

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

The Staff of the Missouri Public)	
Service Commission,)	
)	
Complainant,)	
)	
v.)	Case No. TC-2019-0136
)	
Birch Telecom of Missouri, LLC d/b/a)	
Birch Communications,)	
)	
Respondent.)	

ANSWER AND AFFIRMATIVE DEFENSES

COMES NOW Birch Telecom of Missouri, LLC d/b/a Birch Communications ("Birch" or the "Company"), through the undersigned counsel and pursuant to the Notice of Contested Case and Order Directing Filing issued by the Missouri Public Service Commission ("Commission") on November 14, 2018 and the Second Notice of Contested Case and Order Directing Filing issued by the Commission on December 11, 2018 in the above-referenced case, respectfully submits this Answer to the Complaint filed by Staff of the Commission alleging that Birch has violated the Commission's statutes relating to the payment of annual assessments.¹

ANSWER

The Company answers the enumerated paragraphs of the Complaint as follows:

1. On information and belief, the Company denies the allegations in Paragraph 1 of the Complaint.

¹ The Complaint originally was filed on November 13, 2018. Staff amended the Complaint on December 7, 2018. The Company hereby responds to the Complaint as amended.

2. On information and belief, the Company admits the allegations in Paragraph 2 of the Complaint.

3. The Company admits the allegations in Paragraph 3 of the Complaint, as amended.

4. The Company admits the allegations in Paragraph 4 of the Complaint, as amended.

5. On information and belief, the Company admits the allegations in Paragraph 5 of the Complaint.

6. The Company neither admits nor denies the allegations in Paragraph 6 of the Complaint. The law speaks for itself.

7. The Company neither admits nor denies the allegations in Paragraph 7 of the Complaint. The law speaks for itself.

8. Paragraph 8 of the Complaint requires no response, but to the extent a response is required, the above responses to Paragraphs 1-7 of the Complaint are incorporated herein by reference.

9. The Company neither admits nor denies the allegations in Paragraph 9 of the Complaint. The law speaks for itself.

10. On information and belief, the Company admits the allegations in Paragraph 10 of the Complaint.

11. The Company neither admits nor denies the allegations in Paragraph 11 of the Complaint. The law speaks for itself.

12. The Company is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 12 and therefore denies the same.

13. The Company is without knowledge or information to form a belief as to the truth of the factual allegations of Paragraph 13 and therefore denies the same.

14. The Company denies the allegations in Paragraph 14. As of the date of this filing, the Company has paid the Company's total fiscal year 2019 assessment of \$4,856.28.

15. The Company neither admits nor denies the allegations in Paragraph 15 of the Complaint. The law speaks for itself.

16. The Company neither admits nor denies the allegations in Paragraph 16 of the Complaint. The law speaks for itself.

AFFIRMATIVE DEFENSES

1. The Complaint should be dismissed for failure to state a claim. The Company has paid the Company's total fiscal year 2019 assessment at issue in the Complaint.

2. The Commission should refrain from imposing a penalty on the Company as penalties are designed to deter future violations. *See, e.g., State ex rel. Nixon v. Consumer Automotive Resources*, 882 S.W.2d 717, 722 (Mo. Ct. App. E.D. 1994); *State ex rel. Webster v. Missouri Res. Recovery, Inc.*, 825 S.W.2d 916, 942 (Mo. Ct. App. S.D. 1992). The Company has taken steps to address its regulatory reporting obligations. As explained in the notices filed with the Commission,² the Company underwent organizational changes as a result of a transaction between Birch's parent, Birch Communications, LLC (formerly Birch Communications, Inc.), and Fusion

² Joint Notice of BCHI Holdings, LLC, Birch Telecom of Missouri, Inc., Fusion Telecommunications International, Inc. and Network Billing Systems, LLC Regarding a Transaction That Will Result in a Material Change to the Ownership and Control of Network Billing Systems, LLC (Nov. 30, 2017); Network Billing Systems, LLC, Birch Telecom of Missouri, LLC, Ionex Communications, Inc., and Tempo Telecom, LLC: Notice of Intracorporate Reorganization (Without Change to Controlling Ownership) (Aug. 24, 2018).

Connect, Inc. (formerly Fusion Telecommunications International, Inc.), which was consummated on May 4, 2018 (the "Transaction"). After the Transaction, Birch implemented changes in its regulatory reporting, and has contracted with a third-party to assist with the management of the regulatory reporting process in Missouri (and other states). Birch has not found any record of receiving notice of assessment, and certainly did not intentionally ignore it. Accordingly, the imposition of an administrative penalty is unnecessary and unjustified.

WHEREFORE, the Company respectfully prays for relief as set forth below:

A. The Commission should dismiss the Complaint as the Company has paid the Company's total fiscal year 2019 assessment at issue in the Complaint; and

B. The Commission should refrain from levying an administrative penalty against the Company.

Dated: December ____, 2018

Respectfully submitted,

BIRCH TELECOM OF MISSOURI, LLC

/s/ Carl J. Lumley
Carl J. Lumley, Bar #32869MO
CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.
130 S. Bemiston, Suite 200
St. Louis, MO 63105-1913
314-725-8788 (telephone)
clumley@chgolaw.com

Angela F. Collins
Cahill Gordon & Reindel LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
202-862-8930 (telephone)
acollins@cahill.com

Its Attorneys

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing document was delivered by first class mail, electronic mail or hand delivery, on this 13 day of December 2018, to the following parties:

Travis J. Pringle
Legal Counsel
Attorney for the Staff of the Missouri Public Service Commission
P.O. Box 360
Jefferson City, MO 65102
Travis.Pringle@psc.mo.gov

Missouri Public Service Commission
Staff Counsel Department
200 Madison Street, Suite 800
P.O. Box 360
Jefferson City, MO 65102
staffcounservice@psc.mo.gov

Office of the Public Counsel
Marc Poston
200 Madison Street, Suite 650
P.O. Box 2230
Jefferson City, MO 65102
opcservice@ded.mo.gov

_____/s/ Carl J. Lumley_____