

BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the Matter of the Notification  
By Ionex Communications North, Inc.  
Dba Birch Communications and  
Ernest Communications, Inc., of the  
Transfer of Customers and Assets.

Docket No. 13-2563-03

~~~~~  
HEARING AND PROCEDURAL ORDER  
ADMINISTRATIVE LAW JUDGE REIF  
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TAKEN AT: Heber M. Wells  
160 East 300 South  
Salt Lake City, UT

DATE: September 10, 2013

TIME: 1:10 p.m.

REPORTED BY: Kellie Peterson, RPR

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APPEARANCES

FOR THE DIVISION:

Justin Jetter, Esq.

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ALSO APPEARING:

Christopher Bunce (telephonically)

Ron Slusher

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Hearing and Procedural Order

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September 10, 2013

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## PROCEEDINGS

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ADMINISTRATIVE LAW JUDGE REIF: My name is

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Melanie Reif. I am the administrative law judge for the Utah

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Public Service Commission, and this is the date and time for the

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hearing in Docket No. 13-2563-03, entitled, "In the matter of the

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notification by Ionex Communications North, Inc., dba Birch

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Communications and Ernest Communications, Inc., of the

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transfer of customers and assets."

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Notice of this hearing was previously provided, and

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at this time, we will start by taking appearances. Mr. Evans,

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would you like to start?

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MR. EVANS: Yes, thank you. I am William Evans

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of Parsons, Bahle and Latimer for the joint applicants Ionex

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Communications North dba Birch Communications and Ernest

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Communications, Inc.

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ADMINISTRATIVE LAW JUDGE REIF: Thank you.

19

And are you a companied by the telephone?

20

MR. EVANS: Yes, thank you. On the phone is also

21

counsel for the joint applicants, Angela Collins, and our witness,

22

Christopher Bunce.

23

ADMINISTRATIVE LAW JUDGE REIF: Thank you.

24

Mr. Jetter?

25

MR. JETTER: Justin Jetter, representing the Utah

1 Division of Public Utilities, and with me is Ron Slusher, Utah  
2 Division of Public Utilities technical consultant.

3 ADMINISTRATIVE LAW JUDGE REIF: Thank you,  
4 and welcome, everyone, and, again, my apologies and the  
5 apologies of the Commission for the delays and technical  
6 difficulties in getting started this afternoon. We appreciate your  
7 patience.

8 Mr. Evans, would you like to proceed, given this is  
9 your application?

10 MR. EVANS: Yes, thank you. On July 25, 2013,  
11 the joint applicants filed a joint notification for transfer of  
12 control, and that would be transfer of control from Ernest  
13 Communications to Ionex Communications. A couple weeks  
14 later, on August 2nd, the administrative law judge issued a  
15 Notice of Application comment period and hearing, and so we  
16 presume, as joint applicants, that the joint notification will be  
17 treated as an application for approval of the transfer of control,  
18 rather than merely a notification.

19 To that end, and to supplement the record pursuant  
20 to the Commission's Rule at R 746-349-7, I will -- I would like to  
21 ask some questions of our witness, Christopher Bunce, and  
22 proffer some documents in support of the application. May I call  
23 Mr. Bunce as a witness?

24 ADMINISTRATIVE LAW JUDGE REIF: Yes, you  
25 may, Mr. Evans. I just wanted to clarify, though, just in case

1 there was some confusion about the notification.

2 MR. EVANS: Yes.

3 ADMINISTRATIVE LAW JUDGE REIF: The  
4 notification is to adhere to the Utah Procedures Act and to notify  
5 the public, in general, about the filing and to give anyone an  
6 opportunity to comment. The Notice of Hearing is on the docket  
7 itself.

8 MR. EVANS: Yes.

9 ADMINISTRATIVE LAW JUDGE REIF: So it is not  
10 on the notice, if that created some confusion.

11 MR. EVANS: No, no. Yes, thank you for that. The  
12 applicants filed this matter as a notification, rather than an  
13 application, and so--

14 ADMINISTRATIVE LAW JUDGE REIF: I see.

15 MR. EVANS: So we need to supplement the record  
16 to meet the requirements of the rule, and so we are going to ask  
17 Mr. Bunce to offer some testimony and some documents so that  
18 you will have a proper record of which you can approve this  
19 application.

20 ADMINISTRATIVE LAW JUDGE REIF: Okay, very  
21 well. So just before we get into that, right now the Commission  
22 is reviewing this under 54-4-30, which is the provision that  
23 requires Commission consent for purchase and acquisition of  
24 securities or obligations between two public utilities. And if I  
25 understand you correctly, you are wanting to do something in

1 addition to that?

2 MR. EVANS: No, we think that is the proper  
3 statute.

4 ADMINISTRATIVE LAW JUDGE REIF: Okay.

5 MR. EVANS: Under which this should be  
6 adjudicative but the rule at 746-349-7 provides for an informal  
7 process for adjudication in certain CLEC and merger and  
8 applications and the criteria that should be included in the  
9 application are listed there.

10 ADMINISTRATIVE LAW JUDGE REIF: Okay.

11 MR. EVANS: And we didn't quite file that initially  
12 because it was filed as a notification rather than application, so  
13 what I am going to try to do today is supplement so that we have  
14 gone down the checklist in the rule and you can adjudicate this  
15 under the informal streamline procedures for CLEC in the rule,  
16 but we agree that this is a transaction subject to section  
17 54-4-30. I think you are right about that, yes.

18 ADMINISTRATIVE LAW JUDGE REIF: Yes.

19 MR. EVANS: And if I may, just the first paragraph  
20 of Rule 746-349-7 says this: a CLEC may obtain approval of the  
21 transaction subject to-- skipping over--54-4-30, acquiring  
22 properties in the following manner, and then it sets out a  
23 procedure for that, and that is what we intend to follow today.

24 ADMINISTRATIVE LAW JUDGE REIF: Okay, very  
25 good. And just for clarification so not to confuse the two, under

1 54-4-30, we do hold a hearing, and that, in part, is why the  
2 notice and hearing was issued in early August. So okay, very  
3 good. So you would like to call Mr. Bunce at this time?

4 MR. EVANS: Yes, please.

5 ADMINISTRATIVE LAW JUDGE REIF: Mr. Bunce,  
6 are you on the line?

7 MR. BUNCE: Yes.

8 ADMINISTRATIVE LAW JUDGE REIF: Mr. Evans, if  
9 you like, I will go ahead and swear him in now.

10 MR. EVANS: Yes, thank you.

11 CHRISTOPHER BUNCE, called as a witness and  
12 having been duly sworn, was examined and testified as follows:

13 ADMINISTRATIVE LAW JUDGE REIF: Thank you.  
14 Mr. Evans, you may proceed.

15 EXAMINATION

16 BY-MR.EVANS:

17 Q. Good afternoon, Mr. Bunce. Can you hear me all  
18 right?

19 A. Yes, I can.

20 Q. For the record, would you please state your name,  
21 your business address, and your position at Ionex  
22 Communications North, please?

23 A. Yes. I am Christopher Bunce, senior vice  
24 president, legal and general counsel for Ionex, and its parent  
25 company, Birch Communications, Inc. My office address is 2300



1 Main Street, Suite 340, Kansas City, Missouri, 64108.

2 Q. How long have you held that position at Ionex?

3 A. I have been general counsel for Birch Telecom,  
4 Inc., and its subsidiaries since 2006 and Birch Communications,  
5 Inc., since 2008. Prior to that, I held other positions at Birch  
6 and Ionex, as well as positions with other telecommunications  
7 companies prior to 2000.

8 Q. Okay. Have you reviewed the joint notification filed  
9 by Ionex and Ernest in this proceeding?

10 A. Yes, I have.

11 Q. And do you have personal knowledge of the matter  
12 setout in the notification?

13 A. Yes.

14 Q. But you are not the officer that signed it and  
15 verified the notification, are you?

16 A. No, that was Vincent Oddo, the chief executive  
17 officer and president of Birch and subsidiaries, including Ionex,  
18 but I am fully informed of the detail of the transaction and can  
19 attest to anything in the notification.

20 Q. Okay. For the purposes of the your testimony  
21 today, then, do you adopt the statements made in the  
22 notification as your own?

23 A. Yes.

24 Q. Are there any changes or corrections that should be  
25 made to the joint notification?

1 A. No.

2 Q. We notice that there is no witness on the phone  
3 today for Ernest. Mr. Bunce, did you attempt to locate someone  
4 from Ernest who could testify as a witness in this hearing today?

5 A. Yes, we could not find anybody who could fill the  
6 role of a witness from Ernest. Mr. Masters, Paul Masters, the  
7 CEO, who verified the documentation that was filed with the  
8 Utah Commission, he was an Ernest employee at the time, is no  
9 longer an Ernest employee, so he cannot act on their behalf, but  
10 going background of this transaction is partially closed. I  
11 believe none of their operational people are left at the company  
12 at Ernest have sufficient knowledge of the transaction to testify  
13 about it.

14 Q. Okay, thank you.

15 MR. EVANS: Your Honor, we would, in light of the  
16 absence of an Ernest witness, proffer the statement in the  
17 verified notification as testimony of Ernest in support of this  
18 application.

19 Q. Mr. Bunce, for the purpose of making our record  
20 here today, I would like to follow up with a couple of questions  
21 that will help us satisfy the Commission's rule on these kinds of  
22 transactions.

23 A. Okay.

24 Q. To the extent approval is required from the Utah  
25 Commission for this transaction, are you asking the Commission

1 to approve the transfer of control pursuant to rule 746-349-7?

2 A. Yes.

3 Q. And is Ionex serving as an incumbent local  
4 exchange carrier anywhere in the State of Utah?

5 A. No.

6 Q. Is Ernest Communications serving as ILEC  
7 anywhere in Utah?

8 A. No.

9 Q. Are Ionex and Ernest required to file Section 214  
10 authority with the Federal Communications Commission?

11 A. Yes.

12 Q. And has that been done?

13 A. Yes, it has.

14 Q. Is this transaction subject to streamlined treatment  
15 by the FCC?

16 A. Yes.

17 Q. And has the FCC issued a notice that Section 214  
18 authorization has been granted?

19 A. Yes, it has, and that was issued on July 15, 2013.

20 MR. EVANS: Okay. Your Honor, I would like--may  
21 I approach?

22 ADMINISTRATIVE LAW JUDGE REIF: Yes, you  
23 may.

24 MR. EVANS: This is a copy of the FCC filing by  
25 Ionex. We request that this be marked as Ionex Ernest Joint

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Exhibit 1.

ADMINISTRATIVE LAW JUDGE REIF: Thank you, Mr. Evans, I note that it is marked.

Exhibit-1 marked

MR. EVANS: Yes, thank you.

Q. Mr. Bunce, do any state commissions, other than Utah, require Ionex and Ernest to seek approval of this transaction?

A. Yes, approval is required in several states. Most only require a notification.

Q. And have you filed in all states that require only notification?

A. Yes, we have.

Q. And have you filed in all states that require an approval?

A. Yes.

Q. You have previously sent me copies of decisions from commissions in California, Colorado, Nebraska, and Minnesota, approving the applications; is that correct?

A. Yes, that's correct.

MR. EVANS: May I hand this one out, too?

ADMINISTRATIVE LAW JUDGE REIF: Yes.

MR. EVANS: I have passed around Ionex and Ernest Joint Exhibit 2, which are decisions from those states that Mr. Bunce just mentioned; California, Colorado, Nebraska

1 and Minnesota. That is Joint Exhibit No. 2.

2 Exhibit-2 marked

3 BY MR. EVANS:

4 Q. Mr. Bunce, have you already received approval  
5 from any of the other states that require approval?

6 A. Yes, we have we received approvals from most of  
7 the states.

8 Q. Are there any states that from which you have not  
9 yet received approval?

10 A. Yes, we are waiting for approval from Arizona,  
11 Oklahoma, Pennsylvania, and, of course, Utah.

12 Q. So you sent me a matrix of the regulatory  
13 requirements of this transaction, listing the states and their  
14 various requirements, entitled, "Regulatory checklist." Is that  
15 correct?

16 A. That's correct.

17 Q. And this is a--this is a checklist of states and their  
18 requirements and whether or not the joint applicants have met  
19 those thus far; is that correct?

20 A. That's correct.

21 MR. EVANS: I would like to submit this one, as  
22 well, as Ionex Ernest Joint Exhibit 3.

23 ADMINISTRATIVE LAW JUDGE REIF: Thank you.

24 Exhibit-3 marked

25 BY MR. EVANS:

1 Q. Are there any updates to this list, as far as you  
2 know as of today?

3 A. No.

4 Q. Okay. Turning your attention back to Joint Exhibit  
5 1, which is the FCC Section 214 filing, it states that the parties  
6 intend to close the transaction on or about September 1, 2013;  
7 is that correct?

8 A. Yes.

9 Q. And has that been done?

10 A. We actually closed the transaction on August 29,  
11 2013, for most of the states, except of course those states  
12 which require approval and that we haven't obtained yet. We  
13 will have to go back and we will do a closing on each of those  
14 for the states once we have those approvals.

15 Q. And that would be Arizona, Oklahoma,  
16 Pennsylvania and Utah. Right?

17 A. That's correct.

18 Q. Okay. Have you received any notices or  
19 correspondence from any state denying the joint application for  
20 approval of this transaction?

21 A. No, we have not.

22 Q. Thank you. Can you please offer us a summary of  
23 why you believe this transaction is in the public interest?

24 A. Yes. The Ernest is a very small company in Utah.  
25 It has only 58 customers. This transaction will advance Ionex's

1 economic efficiency, allow it to achieve certain economic of  
2 scale, which would put us in a position both to expand the  
3 services offered to these customers and to bring our services to  
4 a broader customer base.

5 Of course, robust competition, telecommunication is  
6 in itself in the public interest. As the result of this transfer of  
7 control, we hope to be well positioned as a competitive provider  
8 in Utah. As stated in our application, the transaction will be  
9 conducted in a way that is virtually transparent to Ernest  
10 customers, except their billing will be handled by Ionex. They  
11 will continue to receive the same service offerings, rates, terms  
12 and conditions of quality of service that they currently receive  
13 from Ernest.

14 Q. Okay. Thank you, Mr. Bunce.

15 MR. EVANS: That concludes my examination of the  
16 witness. We would request that you take administrative notice  
17 of the joint notification that has been filed and that Exhibits, the  
18 Ionex Ernest Joint Exhibits 1 through 3 be received into the  
19 record.

20 ADMINISTRATIVE LAW JUDGE REIF: Yes, Mr.  
21 Evans, your request is accepted and the application, which was  
22 received by the Commission on July 26, 2013, we do have in the  
23 docket and do take administrative notice of, and the exhibits  
24 that you submitted today will also be entered into evidence in  
25 the docket, as well, and be made a part of the transcript.

1 MR. EVANS: All right. Thank you very much. Mr.  
2 Bunce is available for cross.

3 ADMINISTRATIVE LAW JUDGE REIF: All right. Mr.  
4 Jetter, any questions for Mr. Bunce?

5 MR. JETTER: I have no questions.

6 ADMINISTRATIVE LAW JUDGE REIF: Okay. Mr.  
7 Evans, I have one question, and it may be more of a question  
8 for you than Mr. Bunce, but inasmuch as you may want Mr.  
9 Bunce to answer, that's--I'll leave that open. When Mr. Bunce  
10 was testifying, he indicated there were no corrections to the  
11 joint notification that was filed with the Commission. I am  
12 wondering, under the circumstances, whether you or and/or Mr.  
13 Bunce might want to revise that response, in light of what you've  
14 made known as that you would like this to be referred to as an  
15 application as opposed to a notification.

16 MR. EVANS: Thank you. That is a good point.  
17 And if we want to title it something differently as an application,  
18 that correction could be made and might be helpful. I think,  
19 rather -- as to the substance of the notification, with what we  
20 have supplemented here today live on the record and the  
21 exhibits that have been submitted, I would view those more as a  
22 supplement to what was previously filed than a correction to it.  
23 So I do agree, yes, we should be calling this a joint application.

24 Mr. Bunce, you don't need to revise any statement  
25 that was made in the joint notification, do you?



1 MR. BUNCE: Right.

2 MR. EVANS: So that those statements are all, all  
3 stand without correction, and we would submit that by the  
4 supplementary material, in terms of testimony and exhibits that  
5 have been submitted today, we have met the requirements set  
6 out in the rule.

7 ADMINISTRATIVE LAW JUDGE REIF: Very good,  
8 thank you, Mr. Evans. Mr. Jetter?

9 MR. JETTER: Thank you, Your Honor. I think I  
10 would just like to start out by offering a little, just a little note  
11 from the Division. We recognize and we were aware that there  
12 were some slight missing information maybe from the joint  
13 notice and what we consider an application, and we have  
14 treated it, in our review, as though it were an application.

15 And I think the intent of it was to be the application  
16 necessary in Utah, and we have had the exhibits that were  
17 provided by the joint applicants with sufficient time to review  
18 them and the information within them is all available to anyone  
19 who might have been interested from, I believe, from public  
20 filings. I guess I can't say for sure whether all the state filings  
21 were, but I believe that if a party were interested, they would  
22 have been available.

23 ADMINISTRATIVE LAW JUDGE REIF: Thank you,  
24 Mr. Jetter.

25 MR. JETTER: So with that, I would like to call Ron

1 Slusher and have him sworn in, please.

2 RON SLUSHER, called as a witness and having  
3 been duly sworn, was examined and testified as follows:

4 ADMINISTRATIVE LAW JUDGE REIF: Thank you.  
5 You may proceed, Mr. Jetter.

6 EXAMINATION

7 BY-MR.JETTER:

8 Q. Thank you. Mr. Slusher, would you please state  
9 your name and occupation for the record?

10 A. Name is Ron, R-O-N, Slusher S, as in Sam,  
11 L-U-S-H-E-R. I am a utility technical consultant for the Division  
12 of Public Utilities.

13 Q. Thank you. And have you reviewed the filings  
14 made by the Ionex Birch and Ernest in this docket?

15 A. Yes, I have.

16 Q. Have you also had time to review the three exhibits  
17 that were entered into the record today?

18 A. Yes, I received the exhibits, I believe, last Tuesday  
19 in an email and I have reviewed them.

20 Q. Thank you. And you received those after you  
21 had--let me back up. Did you draft the memorandum filed by  
22 the Division of Public Utilities, dated August 8, 2013?

23 A. Yes, I did.

24 Q. Have you had sufficient time to review those  
25 documents and determine if there was anything in there that

1 would change the Division's recommendation?

2 A. Yes, I did, and there was nothing that would change  
3 our recommendation.

4 Q. Thank you. And would you adopt the memorandum  
5 provided in the recommendation within it as your testimony  
6 today?

7 A. Yes, I would.

8 Q. Thank you.

9 MR. JETTER: We would like to enter the  
10 memorandum into the record or take notice, if appropriate.

11 ADMINISTRATIVE LAW JUDGE REIF: Thank you,  
12 Mr. Jetter. The Commission takes administrative notice of the  
13 Division's memo, dated August 8th, and filed on that same date  
14 with the Commission.

15 MR. JETTER: Thank you, Your Honor.

16 Q. Mr. Slusher, have you become aware of any  
17 objections to this merger throughout any of the proceeding?

18 A. I have not seen any.

19 Q. Okay, thank you. Finally, do you believe that  
20 approval of the merger between these companies would be just,  
21 reasonable and in the public interest?

22 A. Yes, I do.

23 Q. Okay, thank you.

24 MR. JETTER: I have no further questions.

25 ADMINISTRATIVE LAW JUDGE REIF: Any

1 questions, Mr. Evans?

2 MR. EVANS: No questions, thank you.

3 ADMINISTRATIVE LAW JUDGE REIF: Mr. Slusher,  
4 just for clarification, regarding the issue that you address in  
5 your affidavit, which is attached to the Division's memorandum  
6 that you-- that, excuse me, the Division expects that this  
7 application will be unopposed, you have testified that you have  
8 not seen any objection; have you heard any objection?

9 MR. SLUSHER: I have not.

10 ADMINISTRATIVE LAW JUDGE REIF: Okay. And  
11 would that be true since you received the exhibits that have  
12 been presented today?

13 MR. SLUSHER: Correct.

14 ADMINISTRATIVE LAW JUDGE REIF: Okay, thank  
15 you. And do you wish to elaborate any further on the issue of  
16 the public interest that will be served by this, approving this  
17 application if indeed the Commission does so?

18 MR. SLUSHER: I don't think I need to. I think it  
19 has all been addressed but I can.

20 ADMINISTRATIVE LAW JUDGE REIF: Okay, but  
21 when you say you think it's been addressed, are you referring to  
22 your memo?

23 MR. SLUSHER: Between my memo and the  
24 company's testimony, I think it has been addressed.

25 ADMINISTRATIVE LAW JUDGE REIF: Okay. So

1 you would refer the Commission to your memo?

2 MR. SLUSHER: Correct.

3 ADMINISTRATIVE LAW JUDGE REIF: Okay, very  
4 good.

5 Is there anything more, Mr. Evans, that you wish to  
6 add, or any questions regarding the pending application?

7 MR. EVANS: Just in closing, the rule at 746-349-7  
8 states that is if no objection to a proposed transaction is  
9 submitted in filed comments or reply comments, then the  
10 Commission will presume the approval of the transaction is in  
11 the public interest and use the information contained in the  
12 application and the accompanied documents in the record as we  
13 have stated it today as evidence to support an order. We have  
14 had no interveners, as Mr. Slusher has said. We have had no  
15 opposition of the application. So we would submit that it should  
16 be found to be in the public interest and should be granted.

17 ADMINISTRATIVE LAW JUDGE REIF: Thank you,  
18 Mr. Evans, and just for clarification since this hearing is being  
19 recorded, I do wish to ask, is there any objection to the  
20 application? Hearing no objection, the matter will be reviewed  
21 by the Commission, and as noted under 54-4-30, an  
22 investigation and hearing which has occurred in this matter, it is  
23 the precursor before the Commission can issue an order and  
24 that order will be forthcoming. Okay, so thank you very much,  
25 and unless there are questions, we will be adjourned.

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MR. EVANS: Thank you so much.  
  
(The hearing was concluded at 1:50 p.m.)

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REPORTER'S CERTIFICATE

State of Utah )  
 )  
County of Salt Lake )

I hereby certify that the witness in the foregoing deposition was duly sworn to testify to the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken at the time and place herein named;

That the testimony of said witness was reported by me in stenotype and thereafter transcribed into typewritten form.

I further certify that I am not of kin or otherwise associated with any of the parties of said cause of action and that I am not interested in the even thereof.

IN WITNESS WHEREOF, I set my hand this 20th day of September, 2013.

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Kellie Peterson, RPR