

Diamond Williams

100399-TP

From: Collins, Angela [acollins@cgrdc.com]
Sent: Tuesday, September 14, 2010 5:20 PM
To: Filings@psc.state.fl.us
Subject: NEW DOCKET - Request for Expedited Waiver of Slamming Rules in Connection with a Transaction
Attachments: Florida Slamming Waiver Request (filed 9-14-2010).PDF

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NEW DOCKET- Request for Expedited Waiver of Slamming Rules in Connection with a Transaction

This document is being filed on behalf of Birch Communications, Inc. and Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch d/b/a Birch Communications (collectively, "Birch").

The total number of pages is 11.

The document is a request for an expedited waiver of the Commission's slamming rules in connection with the sale of customers to Birch.

Respectfully submitted,

Angela Collins

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**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

Request for expedited waiver of carrier selection)
requirements of Rule 25-4.118, F.A.C., due to a)
transaction in which Birch Telecom of the South,)
Inc. dba Birch Telecom dba Birch)
Communications and Birch Communications,)
Inc. will acquire substantially all of the assets)
and customers of American Fiber Network, Inc.)
and CloseCall America, Inc.)
_____)

Docket No. 100399-TP
Dated: September 14, 2010

WAIVER REQUEST

Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications and Birch Communications, Inc. (collectively, "Birch"), by their undersigned counsel, hereby request a waiver from the Florida Public Service Commission ("Commission") of Rule 25-4.118, Florida Administrative Code, and any other regulations deemed applicable to the authorization and verification of changes in telecommunications providers ("Waiver Request"). This Waiver Request is made in connection with a transaction in which Birch will acquire substantially all of the assets and Florida customers of CloseCall America, Inc. ("CCA") and American Fiber Network, Inc. ("AFN") (CCA and AFN collectively, "Sellers") (Birch and Sellers collectively, the "Parties"). Birch submits the following in support of this Waiver Request:

I. DESCRIPTION OF THE PARTIES

A. Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications, and Birch Communications, Inc.

Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications is a Delaware corporation with headquarters located at 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia. Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications is authorized by the Commission to provide local exchange and interexchange

services in Florida.¹ Birch Telecom of the South, Inc. dba Birch Telecom dba Birch Communications is a wholly owned subsidiary of Birch Communications, Inc., which is a Georgia corporation with principal corporate offices located at 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia. Birch Communications, Inc. is authorized by the Commission to provide local exchange and interexchange services in Florida.²

B. CloseCall America, Inc.

CCA is a Delaware corporation with offices located at 101A Log Canoe Circle, Stevensville, Maryland 21666. CCA is authorized by the Commission to provide local exchange and interexchange services.³

C. American Fiber Network, Inc.

AFN is a Delaware corporation with headquarters located at 9401 Indian Creek Parkway, Suite 280, Overland Park, Kansas, 66210. AFN is authorized by the Commission to provide local exchange and interexchange services.⁴

II. DESIGNATED CONTACTS

For the purposes of this Waiver Request, inquiries or copies of any correspondence, orders, or other materials should be directed as follows:

Angela F. Collins
Cahill Gordon & Reindel LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
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202-862-8958 (facsimile)
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¹ CLEC Certificate No. 7552 and IXC Registration No. TJ414.

² CLEC Certificate No. 7130 and IXC Registration Nos. TJ268 and TX326.

³ Docket No. 050189.

⁴ Docket Nos. 991630, 991810.

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.

Birch respectfully requests a waiver of Rule 25-4.118 so that Sellers may transfer to Birch their customer accounts in Florida without Birch securing authorization and verification from each of Sellers customers in Florida. Obtaining the authorization and verification from each of the affected customers would be a burdensome process and impose an undue hardship on Birch. This transfer of customers will result from a transaction whereby Birch will acquire substantially all of the assets and Florida customers of Sellers pursuant to a Sale Agreement pursuant to Article 9 of the Uniform Commercial Code ("Transaction"). As a result of the Transaction, Birch will provide service to Sellers' customers in Florida and neither of the Sellers will continue to operate as telecommunications carriers in Florida.

Birch will comply with the requirements of the Federal Communications Commission ("FCC") governing the sale of a carrier's customer base as set forth in 47 C.F.R. § 64.1120(e). These rules require that every affected customer receive thirty (30) days prior written notice of the proposed transfer to Birch, and that Birch certify to the FCC that it has provided such written notice to each subscriber affected by the Transaction. Drafts of the customer notice letters to be used in connection with this Transaction are attached as **Exhibit A**. Affected customers will be notified in writing of the transfer of their service to Birch and of their right to choose a different

carrier pursuant to applicable FCC rules. The legal rights of affected customers, therefore, will not be prejudiced by a waiver of the rule because Birch will comply with the FCC's rules governing this type of transaction, which are specifically designed to protect the rights of customers.

Upon consummation of the Transaction and after completion of the customer transfer, Birch will provide CCA and AFN customers with the same service quality they have come to expect and all billing will be handled by Birch. Birch will file revised tariff sheets incorporating the Sellers' current services and rates so that the affected customers will continue to receive the same services that they currently receive without any changes to the service offerings, rates, or terms and conditions. The transfer is scheduled to take place on or after December 1, 2010. 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.

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 Waiver Request, 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 Birch 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 thirty (30) days notice of the transfer and be afforded the opportunity to select another carrier. If prior authorization from each customer is required, 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 Sellers' customers enjoy continuity of high-quality telecommunications service. Following the Transaction, the customers will continue to receive quality services supported by Birch's experienced and well-qualified management team. Consequently, the proposed Transaction will be transparent to 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 Sellers to Birch. Therefore, in consideration of the foregoing, the Parties respectfully request expedited consideration and approval of this Waiver Request no later than November 1, 2010, so that the Parties may consummate the transaction in December 2010.

WHEREFORE, Birch respectfully requests that the Commission grant the request for a waiver of Rule 25-4.118 on an expedited basis and grant additional relief as may be proper and necessary under the circumstances.

Respectfully submitted,

A handwritten signature in black ink that reads "Angela Collins". The signature is written in a cursive style with a horizontal line underneath it.

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Counsel for Birch Communications, Inc.

EXHIBIT A

Draft Customer Notice Letters

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commitment with CCA and you disconnect services or transfer to another carrier prior to the end of that term, you will be liable for any 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 CCA 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 CCA at **877-81-CLOSE (25673)**.

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**.

About Birch Communications - Headquartered in Atlanta, Georgia, Birch Communications is one of the largest competitive local exchange carriers in its 38-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.

CCA thanks you for your business and Birch looks forward to providing you with quality service for many years to come.

Sincerely,

CloseCall America, Inc. and
Birch Communications



IMPORTANT NOTICE
REGARDING A CHANGE IN YOUR TELECOMMUNICATIONS SERVICES

Dear _____

Birch Communications ("Birch") and American Fiber Network, Inc. ("AFN") are pleased to announce that Birch will acquire AFN's local and long distance telephone customers. Subject to approval by the Federal Communications Commission and state regulators, Birch will replace AFN 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 AFN. Birch is excited about the opportunity to provide your telecommunications service(s) 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 AFN has been structured so that the transfer of service will be virtually seamless other than the possibility of a minor change to your voice mail service for which you will receive additional information.¹ 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 a neutral manner and **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 **[INSERT MONTH]** or **[INSERT MONTH]** bill. As in the past, you are responsible for paying all bills rendered to you by AFN during the transition of service.

You do 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 arrange 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

¹ It will be necessary for you to reset your password and re-record your message greeting(s). Additionally, saved messages at the time of the transfer will no longer be retained. Birch will provide further details in a follow-up letter.

commitment with AFN and you disconnect services or transfer to another carrier prior to the end of that term, you will be liable for any 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 AFN 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 AFN at **800-864-0583**.

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**.

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AFN thanks you for your business and Birch looks forward to providing you with quality service for many years to come.

Sincerely,

American Fiber Network, Inc. and
Birch Communications, Inc.