented the facts regarding its underlying dispute with SBC. . . . Thumb never mentions the facts that" there exists various contractual documents. *Response*, at 2. SBC/BSC's position that TCLP lacked candor for failing to produce irrelevant information is irrational when put in the best light and looks like grasping at straws.

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FCC's ownership records are clear regarding the ownership of TCLP and SBC/BSC must look for another forum to present their stale contractual evidence.

7) Even if Ameritech were considered a partner, what is its partnership interest? SBC/BCS claim that Ameritech has a 23% limited partnership interest. A review of the limited partnership agreement SBC/BSC submitted with their *Response* demonstrates that neither SBC nor BSC read the document before filing it with the Commission. §3.11 provides that "the entire ownership interest of a Partner in the Partnership at any particular time [is] determined by the ratio" of that Partners's capital contributions to all capital contributions. Ameritech has made no capital contributions and even if it were a partner, its limited partnership interest would be zero.⁸ It is elementary that a partner must pay in capital to maintain its capital account and SBC/BSC utterly fail to explain the basis on which Ameritech can claim a 23% interest where it has paid in nothing.

8) §7.01 empowers TCLP to take "any and all acts reasonably deemed by the General Partner to be necessary or appropriate in furtherance" of TCLP's business. §§ 8.03 and 8.09 of the agreement requires the general partner to ensure that TCLP complies with applicable law and to make the filings required by law. §12.01(b) requires the removal of a limited partner upon default under the agreement. In § 15.01(a) Ameritech granted to TCLP's an irrevocable power of attorney to TCLP's general partner to execute documents as it "shall deem it advisable to file" on its behalf in order to comply with FCC rules. In §21.11 Ameritech agreed that it bore the burden of obtaining a MFJ waiver and Ameritech explicitly acknowledged that TCLP was not required to take any action which violated the MFJ. As outlined in the 1991 correspondence SBC/BSC provided in the *Response*, TCLP reasonably concluded, and provided the required default notice, that Ameritech's

⁸ Moreover, Ameritech failed to make the initial partnership contribution and §12.01(d) of the partnership agreement requires removal partners which do not make initial capital contributions.

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participation in TCLP would violate the MFJ prohibition on “interLATA cellular radio service.” Thereafter, Ameritech did not remove the default and the FCC Form 430 Ownership Report was filed with the Commission. August 30, 1991 letter from Edwin H. Eichler, for TCLP, to John Cusak, for Ameritech.⁹

9) §10.01 of the agreement forbids a limited partner from taking “part in or interfer[ing] in any manner with, the conduct or control of the Partnership business, nor shall the Limited Partners have any right or authority to act for or bind the Partnership . . .” By filing the Ameritech/SBC *pro forma* transfer of control applications, Ameritech and SBC violated an express prohibition against acting on behalf of the partnership, a matter of serious breach of contract were Ameritech or SBC actually a partner.¹⁰

⁹ Mr. Cusak’s September 16, 1991 responsive letter, at 2, threatens legal action against TCLP, but Ameritech never pursued any claims. SBC/BSC’s claim that “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.” *Response*, at 8. In the first place, SBC/BSC’s statement that the Telecom Act of 1996 changed everything acknowledges that there was good grounds to oust Ameritech in the first place -- Ameritech’s continued participation after commencement of service would have been an MFJ violation (TCLP commenced service to the public on or about February 5, 1992, FCC Form 489 filed February 4, 1992). Second, 1996 Telecom Act, which became law more than four years after the ouster, does not state that Ameritech was, or must be, admitted to TCLP. Third, even after the passage of the 1996 Telecom Act Ameritech neither sought civil relief nor did it pay capital into the partnership.

¹⁰ SBC/BSC claim that because SBC felt that TCLP would not provide the ULS password and TCLP’s TIN, that SBC was justified in filing a *pro forma* application concerning the November 1999 transaction with Ameritech. However, that application fails to explain that reasoning. All the application indicates is that SBC was “unable” to obtain those codes. In fact, no effort was made by SBC or Ameritech to obtain that information. It is assumed that the *pro forma* transfer of control applications would have been processed differently had they candidly read “the official ownership reports on file with the Commission do not list us as owners of these licenses, but we nevertheless seek various waivers so that we may file papers as if we were owners. By the way, please do not tell the Licensee about this because we’d like to keep our activities a secret.”

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10) §§11.01 and 11.06 provides that there shall be “no sale, exchange or other transfer or assignment . . . of any of a Limited Partner’s Partnership Interest to a non-Affiliate without the prior written consent of the General Partner” Neither Ameritech nor SBC complied with this provision, as they would have done were they actually partners. As discussed in footnote 10, SBC and Ameritech desired to keep their activities a secret from TCLP and they made filings with the Commission requesting rules waiver to achieve that objective.

11) SBC/BSC claim that because the issue regarding Ameritech’s lack of an ownership interest which may be transferred is pending in another proceeding, TCLP cannot raise the issue in the captioned proceeding. *Response*, at 4. There is no bar such as the one SBC/BSC posit and they provide no precedent. SBC/BSC’s assertion that SBC’s false claim of an ownership, and Ameritech/SBC’s fraudulent prosecution of the *pro forma* application have nothing to do with its merger, *Response*, at 9-10, is obviously incorrect. Character is always at issue in Commission licensing proceedings.¹¹ and Ameritech, SBC, and BSC have failed to justify the fraudulent prosecution of the *pro forma* transfer of control applications concerning the “claim” to an ownership interest which SBC/BSC intend to transfer to the now tarnished merger entity, Alloy, LLC. Moreover, the *Response* itself presents the Commission with false and misleading information in view of the fact that Ameritech’s April 15, 1996 letter to TCLP acknowledges that Ameritech does

¹¹ The Commission has long held that

The ability of the Commission to rely on the representations of its licensees is crucial to the functioning of its regulatory process. Thus, the truthfulness and candor of applicants are always in issue and the Commission expects applicants to be candid in Commission proceedings. *William M. Rogers*, 92 FCC 2d 187, 199 (1982), *RKO General, Inc.*, 78 FCC 2d 1, 104 (1980), *aff’d RKO General, Inc. v. FCC*, 670 F.2d 215 (D.C. Cir. 1981). Intentional false testimony during an FCC hearing can lead to disqualification.

Evansville Skywave, Inc., 8 FCC Rcd. 7009, 7017 ¶ 16 (Rev. Bd. 1993).

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not have a partnership interest. Accordingly, TCLP has standing to protest the captioned application.¹²

12) SBC intends to transfer its purported “claim” to an ownership interest in TCLP to the entity resulting from the merger proposed in the captioned application. There is no ownership interest to transfer and TCLP will not stand idle while parties emerge from the woodwork to use the Commission’s transfer processes to make baseless, stale contract claims and to file and prosecute wholly unauthorized and fraudulent *pro forma* transfer of control applications to try to cut chunks of ownership out of it. TCLP is the licensee and the Commission’s official licensing files indicate that neither Ameritech nor SBC are owners. If Ameritech/SBC/BSC wish to claim an ownership interest in TCLP, notwithstanding the state of the Commission’s official licensing records, and its own April 15, 1996 correspondence, it is settled that the Commission is not the appropriate forum to litigate their stale contract claim.¹³

¹² Not that standing is required. The May 19, 1999 *Public Notice* indicates that in addition to petitions to deny, the Commission will consider “comments” and “ex parte” comments concerning the captioned applications.

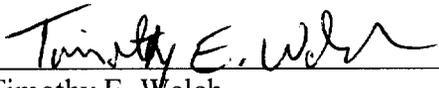
¹³ This is a huge issue for TCLP; given its small size it cannot have parties making what are viewed as stale and fraudulent ownership claims (not that any business would put up with that). However, it is simply not understandable why Ameritech/SBC/BSC are prosecuting the case as they are, forgetting for a moment they are making false statements to the Commission to win. For nearly ten years Ameritech never received nor paid any money vis-a-vis TCLP. It is not readily understandable why the other side puts the merger transactions at risk for value which, for all practical purposes, Ameritech has never had, even if it were correct as a matter of contract law (which obviously it isn’t given its April 15, 1996 acknowledgment that it has no interest in TCLP). The *Response* reads as if a non-controlling, 23% ownership interest in a small RSA were the most significant concern in this “mega” merger. Is this really a must win issue for the other side? Will the various mergers crumble if Ameritech gives up what does not even amount to a long stale contract claim in this small market where Ameritech has not enjoyed the benefits of ownership for nearly ten years? Has anybody on the other side bothered asked these questions? Judging from the *Response* and the response made in the litigation concerning the Ameritech/SBC merger, rationality and proportionality are in short supply. TCLP commenced the litigation as gently as possible,
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WHEREFORE, in view of the information presented herein, it is respectfully submitted that the captioned applications must be denied.

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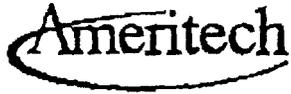
Respectfully submitted,
THUMB CELLULAR LIMITED PARTNERSHIP



Timothy E. Welch
Its Attorney

¹³(...continued)

showing Ameritech/SBC the FCC's ownership record and providing them with an opportunity to make a corrective filing. A decision was made by the other side to litigate the matter full speed ahead, no matter the costs, disregarding TCLP's initially gentle approach, disregarding an official licensing record. Ameritech/SBC/BSC have provided the Commission with false and misleading information and now there are messy fraudulent application prosecution/lack of candor/misrepresentation issues. TCLP initially tried to steer the case for Ameritech/SBC/ BSC to avoid where we are today, but ego appears to have taken the helm. TCLP is willing and equipped to take that ride, however, the destination the other side has scheduled into itinerary is as mind boggling as surprising.



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Stephanie S. Cassioppi
Director - External Affairs

April 15, 1996

Mr. Edwin Eichler, President
Agri-Valley Communications, Inc.
General Partner
Thumb Cellular Limited Partnership
P.O. Box 650
Pigeon, MI 48755

Dear Mr. Eichler,

As you are aware, Ameritech Cellular has been precluded in participating in the Thumb Cellular Limited Partnership because of our interLATA restrictions. With the signing of the Telecommunications Act of 1996, those interLATA restrictions have been lifted. Therefore, we wish to discuss with you the details of resuming Ameritech's interest in the partnership.

Please contact me to discuss this matter. In addition, if you would please send us the last several financial reports, we can begin looking at our partnership requirements.

Thank you for your cooperation. We look forward to working with you.

Sincerely,

Stephanie Cassioppi



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CERTIFICATION

I hereby certify under penalty of perjury that I have reviewed the foregoing Reply to Applicant's Response to Petition to Dismiss or Deny and that the facts stated therein, except for those about official notice may be taken, are true and correct to the best of my knowledge.



**Edwin H. Eichler
President & CEO
Agri-Valley Communications, Inc.,
General Partner,
Thumb Cellular Limited Partnership**

July 6, 2000

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CERTIFICATE OF SERVICE

I hereby certify that I have this 7th day of July 2000 sent a copy of the forgoing REPLY TO APPLICANT'S RESPONSE TO PETITION TO DISMISS OR DENY by First-Class United States mail, postage prepaid, to the following:

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