

# Supplemental Exhibit 6

UT PSC Docket No. 15-2563-01

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Beverly Jones Heydinger  
Nancy Lange  
Dan Lipschultz  
John Tuma  
Betsy Wergin

Chair  
Commissioner  
Commissioner  
Commissioner  
Commissioner

Angela F. Collins  
Cahill Gordon & Reindel, LLP  
1990 K Street NW, Suite 950  
Washington, DC 20006

SERVICE DATE: June 3, 2015

DOCKET NO. P-6144,3144/PA-15-385

In the Matter of the Joint Application of Ionex Communications North, Inc. d/b/a Birch Communications and OrbitCom, Inc. for Approval to Transfer Assets and Customers

The above entitled matter has been considered by the Commission and the following disposition made:

**Approved the transfer of OrbitCom Inc.'s (OrbitCom's) Minnesota assets and customers to Ionex Communications North, Inc. d/b/a Birch Communications (Ionex).**

- 1. Customers must be given a 30-day notice of their transfer from OrbitCom to Ionex and their ability to choose an alternative carrier.**
- 2. MESB and the DPS are being placed on the service list of this docket, and Ionex must coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change to a county 911 Plan for customers.**
- 3. The assignment of OrbitCom's interconnection agreements is not required because Ionex will continue to serve local customers under its interconnection agreements.**
- 4. OrbitCom has no Minnesota NXX codes, and no need to release or return NXX codes to the North American Numbering Plan Administration (NANPA) is anticipated. OrbitCom operates as a reseller in Minnesota so that NXX codes belong to the underlying carrier.**
- 5. USAC does not need to be notified because OrbitCom does not receive Universal Service Fund payments.**
- 6. OrbitCom has filed its 2014 Jurisdictional Annual Report to the Minnesota Department of Commerce. OrbitCom will also be responsible for filing its 2016 Jurisdictional Annual Report for its 2015 operations from January 1, 2015 to the closing date. Ionex must include OrbitCom's 2015 operations in its 2016 Report for its 2015 operations from the date of closing forward.**

7. Applicants must file a notice of closing within 20 days of completion of the transaction, informing the Commission of any change in address and any other necessary changes to the Commission's records.
8. In its next TAP filing following the closing of the Transaction, Ionex shall explain any changes and describe any potential discrepancies between the number of access lines reported and the amount of TAP surcharge revenues reported and deposited as a result of the Transaction.
9. Ionex must file tariff updates within 30 days of the Transaction's closing to reflect the rates, terms and conditions of telecommunications services currently being provided to former customers of OrbitCom, or explain why no tariff update is required.
10. OrbitCom must relinquish its certificate of authority in a separate application when it no longer needs its Minnesota authorizations for operational or billing purposes.
11. OrbitCom is responsible for any of its unpaid regulatory obligations at the time it requests cancellation of its authorizations and existing tariffs.

This decision is issued by the Commission's consent calendar subcommittee, under a delegation of authority granted under Minn. Stat. § 216A.03, subd. 8 (a). Unless a party, a participant, or a Commissioner files an objection to this decision within ten days of receiving it, it will become the Order of the full Commission under Minn. Stat. § 216A.03, subd. 8 (b).

The Commission agrees with and adopts the recommendations of the Department of Commerce, which are attached and hereby incorporated into the Order. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION



Daniel P. Wolf  
Executive Secretary



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May 14, 2015

**PUBLIC DOCUMENT**

Mr. Daniel P. Wolf  
Executive Secretary  
Minnesota Public Utilities Commission  
121 7th Place East, Suite 350  
St Paul Minnesota 55101-2147

RE: **PUBLIC Comments of the Minnesota Department of Commerce**  
Docket No. P6144,P3144/PA-15-385

Dear Mr. Wolf:

Attached are the PUBLIC comments of the Minnesota Department of Commerce (Department) in the following matter:

In the Matter of the Joint Application of Ionex Communications North, Inc. d/b/a Birch Communications and OrbitCom, Inc. for Approval to Transfer Assets and Customers.

The petition was filed on April 28, 2015 by:

Angela F. Collins  
Cahill Gordon & Reindel, LLP  
1990 K Street NW, Suite 950  
Washington, DC 20006

Sincerely,

/s/ BRUCE L. LINSCHIED  
Financial Analyst

BLL/lt  
Attachment

## BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

PUBLIC COMMENTS OF THE  
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. P6144,P3144/PA-15-385

**I. BACKGROUND**

On April 28, 2015, the Minnesota Department of Commerce (Department) received a copy of an application (Application) from Ionex Communications North, Inc. dba Birch Communications (Ionex or Purchaser) and OrbitCom, Inc. (OrbitCom, and collectively with Ionex, the Applicants) to the Minnesota Public Utilities Commission (Commission) for approval to transfer substantially all of OrbitCom's telecommunications assets and Minnesota customer base to Ionex (the Transaction).

**A. APPLICANTS**

Ionex is a wholly owned subsidiary of Birch Communications Inc. (BCI). BCI and its subsidiaries provide telecommunications services to both business and residential customers in 50 states and the District of Columbia. Ionex received Commission approval to provide facilities based local exchange and interexchange services.<sup>1</sup> OrbitCom received Commission approval to provide long distance and facilities based local telecommunications services in Docket No. P6144/NA-02-1116 on September 12, 2002.<sup>2</sup>

**B. THE TRANSACTION**

On April 24, 2015, BCI and OrbitCom entered into an Asset Purchase Agreement (Agreement) pursuant to which BCI will purchase from OrbitCom certain assets (certain customer accounts and receivables, certain customer agreements and contracts, certain vendor agreements and contracts, certain equipment and certain intellectual property). BCI will not assume any of OrbitCom's pre-closing liabilities or obligations.

<sup>1</sup> Application, p. 1, Footnote 1, Docket Nos. P3144/NA-96-822 and P3144/NA-93-953.

<sup>2</sup> Petitioners explain in Footnote 1 to the Petition that the Commission granted VP Telecom, Inc. and VP Telecom, Inc. received Commission approval to change its name to OrbitCom, Inc. in Docket No. P6144/M-03-14.

Upon consummation of the Transaction and after completion of the customer transfer, lonex will provide OrbitCom's customers with the same service quality, and all billing will be handled by lonex using the Birch name.

- Applicants agree to provide the Commission with a notice of closing within twenty days of the completion of the Transaction.
- Following approval of the proposed Transaction, lonex will file a revised tariff incorporating OrbitCom's current services and rates so that customers will continue to receive the same services that they currently receive without any immediate changes to their service offerings, rates, or terms and conditions.
- lonex will provide services to OrbitCom's customers utilizing its existing interconnection agreements, 911 arrangements, and numbering arrangements.
- Applicants will provide a joint notice of the transfer to OrbitCom's customers at least thirty days prior to the transfer.
- To the extent any of OrbitCom's existing customers are enrolled in the Minnesota Telephone Assistance Plan (TAP), those enrollments will transfer with the customer.
- OrbitCom has no NXX codes to be returned in Minnesota, and none are being transferred to lonex in Minnesota. OrbitCom operates as a reseller in Minnesota so that NXX codes belong to the underlying carrier.<sup>3</sup>
- After OrbitCom determines that it no longer needs its Minnesota authorizations for operational or billing purposes, OrbitCom will surrender its authorizations and cancel its tariffs in a separate filing.
- OrbitCom will be responsible for filing its 2016 Jurisdictional Annual Report for its 2015 operations from January 1, 2015 to the closing date. lonex will include OrbitCom's 2015 operations in its 2016 Report from the date of closing forward.

### C. *PUBLIC INTEREST*

The Applicants state that the Transaction is in the public interest because customers will be given prior written notice of the transfer of their account to lonex. Following the consummation of the Transaction, lonex will continue to offer high quality services to Minnesota residents. As a result, the proposed Transaction is expected to be transparent to customers and will not have a negative impact on the public interest, service to Minnesota customers, or competition.

## II. **STATEMENT OF ISSUES**

- A. Does the proposed transfer of assets require Commission approval?
- B. Is the proposed transfer of assets in the public interest?

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<sup>3</sup> May 14, 2015 electronic reply by Counsel for OrbitCom in response to the Department's May 13, 2015 electronic information request asking why no NXX codes need to be returned or transferred in Minnesota.

- C. Have the Applicants complied with Minnesota law requiring prior Commission approval of the transfer of assets?
- D. Is there a requirement to provide Commission notice for the assignment of interconnection agreements?
- E. Does the proposed transfer have any impact on 911 Plans that require regulatory approvals?
- F. Will OrbitCom retain its certificates of authority?
- G. Does the Transaction require other regulatory approvals?

### III. LEGAL REFERENCES

Minn. Stat. § 237.035(a) provides that telecommunications carriers are subject to regulation under this chapter only to the extent required under paragraphs (b) to (e). Minn. Stat. § 237.035(b) provides that telecommunications carriers shall comply with sections 237.121 (prohibited practices) and 237.74 (regulation of telecommunication carriers). Minn. Stat. § 237.035(c) states that telecommunications carriers shall comply with section 237.16, subd. 8 (local competition rules) and 9 (universal service fund requirements). Minn. Stat. § 237.035(d) states that to the extent a telecommunications carrier offers local service, it shall obtain a certificate under section 237.16 for that local service. Minn. Stat. § 237.035(e) provides that a telecommunications carrier's local service is subject to this chapter except that: (1) a telecommunications carrier is not subject to rate-of-return or earnings investigations under section 237.075 (rate change) and 237.081 (investigation), and (2) a telecommunications carrier is not subject to section 237.22 (depreciation, amortization).

Minn. Stat. § 237.23 states that it shall be unlawful for any telephone company, corporation, person, partnership, or association subject to the provisions of this chapter to purchase or acquire the property, capital stock, bonds, securities, or other obligations, or the franchises, rights, privileges, and immunities of any telephone company doing business within the state without first obtaining the consent of the commission thereto.

Minn. Stat. § 237.74, subd. 12 provides that no telecommunications carrier shall construct or operate any line, plant, or system, or any extension of it, or acquire ownership or control of it, either directly or indirectly, without first obtaining from the commission a determination that the present or future public convenience and necessity require or will require the construction, operation, or acquisition, and a new certificate of territorial authority.

Minn. Stat. § 237.16, subd. 4 states that no person shall acquire ownership or control of another telephone company either directly or indirectly, without first obtaining from the Commission an amended certificate of authority.

Minn. Stat. § 237.16, subd. 1(b) states that no person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules.

Minnesota Rule 7812.2210, subp. 3B states that a substantial change in a term or condition of a service, or a discontinuation of a service . . . may take effect 20 days after filing and providing written notice to affected customers.

Minnesota Rule 7812.2210, subp. 16 addresses mergers and acquisitions and states: "In accordance with Minnesota Statutes, section 237.74, subdivision 12, before acquiring ownership or control of any provider of local service in Minnesota, either directly or indirectly, a CLEC must demonstrate to the commission that the present or future public convenience and necessity require or will require the acquisition. To make this determination, a CLEC must show that the merger is consistent with the public interest, based on such factors as the potential impact of the merger on consumers, competition, rates, and service quality."

The Commission's requirement that it receive notice regarding the assignment of interconnection agreements is documented in the docket, In the Matter of ASC, L.P. and U S WEST Communications, Inc. Under the Federal Telecommunications Act of 1996, Docket No. P421/EM-98-554, Order Rejecting Agreement and Directing Further Filing, June 22, 1998 at page 3.

Minn. Rule Part 7812.0550 contains the requirements for Commission approval of 911 Plans.

Minn. Stat. §§ 237.69-.711 describe the Telephone Assistance Plan and procedures for application, financial administration and complaint investigation.

#### **IV. ANALYSIS**

##### **A. COMMISSION ACTION IS NEEDED FOR THIS TRANSACTION**

The Commission has established a consistent precedent for requiring approval for any change of ownership affecting Minnesota telephone companies and telecommunications carriers. Commission approval is required for transactions where the ultimate ownership or control of either a telephone company or telecommunications carrier authorized to operate in Minnesota changes, or a telephone company's or a telecommunications carrier's Minnesota operations are affected by a merger or acquisition transaction. Commission approval is not required for corporate reorganizations in which ultimate ownership or control



does not change, and the operating company is not impacted by the reorganization.<sup>4</sup> The assets and customers of OrbitCom will transfer to Ionex. The Commission should review the Transaction to determine if it is in the public interest.

*B. THE PROPOSED TRANSFER OF ASSETS IS IN THE PUBLIC INTEREST*

The consolidated financial statements of the corporate parent of Ionex, Birch Communications, Inc. (BCI), were submitted for the year ended December 31, 2014 and the two months ended February 28, 2015. As a wholly owned subsidiary of BCI, the financial performance and condition of Ionex are reflected in the consolidated statements of BCI.

- [TRADE SECRET DATA HAS BEEN EXCISED]

Customers of OrbitCom should continue to receive reliable service from Ionex. Despite BCI's reliance upon debt financing it appears to have the liquidity to pay dividends and meet its debt repayment and operating expenses. OrbitCom customers are expected to experience continuous service and a transparent transfer from OrbitCom to Ionex. Competition is not expected to be harmed because customers will have access to other competitive choices. Applicants report that OrbitCom currently operates in the Minnesota service territories of Qwest/CenturyLink. OrbitCom is aware of the following competitors: CenturyLink, Charter, Comcast, WOW!, TDS, POPP, Onvoy, and Integra, although there may be others.<sup>5</sup>

*C. THE APPLICANTS HAVE COMPLIED WITH THE REQUIREMENT TO REQUEST PRIOR COMMISSION APPROVAL FOR THE TRANSFER*

[TRADE SECRET DATA HAS BEEN EXCISED] No violation of Minn. Stat. §§ 237.23 or 237.74, subd. 12 is expected to occur.

*D. THERE IS NO REQUIREMENT TO ASSIGN INTERCONNECTION AGREEMENTS*

The Commission's 60-day notice requirement for the assignment of interconnection agreements<sup>6</sup> does not apply to this Transaction. Ionex will provide services to OrbitCom's local customers utilizing the existing interconnection agreements of Ionex.

*E. IONEX IS SEEKING 911 APPROVALS FOR A 2013 911 PLAN*

Applicants generally must inform the Minnesota Department of Public Safety (DPS) and the Metropolitan Emergency Services Board (MESB) to coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change

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<sup>4</sup> *In the Matter of an Application for Approval of a Corporate Reorganization by Winstar Wireless, Inc.*, Docket No P5246/PA-00-925, August 25, 2000.

<sup>5</sup> May 11, 2015 electronic reply by Counsel for OrbitCom in response to the Department's May 11, 2015 electronic information request asking to identify the service areas in which OrbitCom operates and the competition that exists in those service areas.

<sup>6</sup> *In the Matter of an ASC, L.P. and US WEST Communications, Inc. Under the Federal Telecommunications Act of 1996*, Docket No. P421/EM-98-554, ORDER REJECTION AGREEMENT AND DIRECTION FURTHER FILING, June 22, 1998, page 8.

to a county 911 Plan for customers. Ionex will provide 911 services to OrbitCom's customers utilizing its 911 arrangements. The DPS and MESB will be placed on the service list for this docket to keep them informed of the activity in this docket.

*F. THE CERTIFICATES OF AUTHORITY FOR ORBITCOM SHOULD NOT BE CANCELLED AT THIS TIME*

Upon completion of the Transaction OrbitCom will no longer provide telecommunications services in Minnesota. OrbitCom will surrender its authorization and cancel its tariffs in a separate filing after it determines that it no longer needs to Minnesota authorizations for operational or billing purposes.

*G. THE FOLLOWING REGULATORY ISSUES HAVE BEEN CONSIDERED REGARDING THE PROPOSED TRANSACTION:*

- 1) A sample of the notice that will be sent to OrbitCom's customers was provided as Exhibit C to the Application and informs customers of their ability to choose an alternative carrier.
- 2) MESB and the DPS are being placed on the service list of this docket, and Ionex must coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change to a county 911 Plan for customers.
- 3) The assignment of OrbitCom's interconnection agreements is not required because Ionex will continue to serve local customers under its interconnection agreements.
- 4) OrbitCom has no Minnesota NXX codes, and no need to release or return NXX codes to the North American Numbering Plan Administration (NANPA) is anticipated. OrbitCom operates as a reseller in Minnesota so that NXX codes belong to the underlying carrier.<sup>7</sup>
- 5) USAC does not need to be notified because OrbitCom does not receive Universal Service Fund payments.
- 6) OrbitCom has filed its 2014 Jurisdictional Annual Report to the Minnesota Department of Commerce. OrbitCom will also be responsible for filing its 2016 Jurisdictional Annual Report for its 2015 operations from January 1, 2015 to the closing date. Ionex will include OrbitCom's 2015 operations in its 2016 Report for its 2015 operations from the date of closing forward.
- 7) Applicants must file a notice of closing within 20 days of completion of the transaction, informing the Commission of any change in address and any other necessary changes to the Commission's records.
- 8) The Commission provided for a consistent assessment of TAM, TAP, and 911 surcharges on affected carriers in Minnesota.<sup>8</sup> In its next TAP filing following

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<sup>7</sup> May 14, 2015 electronic reply by Counsel for OrbitCom in response to the Department's May 13, 2015 electronic information request asking why no NXX codes need to be returned or transferred in Minnesota.

<sup>8</sup> In the Matter of a Commission Investigation of How Carriers Assess 911, TAP, and TAM Surcharges on Various Telecommunications Service, DOCKET NO. P999/CI-07-617, AND In the Matter of a Commission Investigation of the Applicability of 911, TAP, and TAM Surcharges to VoIP Services, Docket No. P999/CI-09-

the closing of the Transaction, Ionex should explain any changes and describe any potential discrepancies between the number of access lines reported and the amount of TAP surcharge revenues reported and deposited as a result of the Transaction.

- 9) Ionex must file tariff updates within 30 days of the Transactions' closing to reflect the rates, terms and conditions of telecommunications services currently being provided to former customers of OrbitCom, or explain why no tariff update is required.
- 10) OrbitCom must relinquish its certificate of authority in a separate application when it no longer needs its Minnesota authorizations for operational or billing purposes.
- 11) OrbitCom will pay any unpaid regulatory obligations at the time it requests cancellation of its authorizations and existing tariffs.

#### **V. COMMISSION ALTERNATIVES**

Approve the transfer of OrbitCom Inc.'s (OrbitCom's) Minnesota assets and customers to Ionex Communications North, Inc. d/b/a Birch Communications (Ionex).

- 1) A sample of the notice that will be sent to OrbitCom's customers was provided as Exhibit C to the Application and informs customers of their ability to choose an alternative carrier.
- 2) MESB and the DPS are being placed on the service list of this docket, and Ionex must coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change to a county 911 Plan for customers.
- 3) The assignment of OrbitCom's interconnection agreements is not required because Ionex will continue to serve local customers under its interconnection agreements.
- 4) OrbitCom has no Minnesota NXX codes, and no need to release or return NXX codes to the North American Numbering Plan Administration (NANPA) is required. OrbitCom operates as a reseller in Minnesota so that NXX codes belong to the underlying carrier.
- 5) USAC does not need to be notified because OrbitCom does not receive Universal Service Fund payments.
- 6) OrbitCom has filed its 2014 Jurisdictional Annual Report to the Minnesota Department of Commerce. OrbitCom will also be responsible for filing its 2016 Jurisdictional Annual Report for its 2015 operations from January 1, 2015 to the closing date. Ionex must include OrbitCom's 2015 operations in its 2016 Report for its 2015 operations from the date of closing forward.
- 7) Applicants must file a notice of closing within 20 days of completion of the transaction, informing the Commission of any change in address and any other necessary changes to the Commission's records.
- 8) In its TAP filing following the closing of the Transaction, Ionex should explain any changes and describe any potential discrepancies between the number of access

lines reported and the amount of TAP surcharge revenues reported and deposited as a result of the Transaction.

- 9) Ionex must file tariff updates within 30 days of the Transaction's closing to reflect the rates, terms and conditions of telecommunications services currently being provided to former customers of OrbitCom, or explain why no tariff update is required.
- 10) OrbitCom must relinquish its certificate of authority in a separate application when it no longer needs its Minnesota authorizations for operational or billing purposes.
- 11) OrbitCom is responsible for any of its unpaid regulatory obligations at the time it requests cancellation of its authorizations and existing tariffs.

2. Approve the Application with modifications.

3. Reject the Application.

## **VI. RECOMMENDATION**

The Department recommends Alternative 1:

Approve the transfer of OrbitCom Inc.'s (OrbitCom's) Minnesota assets and customers to Ionex Communications North, Inc. d/b/a Birch Communications (Ionex).

- 1) Customers must be given a 30-day notice of their transfer from OrbitCom to Ionex and their ability to choose an alternative carrier.
- 2) MESB and the DPS are being placed on the service list of this docket, and Ionex must coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change to a county 911 Plan for customers.
- 3) The assignment of OrbitCom's interconnection agreements is not required because Ionex will continue to serve local customers under its interconnection agreements.
- 4) OrbitCom has no Minnesota NXX codes, and no need to release or return NXX codes to the North American Numbering Plan Administration (NANPA) is anticipated. OrbitCom operates as a reseller in Minnesota so that NXX codes belong to the underlying carrier.
- 5) USAC does not need to be notified because OrbitCom does not receive Universal Service Fund payments.
- 6) OrbitCom has filed its 2014 Jurisdictional Annual Report to the Minnesota Department of Commerce. OrbitCom will also be responsible for filing its 2016 Jurisdictional Annual Report for its 2015 operations from January 1, 2015 to the closing date. Ionex must include OrbitCom's 2015 operations in its 2016 Report for its 2015 operations from the date of closing forward.
- 7) Applicants must file a notice of closing within 20 days of completion of the transaction, informing the Commission of any change in address and any other necessary changes to the Commission's records.

- 8) In its next TAP filing following the closing of the Transaction, Ionex should explain any changes and describe any potential discrepancies between the number of access lines reported and the amount of TAP surcharge revenues reported and deposited as a result of the Transaction.
- 9) Ionex must file tariff updates within 30 days of the Transaction's closing to reflect the rates, terms and conditions of telecommunications services currently being provided to former customers of OrbitCom, or explain why no tariff update is required.
- 10) OrbitCom must relinquish its certificate of authority in a separate application when it no longer needs its Minnesota authorizations for operational or billing purposes.
- 11) OrbitCom is responsible for any of its unpaid regulatory obligations at the time it requests cancellation of its authorizations and existing tariffs.

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