

**BEFORE THE PUBLIC SERVICE COMMISSION  
STATE OF MISSOURI**

Application of )  
**Birch Telecom of Missouri, Inc., d/b/a Birch** )  
**Communications and** )  
**Now Communications, Inc., known in Missouri as** ) Case No:  
**Now Communications, Incorporated of Delaware,** )  
**d/b/a Cleartel Communications** )  
for Transfer of Customer Base )

**APPLICATION FOR AUTHORITY TO TRANSFER ASSETS**

COME NOW Birch Telecom of Missouri, Inc., d/b/a Birch Communications (“Birch”); and Now Communications, Inc., known in Missouri as Now Communications, Incorporated of Delaware, d/b/a Cleartel Communications (“NOW”) (together “Applicants”), pursuant to Section 392.300 RSMo. 2000 and 4 CSR 240-3.520, hereby respectfully request Missouri Public Service Commission (“Commission”) authority to effect an acquisition and transfer of certain assets currently owned by NOW to Birch. Applicants seek such Commission authority to enable Birch to begin serving certain NOW subscribers in Missouri immediately upon a grant of the instant Application. Birch does not seek a transfer of NOW’s Certificate of Service Authority (“CSA”) and NOW does not seek to cancel its CSAs at this time.

In support of this Application, Applicants state as follows:

**I. IDENTIFICATION OF APPLICANTS**

1. The full legal name, address, telephone number and facsimile number of Applicants are:

**Birch Telecom of Missouri, Inc., d/b/a Birch Communications**  
4885 Riverside Drive, Ste 304  
Macon, GA 31210  
Telephone: (478) 475-9800  
Facsimile: (478) 475-9988

- and -

**Now Communications, Inc., known in Missouri as Now Communications, Incorporated  
of Delaware, d/b/a Cleartel Communications**  
2855 S. Congress Ave  
Delray Beach, Florida 33445  
Telephone: (202) 373-6000  
Facsimile: (202) 373-6001

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Communications concerning this Application should be directed to:

For Birch

Michael L. McCann  
Eric J. Steinle  
Spencer Fane Britt and Browne LLP  
1000 Walnut Street, Ste. 1400  
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- and -

Sharyl Fowler  
Manager, Legal & Regulatory  
4885 Riverside Drive, Suite 304  
Macon, GA 31210  
Telephone: (478) 476-1165  
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For NOW

Catherine Wang  
Brett P. Ferencak  
Bingham McCutchen LLP  
2020 K Street, NW  
Washington, DC 20006  
Tel: (202) 373-6000  
Fax: (202) 373-6001  
catherine.wang@bingham.com  
brett.ferencak@bingham.com

## II. DESCRIPTION OF APPLICANTS

2. NOW is a corporation organized under the laws of the State of Delaware and is duly authorized to do business in Missouri as a foreign corporation. A Certificate of Good Standing from the Missouri Secretary of State providing that NOW is authorized to do business and in good standing in Missouri is attached hereto as **Exhibit A**. NOW, which was formerly known as Now Acquisition Corporation, adopted the fictitious name "Cleartel Communications" in Missouri. A copy of the Registration of Fictitious Name filed by NOW is attached hereto as **Exhibit B**. NOW is a wholly owned subsidiary of Cleartel Communications, Inc., a Delaware corporation ("Cleartel Communications, Inc.") and leading provider of voice and data solutions

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serving customers in the Northeast, Southeast, Southwest, and Midwestern United States. NOW has principal offices at 1960 S. Congress Ave., Suite 201, Delray Beach, Florida 33445. NOW and other subsidiaries of Cleartel Communications, Inc. offer local, Internet and long distance services to both residential and business users in 30 states. In Missouri, NOW is authorized to provide base local telecommunications services and interexchange and non-switched local exchange services pursuant to CSAs issued in Docket Nos. XM-2004-0065 and XA-2004-0066 and amended in Docket No. LN-2006-0448. Upon completion of the Transaction and the migration of customers to Birch, NOW will no longer offer telecommunications services in Missouri. After NOW determines that it no longer needs its CSA for operational or billing purposes, NOW will surrender its CSA in a separate filing.

3. Birch is a corporation organized under the laws of the State of Delaware and is duly authorized to do business in Missouri as a foreign corporation. A Certificate of Good Standing from the Missouri Secretary of State providing that Birch is authorized to do business and in good standing in Missouri is attached hereto as **Exhibit C**. Birch has adopted the fictitious name “Birch Communications” in Missouri. A copy of the Registration of Fictitious Name filed by Birch is attached hereto as **Exhibit D**. Birch is a wholly-owned subsidiary of Birch Telecom, Inc., a Delaware corporation (“Birch Telecom”). Birch Telecom is a wholly-owned subsidiary of Birch Communications, Inc., a Georgia corporation (“Birch Communications, Inc.”). The principal corporate offices of Birch Communications, Inc. and its subsidiaries and affiliates, including Birch, are located at 4885 Riverside Drive, Suite 304, Macon, Georgia 31210. Birch Communications, Inc., through its subsidiaries and affiliates, including Birch, is one of the largest competitive local exchange carriers in the Northeast, Southeast, Southwest and Midwest regions serving residential and business customers. Birch Communications, Inc., through its subsidiaries and affiliates, including Birch, deploys its own private IP network utilizing soft switch technology to deliver innovative, high quality, affordable voice and broadband communications services to residential and business customers. Birch Communications, Inc. and/or its subsidiaries and affiliates, including Birch, are authorized to provide telecommunications services in thirty (30) states with certification pending in two additional states. Birch is also authorized to provide interstate and international telecommunications services. Birch was granted authority to provide resold local exchange and long distance services in Missouri by order issued in Docket Nos. TA-97-371 and TA-97-372. Birch’s Certificate is in good standing with the Missouri Public Service Commission. Birch is unaware of any pending customer complaints associated with the Company’s provision of service in Missouri.

4. Birch Communications, Inc., Cleartel Communications, Inc. (“CCI”), and certain subsidiaries

of CCI (including NOW), entered into an Asset Purchase Agreement (the “Agreement”) dated as of April 29, 2009, whereby CCI and its subsidiaries have agreed to sell, assign, transfer, convey and deliver certain assets to Birch Communications, Inc., including NOW’s current prepaid local service customers located in Missouri (the “Missouri Purchased Assets”). A copy of the Agreement is attached hereto as **Exhibit E**. Pursuant to an Assignment, dated as of May 12, 2009 (the “Assignment”), Birch Communications, Inc. has assigned to Birch its rights under the Agreement with respect to the Missouri Purchased Assets. A copy of the Assignment is attached hereto as **Exhibit F**. This transaction is predicated on applicable regulatory approval.

5. Under the terms of the Agreement and the Assignment, in exchange for consideration, Birch will acquire NOW’s approximately 200 prepaid local service customers (the “Customers”), related data, databases, and customer records needed to support the provision of telecommunications services to such subscribers. NOW will continue to provide telecommunications services to the Customers pursuant to its existing tariffs until the instant Application is granted by the Commission. Upon approval of this Application by the Commission, Birch will provide telecommunications services to the Customers in accordance with its tariffs.

6. Upon the terms of the Agreement and the Assignment, Birch will assume all managerial, technical and financial responsibilities in connection with the operation of the retail prepaid local assets in order to provide telecommunications services to the Customers in Missouri. Prompt handling of this notification will afford an expeditious, transparent and cost effective transition and will enable Birch and NOW to remain fully compliant with their regulatory obligations. The Customers will continue to receive the same services from Birch under the current rates, terms and conditions as they currently enjoy. This transaction is being made in a seamless fashion that will cause no changes in the Customers’ rates, terms and conditions of service and will be made at no charge to the Customers as they transition to Birch as their presubscribed carrier. There will be no interruption of service, other than a minor change to the non-regulated voicemail, and the Customers will be appropriately informed of their choices. The transfer of NOW’s assets to Birch pursuant to the Agreement and the Assignment will not result in any interruption or diminution in the quality of service provided to the Customers in Missouri and will be essentially transparent to such Customers. The Customers will be notified via letter that states (a) the quality of service to the Customers will remain the same; (b) Birch will continue to provide service to the Customers with the same or better services and rates currently provided to them by NOW; (c) the Customers have the right to switch to the carrier of their choice; (d) the Customers may contact either NOW or Birch via a toll free number with any questions regarding the switchover; and (e)

the information required by 4 CSR 240-3.520(2)(G).

7. Written notice of the proposed transfer will be provided to the Customers via First Class United States mail on or after June 1, 2009, pursuant to Section 64.1120(e), Verification of Orders for Telecommunications Services, as amended, of Federal Communications Commission (FCC) rules<sup>1</sup>. A copy of the subscriber notice and letter of compliance filed with the FCC is attached hereto as **Exhibit G**.

8. The transaction is exclusively an acquisition of assets and does not involve a merger or consolidation, nor does the transaction require financing. The asset acquisition is intended exclusively to enable Birch to provide telecommunications services to certain NOW subscribers as new Birch subscribers. As time is of the essence, Birch requests expeditious handling of this Application.

### **III. INAPPLICABILITY OF CARRIER VERIFICATION RULES**

9. Pursuant to 4 CSR 240-33.150(4), upon approval of this Application by the Commission, Birch may submit or execute a change in a subscriber's provider of telecommunications service on behalf of such subscriber without obtaining authorization and verification in accordance with the procedures prescribed in 4 CSR 240-33.150(2) and 4 CSR 240-33.150(3), provided that such change is made in connection with the transfer of the Missouri Purchased Assets to Birch pursuant to the Agreement and the Assignment, and provided further that Birch has complied with the requirements prescribed in 4 CSR 240-33.150(4).

### **IV. PUBLIC INTEREST, CONVENIENCE AND NECESSITY**

10. The proposed transaction will ensure that the Customers enjoy continuity of high-quality telecommunications service. As discussed above, the Customers will be given prior written notice of the transfer of their account to Birch, in compliance with the FCC's customer notice rules. Following the transaction, the Customers will continue to receive services which will be consistent with the quality of services currently provided by NOW and which will be supported by Birch's experienced and well-qualified management team. As a result, the proposed transaction will be almost transparent to most Customers in terms of the rates and terms and conditions of service that these Customers currently receive. Consequently, granting this Application is consistent with the public interest in promoting competition among telecommunications

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<sup>1</sup> 47 C.F.R. §64.1120(e). *In the Matter of 2000 Biennial Review - Review of Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers; Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket Nos. 00-257, 94-129, *First Report and Order in CC Docket No. 00-257*

carriers in Missouri.

**V. NO TAX IMPACT**

11. The proposed transfer of assets will have no impact upon the revenues of the political subdivisions in which any structure, facility or equipment of the companies involved are located.

**VI. PENDING ACTIONS OR FINAL UNSATISFIED JUDGMENTS**

12. The Applicants state that none of them has any pending actions or unsatisfied judgments or decisions associated with any state or federal agency that involve customer service.

**VII. NO OVERDUE ANNUAL REPORTS OR ASSESSMENT FEES**

13. Birch has no overdue annual reports or assessment fees due in Missouri. NOW is current on its assessment fees but, on April 13, 2009, requested an extension to file its annual report. NOW expects to file the annual report within the next week.

**VIII. REQUEST FOR WAIVER OF HEARING**

14. Inasmuch as time is of the essence, Applicants respectfully request expeditious approval of the Application.

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*and Fourth Report and Order in CC Docket No. 94-129, FCC 01-156 (rel. May 15, 2001).*

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**WHEREFORE**, Applicants, NOW and Birch, respectfully request the Commission to issue its Order Approving the transfer of certain of NOW's telecommunications service assets, specifically a portion of NOW's customer base, to Birch, and granting such other relief as is reasonable in the circumstances.

Respectfully submitted,



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Eric J. Steinle, MO Bar # 59115  
Spencer Fane Britt and Browne LLP  
1000 Walnut Street, Ste. 1400  
Kansas City, MO 64106-2140  
Telephone: (816) 474-8100  
Facsimile: (816) 474-3216  
Email: [mmccann@spencerfane.com](mailto:mmccann@spencerfane.com)  
[esteinle@spencerfane.com](mailto:esteinle@spencerfane.com)

## CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the foregoing document has been hand-delivered, emailed, or mailed, First Class, postage prepaid, this 14th of May, 2009, to:

Office of the Public Counsel  
P.O. Box 7800  
Jefferson City, MO 65102

Kevin Thompson, General Counsel  
Missouri Public Service Commission  
P.O. Box 360  
Jefferson City, MO 65102

A handwritten signature in black ink, appearing to read "Eric J. Steinle", is written over a horizontal line.

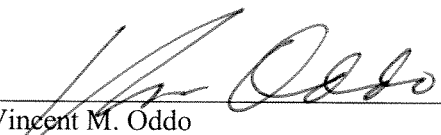
Eric J. Steinle




**VERIFICATION**

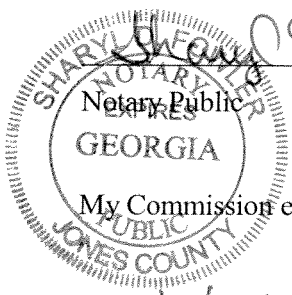
STATE OF GEORGIA  
COUNTY OF BIBB

I, Vincent M. Oddo, being first duly sworn, do hereby certify, depose and state that I am President/Chief Executive Officer of Birch Telecom of Missouri, Inc., d/b/a Birch Communications, and that I am authorized to make this verification on behalf of Birch Telecom of Missouri, Inc., d/b/a Birch Communications; that the foregoing filing was prepared under my supervision and direction; and that the contents with respect to Birch Telecom of Missouri, Inc., d/b/a Birch Communications are true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
Vincent M. Oddo  
President/Chief Executive Officer  
Birch Telecom of Missouri, Inc., d/b/a Birch  
Communications

Sworn to and subscribed before me this 13<sup>th</sup> day of May, 2009.

  
\_\_\_\_\_  
Notary Public  
GEORGIA  
My Commission expires:  
12/4/2012



## VERIFICATION

STATE OF FLORIDA  
COUNTY OF PALM BEACH

I, Keith Parsons, being first duly sworn, do hereby certify, depose and state that I am Vice President of Now Communications, Inc., known in Missouri as Now Communications, Incorporated of Delaware, d/b/a Cleartel Communications; that I am authorized to make this verification on behalf of Now Communications, Inc.; that the foregoing filing was prepared under my supervision and direction; and that the contents with respect to NOW Communications, Inc. are true and correct to the best of my knowledge, information and belief.

*Handwritten signature*

Keith Parsons  
Vice President  
Now Communications, Inc.

Sworn to and subscribed before me this 11 day of May, 2009.

96. Humphreys

Notary Public

My Commission expires:

3-17-2012

**K. HUMPHRIES**  
Notary Public - State of Florida  
My Comm. Exp. March 17, 2012  
#0098926