

**THE STATE OF NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION**

DT 18-012

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

**COMMISSION STAFF'S OBJECTION TO REQUEST FOR
RECONSIDERATION AND REQUEST FOR RULE WAIVER**

Staff of the Public Utilities Commission (Staff) hereby objects to the Request for Reconsideration (Request) filed on February 20, 2018 by Birch Communications, Inc. (Birch), pursuant to N.H. Code Admin. Rules Puc 203.07(f) and the Commission's secretarial letter issued on February 27, 2018, and Staff further recommends that the Commission deny the waiver of Puc 404.03 requested by Birch in the Request. In support thereof, Staff states as follows:

1. Birch's Application Was Properly Denied Under Puc 404.03(a)(1) and (2)

Birch has requested reconsideration of the Commission's denial of its application for authority to provide voice service in New Hampshire, on the grounds that the existence of the Consent Decree (Consent Decree)¹ approved by order of the Federal Communications Commission (FCC) in December 2016 does not provide a basis for denial under either Puc 404.03(a)(1) or Puc 404.03(a)(2). Request at 2. The Consent Decree addressed numerous allegations of "slamming" and "cramming" against Birch and, among other things, required Birch to pay customer refunds, implement a multi-year compliance plan, and pay a "civil penalty" of \$4.2 million to the FCC. *Id.* at 4.

Birch characterizes the Consent Decree as a negotiated settlement agreement containing no admission of liability regarding the allegations addressed, and therefore argues that the amount required to be paid thereunder "is not a civil, criminal, or regulatory sanction or penalty

¹ Order DA 16-1458: *In the Matter of Birch Communications, Inc.*, 31 FCC Rcd. 13510 (2016).

against Birch as contemplated by New Hampshire regulation.” *Id.* at 5. Birch further maintains that the Consent Decree does not demonstrate that it “committed an act that would constitute good cause to find a violation under [Commission] rules,” as contemplated in Puc 404.03(a)(1). *Id.* Birch emphasizes that “[t]here 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,” nor has the Commission made any such finding after notice and hearing with respect to New Hampshire rules. *Id.* at 5-6.

Staff believes that the Commission correctly decided to deny Birch’s voice service application under Puc 404.03(a)(1) and (2). The \$4.2 million civil penalty required to be paid by Birch pursuant to the FCC’s order approving the Consent Decree is properly viewed as a “regulatory sanction or penalty” under a “federal consumer protection law or regulation,” as those terms are used in Puc 404.03(a)(2). The numerous instances of alleged “slamming” and “cramming” covered by the Consent Decree, moreover, represent acts that would violate the provisions of Puc 405 .02 and 405.04 if they were committed in New Hampshire, and therefore provide grounds for application denial under Puc 404.03(a)(1). Birch’s request for reversal of the decision to deny its application therefore should be denied.

2. The Requested Waiver of Puc 404.03 Would Not Serve the Public Interest

In the Request, Birch has also included a request for waiver of the Puc 404.03 standards for voice service application denial, presumably as an alternative if the Commission’s decision to deny its application is not reconsidered and reversed. *Id.* at 6. Birch correctly notes that, under Puc 201.05, the Commission shall waive the provisions of any of its rules if it finds 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.

Id. at 6-7. In support of its argument that a rule waiver would serve the public interest, Birch provides more factual details regarding a pending transaction between Birch, Fusion Telecommunications International, Inc., and Network Billing Systems LLC. *Id.* at 8. In the Request, Birch also provides additional factual information regarding the status of its implementation of the multi-year compliance plan required under the Consent Decree, including related compliance training, reporting, and monitoring activities. *Id.* at 6. Birch asserts that implementation of its 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.” *Id.*

In view of the factual nature of the analysis relevant to any “public interest” determination required to grant a rule waiver, Staff believes the Commission should be aware of additional factual information regarding Birch’s regulatory compliance record and the status of its ongoing efforts to improve its compliance with consumer protection laws and rules. In addition to the Consent Decree, Birch was also the subject of a class action lawsuit brought pursuant to the federal Telecommunications Consumer Protection Act (TCPA) in *Abante Rooter and Plumbing Inc. v. Birch Communications, Inc.*, Case No. 1:15-cv-03562-AT, in the U.S. District Court for the Northern District of Georgia. Pursuant to the terms of a settlement reached in that matter, Birch reportedly has established a \$12 million fund to be distributed to class members that submit valid and timely claims. The resolution of that class action lawsuit may also represent a sanction or penalty under a state or federal consumer protection law or regulation as described in Puc 404.03(a)(2).

Staff's review of FCC public records has also revealed that, in the years prior to the Consent Decree from 2007-2015,² Birch was the subject of 68 consumer complaints for "slamming" or "cramming" that resulted in orders issued by the FCC's Consumer & Governmental Affairs Bureau (CGB). Of those 68 complaints, 66 were granted, and, in 60 of those, non-paying complainants were found to be entitled to "absolution" for the charges assessed without authorization. In 6 instances, Birch was required to pay an amount equal to 150% of the charges it had assessed to the complainants, pursuant to 47 C.F.R. §64.1170 of the FCC's rules.³ The enhanced liability imposed on Birch by CGB order under the FCC's rule might also be considered a "regulatory sanction or penalty" pursuant to a "state or federal consumer protection law or regulation," within the ambit of Puc 404.03(a)(2). The number and nature of customer complaints required to be resolved by CGB order during the time period reviewed are indicative of a concerning record of non-compliance with consumer protection laws and rules well prior to the two-year period covered by the Consent Decree. Staff understands that complaints made to the CGB are subject to a two-year limitations period, so no inference should be drawn from the absence of CGB orders addressing 2017 complaints.

With respect to Birch's efforts to improve its compliance following FCC approval of the Consent Decree, during a recent telephone conference call with Staff, a senior representative of

² Staff notes that the Consent Decree encompasses customer complaints within the 24 months preceding its effective date in December 2016, so any complaints prior to December 2014, such as those subject to the FCC orders cited below, would not be covered by the Consent Decree. With respect to complaints covered by the Consent Decree, Birch is required to issue refunds to all customers that filed slamming and cramming complaints during the two-year period.

³ See *In the Matter of Birch Communications Complaints Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, DA-13-1131 (May 17, 2013); *In the Matter of Birch Communications Complaints Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, DA-13-1827 (August 28, 2013) (order covers two complaints); *In the Matter of Birch Communications Complaints Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, DA-13-1889 (September 13, 2013); and *In the Matter of Birch Communications Complaints Regarding Unauthorized Change of Subscriber's Telecommunications Carrier*, DA-13-2487 (January 6, 2014) (order covers two complaints). A copy of the first order referenced above is attached to this Objection as Appendix A.

Birch indicated that the volume of customer complaints had decreased since the elements of the FCC-required compliance plan were initiated. The Birch representative acknowledged, however, that the complaint levels remain higher than Birch would like to see.

The additional factual information described above suggests there has been a long history of "slamming" and "cramming" on the part of Birch that it is currently working to resolve but has not yet overcome. Staff therefore believes the public interest would not be served by granting the waiver of Puc 404.03 requested by Birch.

Based on the foregoing, Staff respectfully requests that the Commission deny the Request for Reconsideration filed by Birch Communications, Inc. on February 20, 2018, and also deny the waiver of Puc 404.03 requested by Birch in that Request for Reconsideration.

Respectfully,

STAFF OF THE NEW HAMPSHIRE
PUBLIC UTILITIES COMMISSION

Date: March 6, 2018

By: David K. Wiesner
David K. Wiesner, Esq.
Staff Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to Request for Reconsideration and Request for Rule Waiver has this day been served by electronic mail to all persons named on the official service list for this docket.

Dated: March 6, 2018


David K. Wiesner, Esq. (N.H. Bar No. 6919)