

BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

Joint Application of)	
Ionex Communications, Inc. dba Birch)	
Communications, Birch Telecom of Missouri, Inc.)	Docket No. TM-2011-0079
dba Birch Communications, and American Fiber)	
Network, Inc. for Approval to Transfer Assets and)	
Customers)	

RESPONSE TO MOTION TO DISMISS

Come now Joint Applicants Birch Telecom of Missouri, Inc., dba Birch Communications (“Birch”), Ionex Communications, Inc., dba Birch Communications (“Ionex”) (together, the “Purchasers”) and American Fiber Network, Inc. (“AFN” or “Seller”) (Birch, Ionex, and AFN collectively, the “Applicants”), pursuant to 4 CSR-240-2.080, and for their Response to Staff’s Motion to Dismiss, state:

1. On September 17, 2010, Applicants submitted their Joint Application asking the Commission to approve a transfer of certain assets and customers from AFN to Ionex and Birch. The Applicants made their application pursuant to §392.300 RSMo 2000 and 4 CSR 240-3.520.

2. On September 17, 2010, Staff filed its Motion to Dismiss, stating that:

All three applicants are certificated alternative local exchange telecommunications companies, as well as interexchange telecommunications companies.

Effective August 28, 2008, §392.420 RSMo Supp. 2009 provides that “for all existing alternative local exchange telecommunications companies, the commission shall waive.....the application and enforcement ofsection...392.300...”

Approval or denial of the Application would constitute “application and enforcement” of §392.300 RSMo 2000. Therefore, the Commission should dismiss the Application, without granting or denying the relief requested in it, and inform the applicants that the requirement to obtain Commission approval for the transfer of assets, to the extent it ever applied to them, no longer applies.

3. Applicants are not aware that the Commission has ever advised the industry that there has been a change in procedures and that the Commission has affirmatively waived Section 392.300 and other statutes and regulations identified in Section 392.420 for all alternative LECs (or CLECs) without the need for further waiver requests. Moreover, Applicants are not aware that the Commission has informed CLECs that they should stop complying with such statutes and regulations (such as by submitting service quality reports, etc.). Applicants understand Section 392.420 as providing for waivers to be issued on request pursuant to ‘issuance or modification of a certificate . . . of service authority.’”

4. Moreover, absent Commission approval of the transaction as requested in the Joint Application, Applicants will not be able to rely on 4 CSR 240-33.150(4) to achieve compliance with rules regarding changes in service providers, in order to accomplish the transfer of customers in an efficient and expeditious manner.

5. In connection with the Joint Application, Applicants have not requested waiver of Section 392.300, but rather have sought approval of the transaction under that statute so as to be eligible under 4 CSR 240-33.150(4) for the planned process of transferring customers.

6. Applicants request that the Commission deny Staff’s Motion to Dismiss, or in the alternative that the Commission allow Applicants to amend their Joint Application to seek approval of the transaction solely pursuant to 4 CSR 240-33.150. Either way, Applicants continue to seek Commission approval of the transaction.

WHEREFORE, Applicants request the Commission to grant them the relief sought in the Joint Application and this Response.

Respectfully Submitted,

CURTIS, HEINZ,
GARRETT & O'KEEFE, P.C.

/s/ Carl J. Lumley

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CERTIFICATE OF SERVICE

A true and correct copy of the foregoing documents was either faxed, emailed, or mailed by U.S. Mail postage paid this 23rd day of September, 2010, to the following:

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