

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of)
)
Birch Communications, Inc.) File No.: EB-TCD-15-00020193
) Acct. No.: 201732170003
) FRN: 0005044375

ORDER

Adopted: December 29, 2016

Released: December 29, 2016

By the Chief, Enforcement Bureau:

1. The Enforcement Bureau (Bureau) of the Federal Communications Commission has entered into a Consent Decree to resolve its investigation into whether Birch Communications, Inc. (Birch) engaged in deceptive marketing practices, changed the long distance carriers of numerous consumers without their authorization and without proper verification ("slamming"), and charged consumers for long distance service and fees that they never authorized ("cramming"). Slamming and cramming are egregious, deceptive business practices that result in consumers paying for services they never requested and then expending great time and personal effort to return to their preferred carriers. These practices are particularly troubling when coupled with deceptive marketing that takes advantage of consumer trust.

2. Birch is a common carrier that is authorized to provide local exchange service and domestic and international long distance telecommunications service.1 Headquartered in Atlanta, Birch and its wholly owned subsidiaries provide service to both business and residential consumers in all 50 states and the District of Columbia. The Bureau reviewed hundreds of consumer complaints filed with the Commission, the Better Business Bureau, and state regulatory authorities. The consumer complaints alleged that Birch's telemarketers repeatedly misrepresented their identity and the purpose of their telemarketing calls, including claiming to be affiliated with the consumers' own carriers, in order to switch consumers to Birch's service and place unwanted charges on their bills. Many complainants alleged that Birch assessed substantial early termination fees when they cancelled the unauthorized and unwanted service from Birch. Complainants, including small businesses and law offices, alleged that they endured considerable hardship when trying to return to their preferred carriers and restore the services they had before the unauthorized carrier switches.

1 See International Authorizations Granted, Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests, Public Notice, IB File No. ITC-214-19970926-00584 (Oct. 7, 2010). Birch identified the following as wholly owned subsidiaries of Birch and stated that each of the subsidiaries either holds international 214 authority or operates pursuant to Birch's international authority and all are registered to provide interstate telecommunications services: Birch Communications of Virginia, Inc.; Birch Communications of Kentucky, LLC; Cbeyond Communications, LLC; Birch Telecom, Inc.; Birch Telecom of the South, Inc.; Birch Telecom of the West, Inc.; Birch Telecom of the Great Lakes, Inc.; Birch Telecom of Missouri, Inc.; Birch Telecom of Oklahoma, Inc.; Birch Telecom of Texas Ltd, LLP; Birch Telecom of Kansas, Inc.; Birch Communications of the Northeast, Inc.; Ionex Communications, Inc.; Ionex Communications South, Inc.; Ionex Communications North, Inc.; and Tempo Telecom, LLC. See Letter from Vincent M. Oddo, President and Chief Executive Officer, Birch Communications, Inc., to Marlene Dortch, FCC Secretary (Feb. 26, 2016) at 5-6 (on file in EB-TCD-15-00020193) (identifying, in addition to the Birch IB File Number above: IB File No. ITC-214-20130716-00198; IB File No. ITC-214-20001016-00619; IB File No. ITC-214-19990701-00441; and IB File No. ITC-214-20130411-00107).

3. To settle this matter, Birch will issue refunds to all consumers that filed slamming and cramming complaints during the two-year period covered by the Bureau's investigation. As represented in the Consent Decree, Birch has agreed to issue refunds and credits of at least \$1,900,000 to consumers. Birch will also pay a \$4,200,000 civil penalty and implement a compliance plan to ensure that its customers have authorized switching their preferred carrier to Birch and being charged for Birch's service. Finally, Birch will file regular reports with the Bureau to track its compliance with the Consent Decree and its consumer protection obligations.

4. After reviewing the terms of the Consent Decree and evaluating the facts before us, we find that the public interest would be served by adopting the Consent Decree and terminating the referenced investigation into Birch's compliance with Sections 258 and 201(b) of the Communications Act of 1934, as amended (Act),² and Section 64.1120 of the Commission's rules (Rules).³

5. In the absence of material new evidence relating to this matter, we do not set for hearing the question of Birch's basic qualifications to hold or obtain any Commission license or authorization.⁴

6. Accordingly, **IT IS ORDERED** that, pursuant to Section 4(i) of the Act⁵ and the authority delegated by Sections 0.111 and 0.311 of the Rules,⁶ the attached Consent Decree **IS ADOPTED** and its terms incorporated by reference.

7. **IT IS FURTHER ORDERED** that the above-captioned matter **IS TERMINATED**.

8. **IT IS FURTHER ORDERED** that a copy of this Order and Consent Decree shall be sent by first class mail and certified mail, return receipt requested, to Birch Communications, Inc., 140 Gateway Drive, Suite A, Macon, GA 31210, and to Angela Collins, Esq., Cahill Gordon & Reindel, 1990 K Street, NW, Suite 950, Washington, DC 20006.

FEDERAL COMMUNICATIONS COMMISSION

Travis LeBlanc
Chief
Enforcement Bureau

² 47 U.S.C. § 201(b).

³ 47 CFR § 64.1120 *et seq.*

⁴ *See* 47 CFR § 1.93(b).

⁵ 47 U.S.C. § 154(i).

⁶ 47 CFR §§ 0.111, 0.311.

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) Acct. No.: 201732170003
) FRN: 0005044375

CONSENT DECREE

1. The Enforcement Bureau (Bureau) of the Federal Communications Commission (Commission), and Birch Communications, Inc. (Birch), by their authorized representatives, hereby enter into this Consent Decree for the purpose of resolving and terminating the Bureau’s investigation into Birch’s compliance with Sections 201(b) and 258 of the Communications Act of 1934, as amended (Act or Communications Act),¹ and Section 64.1120 of the Commission’s rules (Rules).²

I. DEFINITIONS

- 2. For the purposes of this Consent Decree, the following definitions shall apply:
(a) “Act” or “Communications Act” means the Communications Act of 1934, as amended.³
(b) “Adopting Order” means an order of the Bureau adopting the terms of this Consent Decree without change, addition, deletion, or modification.
(c) “Affiliate” shall have the meaning defined in 47 U.S.C. § 153(2).
(d) “Bill” means a Consumer invoice for wireline telephone exchange services, whether electronic, paper, or any other form. “Billing,” “Billed,” or any other use of the defined term incorporates the definition of Bill.
(e) “Birch” or “Company” means Birch Communications, Inc., its Affiliates, and its successors-in-interest insofar as it engages in the provision of telephone exchange, toll, or interexchange services.
(f) “Bureau” means the Enforcement Bureau of the Federal Communications Commission.
(g) “Commission” and “FCC” mean the Federal Communications Commission and all of its bureaus and offices.
(h) “Communications Laws” means, collectively, the Act, the Rules, and the published and promulgated orders and decisions of the Commission to which Birch is subject by virtue of its business activities, including but not limited to Sections 201 and 258 of the Act and Sections 64.1100 through 64.1195 of the Rules.
(i) “Compliance Plan” means the compliance obligations, programs, and procedures described in this Consent Decree at paragraph 17.

¹ 47 U.S.C. §§ 201(b), 258.

² 47 CFR § 64.1120.

³ 47 U.S.C. § 151 et seq.

- (j) “Consumer” means a current or former customer, subscriber, or purchaser of Birch Services for which charges are placed on the Consumer’s Birch Telephone Bill.
- (k) “Consumer Complaint” means any complaint (whether written, electronic, or made over the telephone) that Birch receives from a Consumer, a billing aggregator, a local exchange carrier, the Better Business Bureau, or a federal or state regulatory agency alleging that Birch: (1) submitted or executed an Unauthorized Change; (2) charged the Consumer for Services the Consumer did not authorize; (3) failed to release all of a Consumer’s telephone lines after the Consumer has advised Birch that he or she is switching Service to another carrier; or (4) misled the Consumer about Birch’s Services or identity during the marketing of Birch’s Services.
- (l) “Covered Personnel” means all employees and agents of Birch who perform, or supervise, oversee, or manage the performance of duties that relate to Birch’s responsibilities under the Communications Laws, including the Slamming Rules, Section 201(b) of the Act, and this Consent Decree, and includes customer service representatives, Sales Representatives, and Verifiers.
- (m) “Early Termination Fee” or “ETF” means any charge assessed to a Consumer for cancelling, terminating, stopping, or discontinuing a contract for Service with Birch when such contract has a term longer than month-to-month.
- (n) “Effective Date” means the date by which both the Bureau and Birch have signed this Consent Decree.
- (o) “Investigation” means the investigation commenced by the Bureau on January 16, 2016, in File No. EB-TCD-15-00020193, regarding Birch’s compliance with Sections 201 and 258 of the Act and Section 64.1120 of the Rules.⁴
- (p) “Operating Procedures” means the standard, internal operating procedures and compliance policies established by Birch to implement the Compliance Plan.
- (q) “Parties” means Birch and the Bureau, each of which is a “Party.”
- (r) “Person” shall have the meaning defined in 47 U.S.C. § 153(39).
- (s) “Rules” means the Commission’s regulations found in Title 47 of the Code of Federal Regulations.
- (t) “Sales Representative” means any Person Birch engages as an employee, independent contractor, or otherwise, to market, sell, attempt to sell, or otherwise engage in any activity to solicit consumers to sign up for or purchase its Services.
- (u) “Service” means telephone exchange service, telephone toll service, and interexchange telephone services as defined by the Act and 47 CFR § 69.2(s).
- (v) “Slamming Rules” means the Rules set forth at 47 CFR § 64.1120 *et seq.*
- (w) “Unauthorized Change” shall have the meaning defined in 47 CFR § 64.1100(e).
- (x) “Unauthorized Charge” means any charge placed on a Consumer’s Bill without the Consumer’s authorization.
- (y) “Verifier” means each independent third-party Birch engages to verify, or attempt to verify, that any buyer or potential buyer of a Birch Service has authorized the purchase of such Service as set forth in 47 CFR § 64.1120(c)(3).

⁴ Subpoena to Birch Communications, Inc., File No. EB-TCD-15-00020193 (Jan. 16, 2016) (Subpoena).

II. BACKGROUND

3. Section 201(b) of the Act states that “[a]ll charges, practices, classifications, and regulations for and in connection with [interstate or foreign] communication service [by wire or radio], shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.”⁵ The Commission has held that unfair and deceptive marketing practices by interstate common carriers, and misrepresentations about a carrier’s identity or the nature of its service to obtain a consumer’s authorization to change his or her preferred long distance carrier, constitute unjust and unreasonable practices under Section 201(b) of the Act.⁶ The Commission has also held that the inclusion of Unauthorized Charges and fees on consumers’ telephone bills is an “unjust and unreasonable” practice under Section 201(b) known as “cramming.”⁷

4. Section 258 of the Act makes it unlawful for any telecommunications carrier to engage in the practice of “slamming” by “submit[ing] or execut[ing] a change in a subscriber’s selection of a provider of telephone exchange service or telephone toll service except in accordance with such verification procedures as the Commission shall prescribe.”⁸ Section 64.1120 of the Rules prohibits carriers from submitting a request to change a consumer’s preferred provider of telecommunications services before verifying authorization from the consumer.⁹

5. The Bureau alleges that Birch violated: (a) Section 201(b) of the Act for misrepresentations it made in connection with marketing calls to consumers; (b) Section 258 of the Act and Section 64.1120 of the Rules by submitting requests to switch Consumers’ long distance service providers without verifying their authorization in accordance with the Commission’s Slamming Rules (“slamming”); and (c) Section 201(b) of the Act by placing, or causing to be placed, Unauthorized Charges on Consumers’ telephone bills (“cramming”). Birch disputes these allegations.

6. Birch is a common carrier authorized to provide local exchange service and domestic and international long distance telecommunications service.¹⁰ Headquartered in Atlanta, Birch and its wholly owned subsidiaries provide service to both business and residential Consumers in all 50 states and the

⁵ 47 U.S.C. § 201(b).

⁶ See *Preferred Long Distance, Inc.*, Forfeiture Order, 30 FCC Rcd 13711 (2015).

⁷ See, e.g., *Long Distance Direct, Inc.*, *Apparent Liability for Forfeiture*, Memorandum Opinion and Order, 15 FCC Rcd 3297, 3302, para. 14 (2000).

⁸ 47 U.S.C. § 258(a).

⁹ 47 CFR § 64.1120(c)(1)-(3).

¹⁰ See *International Authorizations Granted, Section 214 Applications (47 C.F.R. § 63.18); Section 310(b)(4) Requests*, Public Notice, IB File No. ITC-214-19970926-00584 (Oct. 7, 2010). Birch identified the following as wholly owned subsidiaries of Birch and stated that each of the subsidiaries either holds international 214 authority or operates pursuant to Birch’s international authority and all are registered to provide interstate telecommunications services: Birch Communications of Virginia, Inc.; Birch Communications of Kentucky, LLC; Cbeyond Communications, LLC; Birch Telecom, Inc.; Birch Telecom of the South, Inc.; Birch Telecom of the West, Inc.; Birch Telecom of the Great Lakes, Inc.; Birch Telecom of Missouri, Inc.; Birch Telecom of Oklahoma, Inc.; Birch Telecom of Texas Ltd, LLP; Birch Telecom of Kansas, Inc.; Birch Communications of the Northeast, Inc.; Ionex Communications, Inc.; Ionex Communications South, Inc.; Ionex Communications North, Inc.; and Tempo Telecom, LLC. See Letter from Vincent M. Oddo, President and Chief Executive Officer, Birch Communications, Inc., to Marlene Dortch, FCC Secretary (Feb. 26, 2016) at 5-6 (on file in EB-TCD-15-00020193) (Subpoena Response) (identifying, in addition to the Birch IB File Number above: IB File No. ITC-214-20130716-00198; IB File No. ITC-214-20001016-00619; IB File No. ITC-214-19990701-00441; and IB File No. ITC-214-20130411-00107).

District of Columbia.¹¹ The Bureau reviewed more than 400 Consumer Complaints sent to Birch and/or filed with the Commission, the Better Business Bureau, and state regulatory authorities.

7. The complainants allege that Birch slammed or crammed them and many allege that Birch's third-party telemarketers deceived them when marketing Birch's Services. Some complainants allege that Birch's third-party telemarketers misrepresented their identity and the purpose of the telemarketing call, including claiming to be affiliated with the complainant's existing carrier and stating that they were calling to offer the complainant reduced rates, rather than disclosing they were calling to inquire whether the complainant would agree to switch the complainant's service provider to Birch. Some of the complainants allege they were improperly assessed an Early Termination Fee (ETF). Others allege that they properly cancelled Service on a business line according to the terms of the contract, but Birch released only some of the business's lines to the preferred carrier and continued to bill the business's other lines for Service (and subsequently assessed ETFs for those lines when they were finally released). Many complainants allege that after they were slammed by Birch, they were forced to pay Birch's fees in order to keep their telephone numbers, even though they had not authorized a carrier change to Birch in the first place.

8. Based on the number of Consumer Complaints regarding allegations of deceptive sales practices, unauthorized carrier switches and charges, and the assessment of ETFs, the Bureau initiated an Investigation and issued a Subpoena to Birch on January 16, 2016.¹² The Subpoena sought various documents and records, including evidence that Birch complied with the Commission's verification procedures prior to switching consumers' Service providers. Birch responded to the Subpoena and provided third party verification (TPV) recordings and follow up quality control call recordings maintained by Birch of Consumers' authorization to switch carriers. The Bureau reviewed the TPVs at issue to determine whether they complied with the Commission's verification procedures.

9. Birch contends that prior to and during the Investigation, Birch made several changes to business operations and leadership of the business including the replacement of its Chief Executive Officer and President, Chief Financial Officer, Chief Operations Officer, Chief Sales Officer, and General Counsel. In addition, during this period Birch made modifications to: the scripts required by contract to be used by third-party telemarketing vendors, its third-party verification process, and its quality control oversight policies for both.

10. The Parties entered into negotiations to resolve this matter, and this Consent Decree and its terms and conditions below are the result of such negotiations.

III. TERMS OF AGREEMENT

11. **Adopting Order.** The provisions of this Consent Decree shall be incorporated by the Bureau in an Adopting Order.

12. **Jurisdiction.** Birch agrees that the Bureau has jurisdiction over it and the matters contained in this Consent Decree and has the authority to enter into and adopt this Consent Decree.

13. **Effective Date; Violations.** The Parties agree that this Consent Decree shall become effective on the Effective Date. As of the Effective Date, the Parties agree that this Consent Decree shall have the same force and effect as any other order of the Commission. Any violation of the Adopting Order or of the terms of this Consent Decree shall constitute a violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

14. **Termination of Investigation.** 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

¹¹ See Subpoena Response at 1-2, 5-6.

¹² See generally Subpoena.

terms, conditions, and procedures contained herein. The Bureau further agrees that, in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any new proceeding, formal or informal, or to take any action on its own motion against Birch concerning the matters that were the subject of the Investigation. The Bureau also agrees that, in the absence of new material evidence, it will not use the facts developed in the Investigation through the Effective Date, or the existence of this Consent Decree, to institute, on its own motion, any proceeding, formal or informal, or to set for hearing the question of Birch's basic qualifications to be a Commission licensee or hold Commission licenses or authorizations.¹³

15. **Admissions.** The Parties agree, for the purpose of this Consent Decree, and in express reliance on the provisions of paragraph 14 herein, that paragraphs 3 through 10 contain a true and accurate description of the facts underlying the Investigation. It is the intent of the Parties that this Consent Decree shall not be used as evidence or precedent against Birch in any action or proceeding, except an action to enforce this Consent Decree.

16. **Compliance Officer.** Within thirty (30) calendar days after the Effective Date, Birch shall designate a senior corporate manager with the requisite corporate and organizational authority to serve as a Compliance Officer and to discharge the duties set forth below. The person designated as the Compliance Officer shall be responsible for developing, implementing, and administering the Compliance Plan and ensuring that Birch complies with the terms and conditions of the Compliance Plan and this Consent Decree. In addition to the general knowledge of the Communications Laws necessary to discharge his or her duties under this Consent Decree, the Compliance Officer shall have specific knowledge of the Slamming Rules and the Commission's decisions related to carrier marketing practices, misrepresentations about a carrier's identity or the nature of its service, and inclusion of Unauthorized Charges on consumers' telephone bills.

17. **Compliance Plan.** For purposes of settling the matters set forth herein, Birch agrees that it shall, within ninety (90) calendar days after the Effective Date, develop a Compliance Plan designed to ensure future compliance with the Communications Laws, including Sections 201(b) and 258 of the Act and Section 64.1100 *et seq.* of the Rules, and with the terms and conditions of this Consent Decree. The Compliance Plan shall include, at a minimum, the following components:

- (a) **Operating Procedures.** Within one hundred twenty (120) calendar days after the Effective Date, Birch shall establish Operating Procedures that the Compliance Officer and all Covered Personnel must follow to help ensure Birch's compliance with this Consent Decree, the Slamming Rules, and Section 201(b) of the Act with respect to its marketing practices and charges for Services.
- (b) **Compliance Manual.** Within ninety (90) calendar days after the Effective Date, Birch shall develop, use, and maintain a Compliance Manual, and distribute the same to all Covered Personnel. For any Person who becomes Covered Personnel more than ninety (90) calendar days after the Effective Date, Birch shall distribute the Compliance Manual to that Person within thirty (30) calendar days after the date such Person becomes Covered Personnel, and prior to such Person engaging with consumers with respect to Birch's Services. The Compliance Manual shall explain the requirements of this Consent Decree, the Slamming Rules, and Section 201(b) of the Act and shall instruct Covered Personnel to consult and follow the Operating Procedures to ensure Birch's compliance with the Communications Laws and this Consent Decree. Birch shall periodically review and revise the Compliance Manual to ensure that the information set forth therein remains current and complete. Birch shall distribute an updated Compliance Manual to all Covered Personnel within thirty

¹³ See 47 CFR § 1.93(b).

- (30) calendar days of making such revisions.
- (c) **Compliance Training Program.** Birch shall establish and implement a Compliance Training Program in compliance with this Consent Decree, the Slamming Rules, Section 201(b) of the Act, and the Operating Procedures. As part of the Compliance Training Program, Covered Personnel shall be advised of Birch's obligation to report any noncompliance with this Consent Decree, the Slamming Rules, and Section 201(b) of the Act under paragraph 18 of this Consent Decree and shall be instructed on how to disclose noncompliance to the Compliance Officer. All Covered Personnel shall be trained pursuant to the Compliance Training Program within one hundred twenty (120) calendar days after the Effective Date, except that any person who becomes Covered Personnel at any time after the initial Compliance Training Program shall be trained within thirty (30) calendar days after the date such person becomes Covered Personnel. Birch shall repeat compliance training on an annual basis, and shall periodically review and revise the Compliance Training Program as necessary to ensure that it remains current and complete.
- (d) **Consumer Redress for Unauthorized Charges.** Within ninety (90) calendar days after the Effective Date, Birch shall provide full refunds of all charges, including ETFs, incurred in connection with any Unauthorized Change or Unauthorized Charge to any Consumer who filed a Consumer Complaint within the twenty-four (24) months prior to the Effective Date of this Consent Decree.
- (e) **Cease Collection Activity.** Birch shall not send any disputed charges to collection or make any adverse credit report based on non-payment of any charges that a Consumer disputes by filing a Consumer Complaint unless and until the basis for any such Consumer Complaint has been investigated and resolved to the satisfaction of the Consumer. For any Consumer who subscribed to Birch Services in response to an outbound marketing call within the twenty-four (24) month period prior to the Effective Date, and who filed a Consumer Complaint within one hundred twenty (120) calendar days of receiving their first Bill for Service, Birch shall cancel any charges sent to collection and shall take all steps necessary to suspend any actions taken that would adversely affect a Consumer's credit report.
- (f) **Early Termination Fees and Release of Lines.** In addition to any applicable state or Federal law governing automatic renewal contracts, for all Consumers purchasing Service under contracts that include automatic renewal provisions for a term of one (1) year or more, Birch shall provide a notice to the Consumer at the time of contracting that the contract contains an automatic renewal provision and at least three subsequent notices (one each in the Consumer's last three Bills prior to the expiration of the then existing term) reminding the Consumer about the automatic renewal provision. Birch shall honor any request for non-renewal received prior to the expiration of the Consumer's then existing term and shall not charge an ETF for the non-renewed term. If a Consumer cancels, terminates, or discontinues Service, Birch shall also release all telephone lines associated with the Consumer's account to the Consumer's new telecommunications service provider consistent with Commission Rules. Consumers who were subscribed to Birch Services in response to an outbound marketing call and allege an Unauthorized Change or Unauthorized Charge within sixty (60) days of the invoice date of their first Bill for Service will not be charged an ETF if review of the Sales Representative, Verifier, and quality control call recordings by a Birch manager demonstrate that the Consumer was subjected to an Unauthorized Change or Unauthorized Charge.

- (g) **Additional Requirements for Consumer Complaints.** Within sixty (60) calendar days after the Effective Date, Birch shall also handle Consumer Complaints as follows:
- i. **Complaint Response.** Within two (2) business days of receiving any Consumer Complaint asserting an Unauthorized Change or Unauthorized Charge by Birch or its agent, or any Covered Personnel, Birch shall investigate the allegations and contact the complainant. Birch shall assist complainants who are subjected to an Unauthorized Change in re-establishing Service with his or her preferred carrier consistent with Commission Rules. For any Consumer who alleges an Unauthorized Change or Unauthorized Charge after the Effective Date, within thirty (30) days of Birch's receipt of the Consumer Complaint, Birch (1) shall refund all charges (recurring, non-recurring, penalties, fees, etc.) the complainant incurred in connection with any Unauthorized Change or Unauthorized Charge, or (2) may deny a refund provided that Birch (a) has Sales Representative, Verifier, and quality control call recordings demonstrating that the Consumer provided his or her consent to the alleged Unauthorized Change or Unauthorized Charge, (b) offers to provide such information to the Consumer, and, upon request, provides such information to the Consumer, and (c) provides the Consumer thirty (30) days to refute such information from the time it is received by the Consumer. Where the Consumer timely challenges the information, Birch shall promptly consider such information and either provide the Consumer with a refund or credit or respond to the Consumer giving reasons why it rejects the Consumer's response.
 - ii. **Complaint Retention.** Birch shall retain for the term of this Consent Decree all documents evidencing or relating to all Consumer Complaints, including the Consumer Complaints and Birch's responses thereto. Copies of such documents must be forwarded electronically to the Bureau within thirty (30) calendar days from the date of the Consumer Complaint and updated monthly until resolved. These documents evidencing or relating to Consumer Complaints must be submitted electronically to Erica.McMahon@fcc.gov and Mika.Savir@fcc.gov. These documents shall include, at a minimum, the following: all computer records, electronic or e-mail communications, and all written notes regarding such writings, verbal discussions, and electronic mail communications, as well as any relevant recordings, including all TPV recordings made during telephone conversations relating to the Consumer Complaint.
- (h) **Additional Requirements for the Marketing and Selling of Service.** Within sixty (60) calendar days after the Effective Date:
- i. **Scripts.** Birch shall require each Sales Representative and Verifier to use scripts when performing his or her duties as a Sales Representative or Verifier for Birch. The Sales Representative script shall require each Sales Representative at the outset of the call to clearly and promptly state to each buyer or potential buyer of Birch's Services that (A) the Sales Representative is a representative of Birch and not affiliated with the buyer or potential buyer's current long distance, international, or other toll carrier, and (B) the purpose of the call is to inquire whether the buyer or potential buyer is authorized to make a change to and wishes to change his or her long distance, international, or other toll service from his or her current preferred carrier to Birch. The Sales Representative instructions associated with the sales script shall prohibit the Sales Representative from (A) making any false or misleading statements to the Consumer regarding the Verifier or the role of the Verifier, and (B) instructing the Consumer how he or she should respond to the Verifier's questions. The

Verifier script shall require each Verifier to clearly and promptly state at the beginning of the verification process that the purpose of the call is to confirm the call recipient's intent to change preferred carriers for his or her long distance, international, or other toll service to Birch, and to obtain the call recipient's approval to effectuate such a carrier change.

- ii. **Recording of Sales Calls.** Birch shall record or require its Sales Representatives to record all sales calls made by such Sales Representatives acting for or on behalf of Birch. Birch shall retain for a minimum of two years all such recordings that result in Birch switching the Consumer's Service provider or charging the Consumer for Service and provide such recordings to the Commission upon request.
 - iii. **Monitoring.** Birch shall monitor, on a monthly basis, from both on-site and remote locations, no less than ten (10) percent of sales and seventy (70) percent of verification calls to ensure that Sales Representatives and Verifiers are carrying out their responsibilities in compliance with the Communications Laws and this Consent Decree.
- (i) **Changes of Subscribers' Preferred Carriers.** Beginning on the Effective Date, Birch shall, after submitting a request to change a subscriber's telecommunications service provider to Birch, confirm that the carrier change has been effected prior to charging and/or Billing the subscriber (directly or indirectly through an affiliate or third party) for any Service. Birch shall implement, maintain, and use procedures to ensure that it does not continue charging any subscriber who contacts Birch directly to cancel Service with Birch or contacts their local exchange carrier to switch Service from Birch to another carrier consistent with Commission Rules. Birch shall ensure that such procedures are incorporated in and made a part of its Operating Procedures. In addition, Birch shall submit any requests to change a Consumer's telecommunications service provider to Birch consistent with Commission Rules after verifying the subscriber's authorization to switch Consumer's service providers to Birch. Birch shall not use any third-party verification recording it relied on to submit a request to change a subscriber's carrier for any subsequent carrier change requests unless those subsequent requests are verified as authorized by TPV.

18. **Reporting Noncompliance.** Birch shall report any noncompliance with Section 201(b) of the Act, the Slamming Rules, and with the terms and conditions of this Consent Decree within fifteen (15) calendar days after discovery of such noncompliance. Such reports shall include a detailed explanation of: (a) each instance of noncompliance; (b) the steps that Birch has taken or will take to remedy such noncompliance; (c) the schedule on which such remedial actions will be taken; and (d) the steps that Birch has taken or will take to prevent the recurrence of any such noncompliance. All reports of noncompliance shall be submitted to the Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Rm. 4C-224, Washington, DC 20554, with a copy submitted electronically to Erica.McMahon@fcc.gov and Mika.Savir@fcc.gov.

19. **Compliance Reports.** Birch shall file compliance reports with the Commission six (6), twelve (12), eighteen (18), twenty-four (24), thirty (30), thirty-six (36), forty-eight (48), and sixty (60) months after the Effective Date.

- (a) Each Compliance Report shall include a detailed description of Birch's efforts during the relevant period to comply with the terms of this Consent Decree, Section 201(b) of the Act, and the Slamming Rules.
- (b) Each Compliance Report shall include a certification by the Compliance Officer, as an agent of and on behalf of Birch, stating that the Compliance Officer has personal

knowledge that Birch: (i) has established and implemented the Compliance Plan; (ii) has utilized the Operating Procedures since the implementation of the Compliance Plan; and (iii) is not aware of any instances of noncompliance with the terms and conditions of this Consent Decree, including the reporting obligations set forth in paragraph 18 of this Consent Decree.

- (c) The Compliance Officer's certification shall be accompanied by a statement explaining the basis for such certification and shall comply with Section 1.16 of the Rules,¹⁴ and be subscribed to as true under penalty of perjury in substantially the form set forth therein.
- (d) If the Compliance Officer cannot provide the requisite certification, the Compliance Officer, as an agent of and on behalf of Birch, shall provide the Commission with a detailed explanation of the reason(s) why and describe fully: (i) each instance of noncompliance; (ii) the steps Birch has taken or will take to remedy such noncompliance, including the schedule on which proposed remedial actions will be taken; and (iii) the steps that Birch has taken or will take to prevent the recurrence of any such noncompliance, including the schedule on which such preventive action will be taken.
- (e) All Compliance Reports shall be submitted to the Chief, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission, 445 12th Street, SW, Rm. 4-C224, Washington, DC 20554, with copies submitted electronically to Erica.McMahon@fcc.gov and Mika.Savir@fcc.gov.

20. **Termination Date.** The obligations set forth in paragraphs 16 through 19 of this Consent Decree shall expire sixty (60) months after the Effective Date.

21. **Section 208 Complaints; Subsequent Investigations.** Nothing in this Consent Decree shall prevent the Commission or its delegated authority from adjudicating complaints filed pursuant to Section 208 of the Act¹⁵ against Birch or its Affiliates for alleged violations of the Act, or for any other type of alleged misconduct, regardless of when such misconduct took place. The Commission's adjudication of any such complaint will be based solely on the record developed in that proceeding. Except as expressly provided in this Consent Decree, this Consent Decree shall not prevent the Commission from investigating new evidence of noncompliance by Birch with the Communications Laws.

22. **Civil Penalty.** Birch will pay a civil penalty to the United States Treasury in the amount of four million two hundred thousand dollars (\$4,200,000) to be paid in equal installments over the term of this Consent Decree. The first installment shall be due within thirty (30) calendar days after the Effective Date. The remaining installment payments shall be made quarterly payable on the last business day of the first month of each quarter beginning with the second quarter following the Effective Date. Birch shall send electronic notification of payment on the date such payment is made to Lisa Williford, Telecommunications Consumers Division, Enforcement Bureau, Federal Communications Commission at Lisa.Williford@fcc.gov. The payment must be made by check or similar instrument or wire transfer, and must include the Account Number and FRN referenced in the caption of the Adopting Order. Regardless of the form of payment, a completed FCC Form 159 (Remittance Advice) must be submitted.¹⁶ When completing FCC Form 159, Birch shall enter the Account Number in block number 23A (call sign/other

¹⁴ 47 CFR § 1.16.

¹⁵ 47 U.S.C. § 208.

¹⁶ An FCC Form 159 and detailed instructions for completing the form may be obtained at <http://www.fcc.gov/Forms/Form159/159.pdf>.

ID) and enter the letters “FORF” in block number 24A (payment type code). Below are additional instructions Birch must follow based on the form of payment selected:

- Payment by check or money order must be made payable to the order of the Federal Communications Commission. Such payments (along with the completed Form 159) must be mailed to Federal Communications Commission, P.O. Box 979088, St. Louis, MO 63197-9000, or sent via overnight mail to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101.
- Payment by wire transfer must be made to ABA Number 021030004, receiving bank TREAS/NYC, and account number 27000001. To complete the wire transfer and ensure appropriate crediting of the wired funds, a completed Form 159 must be faxed to U.S. Bank at (314) 418-4232 on the same business day the wire transfer is initiated.

Questions regarding payment procedures should be addressed to the Financial Operations Group Help Desk by phone at (877) 480-3201, or by e-mail to ARINQUIRIES@fcc.gov.

23. **Representation; Warranty.** Birch represents and warrants that within ninety (90) calendar days after the Effective Date it will have paid or credited to Consumers at least one million nine hundred thousand dollars (\$1,900,000) in redress in connection with Unauthorized Changes and Unauthorized Charges occurring within the twenty-four (24) months prior to the Effective Date of this Consent Decree.

24. **Waivers.** As of the Effective Date, Birch waives any and all rights they may have to seek administrative or judicial reconsideration, review, appeal, or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Adopting Order. Birch shall retain the right to challenge Commission interpretation of the Consent Decree or any terms contained herein. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Consent Decree or Adopting Order, the Parties shall not contest the validity of the Consent Decree or the Adopting Order, and Birch shall waive any statutory right to a trial *de novo*. Birch hereby agrees to waive any claims it may otherwise have under the Equal Access to Justice Act,¹⁷ relating to the matters addressed in this Consent Decree.

25. **Severability.** The Parties agree that if any of the provisions of the Consent Decree shall be held unenforceable by any court of competent jurisdiction, such unenforceability shall not render unenforceable the entire Consent Decree, but rather the entire Consent Decree shall be construed as if not containing the particular unenforceable provision or provisions, and the rights and obligations of the Parties shall be construed and enforced accordingly.

26. **Invalidity.** In the event that this Consent Decree in its entirety is rendered invalid by any court of competent jurisdiction, it shall become null and void and may not be used in any manner in any legal proceeding.

27. **Subsequent Rule or Order.** The Parties agree that if any provision of this Consent Decree conflicts with any subsequent Rule or Order adopted by the Commission (except an Order specifically intended to revise the terms of this Consent Decree to which Birch does not expressly consent) that provision will be superseded by such Rule or Order.

28. **Successors and Assigns.** Birch agrees that the provisions of this Consent Decree shall be binding on its successors, assigns, and transferees.

29. **Final Settlement.** The Parties agree and acknowledge that this Consent Decree shall constitute a final settlement between the Parties with respect to the Investigation. The Parties further agree that this Consent Decree does not constitute an adjudication on the merits or a legal or factual determination regarding Birch’s compliance or noncompliance with any law.

¹⁷ See 5 U.S.C. § 504; 47 CFR §§ 1.1501-1.1530.

30. **Modifications.** This Consent Decree cannot be modified without the advance written consent of all Parties.

31. **Paragraph Headings.** The headings of the paragraphs in this Consent Decree are inserted for convenience only and are not intended to affect the meaning or interpretation of this Consent Decree.

32. **Authorized Representative.** Each Party represents and warrants to the other that it has full power and authority to enter into this Consent Decree. Each person signing this Consent Decree on behalf of a Party hereby represents that he or she is fully authorized by the Party to execute this Consent Decree and to bind the Party to its terms and conditions.

33. **Counterparts.** This Consent Decree may be signed in counterpart (including electronically or by facsimile). Each counterpart, when executed and delivered, shall be an original, and all of the counterparts together shall constitute one and the same fully executed instrument.

Travis LeBlanc
Chief
Enforcement Bureau

Date

Gordon P. Williams, Jr.
Senior Vice President and General Counsel
Birch Communications, Inc.

Date