

State of Florida



Public Service Commission  
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**-M-E-M-O-R-A-N-D-U-M-**

**DATE:** June 18, 2009

**TO:** Office of Commission Clerk (Cole)

**FROM:** Division of Regulatory Compliance (M. Watts)  
Office of the General Counsel (Morrow)

**RE:** Docket No. 090307-TP – Request for expedited waiver of carrier selection requirements of Rule 25-4.118, FAC, due a transaction in which Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications, a wholly owned subsidiary of Birch Communications, Inc., will acquire substantially all of the assets and customers of Cleartel Telecommunications, Inc. d/b/a Now Communications, also d/b/a VeraNet Solutions, IDS Telcom Corp. d/b/a Cleartel Communications, nii communications, ltd., and Supra Telecommunications and Information Systems, Inc.

**AGENDA:** 06/30/09 – Regular Agenda – Proposed Agency Action – Interested Persons May Participate

**COMMISSIONERS ASSIGNED:** All Commissioners

**PREHEARING OFFICER:** Administrative

**CRITICAL DATES:** None

**SPECIAL INSTRUCTIONS:** None

**FILE NAME AND LOCATION:** S:\PSC\RCP\WP\090307.RCM.DOC

**Case Background**

On May 8, 2008, Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications (Birch), a competitive local exchange telecommunications company (CLEC) and intrastate interexchange company (IXC), submitted a request for a waiver of the carrier selection requirements of Rule 25-4.118, Florida Administrative Code (F.A.C.), for the transfer

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FPSC-COMMISSION CLERK

of all local and long distance customers from four companies<sup>1</sup> (collectively, "Sellers") to Birch. At the conclusion of the transaction, the Sellers will request cancellation of their respective CLEC certificates and IXC registrations in a separate action.

Birch is acquiring approximately 38,600 business and residential customers currently served by the Sellers. Birch seeks the waiver so it will not have to obtain each customer's authorization. With the waiver, Birch can protect itself from possible complaints of unauthorized carrier changes. Customers will benefit because they will not be subject to a loss of service during the transfer.

The Commission is vested with jurisdiction in this matter pursuant to Sections 364.02, 364.335, 364.336, 364.337, 364.345, and 364.603, Florida Statutes. Accordingly, staff believes the following recommendations are appropriate.

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<sup>1</sup> **Cleartel Telecommunications, Inc. d/b/a Now Communications, also d/b/a VeraNet Solutions (Cleartel)**, holder of CLEC certificate no. 8326 and IXC registration no. TJ777;  
**IDS Telecom Corp. d/b/a Cleartel Communications (IDS)**, holder of CLEC certificate no. 5228 and IXC registration no. TJ987;  
**nii Communications, Ltd. (nii)**, holder of CLEC certificate no. 7759 and IXC registration no. TJ510; and  
**Supra Telecommunications and Information Systems, Inc. (Supra)**, holder of CLEC certificate no. 4861 and IXC registration no. TK091.

### Discussion of Issues

**Issue 1:** Should the Commission approve the request for waiver of the carrier selection requirements of Rule 25-4.118, F.A.C., in the transfer of local and long distance customers to Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications from Cleartel Telecommunications, Inc. d/b/a Now Communications, also d/b/a VeraNet Solutions, IDS Telcom Corp. d/b/a Cleartel Communications, nii communications, ltd., and Supra Telecommunications and Information Systems, Inc.?

**Recommendation:** Yes, the Commission should approve the request for waiver of the carrier selection requirements of Rule 25-4.118, F.A.C. Any waiver approved by the Commission should only apply to the specific set of customers identified in the petition. The petitioners should be required to provide the Commission notification of the actual date when the transaction is consummated. If for any reason the transaction is not consummated, any waiver approved by the Commission shall be null and void. (M. Watts/Morrow)

**Staff Analysis:** Pursuant to Rule 25-4.118(1), F.A.C., a customer's carrier cannot be changed without the customer's authorization. Rule 25-4.118(2), F.A.C., provides in pertinent part that a carrier shall submit a change request only if one of the following has occurred:

- (a) The provider has a letter of agency (LOA) from the customer requesting the change;
- (b) The provider has received a customer-initiated call for service;
- (c) A firm that is independent and unaffiliated with the provider has verified the customer's requested change.

Pursuant to Rule 25-24.475(3), F.A.C., Rule 25-4.118, F.A.C., is incorporated into Chapter 25-24, and applies to IXCs.

Rule 25-24.455(2), F.A.C., provides that an IXC may petition for a waiver of any provision of the rules governing IXCs. The Commission can grant in whole, grant in part, or deny the petition for waiver based on the following:

- The extent to which competitive forces may serve the same function as, or obviate the necessity for, the provision sought to be waived;
- Alternative regulatory requirements for the company which may serve the purposes of this part; and
- The extent to which a waiver would serve the public interest.

Pursuant to Rule 25-24.845, F.A.C., Rule 25-4.118, F.A.C., is incorporated into Chapter 25-24, and applies to CLECs.

Section 364.337(2), Florida Statutes, states in pertinent part:

A certificated competitive local exchange telecommunications company may petition the commission for a waiver of some or all of the requirements of this chapter, except ss. 364.16, 364.336, and subsections (1) and (5). The commission may grant such petition if determined to be in the public interest.

The authority for Rule 25-4.118, F.A.C., is found in Section 364.603, Florida Statutes, which is a section the Commission is authorized to waive.

Birch has attested that it will provide for a seamless transition while ensuring that the affected customers understand available choices with the least amount of disruption to the customers. Staff has reviewed the notices that will be sent to the Sellers' customers and found them to be adequate. The customers should not experience any interruption of service, rate increase, or switching fees.

As of the filing date of this recommendation, Birch has two outstanding complaints, Cleartel has three, IDS has one, Supra has 13, and nii has none. All of the companies are actively working with staff to resolve these complaints. After the transaction is consummated, the Sellers provided a single contact to work with staff to resolve any customer complaints that arise from issues occurring prior to the transfer.

Further, neither Birch, Cleartel, IDS, nii nor Supra has any outstanding regulatory assessment fees, penalties or interest associated with its respective IXC registration or CLEC certification.

Staff believes that in this instance it is appropriate to waive the carrier selection requirements of Rule 25-4.118, F.A.C. If prior authorization is required in this event, customers may fail to respond to a request for authorization, neglect to select another carrier, and lose their local and long distance services. Furthermore, staff believes that granting this waiver will avoid unnecessary slamming complaints during this transition.

Therefore, staff recommends that the Commission approve the request for waiver of the carrier selection requirements of Rule 25-4.118, F.A.C. Any waiver approved by the Commission should only apply to the specific set of customers identified in the petition. The petitioners should be required to provide the Commission notification of the actual date when the transaction is consummated. If for any reason the transaction is not consummated, any waiver approved by the Commission shall be null and void.

**Issue 2:** Should this docket be closed?

**Recommendation:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order. **(Morrow)**

**Staff Analysis:** If no person whose substantial interests are affected by the proposed agency action files a protest within 21 days of the issuance of the order, this docket should be closed upon the issuance of a consummating order.