

**STATE OF MISSOURI
PUBLIC SERVICE COMMISSION**

At a session of the Public Service
Commission held at its office in
Jefferson City on the 20th day of
October, 2010.

Joint Application of Ionex Communications,)
Inc. dba Birch Communications, Birch Telecom)
of Missouri, Inc. dba Birch Communications,)
and American Fiber Network, Inc. for Approval)
to Transfer Assets and Customers)

File No. TM-2011-0079

ORDER DISMISSING APPLICATION

Issue Date: October 20, 2010

Effective Date: October 30, 2010

Syllabus: This order dismisses the Application filed by Birch Telecom of Missouri, Inc., d/b/a Birch Communications (“Birch”), Ionex Communications, Inc., d/b/a Birch Communications (“Ionex”) and American Fiber Network, Inc. (“AFN”)

On September 17, 2010,¹ Birch, Ionex and AFN filed an Application in which they asked the Commission for authority to transfer certain assets from AFN to Birch and Ionex. Birch and Ionex wish to serve AFN’s customers, and AFN wishes to have its certificate of service authority and tariffs canceled. Birch, Ionex and AFN have certificates of service authority to provide basic local exchange and interexchange telecommunications services.²

On September 17, the Staff of the Commission filed a Motion to Dismiss. Staff says that Birch, Ionex and AFN are alternative local exchange telecommunications companies, as well as interexchange companies. Section 392.420, RSMo, as of August 28,

¹ Unless otherwise noted, all calendar references are to 2010.

² Commission Case Nos. TA-2000-305, TA-93-332, TA-97-371 and TA-97-372.

2008, provides that for all existing alternative local exchange telecommunications companies, the Commission shall waive the application and enforcement of certain statutes.

One statute that Section 392.420 mandates the Commission waive is Section 392.300. Section 392.300 is the statute requiring telecommunications companies to receive Commission approval before transferring assets. Thus, approval or denial of the application would be application or enforcement of Section 392.300, which is prohibited by Section 392.420, and the Commission should dismiss the application.

Birch, Ionex and AFN replied on September 23, stating that notwithstanding the statutes cited in Staff's motion, Commission Rule 4 CSR 240-33.150(4), the Commission's "anti-slamming" rule, still requires Commission approval for the proposed transaction. Thus, they ask the Commission to deny Staff's motion or, in the alternative, to allow them to amend their application to seek approval solely pursuant to the anti-slamming rule.

Staff replied on October 13, stating that the phrase "approved by the commission" continues to appear in the anti-slamming rule. Consequently, Staff states that until such time as the rule can be amended, the most appropriate action would be for the Commission to waive the anti-slamming rule. Birch, Ionex and AFN responded on October 15, concurring in Staff's October 13 pleading.

Commission Rule 4 CSR 240-33.100 allows the Commission to grant a variance from any provision of Chapter 33. Upon agreement of Birch, Ionex, AFN, and Staff, the Commission waives Commission Rule 4 CSR 240-33.150(4).

The Commission takes up Staff's motion to dismiss unopposed, and will grant it. Approval or denial of the application would constitute application and enforcement of Section 392.300, which Section 392.420 prohibits.

THE COMMISSION ORDERS THAT:

1. The Application is dismissed.
2. Commission Rule 4 CSR 240-33.150(4) is waived.
3. This order shall become effective on October 30, 2010.
4. This case shall be closed on October 31, 2010.

BY THE COMMISSION



Steven C. Reed
Secretary

(S E A L)

Clayton, Chm., Davis, Jarrett,
Gunn, and Kenney, CC., concur.

Pridgin, Senior Regulatory Law Judge