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BEFORE THE ARIZONA CORPORATION

COMMISSIONERS

BOB STUMP - Chairman
GARY PIERCE
BRENDA BURNS
BOB BURNS
SUSAN BITTER SMITH

Arizona Corporation Commission

DOCKETED

JAN 29 2014

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IN THE MATTER OF THE APPLICATION OF IONEX COMMUNICATIONS NORTH, INC. D/B/A BIRCH COMMUNICATIONS FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE RESOLD LOCAL EXCHANGE, RESOLD LONG DISTANCE, FACILITIES-BASED LONG DISTANCE, AND FACILITIES-BASED LOCAL EXCHANGE TELECOMMUNICATION SERVICES IN ARIZONA.

DOCKET NO. T-03864A-13-0051

DECISION NO. 74295

OPINION AND ORDER

DATE OF HEARING: November 18, 2013

PLACE OF HEARING: Phoenix, Arizona

ADMINISTRATIVE LAW JUDGE: Yvette B. Kinsey

APPEARANCES: Ms. Joan S. Burke on behalf of Applicant; and
Mr. Matthew Laudone, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation.

BY THE COMMISSION:

On March 5, 2013, Ionex Communications North, Inc. d/b/a Birch Communications ("Ionex" or "Company") filed with the Arizona Corporation Commission ("Commission") an application for approval of a Certificate of Convenience and Necessity ("CC&N") to provide resold local exchange, resold long distance, facilities-based long distance, and facilities-based local exchange telecommunication services in Arizona. Ionex's application also requests a determination that its proposed services are competitive in Arizona.

On September 5, 2013, the Commission's Utilities Division ("Staff") filed its Staff Report recommending approval of Ionex's application, subject to certain conditions.

1 On September 10, 2013, by Procedural Order the hearing in this matter was set for November
2 18, 2013, and other procedural deadlines were established.

3 On October 9, 2013, Ionex filed an Affidavit of Publication, showing that notice of Ionex's
4 application and the hearing date had been published in the *Arizona Republic*, a newspaper of general
5 circulation, on September 30, 2013.

6 On November 18, 2013, a full public hearing was held as scheduled before a duly authorized
7 Administrative Law Judge of the Commission. Ionex and Staff appeared through counsel and
8 presented testimony and evidence. No members of the public appeared to give comments on the
9 application. At the conclusion of the hearing, the matter was taken under advisement pending
10 submission of a Recommended Opinion and Order to the Commission.

11 * * * * *

12 Having considered the entire record herein and being fully advised in the premises, the
13 Commission finds, concludes, and orders that:

14 **FINDINGS OF FACT**

15 1. Ionex is a foreign "S" corporation organized under the laws of South Dakota, with its
16 principal offices located in Kansas City, Missouri.¹

17 2. Ionex is wholly owned by Birch Telecom, Inc.² Birch Telecom, Inc. is wholly owned
18 by Birch Communications, Inc., which is wholly owned by Birch Communications Holdings, Inc.³

19 3. Ionex is authorized to transact business in Arizona and is in good standing with the
20 Commission's Corporations Division.⁴

21 4. On March 5, 2013, Ionex filed an application with the Commission to provide resold
22 local exchange, resold long distance, facilities-based long distance, and facilities-based local
23 exchange telecommunication services in Arizona.

24 5. Notice of Ionex's application was given in accordance with the law.⁵

26 ¹ Exhibit A-1, Attachment B.

27 ² Exhibit A-1, Attachment A.

28 ³ Exhibit A-1, Attachment A.

⁴ Exhibit A-1, Attachment A.

⁵ Exhibit A-2.

1 6. Staff recommends approval of Ionex's application for a CC&N to provide intrastate
2 telecommunication services in Arizona, subject to the following conditions:

- 3 a. Ionex comply with all Commission Rules, Orders, and other requirements
4 relevant to the provision of intrastate telecommunications services;
- 5 b. Ionex abides by the quality of service standards that were approved by the
6 Commission for Qwest in Docket No. T-01051B-93-0183;
- 7 c. Ionex be prohibited from barring access to alternative local exchange service
8 providers who wish to serve areas where Ionex is the only local provider of
9 local exchange service facilities;
- 10 d. Ionex notify the Commission immediately upon changes to Ionex's name,
11 address or telephone number;
- 12 e. Ionex cooperate with Commission investigations including, but not limited to
13 customer complaints;
- 14 f. The rates proposed by Staff are for competitive services. In general, rates for
15 competitive services are not set according to rate of return regulation. Staff
16 obtained information from Ionex and has determined that its fair value rate
17 base is zero. Staff has reviewed the rates to be charged by Ionex and believes
18 they are just and reasonable as they are comparable to other competitive local
19 carriers, local incumbent carriers and major long distance companies offering
20 service in Arizona and comparable to the rates Ionex charges in other
21 jurisdictions. The rate to be ultimately charged by Ionex will be heavily
22 influenced by the market. Therefore, while Staff considered the fair value rate
23 base information submitted by the Company, the fair value information
24 provided was not given substantial weight in Staff's analysis;
- 25 g. Ionex offer Caller ID with the capability to toggle between blocking and
26 unblocking the transmission of the telephone number at no charge;
- 27 h. Ionex offer Last Call Return service that will not return calls to telephone
28 numbers that have the privacy indicator activated; and
- i. The Commission authorize Ionex to discount its rates and service charges to
 the marginal cost of providing the services.

 7. Staff further recommends that Ionex's CC&N be considered null and void after due
process if Ionex fails to comply with the following conditions:

- a. Ionex shall docket a conforming tariff for each service within its CC&N within
365 days from the date of a Decision in this matter or 30 days prior to
providing service, whichever comes first;
- b. Ionex shall notify the Commission through a compliance filing within 30 days
of the commencement of service to end-user customers;
- c. Ionex shall abide by the Commission adopted rules that address Universal
Service in Arizona. A.A.C. R-14-2-1204(A) indicates that all
telecommunications service providers that interconnect into the public

switched network shall provide funding for the Arizona Universal Service Fund ("AUSF"). The Applicant will make the necessary monthly payments required by A.A.C. R-14-2-1204(B); and

Technical Capability

8. Ionex intends to provide its proposed services to small business customers and has been providing these services for more than ten years.⁶

9. Ionex's witness described the Company as a competitive local exchange carrier.⁷ According to the witness, Ionex intends to provide dial tone, Internet access, long distance, and data, along with hosted services like email and cloud products.⁸ The witness stated that Ionex will provide its proposed services through third-party providers and that the Company will not have any equipment or employees in Arizona.⁹

10. Staff believes Ionex has the technical capabilities to provide its proposed services in Arizona.

Financial Capabilities

11. Ionex provided audited financial statements for its parent company, Birch Communications Holdings, Inc. ("Birch Communications"), for the 12 months ending December 31, 2011, listing total assets of \$71,418,511; equity of negative \$22,754,953; and a net income of negative \$5,444,912.¹⁰ For the 12 months ending December 31, 2012, Birch Communications listed total assets of \$63,272,065; equity of negative \$31,834,832; and a net income of \$2,922,293.¹¹

12. Staff does not recommend, as a condition to receiving a CC&N, that Ionex procure a performance bond to provide its proposed services in Arizona. Staff's witness stated that based on Ionex's complaint and regulatory compliance history in the twelve states in which Ionex operates, Staff does not believe the requirement of a performance bond is necessary.¹² Further, Staff's witness testified that Staff has revised its bond policy and will no longer automatically recommend a bond based on the type of services an applicant wishes to provide, but that Staff will instead recommend a

⁶ Tr. at 13.

⁷ Tr. at 12.

⁸ Tr. at 12.

⁹ Tr. at 12, 14.

¹⁰ Exhibit S-1 at 1.

¹¹ Exhibit S-1 at 1.

¹² Tr. at 23.

1 bond when it appears the applicant lacks the financial, or managerial, or technical capability to
 2 provide its proposed services.¹³ Staff's witness testified that "the telecommunications industry has
 3 changed significantly since Staff began recommending that applicants obtain bonds". . . . "technology
 4 has changed such that consumers have numerous choices in determining what type of service would
 5 best meet their telecommunications requirements, as well as a variety of companies from which they
 6 can obtain these telecommunications services."¹⁴ Staff stated that it does not believe that requiring an
 7 applicant to procure a performance bond provides any guarantee that payments or deposits paid by a
 8 customer would be protected if a Company decided to go out of business.¹⁵ Staff's witness testified
 9 that in a competitive market customers have a choice of providers and it is the customer's
 10 responsibility to evaluate potential providers before selecting their telecommunications provider.¹⁶
 11 Staff stated that, under its revised bond policy, in situations where Staff believes the Company has
 12 financial, or managerial, or technical issues, Staff will recommend denial of the application.¹⁷

13 Rates and Charges

14 13. Staff believes that Ionex will have to compete with other incumbent local exchange
 15 carriers ("ILECs"), and various competitive local exchange ("CLECs"), and interexchange carriers
 16 ("IXCs") in Arizona in order to gain new customers.¹⁸ Staff states it does not believe Ionex will be
 17 able to exert market power given its status as a new entrant in the market.¹⁹

18 14. Pursuant to A.A.C. R14-2-1109, the rates charged for each service Ionex proposes to
 19 provide may not be less than the Company's total service long-run incremental cost of providing that
 20 service.

21 15. Ionex projects that for the first twelve months of operation in Arizona, it will have a
 22 net book value of zero.²⁰

23 . . .

24

25 ¹³ Tr. at 23.

26 ¹⁴ Tr. at 24.

27 ¹⁵ Tr. at 24.

28 ¹⁶ Tr. at 25.

¹⁷ Tr. at 28.

¹⁸ Exhibit S-1 at 2.

¹⁹ Exhibit S-1 at 2

²⁰ Exhibit A-1, Attachment D.

1 16. Staff states that in general, rates for competitive services are not set according to rate
 2 of return regulation and the Company's fair value rate base is zero. Staff believes that Ionex's rates
 3 will be heavily influenced by the market.²¹ Staff reviewed Ionex's proposed tariff pages, the rate
 4 comparison information of other CLECs and ILECs and Staff believes that Ionex's proposed rates are
 5 comparable to the rates charged by CLECs and ILECs providing service in Arizona.²² Therefore,
 6 Staff states that while it considered the fair value rate base information submitted by Ionex, it did not
 7 accord that information substantial weight in Staff's analysis.²³

8 **Local Exchange Carrier Specific Issues**

9 17. Pursuant to A.A.C. R14-2-1308(A) and federal laws and rules, Ionex will make
 10 number portability available to facilitate the ability of customers to switch between authorized local
 11 carriers within a given wire center without changing their telephone number and without impairment
 12 to quality, functionality, reliability or convenience of use.

13 18. Pursuant to A.A.C. R14-2-1204(A) all telecommunication service providers that
 14 interconnect to the public switched network shall provide funding for the AUSF. Ionex shall make
 15 payments to the AUSF described under A.A.C. R14-2-1204(B).

16 19. In Commission Decision No. 59421 (December 20, 1995), the Commission approved
 17 quality of service standards for Qwest which imposed penalties due to an unsatisfactory level of
 18 service. In this matter, Staff believes Ionex does not have a similar history of service quality
 19 problems, and therefore the penalties in that decision should not apply.

20 20. In the areas where the Company is the only local exchange service provider, Staff
 21 recommends that Ionex be prohibited from barring access to alternative local exchange service
 22 providers who wish to serve the area.

23 21. Ionex will provide all customers with 911 and E911 service where available, or will
 24 coordinate with ILECs, and emergency service providers to facilitate the service.

25 ...
 26 ...
 27 ²¹ Exhibit S-1 at 2.

28 ²² Id.

²³ Id.

1 22. Pursuant to prior Commission Decisions, Ionex may offer customer local area
2 signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or
3 unblock each individual call at no additional cost.

4 23. Ionex must offer Last Call Return service, which will not allow the return of calls to
5 the telephone numbers that have the privacy indicator activated.

6 **Complaint Information**

7 24. Ionex's application states that none of the Company's officers, directors, partners, nor
8 managers have been or are currently involved in any formal or informal complaint proceedings
9 before any state or federal regulatory agency, commission, administrative or law enforcement
10 agency.²⁴

11 25. Ionex states that none of the Company's officers, directors, partners or managers have
12 been involved in any civil or criminal investigations, or had judgments entered in any civil matter, or
13 by any administrative or regulatory agency, or been convicted of any criminal acts within the last ten
14 (10) years.²⁵

15 26. Staff verified that Ionex has no formal or informal complaint proceedings pending
16 before any state or federal regulatory commission, administrative agency or law enforcement agency
17 involving the Company or any of its officers, directors, or managers.

18 27. As of the filing of the Staff Report, Ionex had no complaints filed with the Federal
19 Communications Commission ("FCC").

20 **Competitive Review**

21 28. Ionex's application requests that its proposed telecommunication services in Arizona
22 be classified as competitive. Staff believes Ionex's proposed services should be classified as
23 competitive because Ionex will have to compete with CLECs and ILECs to gain customers; there are
24 alternative providers to Ionex's proposed services; ILECs hold a virtual monopoly in local exchange
25 and IXC markets; and that Ionex will not have the ability to adversely affect the local exchange or
26 IXC markets in Arizona.²⁶

27 ²⁴ Exhibit A-1 at A-11.

28 ²⁵ Exhibit A-1 at A-12.

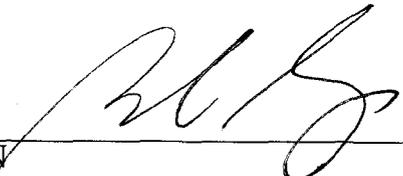
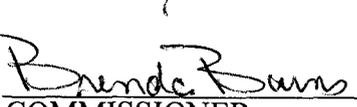
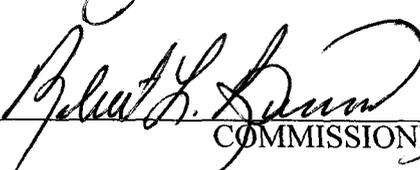
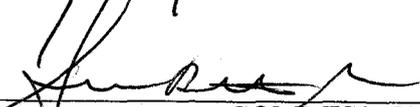
²⁶ Exhibit S-1 at 11.

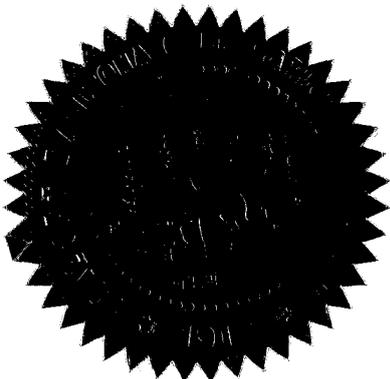
1 IT IS FURTHER ORDERED that if Ionex Communications North, Inc., d/b/a Birch
2 Communications, fails to comply with the Staff conditions described in Finding of Fact No. 7, the
3 Certificate of Convenience and Necessity granted herein shall be considered null and void after due
4 process.

5 IT IS FURTHER ORDERED that Ionex Communications North, Inc., d/b/a Birch
6 Communications, shall docket conforming tariffs for each service within its CC&N within 365 days
7 of the effective date of this Decision or 30 days prior to serving its first customer, whichever comes
8 first. The tariffs submitted shall coincide with the application in this matter.

9 IT IS FURTHER ORDERED that this Decision shall become effective immediately.

10 BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

11			
12			
13	CHAIRMAN	COMMISSIONER	
14			
15	COMMISSIONER	COMMISSIONER	COMMISSIONER



17 IN WITNESS WHEREOF, I, JODI JERICH, Executive
18 Director of the Arizona Corporation Commission, have
19 hereunto set my hand and caused the official seal of the
20 Commission to be affixed at the Capitol, in the City of Phoenix,
21 this 29th day of January, 2014.

22 
JODI JERICH
EXECUTIVE DIRECTOR

23 DISSENT _____

24
25 DISSENT _____
26 YK:tv

1 SERVICE LIST FOR: IONEX COMMUNICATIONS NORTH, INC.

2 DOCKET NO.: T-03864A-13-0051

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