

State of Florida



Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: August 31, 2016

TO: Office of Commission Clerk (Stauffer)

FROM: Office of Telecommunications (Deas, Fogleman) *SD. DE Fogleman*
Office of the General Counsel (Corbari) *Corbari*

RE: Docket No. 160162-TX – Bankruptcy cancellation by Florida Public Service Commission of CLEC Certificate No. 7269, issued to Primus Telecommunications, Inc., effective July 19, 2016.

AGENDA: 09/13/16 – Proposed Agency Action – Interested Persons May Participate

COMMISSIONERS ASSIGNED: All Commissioners

PREHEARING OFFICER: Administrative

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

Case Background

Primus Telecommunications, Inc. (Primus) currently holds local exchange telecommunications company Certificate No. 7269, issued on December 29, 1999. Pursuant to Section 364.336, Florida Statutes (F.S.), telecommunications companies must pay a minimum annual Regulatory Assessment Fee (RAF) if the certificate or registration was active during any portion of the calendar year and late payment charges as outlined in Section 350.113, F.S., for any delinquent amounts.

On February 2, 2016, Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications (Birch) notified the Commission that Primus would be transferring its Florida

customers to Birch.¹ Birch is a Delaware corporation, and is a wholly owned subsidiary of Birch Communications, Inc. (BCI). Primus is a Delaware corporation held by PTUS, Inc., which is a Delaware corporation and wholly owned subsidiary of Holdco, Inc., a private company incorporated under the Ontario *Business Corporations Act*, with registered head offices in Toronto, Canada.² Both Birch and BCI are authorized by the Commission to provide local exchange services in Florida.³

On January 18, 2016, BCI and Primus entered into an Asset Purchase Agreement (Agreement) pursuant to which BCI would purchase certain assets and customers of Primus, including certain customer accounts and receivables, certain customer agreements and contracts, certain vendor agreements and contracts, certain equipment, and certain intellectual property.⁴ BCI, however, would not assume any of Primus' pre-closing liabilities or obligations.⁵

On January 19, 2016, Primus filed an application⁶ for court protection in Ontario, Canada, pursuant to the provisions of Canada's *Companies' Creditors Arrangement Act*, (the CCAA), R.S.C. 1985, c. C-36, the statute under which debtors may be granted relief from creditors. In addition, Primus requested authorization to apply for recognition in the United States pursuant to Chapter 15 of the United States Bankruptcy Code.⁷

On January 19, 2016, an Initial Order was entered by the Ontario Superior Court of Justice, finding Primus insolvent and granting Primus CCAA protection while it is liquidated and winds down operations.

On January 21, 2016, Primus filed a Chapter 15 Petition for Recognition of a Foreign Proceeding in the United States Bankruptcy Court for the District of Delaware,⁸ which resulted in the *pro forma* assignment of Primus' Florida telecommunications authorization from Primus Telecommunications, Inc. to Primus Telecommunications, Inc., debtor-in-possession. In addition, the United States Bankruptcy Court issued an Order granting Primus a stay of any and all actions or proceedings against it or its assets in the United States pursuant to Sections 362 and

¹ Document No. 04272-16, filed in Docket No. 160162-TX, *In Re: Bankruptcy cancellation by Florida Public Service Commission of CLEC Certificate No. 7269, issued to Primus Telecommunications, Inc., effective June 28, 2016*, pgs. 65-73.

² Document No. 01605-16, pgs. 36-43; and Document No. 04272-16, pgs. 25-26.

³ Birch: CLEC Certificate No. 7552;

BCI: CLEC Certificate No. 7130.

⁴ Document No. 04272-16, pgs. 65-73.

⁵ *Id.*

⁶ *In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended, AND In the Matter of a Plan of Compromise or Arrangement of PT Holdco, Inc., Primus Telecommunications Canada Inc., PTUS, Inc. Primus Telecommunications, Inc., and Lingo, Inc.*, Ontario Superior Court of Justice, Commercial List, Court File No. CV-16-11257-00CL.

⁷ 11 U.S.C. § 1501-1532.

⁸ Document No. 06949-16, pgs. 3-27, Chapter 15 Petition for Recognition of a Foreign Proceeding, *In Re: Primus Telecommunications, Inc.*, United States Bankruptcy Court, District of Delaware, Case No. 16-10133 (LSS), administered jointly with, *In Re: PT Holdco, Inc. et al*, United States Bankruptcy Court, District of Delaware, Case No. 16-10131 (LSS).

365 of the Bankruptcy Code, pending the formal recognition of the foreign proceeding by the United States Bankruptcy Court.⁹

On February 25, 2016, the Ontario Superior Court of Justice issued an Approval and Vesting Order, approving the sale transactions outlined in the Agreement between Primus and Birch, and approving transfer and vesting of Primus regulated customer relationships to BCI free and clear of all encumbrances.¹⁰ In addition, the court respectfully requested that its Order be recognized and given effect by any court, tribunal, regulatory or administrative body having jurisdiction in the United States or Canada.

On March 2, 2016, the Ontario Superior Court of Justice issued an Assignment Order, assigning the rights and obligations of Primus under the assigned contracts outlined in the Agreement between Primus and Birch, to BCI free and clear of all encumbrances.¹¹

On March 4, 2016, the United States Bankruptcy Court for the District of Delaware issued an Order recognizing and enforcing the Assignment, Approval and Vesting and Distribution Orders of the Canadian Court and granting related relief.¹²

On March 18, 2016, Commission staff received an email from Primus stating that the Canadian Bankruptcy includes all prior debts, such as RAF fees and penalties owed by Primus for 2015.¹³

On May 3, 2016, certain Primus operating assets and customers were sold to BCI, in accordance with the Agreement and Order Pursuant to Sections 363, 365, 1501, 1517, 1519, 1520, 1521 and 105(a) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 9014, For Entry of an Order Recognizing and Enforcing the Assignment, Approval and Vesting and Distribution Orders and Granting Related Relief, issued by United States Bankruptcy Court Judge Laurie Selber Silversteen.

On June 28, 2016, Birch notified this Commission that the transfer of Primus Florida customers to Birch was consummated effective on May 3, 2016, and requested cancellation of Primus CLEC certificate.¹⁴ On July 19, 2016, the Commission received a letter from counsel for Primus, confirming Primus transferred its Florida customer base to Birch, effective May 3, 2016, and requesting a cancellation of its certificate of authority to offer telecommunications services in Florida and its tariffs on file with the Commission.¹⁵

This recommendation addresses Primus' request for bankruptcy cancellation of its local exchange certificate. The Commission has jurisdiction over this matter pursuant to Chapter 364, F.S., and Section 350.113, F.S.

⁹ Document No. 06949-16, pgs. 33-37.

¹⁰ Document No. 01605-16, pgs. 14-23.

¹¹ Document No. 01605-16, pgs. 3-13.

¹² Document No. 06949-16, pgs. 45-105.

¹³ Document No. 04272-16, pgs. 4-64; and Document No. 01605-16.

¹⁴ Document No. 04272-16, pgs. 2-3.

¹⁵ Document No. 05341-16.

Discussion of Issues

Issue 1: Should the Commission cancel Primus Telecommunications, Inc.'s local exchange telecommunications company Certificate No. 7269, effective July 19, 2016, due to bankruptcy for the reasons set out in Attachment A?

Recommendation: Yes, the Commission should cancel Primus Telecommunications Inc.'s local exchange telecommunications company Certificate No. 7269, effective July 19, 2016, due to bankruptcy, for the reasons set out in Attachment A. In addition, the Commission should direct the Division of Administrative and Information Technology Services to request permission from the Florida Department of Financial Services to write off any outstanding Regulatory Assessment Fees owed by Primus Telecommunication Inc., including any statutory interest and penalties, rather than referring the company to collection services due to bankruptcy. Finally, the Commission should order Primus Telecommunications Inc. to immediately cease and desist providing competitive local exchange services in Florida. (Deas, Corbari)

Staff Analysis: See Attachment A, proposed Order

Issue 2: Should this docket be closed?

Recommendation: Yes, 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, a consummating order should be issued and the docket closed upon issuance of a Consummating Order. (Corbari)

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, a consummating order should be issued and the docket closed upon issuance of a Consummating Order.

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Bankruptcy cancellation by Florida
Public Service Commission of CLEC
Certificate No. 7269, issued to Primus
Telecommunications, Inc., effective July 19,
2016.

DOCKET NO. 160162-TX
ORDER NO.
ISSUED:

The following Commissioners participated in the disposition of this matter:

JULIE I. BROWN, Chairman
LISA POLAK EDGAR
ART GRAHAM
RONALD A. BRISÉ
JIMMY PATRONIS

NOTICE OF PROPOSED AGENCY ACTION ORDER GRANTING CANCELLATION OF
LOCAL EXCHANGE CERTIFICATE DUE TO BANKRUPTCY

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 (F.A.C.).

CASE BACKGROUND

Primus Telecommunications, Inc. (Primus) currently holds local exchange telecommunications company Certificate No. 7269, issued on December 29, 1999. Pursuant to Section 364.336, Florida Statutes (F.S.), telecommunications companies must pay a minimum annual Regulatory Assessment Fee (RAF) if the certificate was active during any portion of the calendar year and late payment charges as outlined in Section 350.113, F.S., for any delinquent amounts.

On February 2, 2016, Birch Telecom of the South, Inc. d/b/a Birch Telecom d/b/a Birch Communications (Birch) notified this Commission that Primus would be transferring its Florida customers to Birch.¹⁶ Birch is a Delaware corporation, and is a wholly owned subsidiary of Birch

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Communications, Inc. (BCI). Primus is a Delaware corporation held by PTUS, Inc., which is a Delaware corporation and wholly owned subsidiary of Holdco, Inc., a private company incorporated under the Ontario *Business Corporations Act*, with registered head offices in Toronto, Canada.¹⁷ Both Birch and BCI are authorized by this Commission to provide local exchange services in Florida.¹⁸

On January 18, 2016, BCI and Primus entered into an Asset Purchase Agreement (Agreement) pursuant to which BCI would purchase certain assets and customers of Primus, including certain customer accounts and receivables, certain customer agreements and contracts, certain vendor agreements and contracts, certain equipment, and certain intellectual property.¹⁹ BCI, however, would not assume any of Primus' pre-closing liabilities or obligations.²⁰

On January 19, 2016, Primus filed an application²¹ for court protection in Ontario, Canada, pursuant to the provisions of Canada's *Companies' Creditors Arrangement Act*, (the CCAA), R.S.C. 1985, c. C-36, the statute under which debtors may be granted relief from creditors. In addition, Primus requested authorization to apply for recognition in the United States pursuant to Chapter 15 of the United States Bankruptcy Code.²²

On January 19, 2016, an Initial Order was entered by the Ontario Superior Court of Justice, finding Primus' financial situation rendered it insolvent, and granting Primus CCAA protection while it is liquidated and winds down operations.

On January 21, 2016, Primus filed a Chapter 15 Petition for Recognition of a Foreign Proceeding in the United States Bankruptcy Court for the District of Delaware,²³ which resulted in the *pro forma* assignment of Primus' Florida telecommunications authorization from Primus Telecommunications, Inc. to Primus Telecommunications, Inc., debtor-in-possession. In addition, the United States Bankruptcy Court issued an Order granting Primus a stay of any and all actions or proceedings against it or its assets in the United States pursuant to Sections 362 and 365 of the Bankruptcy Code, pending the formal recognition of the foreign proceeding by the United States Bankruptcy Court.²⁴

¹⁷ Document No. 01605-16, pgs. 36-43; and Document No. 04272-16, pgs. 25-26.

¹⁸ Birch: CLEC Certificate No. 7552;
BCI: CLEC Certificate No. 7130.

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²⁰ *Id.*

²¹ *In the Matter of the Companies Creditors Arrangement Act, R.S.C. 1985, c. C-36, As Amended, AND In the Matter of a Plan of Compromise or Arrangement of PT Holdco, Inc., Primus Telecommunications Canada Inc., PTUS, Inc. Primus Telecommunications, Inc., and Lingo, Inc.*, Ontario Superior Court of Justice, Commercial List, Court File No. CV-16-11257-00CL.

²² 11 U.S.C. § 1501-1532.

²³ Document No. 06949-16, pgs. 3-27, Chapter 15 Petition for Recognition of a Foreign Proceeding, *In Re: Primus Telecommunications, Inc.*, United States Bankruptcy Court, District of Delaware, Case No. 16-10133 (LSS), administered jointly with, *In Re: PT Holdco, Inc. et al*, United States Bankruptcy Court, District of Delaware, Case No. 16-10131 (LSS).

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On March 4, 2016, the United States Bankruptcy Court issued an Order recognizing and enforcing the Assignment, Approval and Vesting and Distribution Orders of the Canadian Court and granting related relief.²⁷

On March 18, 2016, our staff received an email from Primus stating that the Canadian Bankruptcy included all prior debts, such as RAF fees and penalties owed by Primus.²⁸

On May 3, 2016, certain Primus operating assets and customers were sold to BCI, in accordance with the Agreement and Order Pursuant to Sections 363, 365, 1501, 1517, 1519, 1520, 1521 and 105(a) of the Bankruptcy Code and Bankruptcy Rules 2002, 6004 and 9014, For Entry of an Order Recognizing and Enforcing the Assignment, Approval and Vesting and Distribution Orders and Granting Related Relief, issued by United States Bankruptcy Court Judge Laurie Selber Silversteen.

On June 28, 2016, Birch notified us that the transfer of Primus Florida customers to Birch was consummated effective on May 3, 2016, and requested cancellation of Primus CLEC certificate.²⁹ On July 19, 2016, we received a letter from counsel for Primus, confirming Primus transferred its Florida customer base to Birch, effective May 3, 2016, and requesting a cancellation of its certificate of authority to offer telecommunications services in Florida and its tariffs on file with this Commission.³⁰

We are vested with jurisdiction over this matter pursuant to Chapter 364, F.S., and Section 350.113, F.S.

²⁵ Document No. 01605-16, pgs. 14-23.

²⁶ Document No. 01605-16, pgs. 3-13.

²⁷ Document No. 06949-16, pgs. 45-105.

²⁸ Document No. 04272-16, pgs. 4-64; and Document No. 01605-16.

²⁹ Document No. 04272-16, pgs. 2-3.

³⁰ Document No. 05341-16.

DECISION

Pursuant to Section 364.336, F.S., telecommunications companies must pay a minimum annual RAF if their certificate was active during any portion of the calendar year and late payment charges as outlined in Section 350.113, F.S., for any delinquent amounts.

Primus filed a Chapter 15 Petition for Recognition of a Foreign Proceeding³¹ in the United States Bankruptcy Court in the District of Delaware pursuant to 11 U.S.C. § 1504 of the US Bankruptcy Code. The purpose of Chapter 15 is to provide effective mechanisms for dealing with insolvency cases involving debtors, assets, claimants, and other parties of interest involving more than one country.³² A Chapter 15 bankruptcy proceeding is ancillary to a primary proceeding brought in another country, usually the debtor's home country. Immediately upon the recognition of a foreign main proceeding, the automatic stay and selected other provisions of the Bankruptcy Code, such as 11 U.S.C. § 362, take effect within the United States.³³

Pursuant to 11 U.S.C. § 362 (a)(1), (2) and (6), the filing of a petition for bankruptcy relief acts as an automatic stay that bars an action or proceeding against the debtor that was or could have been commenced before the bankruptcy case. Thus, a governmental entity such as this Commission is enjoined from exercising our regulatory authority to collect, assess or recover pre-petition debt, such as RAFs.

In addition, in any bankruptcy liquidation or reorganization, secured creditors are given the highest priority in the distribution and, normally, receive all of the distributed assets. RAFs, late payment charges, and penalties owed by a company to this Commission, as well as monetary settlements of cases resolving issues of failure to pay such fees, are not secured debts and, as a practical matter, are uncollectible in a bankruptcy proceeding where liquidation occurs.

Therefore, we would be prevented from collecting the RAFs owed by this company, and from assessing and collecting a penalty for failure to pay the fees. Primus currently owes RAFs plus statutory interest and penalties for 2015. In addition, Primus will owe RAFs for 2016.

Accordingly, we hereby find that Primus Telecommunications, Inc.'s Certificate No. 7269, shall be cancelled due to bankruptcy, effective July 19, 2016. In addition, any unpaid RAFs, including any statutory interest and penalties, shall be sent to the Florida Department of Financial Services to request permission for this Commission to write off the uncollectible amount.

³¹ A "foreign proceeding" is a "judicial or administrative proceeding in a foreign country ... under a law relating to insolvency or adjustment of debt in which proceeding the [debtor's assets and affairs] are subject to control or supervision by a foreign court for the purpose of reorganization or liquidation." 11 U.S.C. § 101(23).

³² 11 U.S.C. § 1501

³³ 11 U.S.C. § 1520

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Primus Telecommunications, Inc.'s Certificate No. 7269, to provide local exchange telecommunications service is hereby cancelled, effective July 19, 2016, due to bankruptcy. It is further

ORDERED that any outstanding Regulatory Assessment Fees, including any accrued statutory interest and penalties owed by Primus Telecommunications, Inc., shall be sent to the Department of Financial Services. The Division of Administrative and Information Technology Services shall request permission to write off the uncollectible amount. It is further

ORDERED that Primus Telecommunications, Inc. shall immediately cease and desist providing telecommunication services in Florida. It is further

ORDERED that the provisions of this Order, issued as 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, F.A.C., 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 ____ day
of _____, _____.

CARLOTTA S. STAUFFER
Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399
(850) 413-6770
www.floridapsc.com

KFC

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 _____.

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.