WC Docket 15-102

ACCEPTED/FILED

APR 30 2015

Federal Communications Commission
Office of the Secretary

Agency Tracking ID:PGC2669442 Authorization Number:262038

Successful Authorization -- Date Paid: 4/27/15

FILE COPY ONLY!!

READ INSTRUCTIONS CAREFULLY BEFORE PROCEEDING (1) LOCKBOX #979091	FEDERAL COMMUNICATIONS COMMISSION **REMITTANCE ADVICE** **FORM 159** PAGE NO 1 OF 1	APPROVED BY OMB 3060-059 SPECIAL USE FCC USE ONLY

SECTION A - Payer Information

(2) PAYER NAME (if paying by credit card, enter name exactly as it appears on your card) **Birch Communications, Inc.**	(3) TOTAL AMOUNT PAID (dollars and cents) **$1130.00**
(4) STREET ADDRESS LINE NO. 1 **4885 Riverside Drive**	
(5) STREET ADDRESS LINE NO. 2 **Suite 304**	
(6) CITY **Macon**	(7) STATE **GA** / (8) ZIP CODE **31210**
(9) DAYTIME TELEPHONE NUMBER (INCLUDING AREA CODE) **478-4761165**	(10) COUNTRY CODE (IF NOT IN U.S.A.) **US**

DOCKET FILE COPY ORIGINAL

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(11) PAYER (FRN) **0005044375**	(12) FCC USE ONLY

IF PAYER NAME AND THE APPLICANT NAME ARE DIFFERENT, COMPLETE SECTION B
IF MORE THAN ONE APPLICANT, USE CONTINUATION SHEETS (FORM 159-C)

(13) APPLICANT NAME **Birch Communications, Inc.**	
(14) STREET ADDRESS LINE NO. 1 **4885 Riverside Drive**	
(15) STREET ADDRESS LINE NO. 2 **Suite 304**	
(16) CITY **Macon**	(17) STATE **GA** / (18) ZIP CODE **31210**
(19) DAYTIME TELEPHONE NUMBER (INCLUDING AREA CODE) **478-4761165**	(20) COUNTRY CODE (IF NOT IN U.S.A.) **US**

FCC REGISTRATION NUMBER (FRN) AND TAX IDENTIFICATION NUMBER (TIN) REQUIRED

(21) APPLICANT (FRN) **0005044375**	(22) FCC USE ONLY

COMPLETE SECTION C FOR EACH SERVICE, IF MORE BOXES ARE NEEDED, USE CONTINUATION SHEET

(23A) FCC Call Sign/Other ID	(24A) Payment Type Code(PTC) **CDT**	(25A) Quantity **1**
(26A) Fee Due for (PTC) **$1,130.00**	(27A) Total Fee **$1130.00**	FCC Use Only
(28A) FCC CODE 1	(29A) FCC CODE 2	

(23B) FCC Call Sign/Other ID	(24B) Payment Type Code(PTC)	(25B) Quantity
(26B) Fee Due for (PTC)	(27B) Total Fee	FCC Use Only

(28B) FCC CODE 1	(29B) FCC CODE 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BIRCH COMMUNICATIONS, INC.,	)	**WC Docket No. ____**
Assignee	)	
	)	
and	)	**ITC-ASG- _____**
	)	
ORBITCOM, INC.,	)	
Assignor	)	
	)	
Application for Consent to Assign Assets and/or	)	
Transfer Control of Assets pursuant to Section 214	)	
of the Communications Act of 1934, as Amended	)	
	)	

JOINT APPLICATION

Birch Communications, Inc. ("Birch" or "Assignee") and OrbitCom, Inc. ("OrbitCom" or "Assignor") (Assignees and Assignor collectively, the "Applicants") hereby request authority from the Federal Communications Commission ("Commission") pursuant to Section 214 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 214, and Sections 1.763, 63.03, 63.04, 63.18, and 63.24(e) of the Commission's rules, 47 C.F.R. §§ 1.763, 63.03, 63.04, 63.18, and 63.24(e), to assign and/or transfer control of certain OrbitCom assets to Birch,[1] excluding the Commission authorizations held by OrbitCom.

[1] *Amendment of Parts 1 and 63 of the Commission's Rules*, 22 FCC Rcd 11398, ¶ 38 (2007) (indicating that asset acquisitions should be treated as assignments under the Commission's international Section 214 rules); *Implementation of Further Streamlining Measures for Domestic Section 214 Authorizations*, 17 FCC Rcd 5517, ¶ 59 (2002) (finding that asset acquisitions should be treated as transfers of control under the Commission's domestic Section 214 rules).

I. REQUEST FOR STREAMLINED TREATMENT OF APPLICATION

Under Section 63.04(b) of the Commission's rules, the Applicants are filing a combined domestic and international application for the assignment and/or transfer of control of certain OrbitCom assets to Birch. The Applicants respectfully request streamlined treatment of this Application pursuant to Sections 63.03 and 63.12 of the Commission's rules.

This Application is eligible for streamlined processing pursuant to Section 63.03(b)(2) of the Commission's rules because: (1) the proposed transaction will result in Birch having a market share in the interstate interexchange market of less than ten percent (10%); (2) Birch will provide competitive telephone exchange services exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction; and (3) neither the Applicants nor any of their affiliates are regulated as dominant with respect to any service. This Application also qualifies for streamlined treatment under Section 63.12 of the Commission's rules because: (1) Birch is not affiliated with a dominant foreign carrier; (2) as a result of the transaction, Birch will not be affiliated with any foreign carrier; and (3) none of the other scenarios outlined in Section 63.12(c) of the Commission's rules apply.

II. APPLICANTS

A. Birch Communications, Inc. (FRN: 0005044375)

Birch is a Georgia corporation with headquarters located at 3060 Peachtree Road NW, Suite 1065, Atlanta, GA 30305. Birch has authority to provide interstate and international telecommunications services.[2] Birch's wholly owned subsidiary, Birch Communications of Virginia, Inc., operates pursuant to Birch's international 214 authority and is registered to

[2] IB File No. ITC-214-19970926-00584, FCC Filer ID 815113.

provide interstate telecommunications services.[3] Birch's wholly owned subsidiary, Birch Communications of Kentucky, LLC, holds international 214 authority and is registered to provide interstate telecommunications services.[4] Birch's wholly owned subsidiary, Cbeyond Communications, LLC, holds international 214 authority and is registered to provide interstate telecommunications services.[5] Birch's wholly owned subsidiary, Birch Telecom, Inc. ("Birch Telecom"), has authority to provide international telecommunications services from the Commission.[6] The following wholly owned subsidiaries of Birch Telecom operate pursuant to Birch Telecom's international authority and also provide interstate telecommunications services: Birch Telecom of the South, Inc., Birch Telecom of the West, Inc., Birch Telecom of the Great Lakes, Inc., Birch Telecom of Missouri, Inc., Birch Telecom of Oklahoma, Inc., Birch Telecom of Texas Ltd., LLP, Birch Telecom of Kansas, Inc., Birch Communications of the Northeast, Inc., Ionex Communications, Inc., Ionex Communications South, Inc., and Ionex Communications North, Inc.[7]

Birch and its wholly owned subsidiaries listed above are competitive local exchange carriers, and offer or are certified to offer competitive local exchange, intrastate toll, intrastate interexchange, interstate interexchange, international, or data services to residential and business customers in the District of Columbia and in 50 states.

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[3] FCC Filer ID 828502.

[4] IB File No. ITC-214-20130716-00198; FCC Filer ID 829851.

[5] IB File No. ITC-214-20001016-00619; FCC Filer ID 820930.

[6] IB File No. ITC-214-19990701-00441.

[7] Birch Telecom of the South, Inc. (FCC Filer ID 820616), Birch Telecom of the West, Inc. (FCC Filer ID 827985), Birch Telecom of the Great Lakes, Inc. (FCC Filer ID 826636), Birch Telecom of Missouri, Inc. (FCC Filer ID 819422), Birch Telecom of Oklahoma, Inc. (FCC Filer ID 820061), Birch Telecom of Texas LTD LLP (FCC Filer ID 819948), Birch Telecom of Kansas, Inc. (FCC Filer ID 807993), Ionex Communications, Inc. (FCC Filer ID 815376), Birch Communications of the Northeast, Inc. (FCC Filer ID 828483), Ionex Communications South, Inc. (FCC Filer ID 808443), Ionex Communications North, Inc. (FCC Filer ID 815082).

B. OrbitCom, Inc. (FRN: 0007283187)

OrbitCom is a South Dakota corporation with corporate headquarters at 1701 N. Louise Ave., Sioux Falls, South Dakota, 571071. OrbitCom holds international 214 authority under File No. ITC-ASG-20071204-00483, which approved the assignment of the international 214 authorization of OneEighty Networks, Inc. to OrbitCom (ITC-214-20060616-00320). OrbitCom also is registered to provide interstate telecommunications services.[8] OrbitCom is a competitive local exchange carrier, and offers or is certified to offer competitive local exchange, intrastate toll, intrastate interexchange, interstate interexchange, international, or data services to residential and business customers in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

III. DESCRIPTION OF THE TRANSACTION

On April 24, 2015, Birch and OrbitCom entered into an Asset Purchase Agreement ("Agreement") pursuant to which Birch will purchase certain assets and customers of OrbitCom, including certain customer accounts and receivables, certain customer agreements and contracts, certain vendor agreements and contracts, certain equipment, and certain intellectual property ("Transaction"). Birch, however, will not assume any of OrbitCom's pre-closing liabilities or obligations.

The Transaction involves customers that currently receive services from OrbitCom in Arizona, Colorado, Idaho, Iowa, Minnesota, Montana, Nebraska, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming. All affected customers will receive notice of the Transaction as necessary under Commission and state customer notification

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[8] FCC Filer ID 824032.

requirements. The Birch entity providing services to the affected customers is Ionex Communications North, Inc., which holds domestic 214 authority and operates pursuant to the international 214 authority held by Birch Telecom.[9] The ownership structure of Birch will not be affected by the Transaction. The assets to be purchased do not include the Commission authorizations held by OrbitCom. Consummation of the Transaction is contingent on, among other things, receipt of all necessary regulatory approvals.

IV. PUBLIC INTEREST STATEMENT

The proposed Transaction furthers the public interest, convenience, and necessity. Approval of the Transaction is in the public interest because it will advance economic efficiency by enabling Birch to expand its own business and achieve economies of scale. These benefits are expected to strengthen Birch's ability to expand its offerings and services to a broader customer base. The Transaction will enable Birch to strengthen its competitive position to the benefit of consumers and the telecommunications marketplace. In addition, the existing customers of OrbitCom will benefit as they will now have access to the expanded service offerings available from Birch.

Furthermore, the Transaction will be conducted in a manner that will be transparent to OrbitCom's current customers. Upon consummation of the Transaction and after completion of the customer transfer, Birch will provide OrbitCom's current customers with the same service quality they have come to expect and all billing will be handled by Birch using the Birch name. OrbitCom's customers will continue to receive the same services that they currently receive without any immediate changes to the service offerings, rates, or terms and conditions. Applicants will also provide prior written notice of the Transaction to current customers as

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[9] FCC Filer ID 815082; IB File No. ITC-214-19990701-00441.

required by Section 64.1120(e) of the Commission's rules and applicable state customer notice rules.

Finally, the proposed Transaction does not present any anticompetitive issues. After consummation of the Transaction, Birch's total share of the interstate interexchange market will be less than ten percent (10%). In addition, there are many other interexchange carriers operating on a nationwide basis.

V. INFORMATION REQUIRED BY SECTION 63.24(e) OF THE COMMISSION'S RULES FOR ASSIGNMENT OF ASSETS

In support of this Application, the Applicants submit the following information pursuant to Section 63.24(e) of the Commission's rules, which is the information requested in paragraphs (a)-(d) and (o)-(p) of Section 63.18 for all Applicants and the information requested in paragraphs (h)-(n) of Section 63.18 for Birch.

(a) Name, contact address, and telephone number

Assignor
OrbitCom, Inc. (FRN: 0007283187)
1701 N. Louise Ave.
Sioux Falls, South Dakota, 57107
(605) 977-6900 (telephone)

Assignee
Birch Communications, Inc. (FRN: 0005044375)
3060 Peachtree Road NW, Suite 1065
Atlanta, GA 30305
877-772-4724 (telephone)

(b) Citizenship

OrbitCom is a South Dakota corporation. Birch is a Georgia corporation.

(c) Correspondence concerning this Application should be sent to (Answer to IBFS Main Form Question 10):

For OrbitCom, Inc.	For Birch Communications, Inc.
Meredith A. Moore Cutler Law Firm, LLP 100 N. Phillips Ave., 9th Floor Sioux Falls, SD 57104 605-335-4950 (telephone) 605-335-4961 (facsimile) meredithm@cutlerlawfirm.com	Angela F. Collins Cahill Gordon & Reindel LLP 1990 K Street, NW, Suite 950 Washington, DC 20006 202-862-8930 (telephone) 866-814-6582 (facsimile) acollins@cahill.com

(d) International Section 214 Authorizations (Answer to IBFS Main Form Question 10)

OrbitCom was granted international 214 authority in File No. ITC-ASG-20071204-00483, and holds blanket domestic Section 214 authority.[10] Birch holds blanket domestic Section 214 authority and global Section 214 authority to provide international facilities-based and resale services.[11] As stated above, several wholly owned subsidiaries of Birch also hold blanket domestic Section 214 authority and international 214 authority, or operate pursuant to an affiliate's international 214 authority.

(h) Ten Percent Greater Interest Holders/Interlocking Directorates (Answer to IBFS Main Form Question 11 and 12)

The following entities and individuals hold a ten percent (10%) or greater direct or indirect ownership interest in Birch:

Birch – Birch Communications Holdings, Inc. ("Birch Holdings") owns a 100% voting and equity interest in Birch. Birch Holdings is a Georgia corporation whose principal business is telecommunications holdings. The address for Birch Holdings is 3060 Peachtree Road, NW,

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10 FCC Filer ID 824032.

11 IB File No. ITC-214-19970926-00584, FCC Filer ID 815113.

Suite 1065, Atlanta, GA 30305. The following entities and individuals hold a ten percent (10%) or greater direct or indirect ownership interest in Birch Holdings: (1) Holcombe Green, a U.S. citizen, owns a 53% voting and equity interest in Birch Holdings, and (2) R. Kirby Godsey, a U.S. citizen, owns a 21% voting and equity interest[12] in Birch Holdings. The business address for both Mr. Green and Mr. Godsey is 3060 Peachtree St., NW, Suite 1060, Atlanta, GA 30305.

Mr. Green and Mr. Godsey also hold interests in Tempo Telecom, LLC ("Tempo"), a reseller of prepaid wireless voice and data services throughout the United States.[13] Specifically, Birch Equity Partners, LLC (a Georgia limited liability company formerly known as Birch Capital, LLC) is the sole member of Tempo and holds a 100% ownership interest in Tempo. Birch Equity Partners, LLC is a telecommunications holding limited liability company. The address for Birch Equity Partners, LLC is 3060 Peachtree Road NW, Suite 1065, Atlanta GA, 30305. Mr. Green owns a 65% interest in Birch Equity Partners, LLC, and Mr. Godsey owns a 15% interest in Birch Equity Partners, LLC. Mr. Vincent Oddo, the Chief Executive Officer of Birch, holds a 20% interest in Birch Equity Partners, LLC.

Other than as set forth in this Application, no other entity or individual owns a ten percent (10%) or greater direct or indirect equity or voting interest in Birch or Birch Holdings. No officer or director of Birch or Birch Holdings is also an officer or director of any foreign carrier. Birch does not have any interlocking directorates with a foreign carrier,[14] nor will Birch have any such directorates after consummation of the Transaction. Other than as stated in this Application, none of the entities or individuals holding an interest in Birch or Birch Holdings

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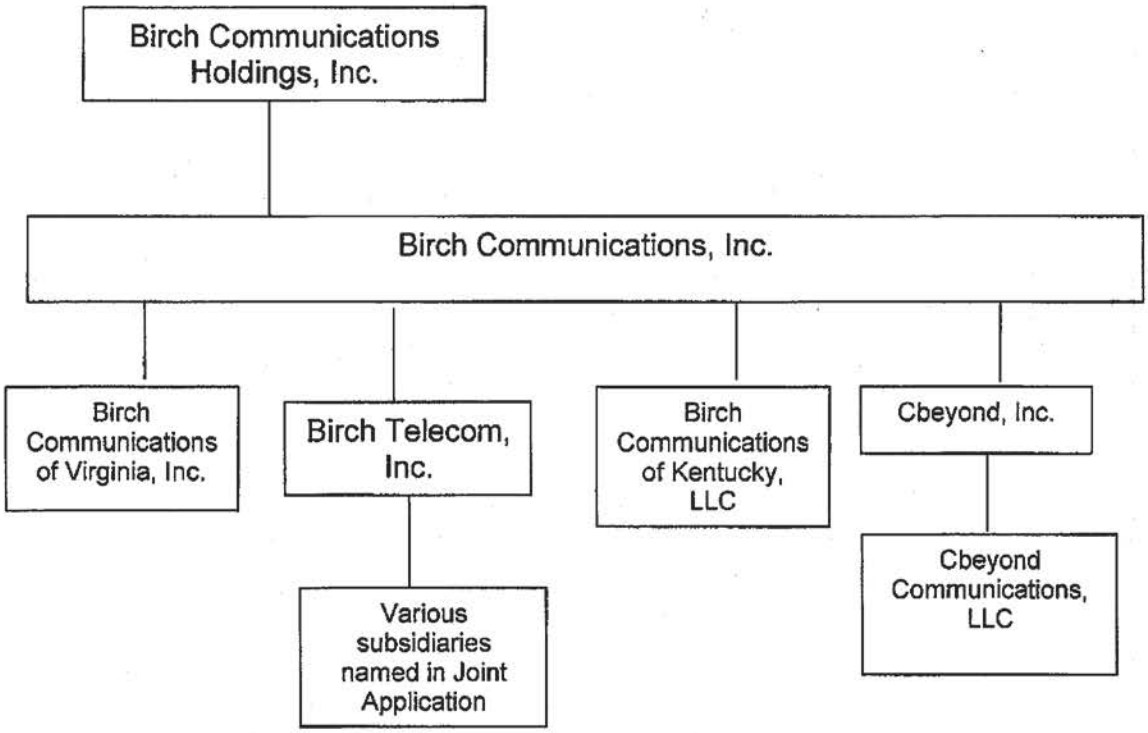
[12] R. Kirby Godsey holds his percentage through his individual holdings and through the R. Kirby Godsey 2008 Grantor Retained Annuity Trust.

[13] IB File No. ITC-214-20130411-00107; FCC Filer ID 829777.

[14] As defined by 47 C.F.R. § 63.09(d).

hold any other interests in other telecommunications-related entities. Below is Birch's organizational chart:



(i) Foreign Carrier Affiliation Certification (Answer to IBFS Main Form Questions 14-17)

Birch certifies that it is not a foreign carrier, that it is not affiliated with a foreign carrier, and that it will not become affiliated with a foreign carrier as a result of this Transaction.

(j) Foreign Carrier and Destination Countries (Answer to IBFS Main Form Questions 14-17).

Birch certifies that upon consummation of the Transaction it will not provide international telecommunications services to any destination country in which: (1) Birch is a foreign carrier in the destination market; (2) Birch controls a foreign carrier in the destination market; (3) any entity that owns more than 25 percent of Birch, or that controls Birch, controls a foreign carrier in that country; and (4) two or more foreign carriers (or parties that control foreign carriers) own, in the aggregate, more than twenty-five percent (25%) of Birch and are

parties to, or the beneficiaries of, a contractual relationship affecting the provision or marketing of international basic telecommunications services in the United States.

(k) WTO Membership of Destination Countries (Answer to IBFS Main Form Questions 14-17).

Not applicable.

(l) International Telecommunications Services (Answer to IBFS Main Form Questions 14-17).

Birch will not resell the international switched services of an unaffiliated U.S. carrier for the purpose of providing international telecommunications services to a country where it is a foreign carrier or is affiliated with a foreign carrier.

(m) Non-dominant Regulatory Classification (Answer to IBFS Main Form Questions 14-17).

Not applicable.

(n) Special Concessions Certification (Answer to IBFS Main Form Question 21).

Birch has not agreed to accept special concessions directly or indirectly from any foreign carrier with respect to any U.S. international route where the foreign carrier possesses sufficient market power on the foreign end of the route to adversely affect competition in the U.S. market, and will not enter into such agreements in the future.

(o) Federal Benefits/Anti-Drug Act of 1988 Certification (Answer to IBFS Main Form Question 25).

Applicants certify, pursuant to Sections 1.2001 through 1.2003 of the Commission's rules that they are not subject to a denial of federal benefits pursuant to Section 5301 of the Anti-Drug Abuse Act of 1988. 21 U.S.C. § 862.

(p) Eligibility for Streamlined Processing (Answer to IBFS Main Form Question 20).

Applicants request streamlined processing of this Application pursuant to Section 63.12 of the Commission's rules, 47 C.F.R. § 63.12, for the reasons set forth above.

VI. INFORMATION REQUIRED BY SECTION 63.04(b) OF THE COMMISSION'S RULES FOR TRANSFER OF CONTROL OF ASSETS

In accordance with the requirements of Section 63.04(b) of the Commission's rules, the additional information required by Section 63.04(b) of the Commission's rules for transfer of control of assets is provided in **Exhibit A**.

WHEREFORE, for the forgoing reasons, Applicants respectfully request that the Commission act expeditiously to approve the proposed Transaction.

Respectfully submitted,

ORBITCOM, INC.

Brad VanLeur
President
OrbitCom, Inc.
1701 N. Louise Drive
Sioux Falls, SD 57107

Meredith A. Moore
Cutler Law Firm, LLP
100 N. Phillips Ave., 9th Floor
Sioux Falls, SD 57104
605-335-4950 (telephone)
605-335-4961 (facsimile)
meredithm@cutlerlawfirm.com

BIRCH COMMUNICATIONS, INC.

Vincent M. Oddo
President/CEO
Birch Communications, Inc.
3060 Peachtree Road NW, Suite 1065
Atlanta, GA 30305

Angela F. Collins
Cahill Gordon & Reindel LLP
1990 K Street, N.W., Suite 950
Washington, D.C. 20006
202-862-8930 (telephone)
866-814-6582 (facsimile)
acollins@cahill.com

Dated: April 27, 2015

18507955v2

WHEREFORE, for the forgoing reasons, Applicants respectfully request that the Commission act expeditiously to approve the proposed Transaction.

Respectfully submitted,

ORBITCOM, INC.

BIRCH COMMUNICATIONS, INC.

Brad VanLeur
President
OrbitCom, Inc.
1701 N. Louise Drive
Sioux Falls, SD 57107

Vincent M. Oddo
President/CEO
Birch Communications, Inc.
3060 Peachtree Road NW, Suite 1065
Atlanta, GA 30305

Meredith A. Moore
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100 N. Phillips Ave., 9th Floor
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605-335-4950 (telephone)
605-335-4961 (facsimile)
meredithm@cutlerlawfirm.com

Angela F. Collins
Cahill Gordon & Reindel LLP
1990 K Street, N.W., Suite 950
Washington, D.C. 20006
202-862-8930 (telephone)
866-814-6582 (facsimile)
acollins@cahill.com

Dated: April 27, 2015

Exhibit A

INFORMATION FOR TRANSFER OF CONTROL OF ASSETS

In accordance with the requirements of Section 63.04(b) of the Commission's rules, the Applicants provide the following information in support of their request for authority to transfer control of certain OrbitCom assets to Birch.

63.04(a)(6): Description of the Transaction

The Transaction is described in Section III of the Application.

63.04(a)(7): Description of Geographic Service Area and Services in Each Area

A description of the geographic service areas and services provided in each area is described in Section II of the Application.

63.04(a)(8): Presumption of Non-Dominance and Qualification for Streamlining

This Application is eligible for streamlined processing pursuant to Section 63.03(b)(2) of the Commission's rules because: (1) the proposed Transaction will result Birch having a market share in the interstate interexchange market of less than ten percent (10%); (2) Birch will provide competitive telephone exchange services or exchange access services exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the Transaction; and (3) neither the Applicants nor any of their affiliates are regulated as dominant with respect to any service.

63.04(a)(9): Other Pending Commission Applications Concerning the Proposed Transaction

None.

63.04(a)(10): Special Considerations

None.

63.04(a)(11): Waiver Requests (If Any)

None.

63.04(a)(12): Public Interest Statement

The Transaction is in the public interest for the reasons detailed in Section IV of the Application.

STATE OF SOUTH DAKOTA)
)
COUNTY OF MINNEHAHA)

VERIFICATION

I, Brad VanLeur, President of OrbitCom, Inc., have reviewed and am familiar with the foregoing document. The statements in the foregoing document are true of my own knowledge, except as to matters which are herein stated on information and belief, and as to those matters, I believe them to be true.

4-27-15
Date

Name: Brad VanLeur

Title: President
OrbitCom, Inc.

Subscribed and sworn to before me this 27 day of April, 2015

MEREDITH A. MOORE
NOTARY PUBLIC
SOUTH DAKOTA

Notary Public 1/1/21

STATE OF **GEORGIA**)
)
COUNTY OF **BIBB**)

VERIFICATION

I, Vincent M. Oddo, President/CEO of Birch Communications, Inc., have reviewed and am familiar with the foregoing document. The statements in the foregoing document are true of my own knowledge, except as to matters which are herein stated on information and belief, and as to those matters, I believe them to be true.

April 27, 2015
Date

Name: Vincent M. Oddo

Title: President/CEO
Birch Communications, Inc.

PATRICIA RODRIGUEZ
NOTARY
EXPIRES
GEORGIA
4-1-16
PUBLIC
HOUSTON COUNTY

Subscribed and sworn to before me this 27th day of April, 2015

Patricia Rodriguez
Notary Public