

Dorothy Menasco

From: Carey Roesel [croesel@tminc.com]
Sent: Friday, May 08, 2009 4:54 PM
To: Filings@psc.state.fl.us
Subject: Birch Waiver Request
Attachments: Birch Waiver.pdf

a. Carey L. Roesel, Technologies Management, Inc.
2600 Maitland Center Parkway, Suite 300
Maitland, FL 32751
(407) 740-3006 (voice)
(407) 740-0613 (fax)
croesel@tminc.com

b. N/A

c. Filed on Behalf of **Birch Telecom of the South, Inc.**

d. **20 Pages**

e. **Petition by Birch Telecom of the South, Inc. for Waiver of Rule 25-4.118, F.A.C., Local, Local, Toll or Toll Provider Selection Regarding Authorization and Verification of Changes in Telecommunications Providers and Other Such Relief as Proper and Necessary**

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ADM _____
CLK Grant

5/8/2009

DOCUMENT NUMBER-DATE

04484 MAY-8 8

FPSC-COMMISSION CLERK.

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

Petition of)	
)	
Birch Telecom of the South, Inc.)	Docket No. _____
dba Birch Telecom)	
dba Birch Communications,)	
a wholly owned subsidiary of)	
Birch Communications, Inc.,)	
)	
For Waiver of Rule 25-4.118, F.A.C., Local, Local)	
Toll or Toll Provider Selection Regarding)	
Authorization and Verification of Changes in)	
Telecommunications Providers and Other Such)	
Relief as Proper and Necessary)	

WAIVER REQUEST

I. INTRODUCTION

Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications ("Assignee" or "Petitioner"), a wholly owned subsidiary of Birch Communications, Inc. ("BCI") (Assignee, BCI, and BCI's subsidiaries collectively, "Birch"), by their undersigned counsel, requests a waiver from the Florida Public Service Commission ("Commission") of Rule 25-4.118 and any other regulations deemed applicable, regarding authorization and verification of changes in telecommunications providers. This Waiver Request is made in connection with a transaction in which Assignee will acquire substantially all of the assets and customers of Cleartel Telecommunications, Inc. ("Cleartel"), IDS Telcom Corp. ("IDS"), nii communications, ltd. ("nii"), and Supra Telecommunications and Information Systems, Inc. ("Supra") (Cleartel, IDS, nii and Supra collectively, "Assignors") (Assignee and Assignors collectively, the "Parties"). Following the transaction, Assignee will assume Assignors' operations. Following

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04484 MAY-88

FPSC-COMMISSION CLERK

approval of transaction, Assignee will adopt Assignors' existing tariffs or file revised tariff sheets incorporating Assignors' current rates, so that the affected customers will continue to receive the same services that they currently receive without any significant changes to the service offerings, rates, or terms and conditions. There may be instances, however, where there are service or rate structure dissimilarities that Birch cannot accommodate with its existing systems (e.g., customers currently utilizing a message or measured local service plan). In those cases, Birch will transition customers in as neutral a manner as is reasonably possible, with no increase to the regular monthly recurring charges, and notify those customers of their new rates, terms and conditions of service. The Parties respectfully request expedited treatment and consideration of this Waiver Request.¹ Expeditious approval of this Waiver Request will allow Assignee to promptly assume responsibility for the provision of telephone services to customers of Assignors. Therefore the Parties respectfully request that approval of this Waiver Request be granted on an expedited basis and not later than June 22, 2009.

In support of this Waiver Request, Petitioner states:

I. DESCRIPTION OF THE PARTIES

A. Birch Communications

In Florida, the Birch companies consist of the following, Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications, a wholly owned subsidiary of BCI, and Birch Communications, Inc. (formerly known as Access Integrated Networks, Inc. d/b/a Birch Communications). BCI is a Georgia corporation with principal corporate offices located at 4885

¹ Assignors have authorized Petitioner to represent that Assignors support the request for expedited treatment and are providing a verification for this Waiver Request.

Riverside Drive, Suite 304, Macon, Georgia 31210. Birch is a longstanding and large competitive local exchange carrier in the Southeast, Southwest and Midwest regions serving small and medium business customers. Birch deploys its own private IP network utilizing soft switch technology to deliver innovative, high quality, affordable voice and broadband communications services to small and medium business customers. Collectively, Birch and its subsidiaries are authorized to provide telecommunications services in thirty (30) states: Alabama, Arkansas, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Wisconsin, and Wyoming with certification pending in California and New Jersey. Birch is also authorized to provide interstate and international telecommunications services. The Florida entity requesting this waiver, Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications, holds CLEC Certificate No. 7552 and IXC Registration No. TJ414. Further information regarding Birch was provided in the proceedings granting Assignee those authorizations and is incorporate by reference herein.

B. Assignors

CTI, IDS and Supra are each Delaware corporations, while nii is a Texas limited partnership. Assignors are wholly owned direct or indirect subsidiaries of Cleartel Communications, Inc. ("CCI"), a Delaware corporation and leading provider of voice and data solutions serving customers in the Northeast, Southeast, Southwest, and Midwestern United States. Assignors and CCI have principal offices at 1960 S. Congress Ave., Suite 201, Delray Beach, Florida 33445. CCI, through Assignors and its other subsidiaries, offers local, Internet and long

distance services to both residential and business users in 30 states. In Florida, Assignors hold the following authorizations:

Cleartel holds CLEC Certificate No. 8326 and IXC Registration No. TJ777.

IDS holds CLEC Certificate No. 5228 and IXC Registration No. TJ987.

nii holds CLEC Certificate No. 7759 and IXC Registration No. TJ510.

Supra holds CLEC Certificate No. 4861, PATS (pay telephone service company) Certificate No. 5922, and IXC Registration No. TK091.

Upon completion of the Transaction and the migration of customers to Birch, Assignors will no longer offer telecommunications services in Florida. After Assignors determine that they no longer need their authorizations for operational or billing purposes, Assignors will surrender their authorizations in a separate filing.

II. CONTACT INFORMATION

For the purposes of this Waiver Request, questions or any correspondence, orders, or other materials should be directed to the following contacts:

For Birch:

Carey Roesel
Technologies Management, Inc.
2600 Maitland Center Parkway
Suite 300
Maitland, FL 32751
Tel: 407-740-4006
Fax: 407-740-0613
croesel@tminc.com

with a copy to:

Sharyl Fowler
Manager, Legal & Regulatory
Birch Communications, Inc.
4885 Riverside Drive
Suite 304
Macon, Georgia 31210
Tel: 478-476-1165
Fax: 478-405-3112
sharyl.fowler@birch.com

For Assignors:

Catherine Wang
Brett P. Ferenchak
Bingham McCutchen LLP
2020 K Street, NW
Washington, DC 20006
Tel: 202-373-6000
Fax: 202-373-6001
catherine.wang@bingham.com
brett.ferenchak@bingham.com

III. REQUEST FOR WAIVER

Pursuant to Rule 25-4.118, Florida Administrative Code, a customer's local exchange or interexchange telecommunications service provider shall not be changed without the customer's authorization. To make such a change, the carrier must either: (1) obtain a letter of agency from the customer requesting the change; (2) obtain confirmation from the subscriber via a customer-initiated call; or (3) utilize an independent third party to verify the subscriber's order. The requirements of Rule 25-4.118 are applicable to interexchange carriers through incorporation by reference in Rule 25-24.490.

Petitioner respectfully requests a waiver of Rule 25-4.118 so that Assignors may transfer to Assignee their customer accounts in Florida without Assignee securing authorization and verification from each of the more than 38,600 customers of Assignors in Florida. Obtaining the authorization and verification from each of the affected customers would be a burdensome

process and impose an undue hardship on Petitioner. This transfer of customers will result from a transaction whereby Birch will acquire the assets and customers of Assignors pursuant to an Asset Purchase Agreement (“Agreement”) dated as of April 29, 2009 between Birch, CCI and Certain of the Subsidiaries of CCI, including Assignors. As a result of the transaction, Birch will provide service to Assignors’ customers and Assignors will no longer have any operations in Florida.

Birch has complied with the Federal Communication Commission’s rules governing the sale of a carrier’s customer base. 47 C.F.R. § 64.1120(e). These rules require that every affected subscriber of Assignors receive 30 days prior written notice of the proposed transfer to Assignee; and that Assignee certify to the FCC that it has provided at least 30 days’ written notice to each subscriber affected by this transaction. 47 C.F.R. § 64.1120(e)(1-3). A sample of the customer notice letters is provided as Exhibit A. Affected customers will be notified in writing of the transfer of their service to Assignee and of their right to choose a different carrier pursuant to the applicable rule of the FCC.² The legal rights of affected customers, therefore, will not be prejudiced by a waiver of the rule because Petitioner will comply with the FCC’s rules governing this type of transaction, which are specifically designed to protect the rights of customers.

Following closing, the Customers will continue to receive service at substantially the same rates and charges that they currently receive from Assignors. Specifically, Assignee intends to adopt Assignors’ tariff or file revised tariff sheets incorporating Assignors’ current rates, terms and conditions of service after the consummation of the transaction or as may be otherwise directed by the Commission. There may be instances, however, where there are service or rate

² 47 C.F.R. § 64.1120(e).

structure dissimilarities that Birch cannot accommodate with its existing systems (e.g., customers currently utilizing a message or measured local service plan). In those cases, Birch will transition customers in as neutral a manner as is reasonably possible and will notify those customers of their new rates, terms and conditions of service. As a result, the proposed transaction will be virtually transparent to customers in terms of the rates and terms and conditions of service that these customers currently receive. No existing service will be discontinued, reduced, or impaired as a result of the merger. Thus, the transaction will be handled so as to avoid undue disruption to consumers. There will be a minor change of the voice mail service which will require re-establishment of greetings and passwords with no change or interruption in local dial tone and long distance. Customers will be well informed of their choices.

IV. PUBLIC INTEREST CONSIDERATIONS

The basis for granting a waiver for local exchange and interexchange carriers is set forth in Section 120.542, Florida Statutes, and Rule 25-24.455(4), Florida Administrative Code. Under Section 120.542 a request for waiver must demonstrate that the purpose of the underlying statute will otherwise be served if waiver of the rule is granted and that enforcement of the rule would result in substantial hardship for the petitioner or violate principles of fairness. Similarly, under Rule 25-24.455(4), the Commission may consider whether the petition is in the public interest, whether market forces obviate the need for the provision in a particular instance, and whether reasonable alternative regulatory methods may service the same purpose.

In the circumstance described in this Petition, it is in the public interest to waive the carrier selection requirements of Rule 24-4.118, Florida Administrative Code. Rule 25-4.118 does not prescribe any means of authorizing a carrier change that is necessitated by a mass

migration of customers as part of an asset transfer. It would be unfair to hold Assignee to requirements that plainly do not address its particular situation and with which it cannot reasonably comply. Birch has provided for a seamless transition while ensuring that customers understand available choices with the least amount of disruption and confusion; thus, the requirements of the rule are satisfied. The customers will receive at least 30 days notice of the transfer and be afforded the opportunity not to participate. The Parties believe that if prior authorization is required in this case, customers may fail to respond to a request for authorization, neglect to select another carrier, and thus lose their service.

Grant of this Waiver Request will serve the public interest by ensuring that the affected Assignors' customers enjoy continuity of high-quality telecommunications service. As discussed above, the customers will be given prior written notice of the transfer of their account to Assignee, in compliance with the FCC's customer notice rules. Following the transaction, the customers will continue to receive services which will be consistent with the quality of services currently provided by Assignors and which will be supported by Assignee's experienced and well-qualified management team. As a result, the proposed transaction will be almost transparent to most customers in terms of the rates and terms and conditions of service that these customers currently receive. The public interest therefore will be served by approval of this Waiver Request.

Finally, expedited consideration of this Waiver Request will serve the public interest by permitting the Parties to more speedily transfer the affected customers of Assignors to Assignee. Therefore, in consideration of the foregoing, the Parties respectfully request expedited consideration and approval of this Waiver Request no later than June 22, 2009, so that the Parties may consummate the transaction in the late second quarter or early third quarter this year.

WHEREFORE, Petitioner requests that the Commission grant the request for a waiver of Rule 25-4.118 on an expedited basis and no later than June 22, 2009, and grant additional relief as may be proper and necessary under the circumstances.

Respectfully submitted,

s/ Carey L. Roesel

Carey L. Roesel
Technologies Management, Inc.
2600 Maitland Center Parkway
Suite 300
Maitland, FL 32751
Tel: 407-740-3006
Fax: 407-740-0613

Consultant for Birch

Date: May 8, 2009

EXHIBIT A

Sample Customer Notice Letters



DATE

Customers Name
Customers Address
City, State, Zipcode

IMPORTANT NOTICE REGARDING A CHANGE IN YOUR TELECOMMUNICATIONS SERVICES

Dear _____

Birch Communications (Birch) and Cleartel Communications, Inc. (CCI) are pleased to announce that Birch will acquire the business, residential and payphone customers of CCI and its subsidiaries, including [State Specific Entities], Cleartel Telecommunications, Inc. (CTI), [nii Communications, Inc. (nii), Now Communications, Inc. (NOW)], and [Telecom Communications Corporation (Telecom)]. Subject to approval by the Federal Communications Commission and state regulators, Birch will replace CCI, CTI, [nii] or [Telecom] (collectively, Cleartel) as your current telecommunications service provider on or after [60 DAYS] (the Transfer Date). As a result of this transaction, Birch will assume responsibility for all services previously provided to you by Cleartel. Birch is excited about the opportunity to provide your phone service and looks forward to a long and successful business relationship.

Please rest assured, the transition will have little or no impact on your current services, nor will there be any interruption of your service. The agreement between Birch and CCI has been structured so that the transfer of service will be an almost seamless transition with only a minor change to voicemail services. You will retain all service rates, features, terms and conditions of service and your telephone phone number. You will not incur any charges for the transfer of services to Birch and **no action is required from you to continue your telecommunications service(s) with Birch.** You will receive your first billing statement from Birch starting with your [redacted] or [redacted] bill. As in the past, you are responsible for paying all bills rendered to you by Cleartel during the transition of service.

You have the right to select a different carrier for the telecommunications service(s) at issue. If you do not wish to receive service from Birch, you should select and contact an alternate carrier directly to make arrangements to complete the transfer of your service to the alternate carrier before [60 Days]. If you choose to switch to an alternate carrier for services, you may incur a fee for the transfer of services to that alternate carrier. In addition, should you have a term commitment with Cleartel and you disconnect services or transfer to another carrier prior to the end of that term, you will be liable for early termination charges. If you select a local telephone provider other than Birch, you should also contact your current long distance provider to ensure that your current long distance plan is not changed. Please note that if you are a customer of Cleartel on the Transfer Date, your account will automatically be transferred to Birch.

Please note that any preferred carrier "freeze" you have placed on your existing telephone lines to prevent unauthorized transfer of your services to another carrier will be over-ridden for purposes of this transaction and will need to be reinstated by you by contacting your local exchange carrier after the transfer is complete.

If you have any questions about this transaction or your service or billing prior to the actual Transfer Date, you should contact the appropriate Cleartel entity at: [STATE SPECIFIC ENTITIES]

Cleartel [Telecom]: 888-389-1400

[redacted] 866-388-6500

[NOW] 388-365-1011

[Payphone Customers] 366-660-3994

If you have any questions regarding this transaction or your service or billing after the actual Transfer Date, you should contact Birch at ~~888-275-0770 or 888-772-1724~~ **will be state specific**

About Birch Communications

Headquartered in Atlanta GA, Birch Communications is one of the largest competitive local exchange carriers in its 31-state southeast, southwest, midwest and northeast regions serving residential and business customers. Birch was the first in its class to deploy its own private IP network utilizing soft switch technology to deliver innovative, high quality, affordable voice and broadband communications services to small and medium business customers.

Cleartel thanks you for your business and Birch looks forward to continuing to provide you with quality service for many years to come.

Sincerely,

Cleartel Communications and
Birch Communications



DATE

Customers Name
Customers Address
City, State, Zipcode

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Please rest assured, the transition will have little or no impact on your current services, nor will there be any interruption of your service. The agreement between Birch and CCI has been structured so that the transfer of service will be an almost seamless transition with only a minor change to voicemail service. There may be instances, however, where there are service or rate structure dissimilarities that Birch cannot accommodate with its existing systems (e.g., customers currently utilizing a message or measured local service plan). In those cases, Birch will transition you in as neutral a manner as is reasonably possible *with no increase to your regular monthly recurring charges*. You will retain all other service rates, features, terms and conditions of service and your telephone phone number. You will not incur any charges for the transfer of services to Birch and **no action is required from you to continue your telecommunications service(s) with Birch**. You will receive your first billing statement from Birch starting with your ~~_____~~ or ~~_____~~ bill. As in the past, you are responsible for paying all bills rendered to you by Cleartel during the transition of service.

You do have the right to select a different carrier for the telecommunication service(s) at issue. If you do not wish to receive service from Birch, you should select and contact an alternate carrier directly to make arrangements to transfer your service before ~~30 Days~~. If you choose to switch to an alternate carrier for services, you may incur a fee for the transfer of services to that alternate carrier. In addition, should you have a term commitment with Cleartel and you disconnect services or transfer to another carrier prior to the end of that term, you will be liable for early termination charges. If you select a local telephone service provider other than Birch, you should also contact your current long distance provider to ensure that your current long distance plan is not changed. Please note that if you are a customer of Cleartel on the Transfer Date, your account will automatically be transferred to Birch.

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If you have any questions about this transaction or your service or billing prior to the actual Transfer Date, you should contact the appropriate Cleartel entity at: **STATE SPECIFIC ENTITIES**

Cleartel **Telephone**: 888-389-1400

NOVA: 888-565-1011

FL: 866-388-6500

Payphone Customers: 866-660-5994

If you have any questions regarding this transaction or your service or billing after the actual Transfer Date, you should contact Birch at **888-276-0777 or 888-772-4724 (will be state specific)**

About Birch Communications

Headquartered in Atlanta GA, Birch Communications is one of the largest competitive local exchange carriers in its 31-state southeast, southwest, midwest and northeast regions serving residential and business customers. Birch was the first in its class to deploy its own private IP network utilizing soft switch technology to deliver innovative, high quality, affordable voice and broadband communications services to small and medium business customers.

Cleartel thanks you for your business and Birch looks forward to continuing to provide you with quality service for many years to come.

Sincerely,

Cleartel Communications and
Birch Communications



DATE

Customers Name
Customers Address
City, State, Zipcode

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Please rest assured, the transition will have little or no impact on your current services, nor will there be any interruption of your service. The agreement between Birch and CCI has been structured so that the transfer of service will be an almost seamless transition with only a minor change to voicemail services. You will retain all service rates, features, terms and conditions of service and your telephone phone number. You will not incur any charges for the transfer of services to Birch and **no action is required from you to continue your telecommunication service(s) with Birch.** You will receive your first billing statement from Birch starting with your [redacted] or [redacted] bill.

You do have the right to select a different carrier for the telecommunication service(s) at issue. If you choose to switch to an alternate carrier for services, you may incur a fee for the transfer of services to that alternate carrier. In addition, should you have a term commitment with Cleartel and you disconnect services or transfer to another carrier prior to the end of that term, you will be liable for early termination charges. Please note that if you are a customer of Cleartel on the Transfer Date, your account will automatically be transferred to Birch.

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Cleartel 888-388-1400
nii 866-266-6500

Supra 800-412-1234
NOW 888-567-1011

IDS 888-388-2400
Payphone Customers 866-660-3992

If you have any questions regarding this transaction or your service or billing after the actual Transfer Date, you should contact Birch at 888-275-0777 or 888-772-4723 (will be state specific)

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Cleartel thanks you for your business and Birch looks forward to continuing to provide you with quality service for many years to come.

Sincerely,

Cleartel Communications and
Birch Communications



DATE

Customers Name
Customers Address
City, State, Zipcode

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If you have any questions about this transaction or your service or billing prior to the actual Transfer Date, you should contact the appropriate Cleartel entity at: **[STATE SPECIFIC ENTITIES]**

Cleartel: 888-389-1100
All: 866-388-6500

Supra: 800-412-1232
NOW: 888-965-1011

ID: 888-389-1200
Payphone customers: 866-660-5992

If you have any questions regarding this transaction or your service or billing after the actual Transfer Date, you should contact Birch at **888-276-0777 or 888-772-4724 (will be state specific)**

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Cleartel thanks you for your business and Birch looks forward to continuing to provide you with quality service for many years to come.

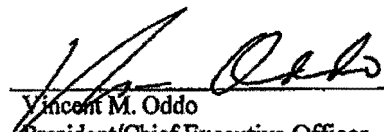
Sincerely,

Cleartel Communications and
Birch Communications

VERIFICATION

STATE OF GEORGIA
COUNTY OF BIBB

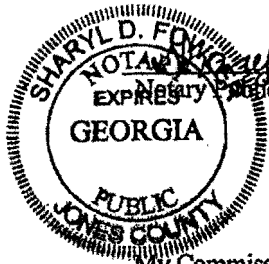
I, Vincent M. Oddo, being first duly sworn, do hereby certify, depose and state that I am President/Chief Executive Officer for Birch Communications Inc., and that I am authorized to make this verification on behalf of Birch Communications, Inc.; that the foregoing filing was prepared under my supervision and direction; and that the contents with respect to Assignees is true and correct to the best of my knowledge, information and belief.

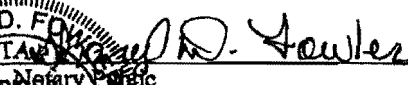


Vincent M. Oddo
President/Chief Executive Officer
Birch Communications, Inc.

Subscribed and sworn to before me, a Notary Public,
this _____ day of _____ 2009

8th day of May



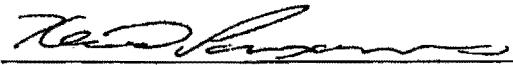


My Commission expires: 12/4/2012

VERIFICATION

STATE OF FLORIDA
COUNTY OF PALM BEACH

I, Keith Parsons, being first duly sworn, do hereby certify, depose and state that I am the Vice President of Cleartel Communications, Inc. ("CCI"), the parent company of the Assignors in this filing; that I am authorized to make this verification on behalf of CCI and Assignors; that the foregoing filing was prepared under my supervision and direction; and that the contents with respect to CCI and Assignors are true and correct to the best of my knowledge, information and belief.

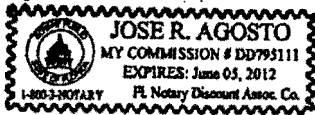


Keith Parsons
Vice President
Cleartel Communications, Inc.

Subscribed and sworn to before me, a Notary Public, 7TH day of MAY 2009.
this



Notary Public



My Commission expires: JUNE 03, 2012