

**BEFORE THE
NEW HAMPSHIRE PUBLIC UTILITIES COMMISSION**

Birch Communications, Inc.
Application for Registration to Provide
Voice Service

DT 18-012

REQUEST FOR RECONSIDERATION

Pursuant to N.H. Code Admin. Rules Puc 404.03(b), Birch Communications, Inc. (“Birch”) hereby files a request for reconsideration of the denial of its Application for Registration to Provide Voice Service (“Application”). In support of Birch’s request for reconsideration, Birch submits the following:

STATEMENT OF FACTS

1. On November 6, 2017, pursuant to Puc 404.02, Birch filed its Application with the New Hampshire Public Utilities Commission (“Commission”).

2. The Commission acknowledged receipt of Birch’s Application on November 6, 2017 by returning a date-stamp copy of the Application to Birch.

3. The Application asked a series of questions about Birch under the header “History of Applicant.” In response to the question as to whether Birch “had any civil, criminal or regulatory sanctions or penalties imposed pursuant to any state or federal consumer protection law or regulation” in the past ten years, Birch answered “no.” In response to the question as to whether Birch “settled any civil, criminal or regulatory investigation or complaint involving any state or federal consumer protection law or regulation” in the past ten years, Birch answered “yes” and provided information regarding a Consent Decree between Birch and the Federal Communications Commission (“FCC”).¹

4. After several inquiries to Commission staff about the status of the Application, on

¹ *Birch Communications, Inc.*, 31 FCC Rcd 13510 (2016) (“Consent Decree”), available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1458A1.pdf.

February 5, 2018, Birch received notice that its Application had been docketed under DT 18-012.

5. On February 6, 2018, Birch received a copy of Commission staff's recommendation that the Commission deny Birch's Application in light of the Consent Decree between Birch and the FCC (the "Staff Recommendation").

6. Immediately after receiving staff's recommendation, counsel for Birch contacted Commission staff to inquire about the possibility of discussing the recommendation prior to a decision by the Commission. Birch did not receive a response from staff, and on February 7, 2018, Birch received the Commission's letter denying Birch's Application (the "Denial Letter").

7. Birch is filing this Request for Reconsideration within 30 days of the date of the Denial Letter as required by Puc 404.03(b).

ARGUMENT

8. When determining whether to grant or deny an application for registration, Puc 404.03(a)(1) and (2) state the Commission "shall deny an application for registration if, and only if, it determines the applicant" has, among other things: (1) "committed an act that would constitute good cause to find a violation" of the Commission's rules; or (2) "within the 10 years immediately prior to registration, had any civil, criminal or regulatory sanctions or penalties imposed against them pursuant to any state or federal consumer protection law or regulation." The existence of the FCC Consent Decree does not trigger either of these scenarios, and cannot serve as the basis for denial of Birch's Application.

I. THE FCC CONSENT DECREE IS NOT A SANCTION OR PENALTY IMPOSED AGAINST BIRCH

9. The FCC Consent Decree is not a civil, criminal, or regulatory sanction or penalty against Birch as contemplated in Puc 404.03(a)(2) as no enforcement action was taken against Birch. The Denial Letter incorrectly finds "the substantial civil penalty required to be paid by

Birch to the FCC is an example of a sanction or penalty based on consumer protection laws or regulations.”²

10. The FCC opened an investigation into Birch’s compliance with Sections 201(b) and 258 of the federal Communications Act of 1934, as amended (the “federal Act”) and corresponding FCC rules found in Section 64.1120. After nearly 12 months of working with FCC staff through submissions of information, conference calls, and in-person meetings, the parties agreed the investigation could be resolved through a Consent Decree without any findings of violations entered against Birch. In December 2016, Birch and the FCC entered into the Consent Decree to resolve and settle the FCC’s investigation.³

11. There was no determination that Birch violated any statutory or regulatory provisions of the federal Act or the FCC’s rules. The Consent Decree specifically states it “does not constitute an adjudication on the merits or a legal or factual determination regarding Birch’s compliance or noncompliance with any law.”⁴

12. Further, the Consent Decree states it may not be used as evidence or precedent against Birch in any action or proceeding, except an action to enforce the Consent Decree.⁵ Important to the consideration of Birch’s Application, the Consent Decree makes clear the FCC cannot use the existence of the Consent Decree to question “Birch’s basic qualifications to be a [FCC] licensee or hold [FCC] licenses or authorizations.”⁶

² Denial Letter at 1.

³ Consent Decree ¶ 14 (“In express reliance on the covenants and representations in this Consent Decree and to avoid further expenditure of public resources, the Bureau agrees to terminate the Investigation. In consideration for the termination of the Investigation, Birch agrees to the terms, conditions, and procedures contained herein.”).

⁴ Consent Decree ¶ 29.

⁵ Consent Decree ¶ 15.

⁶ Consent Decree ¶ 14.

13. As part of the Consent Decree, Birch agreed to implement a multi-year compliance plan outlining the operational steps Birch would take to meet the terms of the Consent Decree, and the requirements of the FCC’s slamming rules.⁷ To implement the compliance plan, Birch developed internal operating procedures, produced a compliance manual, modified its customer complaint procedures, conducted training of its personnel, and revised its marketing techniques.⁸ Finally, Birch agreed to make a payment to the United States Treasury, and provide refunds and/or credits to certain consumers.⁹

14. Settlements between the FCC and a regulated entity commonly are reflected in a negotiated consent decree that includes a financial payment along with steps for future compliance. While the Consent Decree may use the term “civil penalty” with respect to the financial terms of the Consent Decree, the Consent Decree makes clear the Consent Decree constitutes “a final settlement” between the parties.¹⁰ Birch’s payment to the United States Treasury and its implementation of a multi-year compliance plan, in return for the FCC’s agreement to terminate the pending investigation, “represents the *quid pro quo*” the FCC found necessary to resolve the matter.¹¹

15. From 2015 to present, the FCC has entered into at least 80 consent decrees to settle investigations, including settlements with large providers such as T-Mobile,¹² Comcast,¹³

⁷ Consent Decree ¶ 17.

⁸ The FCC has proposed that some components of the Consent Decree be applied industry-wide to all telecommunications carriers. See *Protecting Consumers from Unauthorized Carrier Changes and Related Unauthorized Charges*, 32 FCC Rcd 6022 (2017).

⁹ Consent Decree ¶¶ 22, 23.

¹⁰ Consent Decree ¶ 29.

¹¹ *Viacom, Inc.*, 21 FCC Rcd 12223, ¶ 6 (2006).

¹² Available at: https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1125A1.pdf.

¹³ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-1127A1.pdf.

AT&T,¹⁴ Verizon Wireless,¹⁵ Cox Communications,¹⁶ Sprint,¹⁷ CenturyLink,¹⁸ and Verizon Business (formerly MCI).¹⁹ The Consent Decree represents “a valid and appropriate exercise of the [FCC]’s authority to settle enforcement actions,”²⁰ and is not a civil, criminal, or regulatory sanction or penalty against Birch as contemplated by New Hampshire regulation.

II. THE FCC CONSENT DECREE DOES NOT PROVIDE GOOD CAUSE TO FIND A VIOLATION OF COMMISSION RULES

16. The FCC Consent Decree does not demonstrate Birch “committed an act that would constitute good cause to find a violation under [Commission] rules” as contemplated in Puc 404.03(a)(1). The Denial Letter incorrectly finds “the alleged actions by Birch that led to the FCC Consent Decree would represent violations of Puc 405.02 and Puc 405.04.”²¹

17. As the Denial Letter recognizes, the FCC Consent Decree contained “alleged actions” by Birch.²² There was no finding in the Consent Decree that Birch violated any statutory or regulatory provisions of the federal Communications Act or the FCC’s rules.

18. Likewise, there has been no finding that Birch has committed any act that violates the Commission’s slamming rules found in Puc 405.02 or the Commission’s prohibition on cramming contained in Puc 405.04. Puc 405.02 requires the Commission to make a finding,

¹⁴ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-771A1.pdf.

¹⁵ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-16-242A1.pdf.

¹⁶ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-1241A1.pdf.

¹⁷ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-536A1.pdf.

¹⁸ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-406A1.pdf.

¹⁹ Available at https://apps.fcc.gov/edocs_public/attachmatch/DA-15-308A1.pdf.

²⁰ *United States Cellular Corp. Constructed Tower near Fries, Virginia*, 24 FCC Rcd 8729, ¶ 26 (2009); *see also, e.g., Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”).

²¹ Denial Letter at 1.

²² Denial Letter at 1; *see also* Consent Decree ¶ 5 (“The Bureau alleges that Birch violated. . . . Birch disputes these allegations.”).

“after notice and opportunity for hearing,” that a provider has switched a customer’s selection of carrier without authorization. There has been no such finding made with respect to Birch.

III. BIRCH HAS TAKEN REMEDIAL ACTIONS TO ENSURE COMPLIANCE WITH FCC AND STATE SLAMMING RULES

19. As discussed above, Birch has implemented a multi-year compliance plan, and relies on that plan for its outbound telemarketing campaigns. As contemplated by the Consent Decree, Birch routinely provides reports to the FCC’s Enforcement Bureau, which is charged with monitoring Birch’s compliance with the Consent Decree.²³

20. Birch also has conducted compliance training of all Birch personnel meeting the definition of “Covered Personnel” in the Consent Decree, which includes Birch’s customer service representatives, sales representatives, and third-party verifiers.²⁴ Birch repeats the compliance training on an annual basis, and for any person that becomes “Covered Personnel” after the initial training.²⁵

21. Birch’s implementation of the compliance plan ensures Birch’s compliance with the FCC’s slamming rules, which are mirrored in New Hampshire’s slamming rules set forth in Puc 405.02, as well as compliance with the prohibition on cramming set forth in Puc 405.04.

IV. THE COMMISSION MAY WAIVE PUC 404.03 TO GRANT BIRCH’S APPLICATION

22. To the extent necessary, Birch respectfully requests the Commission waive rule Puc 404.03 and grant Birch’s Application.

23. Under Puc 201.05, the commission

shall waive the provisions of any of its rules, except where precluded by statute, upon request by an interested party, or on its own motion, if the commission finds

²³ Consent Decree ¶¶ 17(g)(ii), 18, 19.

²⁴ Consent Decree ¶ 17(c); *see also id.* ¶ 2(l) (defining “Covered Personnel”).

²⁵ Consent Decree ¶ 17(c).

that: (1) The waiver serves the public interest; and (2) The waiver will not disrupt the orderly and efficient resolution of matters before the commission. In determining the public interest, the commission shall waive a rule if: (1) Compliance with the rule would be onerous or inapplicable given the circumstances of the affected person; or (2) The purpose of the rule would be satisfied by an alternative method proposed.

24. The public interest would be served by waiver of Puc 404.03 and grant of Birch's Application.

25. In 1995, the New Hampshire legislature gave the Commission authority to approve the competitive provision of telecommunications services within then-Bell Atlantic's service territory based on its determination that:

[c]ompetitive markets generally encourage greater efficiency, lower prices, and more consumer choice. It is the policy of the state of New Hampshire to encourage competition for all telecommunications services, including local exchange services, which will promote lower prices, better service, and broader consumer choice for the residents of New Hampshire.²⁶

26. More recently, the New Hampshire legislature streamlined the process for obtaining authority to offer telecommunications services in New Hampshire by creating a new category of providers known as Excepted Local Exchange Carriers ("ELECs"), and limiting the Commission's authority over the services provided by ELECs.²⁷ The rules contained in Puc 404 reflect those statutory changes.²⁸

27. Grant of Birch's Application serves the legislature's goals to promote competition in New Hampshire. Birch's entry into the New Hampshire market would expand the availability of competitive telecommunications services in New Hampshire, and give New Hampshire

²⁶ *Comcast Phone of New Hampshire*, 94 N.H.P.U.C. 52 (Feb. 6, 2009) (citing 1995 N.H. Laws 147:1); *see also Generic Telecommunications Competition Docket*, 82 N.H.P.U.C. 3 (Jan. 6, 1997) ("The Commission's movement towards competition in telecommunications has been mirrored by enactments at our Legislature (*see, e.g.,* RSA 374:22-g) and on a federal level with the passage of the Telecommunications Act of 1996.").

²⁷ Laws 2012 chapter 177 (SB 48).

²⁸ *See, e.g.,* DRM 12-036, *Request for Advance Comment on a Subject Matter of Proposed Rulemaking concerning New Hampshire Code of Administrative Rules PART Puc 400 - Rules for Telephone Service* (Feb. 2, 2012).

consumers access to new technologies and service choices. Since 1995, the New Hampshire legislature has made a “commitment to expanding competition into local telecommunications markets.”²⁹ Waiver of Puc 404.03 and grant of Birch’s Application would serve that commitment and the public interest.

28. Further, as noted in the Staff Recommendation, notice was provided to the Commission of a pending transaction between Birch, Fusion Telecommunications International, Inc. (“Fusion”), and Network Billing Systems LLC (the “Fusion Transaction”). Birch’s Application was filed in connection with an internal corporate reorganization pursuant to which Birch’s currently-authorized affiliate, Birch Communications of the Northeast, Inc. (“BCNE”), will serve residential and single-line business customers in New Hampshire and Birch will serve larger business customers located in New Hampshire (once authorized). As explained in the notice, as a result of the Fusion Transaction, Birch will become a wholly owned subsidiary of Fusion, which will be majority-owned by Birch’s current shareholders. Prior to or at closing of the Fusion Transaction, BCNE will be spun-off to the existing Birch shareholders, and BCNE will not be part of the merged entity resulting from the Fusion Transaction. Thus, Birch needs its own operating authority to serve customers in New Hampshire.

29. Waiver of Puc 404.03 and grant of Birch’s Application would serve the public interest and permit the Fusion Transaction to proceed as planned. As explained in the notice, the Fusion Transaction will allow the merged entity, including Birch, to increase the breadth and innovative caliber of its service offerings and to provide nationwide coverage that will be of particular interest to business customers with multiple locations.

²⁹ *Preliminary Investigation into Local Calling Areas (Extended Area Service)*, 81 N.H.P.U.C. 288 (Apr. 15, 1996) (stating the 1995 “legislation clearly indicates the state’s commitment to expanding competition into local telecommunications markets.”).

CONCLUSION

For the foregoing reasons, Birch respectfully requests the Commission grant Birch's request for reconsideration and approve Birch's Application on an expedited basis.

Respectfully submitted,



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