

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Request for expedited waiver of carrier selection requirements of Rule 25-4.118, FAC, due to transfer of all assets and customers from American Fiber Network, Inc. and CloseCall America, Inc. to Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications and Birch Communications, Inc.

DOCKET NO. 100399-TP
ORDER NO. PSC-10-0667-PAA-TP
ISSUED: November 3, 2010

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
NATHAN A. SKOP
RONALD A. BRISÉ

NOTICE OF PROPOSED AGENCY ACTION
ORDER GRANTING REQUEST FOR WAIVER OF CARRIER SELECTION
REQUIREMENTS OF RULE 25-4.118, F.A.C.

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service Commission that the action discussed herein is preliminary in nature and will become final unless a person whose interests are substantially affected files a petition for a formal proceeding, pursuant to Rule 25-22.029, Florida Administrative Code.

CASE BACKGROUND

On September 15, 2010, 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 of all local and long distance customers from two companies¹ (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.

¹ American Fiber Network, Inc., (American Fiber) holder of CLEC certificate no. 7303 and IXC registration no. TJ333, and CloseCall America, Inc., (CloseCall) holder of CLEC certificate no. 8588.

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Birch is acquiring approximately 17 business and 1,941 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.

We are vested with jurisdiction in this matter pursuant to Sections 364.02, 364.335, 364.336, 364.337, 364.345, and 364.603, Florida Statutes.

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 IXC's.

Rule 25-24.455(2), F.A.C., provides that an IXC may petition for a waiver of any provision of the rules governing IXC's. 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. We find that the notices that will be sent to the Sellers' customers are adequate; therefore, the customers should not experience any interruption of service, rate increase, or switching fees.

Neither Birch nor the Sellers have any outstanding consumer complaints. After the transaction is consummated, each Seller will continue to work with us to resolve any customer complaints that may arise from issues occurring prior to the transfer.

Further, neither Birch, American Fiber, nor CloseCall has any outstanding regulatory assessment fees, penalties or interest associated with its respective IXC registration or CLEC certification.

Therefore, we find it appropriate to waive the carrier selection requirements of Rule 25-4.118, F.A.C., because 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. Moreover, granting this waiver will avoid unnecessary slamming complaints during this transition.

Thus we shall approve the request for waiver of the carrier selection requirements of Rule 25-4.118, F.A.C., as applicable to the specific set of customers identified in the petition. The petitioners must notify us of the actual date when the transaction is consummated. If for any reason the transaction is not consummated, any waiver approved shall be null and void.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the request for waiver of the carrier selection requirements of Rule 25-4.118, F.A.C. for the transfer of all local and long distance customers from American Fiber Network, Inc. and CloseCall America, Inc. to Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications, is approved. It is further

ORDERED that any waiver approved by the Commission should only apply to the specific set of customers identified in the petition. It is further

ORDERED that the petitioners shall be required to provide us with notification of the actual date when the transaction is consummated. It is further

ORDERED that if for any reason the transaction is not consummated, any waiver approved by the Commission shall be null and void. It is further

ORDERED that the provisions of this Order, issued as a proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event this Order becomes final, this docket shall be closed.

By ORDER of the Florida Public Service Commission this 3rd day of November, 2010.



ANN COLE
Commission Clerk

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing that is available under Section 120.57, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on November 24, 2010.

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In the absence of such a petition, this order shall become final and effective upon the issuance of a Consummating Order.

Any objection or protest filed in this/these docket(s) before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.