

WC 10-197

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

In the Matter of)	
)	
BIRCH COMMUNICATIONS, INC. and)	ITC-ASG- _____
BIRCH TELECOM, INC.,)	ITC-ASG- _____
Assignees)	
)	WC Docket No. _____
and)	
)	
AMERICAN FIBER NETWORK, INC. and)	
CLOSECALL AMERICA, INC.,)	
Assignors)	
)	
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. ("BCI"), Birch Telecom, Inc. ("Birch Telecom") (BCI and Birch Telecom collectively, "Birch" or "Assignees"), American Fiber Network, Inc. ("AFN"), and CloseCall America, Inc. ("CCA") (AFN and CCA collectively, "Assignors") (Assignees and Assignors 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 AFN and CCA assets to Birch,¹ excluding the Commission authorizations held by the Assignors.

¹ *Amendment of Parts 1 and 63 of the Commission's Rules*, 22 FCC Red 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 Red 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 AFN and CCA 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) and Birch Telecom, Inc. (FRN: 0014685887)

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

² IB File No. ITC-214-19970926-00584, FCC File# ID 815113.

Birch Telecom, a Delaware corporation, is a wholly-owned subsidiary of BCI with headquarters located at 3060 Peachtree Road NW, Suite 1065, Atlanta, GA 30305. Birch Telecom has authority to provide international telecommunications services from the Commission.³ The following wholly-owned subsidiaries 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.⁴

Birch and its wholly-owned subsidiaries either offer service or are certificated to offer telecommunications services in the following 33 states: Alabama, Arkansas, California, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, New Jersey, New York, North Carolina, North Dakota, Nebraska, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Washington, Wisconsin, and Wyoming. Birch and its wholly-owned subsidiaries have applications to provide telecommunications services pending in the following five (5) states: Delaware, Maryland, New Mexico, Oregon, and Virginia.

³ IB File No. ITC-214-19990701-00441.

⁴ 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 815176), Ionex Communications South, Inc. (FCC Filer ID 808443), Ionex Communications North, Inc. (FCC Filer ID 815082). The FCC Filer ID for Birch Communications of the Northeast, Inc. is pending given that its registration was filed September 7, 2010.

B. American Fiber Network, Inc. (FRN: 0006801583)

AFN is a Delaware corporation with headquarters located at 9401 Indian Creek Parkway, Suite 280, Overland Park, Kansas 66210. AFN has authority to provide interstate and international telecommunications services.⁵ AFN and its affiliate American Fiber Network of Virginia, Inc. either offer service or are certificated to offer telecommunications service in all fifty states and the District of Columbia with the exception of Alaska, Delaware, Maine, New Hampshire, Vermont, and West Virginia.

C. CloseCall America, Inc. (FRN: 0017037474)

CCA is a Delaware corporation with offices located at 101A Log Canoe Circle, Stevensville, MD 21666. CCA holds domestic interstate authority only.⁶ CCA and its affiliate CloseCall America, Inc. of Virginia are authorized to provide telecommunications service in the following states: Delaware, Florida, Illinois, Indiana, Kansas, Maine, Maryland, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Virginia, and Wisconsin.

III. DESCRIPTION OF THE TRANSACTION

On September 3, 2010, BCI agreed to purchase certain assets and customers of AFN and CCA pursuant to a Sale Agreement pursuant to Article 9 of the Uniform Commercial Code (the "Transaction"). The assets to be purchased include customer accounts, accounts receivable, customer agreements and contracts, vendor agreements and contracts, and intellectual property associated with the customers currently receiving AFN and CCA services in the following states: Alabama, California, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Iowa, Kansas,

⁵ IB File No. ITC-214-19990908-00561, FCC Filer ID 821538.

⁶ FCC Filer ID 821270.

Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, Washington, and Wisconsin. 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 AFN and CCA. 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.

Furthermore, the Transaction will be conducted in a manner that will be transparent to current AFN and CCA customers. Upon consummation of the Transaction and after completion of the customer transfer, Birch will provide AFN and CCA customers with the same service quality they have come to expect and all billing will be handled by Birch using the Birch name. AFN and CCA 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 AFN and CCA customers in accordance with 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 both Applicants and the information requested in paragraphs (h)-(n) of Section 63.18 for Birch.

(a) Name, contact address, and telephone number

Assignors

American Fiber Network, Inc. (FRN: 0006801583)
9401 Indian Creek Parkway
Suite 280
Overland Park, Kansas 66210
913-338-2658 (telephone)

CloseCall America, Inc. (FRN: 0017037474)
101A Log Canoe Circle
Stevensville, MD 21666
913-338-2658 (telephone)

Assignees

Birch Communications, Inc. (FRN: 0005044375)
Birch Telecom, Inc. (FRN: 0014685887)
3060 Peachtree Road NW
Suite 1065
Atlanta, GA 30305
877-772-4724 (telephone)

(b) Citizenship

AFN, CCA, and Birch Telecom are corporations organized and existing under the laws of Delaware. BCI is a Georgia corporation.

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

For American Fiber Network, Inc. and CloseCall America, Inc.	For Birch Communications, Inc. and Birch Telecom, Inc.
Douglas C. Bethell American Fiber Network, Inc. and CloseCall America, Inc. 9401 Indian Creek Parkway, Suite 280 Overland Park, KS 66210 913-338-2658 (telephone) 913-338-5285 (facsimile)	Angela F. Collins Cahill Gordon & Reindel LLP 1990 K Street, NW, Suite 950 Washington, DC 20006 202-862-8930 (telephone) 202-862-8958 (facsimile) acollins@cgrdc.com

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

AFN holds blanket domestic Section 214 authority and global Section 214 authority to provide international facilities-based and resale services.⁷ CCA holds blanket domestic Section 214 authority.⁸ BCI holds blanket domestic Section 214 authority and global Section 214 authority to provide international facilities-based and resale services.⁹ Birch Telecom holds global Section 214 authority to provide international facilities-based and resale services.¹⁰

⁷ IB File No. ITC-214-19990908-00561, FCC Filer ID 821538.

⁸ FCC Filer ID 821270.

⁹ IB File No. ITC-214-19970926-00584, FCC Filer ID 815113. Birch Communications of Virginia, Inc. operates pursuant to BCI's international authority and is preparing to register for blanket domestic authority.

¹⁰ IB File No. ITC-214-19990701-00441. The following wholly-owned subsidiaries operate pursuant to Birch Telecom's international authority and also provide interstate telecommunications services: 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), Ionex Communications South, Inc. (FCC Filer ID 808443), Ionex Communications North, Inc. (FCC Filer ID 815082). Birch Communications of the Northeast, Inc. also operates pursuant to Birch Telecom's international authority; Birch Communications of the Northeast, Inc.'s registration was filed September 7, 2010 and its FCC Filer ID is pending.

(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 Telecom and BCI:¹¹

Birch Telecom – BCI, a Georgia corporation with offices at 3060 Peachtree Road, NW, Suite 1065, Atlanta, GA 30305, owns a 100% voting and equity interest in Birch Telecom.

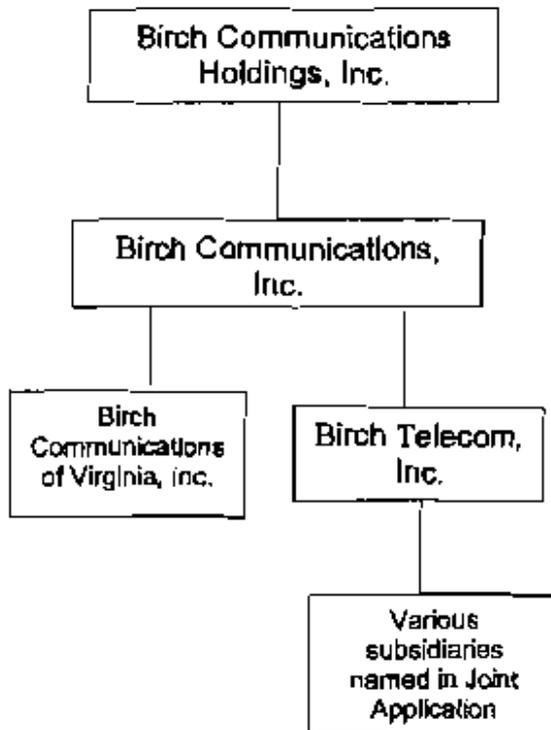
BCI – Birch Holdings own a 100% voting and equity interest in BCI. Birch Holdings is a Georgia corporation whose principal business is telecommunications holdings. The address for Birch Holdings is 3060 Peachtree Road, NW, Suite 1065, Atlanta, GA 30305. The following entities and individuals hold a ten percent (10%) or greater direct or indirect ownership interest in Birch Holdings: (1) Holcombe Green, a U.S. citizen, owns a 66% voting and equity interest in Birch Holdings and (2) R. Kirby Godsey, a U.S. citizen, owns a 32% voting and equity interest¹² in Birch Holdings. The address for both Mr. Green and Mr. Godsey is 3060 Peachtree St., NW, Suite 1060, Atlanta, GA 30305.

No officer or director of Birch Telecom, BCI, or Birch Holdings is also an officer or director of any foreign carrier. Other than as set forth in this Joint Application, no other entity or individual owns a ten percent (10%) or greater direct or indirect equity or voting interest in Birch Telecom, BCI, or Birch Holdings. None of the entities or individuals holding an interest in Birch Telecom, BCI, or Birch Holdings hold any interests in other telecommunications-related entities.

¹¹ On September 20, 2010, BCI and Birch Telecom filed a notice of a *pro forma* reorganization. See IB File Nos. ITC-T/C-20100920-00367 and ITC-T/C-20100920-00370. This *pro forma* reorganization will be consummated on or before September 30, 2010. The ownership information set forth herein reflects the ownership of BCI and Birch Telecom after the consummation of the reorganization.

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

Birch does not have any interlocking directorates with a foreign carrier,¹³ nor will Birch have any such directorates after consummation of the Transaction. 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; and (3) two or more foreign carriers (or parties that control foreign carriers) own, in the

¹³ As defined by 47 C.F.R. § 63.09(d).

aggregate, more than twenty-five percent (25%) of Birch and are not 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.

AMERICAN FIBER NETWORK, INC.
AND CLOSECALL AMERICA, INC.

Respectfully submitted,

BIRCH COMMUNICATIONS, INC.
BIRCH TELECOM, INC.


Vincent M. Oddo
President/CEO

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acollins@cgfdc.com

Dated: September 22, 2010

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

Respectfully submitted,

**AMERICAN FIBER NETWORK, INC.
AND CLOSECALL AMERICA, INC.**

**BIRCH COMMUNICATIONS, INC.
BIRCH TELECOM, INC.**



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acollins@cgrdc.com

Dated: September 9, 2010

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 AFN and CCA 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.