

# OPEN MEETING



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**ORIGINAL**

**MEMORANDUM**  
Arizona Corporation Commission  
**DOCKETED**

RECEIVED  
AZ CORP COMMISSION  
DOCKET CONTROL

TO: THE COMMISSION MAY 27 2016

FROM: Utilities Division

DOCKETED BY 

2016 MAY 27 PM 2 02

DATE: May 27, 2016

RE: IN THE MATTER OF THE APPLICATION OF IONEX COMMUNICATIONS NORTH, INC D/B/A BIRCH COMMUNICATIONS FOR APPROVAL OF WAIVER OF SLAMMING RULES AND TRANSFER OF CUSTOMERS FROM PRIMUS TELECOMMUNICATIONS, INC. (DOCKET NOS. T-03243A-16-0052 AND T-03864A-16-0052)

## INTRODUCTION

On February 12, 2016, Ionex Communications North, Inc. dba Birch Communications (“Ionex”) and Primus Telecommunications, Inc. (“Primus”), (together the “Applicants”), filed a joint application requesting approval from the Arizona Corporation Commission (“Commission”) for a waiver of Arizona Administrative Code (“A.A.C”) R14-2-1901 to -1913, the “Slamming Rules”, in connection with the transfer of Primus’ customers in Arizona to Ionex. This Application included a copy of the draft notice that was to be sent to Primus customers.

On May 3, 2016, Ionex filed a Supplement to the Application indicating that the transaction described in the initial Application has not closed with respect to Arizona customers and assets and that the draft notice included with the original Application was not sent to Arizona customers. Instead, a revised notice was sent to Primus residential and business customers in Arizona during the last week of March. Primus’ residential customers received the initial revised notice in error. Consequently, a revised residential customer notice was subsequently sent to Arizona residential customers which clarified: (a) what Primus residential customers could expect, (b) informed customers that Ionex would use the Primus brand name in delivering residential services, and (c) provided phone numbers customers could use to contact Primus or Ionex.

In support of this filing, Applicants provide the following information.

## DESCRIPTION OF THE APPLICANTS

A. *Ionex Communications North, Inc. dba Birch Communications*

Ionex is a South Dakota corporation with headquarters located at 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia 30305. Ionex was issued a Certificate of Convenience and Necessity (“CC&N”) by the Arizona Corporation Commission (“Commission”) to provide local exchange and

interexchange telecommunications services on January 29, 2014.<sup>1</sup> Ionex is a wholly owned subsidiary of Birch Communication, Inc. ("BCI"), a Georgia corporation with headquarters located at 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia 30305. BCI and its subsidiaries are authorized to provide telecommunications services to both residential and business customers in 50 states and the District of Columbia.

B. *Primus Telecommunications, Inc.*

Primus is a Delaware corporation with corporate headquarters at 805 Wright Brothers Boulevard, Cedar Rapids, Iowa 52404. Primus was issued a CC&N by the Commission to provide interexchange telecommunications services on Mary 30, 2001.<sup>2</sup> Primus serves approximately 200-250 long distance customers in Arizona.

On January 21, 2016, Primus filed a petition under Chapter 15 of the United States Bankruptcy Code, which resulted in the pro forma transfer of Primus' Arizona authorization to Primus Telecommunications, Inc., Debtor-in-Possession.<sup>3</sup> During the restructuring process, which will allow Primus to remain in possession and control of its current and future assets, undertaking and properties, and the proceeds thereof while it completes a sale of its business. Primus will continue to operate as debtor-in-possession in the ordinary course of business. No substantive change in ownership or control of Primus has taken place as a result of the bankruptcy filing.

## THE PROPOSED TRANSACTION

The Applicants state that on January 18, 2016, BCI and Primus entered into an Asset Purchase Agreement ("Agreement") pursuant to which BCI will purchase certain assets and customers of Primus, including certain customer accounts and receivables, certain customer agreements and contracts, certain vendor agreements and contracts, certain equipment, and certain intellectual property (the "Transaction"). BCI, however, will not assume any of Primus' pre-closing liabilities or obligations.

Following approval of the proposed Transaction, Ionex states it will file any necessary tariff revisions to incorporate Primus' current services and rates so that affected customers will continue to receive the same services that they currently received without any immediate changes to their service offerings or rates. The ownership structure of BCI and Ionex will not be affected by the Transaction. Ionex will also incorporate into its tariff the rates, terms and conditions of services currently provided to Primus customers. The transfer is designed to be seamless as there will be no change to the affected customer's rates, terms and conditions and there will be no charge to the transferred customers for the transfer of service.

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<sup>1</sup> See Decision No. 74295, Docket No. T-03864A-13-0051.

<sup>2</sup> See Decision No. 63529, Docket No. T-03243A-96-0443.

<sup>3</sup> In re PT Holdco, Inc., et al., Case No. 16-10131 (LSS)(D. Del. Jan. 21, 2016).

Upon completion of the Transaction and the migration of customers, Primus will no longer offer telecommunications services in Arizona. Primus will request cancellation of its CC&N and tariffs in a separate application once the Parties inform the Commission that the Transaction has been consummated.

### **REQUEST FOR WAIVER OF SLAMMING RULES**

Applicants request a waiver of A.A.C. R14-2-1901, et seq., generally and R14-2-1904 and R14-2-1905 specifically, as those rules may apply to this transaction. This transaction is designed to be seamless to the former Primus customers insofar as there will be no immediate change to customers' rates, terms, and conditions of service and the transfer will occur with no change to customers as they transition to Ionex. Ionex will incorporate into its tariff the rates, terms and conditions of services currently provided to Primus customers. Ionex will assume all managerial, technical and financial responsibilities in connection with providing service to the former Primus customers.

In accordance with the rules and procedures of the FCC and applicable state(s), including this Commission, customers have been notified of the proposed transaction and the change in their telecommunications provider from Primus to Ionex. In a filing with the FCC, the Applicants attest<sup>4</sup> that affected customers were provided direct customer notice of the transfer pursuant to Section 64.1120(e) of the FCC's rules 47 C.F.R. §64.1120(e), a copy of which is attached to the Application as Exhibit 1 and attached to the Supplement to the Application as Exhibits A and B. Applicants request, to the extent necessary, that the Commission grant a waiver of A.A.C. R14-2-1904 et seq. (the "Slamming Rules") and any other applicable anti-slamming regulations that may be consistent with the FCC's rules regarding the transfer of customer bases.

### **STAFF'S RECOMMENDATION FOR WAIVER OF SLAMMING RULES**

Staff has reviewed the notice that was sent to the affected customers. The notice informs customers that the rates, terms and conditions of service will not change as a result of the proposed transactions and informs customers that they may subscribe to the telecommunications service provider of their choice. The Applicants also state in their application that affected customers will continue to receive the same services they currently receive and that the transfer is designed to be seamless to those customers. Given the nature of this transaction and the notice to the affected customers, Staff believes the Commission's Slamming Rules should be waived in this matter.

#### *Complaints and Compliance*

The Compliance Section of the Utilities Division reports the Applicants are in compliance. The Consumer Services Section of the Utilities Division reports that from January 1, 2013 to May 20, 2016, there have been no complaints or opinions concerning Ionex. However, for the same time period, Consumer Services shows there has been one (1) complaint about billing against Primus,

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<sup>4</sup> Copy of Notification of Birch Communications, Inc. and Primus Telecommunications, Inc. pursuant to 47 C.F.R. § 64.1120(e), identified as Exhibit C of the Supplement to Application filed on May 3, 2016.

which was resolved. According to the Corporations Division, Ionex is in good standing but Primus is not for failure to file its 2016 Annual Corporation Report. Primus filed its 2015 Utilities Annual Report in April, 2016 but Ionex has not filed its 2015 Utilities Annual Report with the Utilities Division.

### STAFF RECOMMENDATIONS

Staff recommends approval of the Application for Ionex to acquire the Arizona customers of Primus.

Staff further recommends that approval be conditioned on the following:

- a. The Applicants provide notice to Docket Control within thirty (30) days following completion of the proposed transactions in this Application.
- b. That Ionex file tariff updates, within thirty (30) days of the effective date of a Decision in this matter, to incorporate the rates, terms and conditions of services provided to transferred Primus customers.

Finally, based on the above, Staff recommends a waiver of A.A.C. R14-2-1901 et seq., in connection with the transfer of Primus' customers in Arizona to Ionex.

*for*  
  
Thomas M. Broderick  
Director  
Utilities Division

TMB:LLMnr\CHH

ORIGINATOR: Lori Morrison

1 **BEFORE THE ARIZONA CORPORATION COMMISSION**

2 DOUG LITTLE

Chairman

3 BOB STUMP

Commissioner

4 BOB BURNS

Commissioner

5 TOM FORESE

Commissioner

6 ANDY TOBIN

Commissioner

7  
8 IN THE MATTER OF THE APPLICATION )  
9 OF IONEX COMMUNICATIONS NORTH, )  
10 INC D/B/A BIRCH COMMUNICATIONS )  
11 FOR APPROVAL OF WAIVER OF )  
12 SLAMMING RULES AND TRANSFER OF )  
13 CUSTOMERS FROM PRIMUS )  
14 TELECOMMUNICATIONS, INC. )

DOCKET NO. T-03864A-16-0052

T-03243A-16-0052

DECISION NO. \_\_\_\_\_

ORDER

13 Open Meeting

June 14 and 15, 2016

14 Phoenix, Arizona

15 BY THE COMMISSION:

16 FINDINGS OF FACT

17 1. On February 12, 2016, Ionex Communications North, Inc. dba Birch Communications  
18 (“Ionex”) and Primus Telecommunications, Inc. (“Primus”), (together the “Applicants”), filed a joint  
19 application requesting approval from the Arizona Corporation Commission (“Commission”) for a  
20 waiver of Arizona Administrative Code (“A.A.C”) R14-2-1901 to -1913, the “Slamming Rules”, in  
21 connection with the transfer of Primus’ customers in Arizona to Ionex. This Application included a  
22 copy of the draft notice that was to be sent to Primus customers.

23 2. On May 3, 2016, Ionex filed a Supplement to the Application indicating that the  
24 transaction described in the initial Application has not closed with respect to Arizona customers and  
25 assets and that the draft notice included with the original Application was not sent to Arizona  
26 customers. Instead, a revised notice was sent to Primus residential and business customers in Arizona  
27 during the last week of March. Primus’ residential customers received the initial revised notice in  
28 error. Consequently, a revised residential customer notice was subsequently sent to Arizona

1 residential customers which clarified: (a) what Primus residential customers could expect, (b) informed  
2 customers that Ionex would use the Primus brand name in delivering residential services, and (c)  
3 provided phone numbers customers could use to contact Primus or Ionex.

4 3. In support of this filing, Applicants provide the following information.

5 **Description of the Applicants**

6 *Ionex Communications North, Inc. dba Birch Communications*

7 4. Ionex is a South Dakota corporation with headquarters located at 3060 Peachtree  
8 Road NW, Suite 1065, Atlanta, Georgia 30305. Ionex was issued a Certificate of Convenience and  
9 Necessity ("CC&N") by the Arizona Corporation Commission ("Commission") to provide local  
10 exchange and interexchange telecommunications services on January 29, 2014.<sup>1</sup> Ionex is a wholly  
11 owned subsidiary of Birch Communication, Inc. ("BCI"), a Georgia corporation with headquarters  
12 located at 3060 Peachtree Road NW, Suite 1065, Atlanta, Georgia 30305. BCI and its subsidiaries are  
13 authorized to provide telecommunications services to both residential and business customers in 50  
14 states and the District of Columbia.

15 *Primus Telecommunications, Inc.*

16 5. Primus is a Delaware corporation with corporate headquarters at 805 Wright Brothers  
17 Boulevard, Cedar Rapids, Iowa 52404. Primus was issued a CC&N by the Commission to provide  
18 interexchange telecommunications services on May 30, 2001.<sup>2</sup> Primus serves approximately 200-250  
19 long distance customers in Arizona.

20 6. On January 21, 2016, Primus filed a petition under Chapter 15 of the United States  
21 Bankruptcy Code, which resulted in the pro forma transfer of Primus' Arizona authorization to  
22 Primus Telecommunications, Inc., Debtor-in-Possession.<sup>3</sup> During the restructuring process, which  
23 will allow Primus to remain in possession and control of its current and future assets, undertaking and  
24 properties, and the proceeds thereof while it completes a sale of its business. Primus will continue to  
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27 <sup>1</sup> See Decision No. 74295, Docket No. T-03864A-13-0051.

28 <sup>2</sup> See Decision No. 63529, Docket No. T-03243A-96-0443.

<sup>3</sup> In re PT Holdco, Inc., et al., Case No. 16-10131 (LSS)(D. Del. Jan. 21, 2016).

1 operate as debtor-in-possession in the ordinary course of business. No substantive change in  
2 ownership or control of Primus has taken place as a result of the bankruptcy filing.

### 3 **The Proposed Transaction**

4 7. The Applicants state that on January 18, 2016, BCI and Primus entered into an Asset  
5 Purchase Agreement (“Agreement”) pursuant to which BCI will purchase certain assets and customers  
6 of Primus, including certain customer accounts and receivables, certain customer agreements and  
7 contracts, certain vendor agreements and contracts, certain equipment, and certain intellectual  
8 property (the “Transaction”). BCI, however, will not assume any of Primus’ pre-closing liabilities or  
9 obligations.

10 8. Following approval of the proposed Transaction, Ionex states it will file any necessary  
11 tariff revisions to incorporate Primus’ current services and rates so that affected customers will  
12 continue to receive the same services that they currently received without any immediate changes to  
13 their service offerings or rates. The ownership structure of BCI and Ionex will not be affected by the  
14 Transaction. Ionex will also incorporate into its tariff the rates, terms and conditions of services  
15 currently provided to Primus customers. The transfer is designed to be seamless as there will be no  
16 change to the affected customer’s rates, terms and conditions and there will be no charge to the  
17 transferred customers for the transfer of service.

18 9. Upon completion of the Transaction and the migration of customers, Primus will no  
19 longer offer telecommunications services in Arizona. Primus will request cancellation of its CC&N  
20 and tariffs in a separate application once the Parties inform the Commission that the Transaction has  
21 been consummated.

### 22 **Request for Waiver of Slamming Rules**

23 10. Applicants request a waiver of A.A.C. R14-2-1901, et seq., generally and R14-2-1904  
24 and R14-2-1905 specifically, as those rules may apply to this transaction. This transaction is designed  
25 to be seamless to the former Primus customers insofar as there will be no immediate change to  
26 customers’ rates, terms, and conditions of service and the transfer will occur with no change to  
27 customers as they transition to Ionex. Ionex will incorporate into its tariff the rates, terms and  
28 conditions of services currently provided to Primus customers. Ionex will assume all managerial,

1 technical and financial responsibilities in connection with providing service to the former Primus  
2 customers.

3 11. In accordance with the rules and procedures of the FCC and applicable state(s),  
4 including this Commission, customers have been notified of the proposed transaction and the change  
5 in their telecommunications provider from Primus to Ionex. In a filing with the FCC, the Applicants  
6 attest<sup>4</sup> that affected customers were provided direct customer notice of the transfer pursuant to  
7 Section 64.1120(e) of the FCC's rules 47 C.F.R. §64.1120(e), a copy of which is attached to the  
8 Application as Exhibit 1 and attached to the Supplement to the Application as Exhibits A and B.  
9 Applicants request, to the extent necessary, that the Commission grant a waiver of A.A.C. R14-2-1904  
10 *et seq.* (the "Slamming Rules") and any other applicable anti-slamming regulations that may be  
11 consistent with the FCC's rules regarding the transfer of customer bases.

#### 12 **Staff's Recommendation for Waiver of Slamming Rules**

13 12. Staff has reviewed the notice that was sent to the affected customers. The notice  
14 informs customers that the rates, terms and conditions of service will not change as a result of the  
15 proposed transactions and informs customers that they may subscribe to the telecommunications  
16 service provider of their choice. The Applicants also state in their application that affected customers  
17 will continue to receive the same services they currently receive and that the transfer is designed to be  
18 seamless to those customers. Given the nature of this transaction and the notice to the affected  
19 customers, Staff believes the Commission's Slamming Rules should be waived in this matter.

#### 20 **Complaints and Compliance**

21 13. The Compliance Section of the Utilities Division reports the Applicants are in  
22 compliance. The Consumer Services Section of the Utilities Division reports that from January 1,  
23 2013 to May 20, 2016 there have been no complaints or opinions concerning Ionex. However, for the  
24 same time period, Consumer Services shows there has been one (1) complaint about billing against  
25 Primus, which was resolved. According to the Corporations Division, Ionex is in good standing but  
26 Primus is not for failure to file its 2016 Annual Corporation Report. Primus filed its 2015 Utilities

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28 <sup>4</sup> Copy of Notification of Birch Communications, Inc. and Primus Telecommunications, Inc. pursuant to 47 C.F.R. §  
64.1120(e), identified as Exhibit C of the Supplement to Application filed on May 3, 2016.

1 Annual Report in April, 2016 but Ionex has not filed its 2015 Utilities Annual Report with the Utilities  
2 Division.

### 3 **Staff Recommendations**

4 14. Staff recommends approval of the Application for Ionex to acquire the Arizona  
5 customers of Primus.

6 15. Staff further recommends that approval be conditioned on the following:

7 A. The Applicants provide notice to Docket Control within thirty (30) days  
8 following completion of the proposed transactions in this Application;

9 B. That Ionex file tariff updates, within thirty (30) days of the effective date of a  
10 Decision in this matter, to incorporate the rates, terms and conditions of  
services provided to transferred Primus customers.

11 16. Finally, based on the above, Staff recommends a waiver of A.A.C. R14-2-1901 et seq.,  
12 in connection with the transfer of Primus' customers in Arizona to Ionex.

### 13 CONCLUSIONS OF LAW

14 1. Ionex Communications North, Inc. dba Birch Communications and Primus  
15 Telecommunications, Inc. are public service corporations within the meaning of Article XV of the  
16 Arizona Constitution.

17 2. The Commission has jurisdiction over Ionex Communications North, Inc. dba Birch  
18 Communications and Primus Telecommunications, Inc. and the subject matter of this filing.

19 3. The Commission, having reviewed the filing and Staff's Memorandum dated May 31  
20 2016, concludes that it is in the public interest to grant approval as proposed and discussed herein.

### 21 ORDER

22 IT IS THEREFORE ORDERED that the request by Ionex Communications North, Inc. dba  
23 Birch Communications and Primus Telecommunications, Inc. for a waiver of A.A.C. R14-2-1901 et  
24 seq., the Commission's Slamming Rules, is hereby approved in conjunction with the proposed  
25 transaction.

26 IT IS FURTHER ORDERED that within thirty (30) days following the closing of the  
27 proposed transaction, Ionex Communications North, Inc. dba Birch Communications and Primus  
28

1 Telecommunications, Inc. shall inform the Commission, by filing an affidavit with Docket Control,  
2 that the transaction has closed and the proposed transfer has been consummated. .

3 IT IS FURTHER ORDERED that Ionex Communications North, Inc. dba Birch  
4 Communications file an updated tariff, within thirty (30) days of the effective date of a Decision in  
5 this matter, to incorporate the rates, terms and conditions of service that were included in the Primus  
6 Telecommunications, Inc. tariff.

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

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9 **BY THE ORDER OF THE ARIZONA CORPORATION COMMISSION**

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CHAIRMAN

COMMISSIONER

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COMMISSIONER

COMMISSIONER

COMMISSIONER

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IN WITNESS WHEREOF, I, JODI JERICH, Executive  
Director of the Arizona Corporation Commission, have  
hereunto, set my hand and caused the official seal of this  
Commission to be affixed at the Capitol, in the City of  
Phoenix, this \_\_\_\_\_ day of \_\_\_\_\_, 2016.

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\_\_\_\_\_  
JODI JERICH  
EXECUTIVE DIRECTOR

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DISSENT: \_\_\_\_\_

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DISSENT: \_\_\_\_\_

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TMB:LLM:nr\CHH

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1 SERVICE LIST FOR: IONEX COMMUNICATIONS NORTH, INC. DBA BIRCH  
COMMUNICATIONS AND PRIMUS TELECOMMUNICATIONS, INC.  
2 DOCKET NOS. T-03864A-16-0052 AND T-03243A-16-0052

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19 Mr. Dwight Nodes  
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