

Decision _____

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Access Integrated Networks, Inc. d/b/a Birch Communications, Inc, for a Certificate of Public Convenience and Necessity to Operate as a Provider of Facilities-Based and Resold Local Exchange Service within the State of California.

Application 08-07-024
(Filed July 16, 2008)

**DECISION APPROVING SETTLEMENT AND
GRANTING CERTIFICATE OF PUBLIC CONVENIENCE
AND NECESSITY TO OPERATE AS A PROVIDER OF FACILITIES-BASED
AND RESOLD TELECOMMUNICATIONS SERVICES**

1. Summary

This application was originally filed on July 16, 2008, as the Application of Access Integrated Networks, Inc. (Access) d/b/a Birch Communications. The applicant sought the Commission's authority to conduct business as a resale and facilities-based provider of local telecommunications services in California. The application was filed on behalf of the applicant by an out-of-state consultant.

The Commission's Consumer Protection and Safety Division (CPSD) filed a timely protest asserting that Access had acquired Birch Telecom, Inc., a company that had been in bankruptcy prior to the filing of the application, and that Access had been sanctioned by the Federal Communications Commission for violations of consumer rules, but had not disclosed these facts in the application, as required by the Commission. Consequently, CPSD opposed the application.

The applicant substituted California counsel for its original representative, and filed an amendment to the original application, expanding the scope of authority sought to include interexchange services, noting that a change had occurred to its name, and admitting that, due to a claimed misunderstanding and inadvertence, the original application contained a number of omissions and erroneous representations. CPSD renewed its protest, and settlement negotiations ensued. Eventually the parties reached a settlement that provides for the Certificate of Public Convenience and Necessity (CPCN) to be granted, but also admits that the initial application violated Rule 1.1 of the Commission's Rules of Practice and Procedure (Rules); that the applicant will pay a fine of \$10,000 for the violation; and that it will notify CPSD in the event that it commences selling communications services in California through any type of telemarketing operation. By joint motion the parties seek approval of the written settlement agreement (Settlement) and issuance of the requested CPCN granting the amended application.

We find that the applicant's financial and technical qualifications satisfy our requirements for issuing the CPCN. We also find that the remedial provisions of the Settlement appropriately address the deficiencies in the original application. Accordingly, we approve the Settlement and grant the CPCN.

Application 08-07-024 is closed.

2. Background

2.1. Applicant

Birch Communications, Inc. (Birch) is the present applicant in this proceeding. The application was initially filed under the name of Access Integrated Networks, Inc., dba Birch Communications, but the applicant subsequently changed its name. The name change was reflected by amendment

of the application at the applicant's request during the course of the proceeding, and is now in the name of Birch.

Birch is a Georgia corporation qualified to do business in California. Birch provides facilities-based and resold local and interexchange telecommunications services, directly and through its subsidiaries, to business and residential customers in 30 states. Access Integrated Networks, Inc. acquired Birch Telecom, Inc., (Birch Telecom) in February 2008.

2.2. Authority Sought by Applicant

The application originally requested authority to provide facilities-based and resale local exchange service in California, limited to Verizon and SBC service areas throughout the state. Subsequent amendment of the application added the clarification that Birch seeks authority to provide resold and limited facilities-based competitive local exchange service throughout the service territories of Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone, and Citizens Telecommunications Company of California, Inc. This expands the scope of requested authority to include resold and facilities-based interexchange service statewide. Birch intends to provide its services using services and facilities of other carriers or its own facilities, which Birch will install in or on existing structures.¹

¹ The original application states that it will provide services using "resold services and UNE-P-like arrangements of the incumbent local exchange company... [but may] in the future install its own switching equipment" Application, p. 4.

2.3. History of Application

The original application in this matter was filed by Access on July 16, 2008. The application was filed by an out-of-state telecommunications consultant, who had prepared it with the assistance of an employee of Access.

At the time the original application was filed, it contained erroneous representations, and omitted material information, about the regulatory history of Birch Telecom (which by then was its subsidiary) and itself. The application included a verification pursuant to the Commission's application requirements that essentially disclaimed the existence of certain prior or current bankruptcy activity, civil or criminal liability under section 17000 *et seq.* of the California Business and Professions Code, or actions involving misrepresentations to consumers, as of July 2, 2008.² The verification was signed by Vincent Oddo, Birch's CEO and President.

On August 22, 2008, CPSD filed a Protest to the Application, alleging that the verification was materially false and misleading in several respects, and therefore violated Rule 1.1.³

On September 23, 2008, Birch filed a substitution of counsel. Following a month of investigation and discussions between the parties, Birch filed an Amendment to its Application, expanding the scope of authority sought, noting its name change, and admitting that, due to alleged misunderstanding and inadvertence, the original application contained a number of omissions and

² The full text of this verification is set forth in the Statement of Stipulated Facts set forth in the Settlement Agreement.

³ Rule 1.1 in general prohibits any person who signs a pleading or other document, or otherwise transacts business with the Commission, from misleading the Commission by artifice or false statement of fact or law.

misrepresentations relating to prior investigations, sanctions, and bankruptcies involving Birch, its affiliates, or its officers.⁴

CPSD twice renewed its protest to the amended application, clarifying its reasons for objecting to granting the CPCN,⁵ but the issues were finally settled by a ruling of the ALJ on March 10, 2009, that granted leave to file CPSD's most recent amended protest.

2.4. Proposed Settlement

On April 14, 2009, the parties jointly filed a motion with a proposed written settlement agreement (Settlement) attached. The proposal would allow approval of the amended application, subject to Commission adoption of the Settlement.⁶ Two conditions are imposed upon Birch under the Settlement. These are the payment of a fine of \$10,000 for violation of Rule 1.1, and a requirement that Birch notify CPSD in writing before it engages in any telemarketing services to consumers in California.

The underlying basis for the sanctions imposed in connection with the issuance of the CPCN are the following facts, which CPSD contends should have been disclosed in the application to prevent Mr. Oddo's verification from being false or misleading concerning activities of Access and of Birch Telecom. CPSD

⁴ Applicant filed the Amendment following a prehearing conference (PHC) held by the Administrative Law Judge (ALJ) on October 22, 2008.

⁵ The ALJ held a second PHC on March 6, 2009, to set a procedural schedule for bringing the matter to a conclusion through litigation of the issues.

⁶ A complete copy of the Settlement is attached as the Appendix to the Order.

also contends, and Birch admits in the Settlement, that it violated Rule 1.1 by reason of its failure to make some or all of the disclosures, even if inadvertently.⁷

- (a) At the time the verification was signed, Applicant's newly-acquired subsidiary, Birch Telecom, Inc. ("Birch Telecom") was the subject of two complaints before the Federal Communications Commission ("FCC") involving allegation of slamming that arose as the result of misrepresentations to consumers by independent telemarketers who had been working for Birch Telecom. Birch alleges that it terminated the telemarketing firm following the discovery of the misrepresentations. After the application was filed, the FCC resolved those two slamming complaints against Birch Telecom.
- (b) Prior to the date of the verification, three other related FCC slamming complaints were resolved against Birch Telecom. One of the orders granting a slamming complaint was issued several days before the date of the verification.
- (c) Prior to the date of the verification, two FCC slamming complains, one in the 2002 and a second in 2007, were resolved against Applicant.
- (d) In 2004, Applicant agreed to a consent order by the FCC to resolve an investigation against Applicant relating to allegations that during 2002, independent telemarketers working for Applicant (but who had been terminated by Applicant prior to the institution of the investigation) had impersonated Bell South employees or agents and induced consumers to transfer their long-distance service under false pretenses, as well as other allegations of other unlawful conduct (including but not limited to unlawful facsimile transmission of unsolicited advertisements). Pursuant to the consent order, Applicant agreed to make a "voluntary" payment in the amount of \$155,000 to the U.S. Treasury and institute various remedial measures to prevent such actions in the future.

⁷ This recitation of the facts is quoted verbatim from paragraph 11 of the Settlement.

- (e) Birch Telecom filed for bankruptcy twice, in 2002 and 2005, before it was acquired by Applicant. One of Applicant's officers, Allan Samson, was an officer of or held a similar managerial position in Birch Telecom when those bankruptcy filing were made.
- (f) Mr. Samson was an officer of Birch Telecom during the pendency of the slamming complaints and related FCC orders noted in paragraphs (a) and (b) above.
- (g) Mr. Oddo joined Applicant as its new CEO in 2003, while the FCC investigation noted in paragraph (d) was pending, and executed the consent order resolving that investigation. Applicant's current Vice President of Finance, Apryle Ovell, was an employee, but not an officer of Applicant during the same period. Mr. Oddo and Ms. Ovell were both officers of Applicant during the pendency of the FCC slamming complaints described in paragraph (a) and (c) and during the pendency of two of the three FCC slamming complaints described in paragraph (b), as well as when the FCC orders resolving those complaints against Applicant and Birch Telecom were issued.

In a footnote in its amendment to the application, Birch offers as the explanation for its omission to disclose these facts that the Birch employee primarily involved in preparing the application and the outside consultant misunderstood the extent of the disclosures required by Mr. Oddo's verification, and on that basis advised him to sign the document. *See* Amendment to Application, n.1 at p. 3.

3. Discussion of Birch's Fitness to Provide Telecommunications Services

3.1. Financial Qualifications

To be granted a CPCN, an applicant for authority to provide facilities-based local exchange and/or interexchange services must demonstrate that it has a minimum of \$100,000 of cash or cash equivalent to meet its start-up expenses. An applicant must also demonstrate that it has sufficient additional

resources to cover all deposits required by local exchange carriers (LECs) and/or interexchange carriers (IECs) in order to provide the proposed service.⁸

As part of the amendment to its application Birch furnished audited 2007 financials and unaudited September 2008 financials⁹. Although the acquisition of Birch Telecom created a temporary reduction of cash or cash equivalent below the required threshold at the end of 2007, the subsequent unaudited financial statements confirm that Birch's financial position meets the Commission's requirements, and that it continues to be a going concern with sufficient cash flow to satisfy its commitments. Birch has made a satisfactory showing of financial fitness to satisfy our requirements.

3.2. Technical Qualifications

An applicant for local exchange and interexchange authority is required to make a reasonable showing of technical expertise in telecommunications or a related business. The original application includes the resumes of six key executives of the applicant. These reflect that Birch's senior management has substantial experience in wireline and wireless telecommunications businesses, including engineering, sales and marketing, information technology, legal and regulatory matters, finance and accounting. Birch satisfies the Commission's requirements for technical qualifications.

3.3. Other Fitness Issues

Birch's substantive qualifications are not disputed by CPSD. Its challenge to Birch's fitness is based solely upon Birch's nondisclosure of previous events,

⁸ The financial requirements for LECs are set forth in D.95-12-056, Appendix C. For IECs, the requirements are found in D.91-10-041 and D.93-05-010.

⁹ These are filed under seal pursuant to ALJ ruling.

as set forth above. The parties offer the Settlement as the means to remove this taint and the consequent roadblock to approval, enabling the application to be granted while at the same time ensuring that the public interest is adequately safeguarded.

There are three central features of the Settlement.¹⁰ First, Birch stipulates to violating Rule 1.1 for its failure, even if inadvertent, to disclose its regulatory history accurately on its initial application. Second, Birch agrees to pay a \$10,000 fine for the violation. Third, Birch agrees to notify CPSD promptly if it commences the sale of its utility communications services through any type of telemarketing operation.¹¹ CPSD accepts these measures to redress the initial nondisclosures, and agrees to withdraw its protest in return.

Although the initial absence of disclosures is troubling, the Settlement reflects that the circumstances were investigated by CPSD with Birch's full cooperation, and the resultant terms address the fitness issues raised by the historical disclosures. Specifically, the lack of disclosure is remedied by payment of the fine, and the potential for future marketing abuses is discouraged by the notification requirement. We discuss below the question whether these terms satisfy our requirements for adoption of the Settlement, but we note at this point that they are rationally related to ensuring Birch's fitness to engage in the telecommunications activities proposed in the amended application.

¹⁰ The full text of the Settlement is included as the Attachment to this decision.

¹¹ The accompanying motion clarifies that this requirement extends to any of Birch's subsidiaries.

4. Rates and Tariffs

Birch intends to provide facilities-based and resold services throughout the state. A proposed local tariff describing the services, rates, and general rules is included as Attachment C to the original application. Birch must file a revised tariff reflecting its current name and ownership and any other changes required because of intervening circumstances since the application was initially filed.

5. Discussion

The application, as amended, makes a *prima facie* showing of financial, managerial and technical fitness for authority to provide services as a facilities-based competitive local exchange carrier (LEC) and interexchange carrier (IEC) in California. It is the nature and scope of the undisclosed conduct of Access and Birch Telecom that is the troubling aspect of the application. But for the fact that the nondisclosures came to light through CPSD's review of the application, they might never have come to our attention. This would have exposed consumers to the risk that Birch would commit future marketing abuses of the nature it has now disclosed, or that its bankruptcy history would have escaped our notice.

The errors were discovered and addressed by the parties before they created a risk of harm to the public. Birch has disclosed the conduct and events that vary from the representations Mr. Oddo made in his verification, and the Settlement acknowledges Birch's culpability. Birch has provided an account of why the omissions occurred, agreed to remedy the Rule 1.1 violation by paying the fine, and promised to implement a safeguard against the occurrence of future marketing abuses. These measures appropriately address the concerns raised by the deficiencies in the initial application.

The Settlement is jointly proposed for adoption by the only parties to the proceeding. In such circumstances, Rule 12.1, subdivision (d), provides that the

Settlement will be disapproved only in the event that it is not reasonable in light of the whole record, consistent with law, and in the public interest. The parties have undertaken their burden of showing that the Settlement satisfies this standard, and we will approve it as part of our order.

The record discloses that the applicant's Rule 1.1 violation resulted from two circumstances in the preparation of the original Application. First, the persons who prepared the original Application misunderstood the scope of the disclosure requirement, and believed that they were correctly advising Mr. Oddo to sign the verification. Second, the applicant's acquisition of Birch Telecom was a relatively recent event at the time Mr. Oddo verified the application, and the dimensions of Birch Telecom's prior activity were not fully known to those who prepared the initial application. At the March 10 PHC the applicant concurred that the problem was one of failure to do its due diligence before the verification was signed and the application was submitted.

Under the circumstances of this proceeding, once the misinformation was discovered, it was quickly investigated and corrected with the full cooperation of the applicant. Particularly considering the extent of the effort that would have been required to litigate the omitted compliance history in the verification, the collaborative effort to resolve the matter was a reasonable response. Compared to the risk, expense, complexity and duration of collateral proceedings on these issues, Birch's conduct accomplished the purpose of disclosure without sacrificing the public interest.¹²

¹² The parties cite *In re Southern California Gas Co.* (1999) D.00-09-034, 2000 Cal. PUC LEXIS 694 at p.* 31 in support of evaluating the reasonableness of a settlement on this basis.

A \$10,000 fine is reasonable for the mistaken completion of the verification in the application. The parties concur that the nondisclosure was either inadvertent, or it was the result of a misunderstanding on the part of those who prepared the application. Birch took immediate corrective action, changed its legal representative, prepared and filed an amended application, and demonstrated substantial cooperation in resolving the issues of misrepresentation and omission with CPSD. Although a fine of \$10,000 is at the lower end of the spectrum of fines that the Commission has imposed for inadvertent omissions, in this instance it appears sufficient to deter future wrongdoing.¹³

The parties cite Public Utilities Code section 2107 as an indication that the Settlement is consistent with law. That statute authorizes the Commission to levy a fine of \$500 to \$20,000 per offense on a public utility that neglects to comply, *inter alia*, with any order, decree, rule, direction, demand or requirement of the Commission in a case in which a penalty has not otherwise been provided. The parties contend that this is such a case, and that the \$10,000 fine is consistent with the statute. By comparison, the motion cites the amounts of fines imposed in a series of cases involving more numerous or severe citations to demonstrate that \$10,000 falls at the proper point on this continuum.

Finally, the parties concur that the Settlement promotes the public interest, because it preserves and defends the integrity of the licensing process. The fine is actually imposed within the licensing proceeding, an unusual measure that

¹³ CPSD expressly acknowledges the fact that Birch has substantial income from its nationwide operations, but advocates the \$10,000 fine in this instance as being fair under the circumstances.

reflects a recognition of the lack of due diligence in the initial preparation of the application. The provision requiring Birch to alert CPSD of contemplated telemarketing activities is a reasonable measure to protect the public from future marketing abuses by this company.

In the parties' own terms, the Settlement "vindicates the Commission's application process, while not unduly punishing [Birch]." As the parties characterize the circumstances here, Birch's conduct caused limited disruption to the regulatory process and no direct harm to the public, so the Settlement is an appropriate response, and should be approved.

We will grant Birch's application and approve the Settlement.

6. Categorization and Need for Hearings

In Resolution ALJ 176-3218, dated July 31, 2008, the Commission preliminarily categorized this application as Ratesetting, and preliminarily determined that hearings were not necessary. Although one protest was received, it is withdrawn under the terms of the Settlement, and there is no apparent reason why the application should not be granted at this time. Given these circumstances, a public hearing is not necessary, and it is not necessary to disturb the preliminary categorization and hearing determinations.

7. Comments on Proposed Decision

Public Utilities Code Section 311, subdivision (g)(1), provides that a decision must be served on all parties and be subject to at least 30 days review and comment prior to a vote of the Commission. Subdivision (g)(2) provides that this 30-day comment period may be waived for an uncontested matter in which the decision grants the relief requested. This is such a matter. Birch has requested a waiver of the 30-day waiting period required by subdivision (g)(1)

on the grounds that the matter is uncontested. The public review and comment period is waived to expedite this matter in accordance with Birch's request.

8. Assignment of Proceeding

Rachelle B. Chong is the assigned Commissioner and Victor D. Ryerson is the assigned ALJ in this proceeding.

Findings of Fact

1. Birch Communications, Inc. is the applicant in this proceeding. The application was initially filed under the name of Access Integrated Networks, Inc., dba Birch Communications, but the applicant acquired Birch Telecom, Inc., in February 2008 and subsequently changed its name to Birch Communications, Inc., (Birch hereinafter).

2. Birch is a Georgia corporation qualified to do business in California. It provides facilities-based and resold local and interexchange telecommunications services, directly and through its subsidiaries, to business and residential customers in 30 states.

3. The original application, which was filed on July 16, 2008, by an out-of-state consultant on applicant's behalf, contained a number of material inaccuracies and misrepresentations about the disciplinary and financial history of the applicant. Specifically, a verification signed by Birch's CEO and President, Vincent Oddo, essentially disclaimed the existence of previous or current bankruptcy activity, civil or criminal liability under section 17000 *et seq.* of the California Business and Professions Code, or actions involving misrepresentations to consumers, as of July 2, 2008.

4. Certain of the representations in the verification were untrue, as is more specifically set forth in Paragraph 11 of the Attachment to the Order and incorporated by reference herein.

5. On August 22, 2008, CPSD filed a Protest to the Application on the grounds that the information in the verification was materially false and misleading, and might violate Rule 1.1 of the Commission's Rules of Practice and Procedure.

6. On September 23, 2008, applicant substituted California counsel for its out-of-state consultant as applicant's representative in this matter.

7. Applicant's new counsel cooperated with CPSD following the substitution, responding to requests from CPSD and providing documentation to correct the omissions and misrepresentations in the original application. On October 24, 2008, Birch filed an Amendment to its Application, expanding the scope of authority sought to include interexchange operating authority, noting the change in its name, and admitting that, due to alleged misunderstanding and inadvertence, the original application contained a number of omissions and misrepresentations relating to prior investigations, sanctions, and bankruptcies of Birch, its affiliates, or its officers.

8. After CPSD twice renewed its protest to the amended application to clarify its reasons for objecting to granting the CPCN, Birch and CPSD entered into a proposed written settlement agreement, dated April 9, 2009, (Settlement) under the terms of which CPSD would withdraw its protest in return for Birch's payment of a \$10,000 fine and its agreement to notify CPSD before it engages in any telemarketing of its services to consumers in California.

9. The Settlement admits that the omissions and misrepresentations in the original application, even if inadvertent, constitute a violation of Rule 1.1.

10. Birch agrees under the Settlement to pay a fine of \$10,000 for omitting and misrepresenting the facts as set forth in Paragraph 11 of the Settlement.

11. Birch agrees in the Settlement to notify CPSD before it engages in any telemarketing of its services to consumers in California as a safeguard against the occurrence of “slamming” and other market abuses that Birch disclosed in Paragraph 11 of the Settlement.

12. Birch has sufficient additional cash or cash equivalent on hand to satisfy the Commission’s requirement for granting a CPCN to provide the services described in the application, as amended.

13. Birch’s management possesses sufficient relevant industry experience and knowledge of the telecommunications business to provide the services it intends to provide, as described in the amended application.

14. As part of its application, Birch submitted a draft of the form of its anticipated initial tariff. Except for any deficiencies noted in Attachment A to this decision, the form of Birch’s draft tariffs complies with the Commission’s requirements.

Conclusions of Law

1. The application, as amended, demonstrates that Birch is financially, managerially and technically fit for certification as a limited facilities-based local exchange and interexchange carrier in accordance with applicable requirements of the Commission.

2. Although the omissions and misrepresentations in the initial application were material and raised legitimate concerns about Birch’s fitness to provide the service for which it seeks authorization, those concerns have been addressed by the subsequent disclosure of information in the Settlement and the remedial measures included in the Settlement, as set forth in Findings of Fact 9 through 11. The \$10,000 fine and the requirement of giving CPSD advance notice of telemarketing activities are reasonable measures to respond to the initial

nondisclosures, and to diminish the risks to consumers indicated by the past marketing behavior of Birch and its predecessors.

3. The Settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

4. The Commission should adopt the Settlement

5. Public convenience and necessity require Birch's limited facilities-based local exchange and interexchange services, subject to the terms and conditions set forth in the Order.

6. Since Birch will not be constructing any outside facilities pursuant to the CPCN granted herein, it can be seen with certainty that granting the application subject to the terms and conditions set forth in the Order will have no significant effect on the environment.

7. The application should be granted to the extent set forth in the Order.

8. Because Birch's application, as amended, is uncontested under the terms of the Settlement, this decision should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A Certificate of Public Convenience and Necessity is granted to Birch Communications, Inc. to construct telecommunications facilities and provide local exchange services and interexchange services subject to the terms and conditions set forth below.

2. The Settlement Agreement entered into as of April 9, 2009, by and between Birch Communications, Inc. on behalf of itself, its affiliates, and its predecessors in interest, and the Consumer Protection and Safety Division of this Commission,

a copy of which is attached as the Appendix to this Order and incorporated by reference as if fully set forth herein, is approved.

3. All terms and conditions of the Settlement Agreement shall be binding upon the parties as part of the Order. As expressly required under Paragraph 1 of Part II of the Settlement Agreement, Birch Communications, Inc. shall pay a fine in the amount of \$10,000, payable to the California general fund, within 10 days of the issuance of this decision; and shall notify Consumer Protection and Safety Division, in writing, before it engages in any telemarketing of its services to consumers in California.

4. Birch Communications, Inc. is authorized to provide local exchange service and interexchange service in the service territories of service throughout the service territories of Pacific Bell Telephone Company, Verizon California Inc., SureWest Telephone, and Citizens Telecommunications Company of California, Inc., throughout the state of California.

5. Birch Communications, Inc. is authorized to file tariff schedules for the provision of competitive local exchange services in the form indicated by Attachment C to the Application. The final tariff schedules must be reviewed and approved by Commission staff as to form and content before they are permitted to be filed, and Birch Communications, Inc. may not offer services until tariffs are on file. Birch Communications, Inc.'s initial filing shall be made in accordance with General Order 96-B. Birch Communications, Inc. shall comply with its tariffs.

6. The certificate granted, and the authority to render service under the rates, charges, and rules authorized will expire if not exercised within 12 months after the effective date of this order.

7. The corporate identification number assigned to Birch Communications, Inc., U-7118-C, shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases.

8. Birch Communications, Inc. shall comply with all applicable rules adopted in the Local Exchange Competition proceeding (Rulemaking 95-04-043/Investigation 95-04-044), the Commission's rules and regulations for interexchange carriers set forth in Decision 93-05-010 and Decision 90-08-032, as well as other applicable Commission's rules, decisions, General Orders, and statutes that pertain to California public utilities, subject to the exemptions granted in this decision.

9. Birch Communications, Inc. shall comply with the requirements applicable to competitive local exchange carriers included in Attachment A to this decision.

10. Birch Communications, Inc. is not authorized to construct facilities, except for the installation of those in or on existing buildings or structures, until Birch Communications, Inc. undergoes any required environmental review and applies for and obtains full facilities-based authority, under the procedure adopted by the Commission in Decision 06-04-030 in Application for NewPath Networks, LLC for a Modification of its Certificate of Public Convenience and Necessity in Order to Provide Competitive Local Exchange, Access Integrated Networks, Inc., and Non-Dominant Interexchange Services (April 13, 2006).

11. Application 08-07-024 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

APPENDIX

SETTLEMENT AGREEMENT

This Settlement Agreement is made and entered into as of this 9th day of April, 2009 the "Effective Date", by and between Birch Communications, Inc. ("Applicant") on behalf of itself, its affiliates, and its predecessors in interest, and the Consumer Protection and Safety Division of the California Public Utilities Commission ("CPSD") (Applicant and CPSD each individually a "Party," and collectively the "Parties").

I. Statement of Stipulated Facts

1. On July 17, 2008, Applicant, then known as Access Integrated Networks, Inc., dba Birch Communications, filed with the California Public Utilities Commission ("Commission") Application 08-07-024 for a Certificate of Public Convenience and Necessity ("CPCN") to operate as a provider of facilities-based and resold local exchange service within the State of California ("Application").

2. As part of this Application, Applicant's CEO and President Vincent Oddo signed an unsworn "verification" on July 2, 2008, on behalf of Applicant, which read:

No affiliate, officer, director, partner or person owning more than 10% of Access Integrated Networks, Inc., d/b/a/ Birch Communications, or anyone acting in such a capacity whether or not formally appointed, held one of these positions with a telecommunications carrier that filed for bankruptcy, or had been found either criminally or civilly liable by a court of appropriate jurisdiction for a violation of § 17000 *et seq.* of the California Business and Professions Code, or for any actions which involved in [sic] misrepresentations to consumers, and to the best of applicant's knowledge is not currently under investigation for similar violations.

3. On August 22, 2008, CPSD filed a Protest to the Application, alleging that this verification was materially false and misleading in a number of respects and therefore violated Commission Rule 1.1.

4. After CPSD filed its Protest, Applicant retained new counsel and cooperated with CPSD's investigation of the issues raised in the Protest.

5. On October 24, 2008, Applicant filed an amendment to its Application, expanding the scope of authority sought to include interexchange operating authority, noting the change in its name, and admitting that, due to alleged misunderstanding and inadvertence, its original application contained a number of omissions and misrepresentations relating to prior investigations, sanctions, and bankruptcies involving Applicant, its affiliates, or officers.

6. On December 1, 2008, CPSD renewed its Protest to the now-amended Application.

7. On December 11, 2008, Birch filed a Reply to the renewed Protest.
8. On January 7, 2009, CPSD filed a Motion for Leave to File a Second Amendment to Protest ("Motion"), in which it clarified the allegations of its renewed Protest.
9. On January 8, 2009, Birch filed a Response stating that it did not object to the Motion.
10. On March 10, 2009, the Assigned Administrative Law Judge granted the Motion.
11. The pleadings, CPSD's investigation, and documents furnished to CPSD by Applicant, disclose the following facts that CPSD contends should have been disclosed in the Application in order to render the verification not false or misleading:

(a) At the time the verification was signed, Applicant's newly-acquired subsidiary, Birch Telecom, Inc. ("Birch Telecom") was the subject of two complaints before the Federal Communications Commission ("FCC") involving allegations of slamming that arose as the result of misrepresentations to consumers by independent telemarketers who had been working for Birch Telecom. Birch alleges that it terminated the telemarketing firm following the discovery of the misrepresentations. After the application was filed, the FCC resolved those two slamming complaints against Birch Telecom.

(b) Prior to the date of the verification, three other related FCC slamming complaints were resolved against Birch Telecom. One of the orders granting a slamming complaint was issued several days before the date of the verification.

(c) Prior to the date of the verification, two FCC slamming complaints, one in 2002 and a second in 2007, were resolved against Applicant.

(d) In 2004, Applicant agreed to a consent order by the FCC to resolve an investigation against Applicant relating to allegations that during 2002, independent telemarketers working for Applicant (but who had been terminated by Applicant prior to the institution of the investigation) had impersonated Bell South employees or agents and induced consumers to transfer their long-distance service under false pretenses, as well as other allegations of other unlawful conduct (including but not limited to unlawful facsimile transmission of unsolicited advertisements). Pursuant to the consent order, Applicant agreed to make a "voluntary" payment in the amount of \$155,000 to the U.S. Treasury and institute various remedial measures to prevent such actions in the future.

(e) Birch Telecom filed for bankruptcy twice, in 2002 and 2005, before it was acquired by Applicant. One of Applicant's officers, Allan Samson, was an officer of or held a similar managerial position in Birch Telecom when those bankruptcy filings were made.

(f) Mr. Samson was an officer of Birch Telecom during the pendency of the slamming complaints and related FCC orders noted in paragraphs (a) and (b) above.

(g) Mr. Oddo joined Applicant as its new CEO in 2003, while the FCC investigation noted in paragraph (d) was pending, and executed the consent order resolving that investigation. Applicant's current Vice President of Finance, Apryle Ovell, was an employee, but not an officer of Applicant during the same period. Mr. Oddo and Ms. Ovell were both officers of Applicant during the pendency of the FCC slamming complaints described in paragraph (a) and (c) and during the pendency of two of the three FCC slamming complaints described in paragraph (b), as well as when the FCC orders resolving those complaints against Applicant and Birch Telecom were issued.

12. Applicant's failure to make some or all of the disclosures set forth in paragraph 11 (a)-(g), even if inadvertent as Applicant alleges, violated Rule 1.1 of the Commission's Rules of Practice and Procedure.

WHEREFORE, based on the foregoing stipulated facts, Applicant's cooperation in addressing the issues raised by CPSD, the showing made by Applicant in support of its Application, as amended, and Applicant's willingness to accept responsibility for violating Rule 1.1 through the payment of a reasonable fine, the Parties, mindful of the benefits of resolving the controversy in this proceeding in an efficient manner that is consistent with the benefits of competition and protection of consumers, agree to the following terms and conditions of settlement:

II. Terms and Conditions

1. Applicant and CPSD consent to the issuance of a decision in this proceeding that grants approval of the Application, as amended, subject to the adoption of this Settlement Agreement by the Commission. Material to this Settlement Agreement are the following two provisions, to which Applicant has agreed:

(a) A requirement that Applicant pay a fine for the above-described violation of Rule 1.1, in the amount of \$10,000, and payable to the California general fund within 10 days of the issuance of such decision; and

(b) A requirement that Applicant notify CPSD, in writing, before it engages in any telemarketing of its services to consumers in California.

2. **No Further Admission.** Applicant admits that it violated Rule 1.1 as set forth above. Except as so admitted, nothing in this Settlement Agreement shall constitute, or be considered as, an admission of liability or wrongdoing by Applicant.

3. Enforcement.

(a) Each material breach of this Settlement Agreement will constitute a separate violation and will entitle the Commission to take any necessary action to enforce its orders.

(b) After payment of the sum described in paragraph 1 of these Terms and Conditions, this Settlement Agreement will release Applicant from, and constitute a final settlement of, any and all costs, direct or indirect, presently known or unknown, accruing to or incurred by the Commission, including without limitation CPSD, during the course of its investigation and review in this proceeding.

(c) The Parties agree that the Commission has primary jurisdiction over any interpretation, enforcement, or remedies pertaining to this Settlement, to the extent provided by law. This Settlement shall be governed by and interpreted in accordance with the laws of the State of California and Commission rules and regulations.

(d) The Commission's adoption of this Settlement shall be binding on all Parties to this action. Except as expressly set forth in paragraphs 1 and 2 of these Terms and Conditions, the Parties agree that pursuant to Rule 12.5, this Settlement Agreement shall not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.

(e) After the Commission's adoption of this Settlement Agreement, CPSD will neither initiate nor continue any enforcement action or seek any further administrative or other penalties against Applicant based on the evidence of non-disclosure (recited above) in this case. This provision will not apply if Applicant breaches this Settlement Agreement or violates the Commission order approving it. This provision shall not prohibit the Commission from considering the Rule 1.1 violation that is the subject of this Settlement Agreement in the event it finds that Applicant subsequently commits violations of Rule 1.1 or other Commission rules and regulations, or sections of the Public Utilities Code related to Applicant's operations.

4. The Parties agree that they will not take any other action that would in any manner be inconsistent with fully supporting this Settlement Agreement. The Parties agree to furnish such additional information, documents, and testimony as the Commission or CPSD may request to implement the Settlement.

5. CPSD agrees that it will not further protest the Application based on the investigation or allegations of non-disclosure recited above, so long as Applicant does not further violate the Commission's rules, regulations, or sections of the Public Utilities Code related to Applicant's operations.

6. Execution of Settlement

(a) This Settlement Agreement is subject to approval and adoption by the Commission. The Parties agree to file a joint motion for approval and adoption of this Settlement Agreement and to execute or furnish any other additional information, documents, and testimony, or take any other action, that the Commission or CPSD may request, as necessary to implement this Settlement Agreement and such joint motion.

(b) This Settlement Agreement may be executed in any number of counterparts and by different Parties hereto in separate counterparts, with the same effect as if all Parties had signed the same document. All such counterparts will be deemed an original and will together constitute the same Settlement. This Settlement is the entire agreement among the Parties, which cannot be amended or modified without the express written consent of all the Parties.

7. This Settlement is not severable. If pursuant to Rule 12.4, the Commission materially modifies or negates any provision of this Settlement Agreement, the Parties must consent to such change. A Party will be deemed to have consented to the Commission modification unless within 15 days following the date of issuance of the Commission's proposed modification(s) (or such longer period as may be directed by the Commission), that Party notifies in writing the other Party and files with the Commission its objection to the modification(s). After the 10th day following the filing of the objection if the objecting Party has not withdrawn, canceled, or modified its objection, the Settlement Agreement will be deemed rescinded. If this Settlement Agreement is rescinded following payment of any sums by Applicant, those sums shall be refunded within 15 days of rescission.

8. Each Party represents that it has investigated the facts and law pertaining to the matters described in this Settlement Agreement. No Party has relied or presently relies upon any oral or written statement, promise, or representation by any other Party, except as specifically set forth in this Settlement.

9. This Settlement will be binding upon the respective Parties, their successors, assignees, executors and administrators.

10. The Parties acknowledge and stipulate that this Settlement is fair and not the result of any fraud, duress, or undue influence by any other Party. Each Party hereby states that it has read and fully understands its rights, privileges, and duties under this Settlement. Moreover, each Party has had its respective attorney or other authorized person review the terms of this Settlement. By executing this Settlement each Party declares that the provisions herein are adequate, reasonable, and mutually agreed upon; and that they are entering this Settlement freely and voluntarily.

IN WITNESS WHEREOF, the Parties hereby execute Agreement on the date first set forth opposite their signatures.

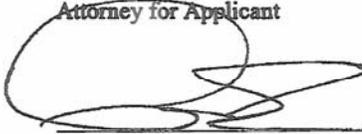


Christopher Witteman
Attorney for the Consumer Protection
and Safety Division

Date: 4/9/09

John Clark
Attorney for Applicant

Date: _____



Richard Clark,
Director of the Consumer Protection
and Safety Division

Date: 4/9/09

Duly Authorized Officer of Applicant

Date: _____

Christopher Wittman
Attorney for the Consumer Protection
and Safety Division

Date: _____



John Clark
Attorney for Applicant

Date: 4/9/09

Richard Clark,
Director of the Consumer Protection
and Safety Division

Date: _____



Duly Authorized Officer of Applicant

Date: 4/9/09

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(END OF APPENDIX)

ATTACHMENT A

List of deficiencies in form of tariff filed by Birch Communications, Inc, Inc. in Application 08-07-024 to be corrected in its tariff compliance filing:

Tariff Sheet Format: CPUC assigned utility ID number (U#) should be included on each sheet in the upper left header along with Company name and address. (General Order 96-B, Section 8.4.1).

(END OF ATTACHMENT A)

ATTACHMENT B**REQUIREMENTS APPLICABLE TO COMPETITIVE LOCAL EXCHANGE CARRIERS**

1. Applicant shall file, in this docket, a written acceptance of the certificate granted in this proceeding within 30 days of the effective date of this order.

2. Applicant is subject to the following fee and surcharges that must be regularly remitted per the instructions in Appendix E to D.00-10-028. The Combined California PUC Telephone Surcharge Transmittal Form must be submitted even if the amount due is zero.

3. Revenues collected for the California Advanced Services Fund (CASF) at the surcharge rate of 0.25% shall be held by the carrier in a memorandum account tracking system and the account will accrue monthly interest on the accumulated balance at the short-term commercial paper rate. Carriers shall continue to hold custody of all the collected CASF surcharge revenues and accumulated interest until the Commission provides further direction on the disposition of these revenues.

- a. The current 1.15% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service Trust Administrative Committee Fund (Pub. Util. Code § 879; Resolution T-17071, dated March 1, 2007, effective April 1, 2007);
- b. The current 0.20% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (Pub. Util. Code § 2881; D.98-12-073 and Resolution T-17127, dated December 20, 2007, effective January 1, 2008);
- c. The user fee provided in Pub. Util. Code §§ 431-435, which is 0.18% of gross intrastate revenue (Resolution M-4819), dated June 7, 2007, effective July 1, 2007;

- d. The current 0.13% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (Pub. Util. Code § 739.3; D.96-10-066, pp. 3-4, App. B, Rule 1.C; Resolution T-17128, dated December 20, 2007, effective January 1, 2008);
- e. The current 0.25% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F.; D.07-12-054);
- f. The current 0.25% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Advances Services Fund (D.07-12-054); and
- g. The current 0.79% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G; Resolution T-17142, dated April 24, 2008, effective June 1, 2008).

Note: These fees change periodically. In compliance with Resolution T-16901, December 2, 2004, you should check the joint tariff for surcharges and fees filed by Pacific Bell (dba SBC California) and apply the current surcharge and fee amounts in that joint tariff on end-user bills until further revised.

- 4. Applicant is a competitive local exchange carrier (CLC). The effectiveness of its future tariffs is subject to the requirements of General Order (GO) 96-B and the Telecommunications Industry Rules (D.07-09-019).
- 5. Applicant is a non-dominant interexchange carrier (NDIEC). The effectiveness of its future NDIEC tariffs is subject to the requirements of GO 96-B and the Telecommunications Industry Rules (D.07-09-019).
- 6. Tariff filings shall reflect all fees and surcharges to which Applicant is subject, as reflected in 2 above.

7. Applicant shall file a service area map as part of its initial tariff.

8. Prior to initiating service, Applicant shall provide the Commission's Consumer Affairs Branch with the name and address of its designated contact person(s) for purposes of resolving consumer complaints. This information shall be updated if the name or telephone number changes, or at least annually.

9. Applicant shall notify the Director of the Communications Division in writing of the date that local exchange service is first rendered to the public, no later than five days after service first begins.

10. Applicant shall notify the Director of the Communications Division in writing of the date interLATA service is first rendered to the public within five days after service begins, and again within five days after intraLATA service begins.¹

11. Applicant shall keep its books and records in accordance with the Generally Accepted Accounting Principles.

12. In the event Applicant's books and records are required for inspection by the Commission or its staff, it shall either produce such records at the Commission's offices or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to its office.

13. Applicant shall file an annual report with the Director of the Communications Division, in compliance with GO 104-A, on a calendar-year basis with the information contained in Attachment C to this decision.

¹ California is divided into ten Local Access and Transport Areas (LATAs), each containing numerous local telephone exchanges. InterLATA describes services, revenues and functions relating to telecommunications originating within one LATA and terminating in another LATA. IntraLATA describes services, revenues and functions relating to telecommunications originating within a single LATA.

14. Applicant shall file an affiliate transaction report with the Director of the Communications Division, in compliance with D.93-02-019, on a calendar-year basis using the form contained in Attachment D.

15. Applicant shall ensure that its employees comply with the provisions of Pub. Util. Code § 2889.5 regarding solicitation of customers.

16. Within 60 days of the effective date of this order, Applicant shall comply with Pub. Util. Code § 708, Employee Identification Cards, and notify the Director of the Communications Division in writing of its compliance.

17. If Applicant is 90 days or more late in filing an annual report, or in remitting the surcharges and fee listed in 2 above, the Communications Division shall prepare for Commission consideration a resolution that revokes Applicant's CPCN unless it has received written permission from the Communications Division to file or remit late.

18. Applicant is exempt from Rule 3.1(b) of the Commission's Rules of Practice and Procedure.

19. Applicant is exempt from Pub. Util. Code §§ 816-830.

20. Applicant is exempt from the requirements of Pub. Util. Code § 851 for the transfer or encumbrance of property whenever such transfer or encumbrance serves to secure debt.

21. If Applicant decides to discontinue service or file for bankruptcy, it shall immediately notify the Communications Division's Bankruptcy Coordinator.

22. Applicant shall send a copy of this decision to concerned local permitting agencies no later than 30 days from the date of this order.

(END OF ATTACHMENT B)

ATTACHMENT C
ANNUAL REPORT

An original copy and a machine readable copy using Microsoft Word or compatible format shall be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3107, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

Failure to file this information on time may result in a penalty as provided for in Sections 2107 and 2108 of the Public Utilities Code.

Required information:

1. Exact legal name and U # of the reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (*e.g.*, corporation, partnership, sole proprietorship, etc.).

If incorporated, specify:

- a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Number and date of the Commission decision granting the Certificate of Public Convenience and Necessity.
 7. Date operations were begun.
 8. Description of other business activities in which the utility is engaged.
 9. List of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
 10. Balance sheet as of December 31st of the year for which information is submitted.

11. Income statement for California operations for the calendar year for which information is submitted.

For answers to any questions concerning this report, call (415) 703-2883.

(END OF ATTACHMENT C)

ATTACHMENT D
CALENDAR YEAR AFFILIATE TRANSACTION REPORT

1. Each utility shall list and provide the following information for each affiliated entity and regulated subsidiary that the utility had during the period covered by the annual Affiliate Transaction Report.

- Form of organization (*e.g.*, corporation, partnership, joint venture, strategic alliance, etc.);
- Brief description of business activities engaged in;
- Relationship to the utility (*e.g.*, controlling corporation, subsidiary, regulated subsidiary, affiliate);
- Ownership of the utility (including type and percent ownership);
- Voting rights held by the utility and percent; and
- Corporate officers.

2. The utility shall prepare and submit a corporate organization chart showing any and all corporate relationships between the utility and its affiliated entities and regulated subsidiaries in #1 above. The chart should have the controlling corporation (if any) at the top of the chart; the utility and any subsidiaries and/or affiliates of the controlling corporation in the middle levels of the chart and all secondary subsidiaries and affiliates (*e.g.*, a subsidiary that in turn is owned by another subsidiary and/or affiliate) in the lower levels. Any regulated subsidiary should be clearly noted.

3. For a utility that has individuals who are classified as “controlling corporations” of the competitive utility, the utility must only report under the requirements of #1 and #2 above any affiliated entity that either (a) is a public utility or (b) transacts any business with the utility filing the annual report excluding the provision of tariff services.

4. Each annual report must be signed by a corporate officer of the utility stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

5. Any required material that a utility is unable to provide must be reasonably described and the reasons the data cannot be obtained, as well as the efforts expended to obtain the information, must be set forth in the utility's annual Affiliate Transaction Report and verified in accordance with Sections I-F of Decision 93-02-019.

6. Utilities that do not have affiliated entities must file, in lieu of the annual transaction report, an annual statement to the Commission stating that the utility had no affiliated entities during the report period. This statement must be signed by a corporate officer of the utility, stating under penalty of perjury under the laws of the State of California (CCP 2015.5) that the annual report is complete and accurate with no material omissions.

(END OF ATTACHMENT D)