



Agenda Date: 01/31/18
Agenda Item: IVA

STATE OF NEW JERSEY
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
www.nj.gov/bpu/

TELECOMMUNICATIONS

IN THE MATTER OF THE VERIFIED PETITION OF)
BCHI HOLDINGS, LLC, BIRCH COMMUNICATIONS,)
INC., FUSION TELECOMMUNICATIONS)
INTERNATIONAL, INC., AND NETWORK BILLING)
SYSTEMS, LLC FOR CONSENT TO A TRANSACTION)
THAT WILL RESULT IN A MATERIAL CHANGE TO)
THE OWNERSHIP AND CONTROL OF NETWORK)
BILLING SYSTEMS, LLC AND FOR APPROVAL TO)
PARTICIPATE IN NEW FINANCING ARRANGEMENTS)

ORDER

DOCKET NO. TF17111167

Parties of Record:

Stefanie A. Brand, Esq., Director, New Jersey Division of Rate Counsel
James H. Laskey, Esq., Norris, McLaughlin & Marcus, P.A., on behalf of Petitioners

BY THE BOARD:

On November 15, 2017, BCHI Holdings, LLC (“BCHI Holdings”), Birch Communications, Inc. (“BCI”), Fusion Telecommunications International, Inc. (“FTI”), and Network Billing Systems, LLC d/b/a Solex and d/b/a Fusion (“NBS”)(collectively, “Petitioners”) submitted a Verified Petition with the New Jersey Board of Public Utilities (“Board”) pursuant to N.J.S.A. 48:2-51.1, 48:3-7 and 48:3-10, requesting approval to transfer a controlling interest in NBS to BCHI Holdings and requesting approval for NBS and BCI to participate in new financing arrangements to be entered into by FTI in connection with the closing on a merger transaction. Following the closing, NBS will continue to offer the same services in New Jersey at the same rates, terms, and conditions.

BACKGROUND

BCHI Holdings is a Georgia limited liability company, with a principal office in Atlanta, Georgia. BCHI Holdings was recently formed by the shareholders of Birch Communications Holdings, Inc. (“Birch Holdings”) to hold the shares of FTI to be issued in connection with the merger. Birch Holdings is the current parent of BCI. BCI is a Georgia corporation, with principal offices in Atlanta, Georgia. According to the petition, the Birch Companies operate as a nationwide provider of communications, network, cloud and IT services. They serve a full range of small, mid-sized, enterprise and wholesale businesses and residential customers, providing integrated technology solutions including metro-fiber, metro-Ethernet, unified communications (UC), hosted phone systems, hosted data centers and hosted file storage services. The Birch Companies hold federal and state authority, as required, to provide competitive local exchange,

intrastate toll, intrastate interexchange, interstate interexchange, and international services to residential and business customers in all 50 states and the District of Columbia. In New Jersey, BCI is authorized to provide local exchange and interexchange telecommunications services. See I/M/O Birch Communications Inc., Petition for Authority to Provide Local Interexchange Telecommunication Services within the State of New Jersey, Docket No. TE09040307, (July 1, 2009). The Birch Companies have indicated that they have no employees in New Jersey.

FTI is a publicly traded Delaware corporation with its headquarters located in New York, New York. FTI holds Section 214 authority from the Federal Communications Commission to provide interstate and international telecommunications services. FTI does not hold authority to provide intrastate telecommunications services within any state. FTI's wholly-owned indirect subsidiary, NBS d/b/a Solex and d/b/a Fusion, is a New Jersey limited liability company with corporate headquarters located in Fairfield, New Jersey. The petition states that NBS provides unified communications (or "UC") and hosted voice and data services, broadband Internet access service, interconnected VoIP, data networks, and traditional voice solutions primarily to business customers throughout the United States. In New Jersey, NBS is authorized to operate as both a competitive local exchange carrier and an interexchange carrier. See In the Matter of the Verified Petition of Network Billing Systems LLC for Approval to Provide Local Exchange and Interexchange Telecommunications Services Throughout the State of New Jersey, Docket No. TE08070466, (September 15, 2008). NBS holds authority to offer services in 46 other states. FTI and NBS have indicated that they have fewer than 70 employees located in New Jersey

On August 26, 2017, FTI, Fusion BCHI Acquisition LLC ("Fusion Merger Sub"), a direct wholly-owned subsidiary of FTI formed solely to complete the merger transaction, and Birch Holdings, the current holding company for the Birch Companies, entered into an Agreement and Plan of Merger. Birch Holdings will merge with and into Fusion Merger Sub, the surviving entity in the merger. Under its terms, the existing shareholders of Birch, through BCHI Holdings, will acquire approximately 75% of FTI's issued and outstanding common stock. As a result, the majority ownership and control of FTI will be acquired by the existing shareholders of Birch. The remaining approximately twenty-five percent (25%) of FTI issued and outstanding shares of common stock will be held by the current stockholders of FTI at the time of the closing. The result is that approximately seventy-five percent (75%) of the indirect equity interests in NBS also will be acquired by BCHI Holdings and ultimately held by the Birch Shareholders. The FTI stockholders will hold the remaining approximately twenty-five percent (25%) indirect equity interest in NBS.

The merger transaction will not involve a change of service provider for any NBS customer and therefore be transparent to those customers. Prior to the merger, Birch will engage in a series of pro-forma intra-corporate restructuring transactions that will be transparent to customers in order to segregate its cloud and business services from its consumer and single line business customers. Following the merger, cloud and business services business, including BCI, will continue as wholly-owned subsidiaries of Birch Holdings and indirect wholly-owned subsidiaries of FTI and the consumer and single-line business customers will remain under Birch Communications of the Northeast, Inc., ("Birch Northeast").¹

¹ On November 22, 2017, Birch Northeast filed a petition with the Board requesting authority to provide facilities-based and resold local exchange and intrastate interexchange telecommunications services within New Jersey in BPU Docket No. TE17121242.

FTI proposes that the New Fusion Birch companies borrow up to \$775 million² through financing arrangements with banks, other financial institutions, and/or other types of funding sources. The proceeds will be used to repay existing debt, facilitate operational consolidations, and provide for future working capital and general corporate requirements. The financing may be issued in multiple senior and subordinated tranches, containing a revolver facility and an accordion facility to fund future acquisitions by FTI. The exact amounts and terms of the financing will not be finalized until the specific arrangements have been executed, shortly before funding the various transactions and reflecting market conditions then existing. Some terms, such as the interest rate, may be fixed, floating tied to LIBOR or the Federal Funds rate plus applicable margin, or a combination of fixed and floating rates. FTI or one or more of its subsidiaries is the borrower in the financing. New Fusion Birch, including NBS and BCI, are the guarantors on some or all of the financing arrangements. Funding obligations are secured by an interest in the assets of New Fusion Birch companies and of the guarantor subsidiaries, including NBS and/or BCI.

By the petition, NBS and BCI will continue to provide high-quality services at the same rates and on the same terms and conditions as are currently in effect following the merger transaction. Any future changes to the rates, terms and conditions of service will be undertaken pursuant to the customers' contracts and applicable law. The only material change immediately following closing will be to ownership of the companies. Petitioners contend that the new ownership of these companies is managerially, technically and financially qualified to assume ownership and control of these companies. Petitioners assert the proposed transaction will serve the public interest by enhancing the ability of these companies to serve their customers more effectively and efficiently with enhanced service offerings through combined existing networks and through access to additional financial, technical and managerial resources to compete in the marketplace. Petitioners emphasize that approval of the new financing will serve the public interest because the New Fusion Birch enterprise will increase the breadth and innovative caliber of their service offerings and to provide the nationwide coverage that will be of particular interest to business customers with multiple locations, including projected cost-saving synergies to offer service with lower cost structures to the benefit of consumers. Petitioners argue the transaction will enable BCI Holdings to more effectively concentrate resources toward consumer and small business customers. Petitioners add that access to the financial resources is necessary to complete potential acquisitions and other capital improvements. Petitioners assert that the financing is necessary and appropriate, consistent with the performance by NBS and BCI of their respective services to the public, does not impair the ability of either NBS or BCI to perform such services, and promotes the corporate purposes of the New Fusion Birch companies.

Petitioners also state that they do not expect the transaction or the proposed financing to result in a change to their existing management or employees in New Jersey. Petitioners further assert that neither the transaction nor the financing will have any adverse impact on any pension benefits of such employees.

The New Jersey Division of Rate Counsel ("Rate Counsel") submitted comments by letter dated December 21, 2017, stating it does not oppose approval of the proposed acquisition provided conditions are imposed to ensure continued service quality in connection with potential future employment attrition in New Jersey. Rate Counsel states Petitioners have provided information required under the statutes and Board regulations in support of its assertion that the merger and financing arrangements contemplated are not contrary to the public interest and will serve a

² On December 18, 2017, Petitioners submitted an amendment to revise their borrowing commitment from \$720 million to \$775 million on the total amount of the proposed financing arrangements.

beneficial purpose for New Jersey customers. Specifically, as a condition of approval, Rate Counsel urges that the Board require Petitioners to notify the Board and Rate Counsel, providing an appropriate explanation in writing within a minimum of thirty days prior to effectuating a reduction in New Jersey jobs that is greater than fifteen percent (15%), throughout a three (3) year period following approval.

By letter dated December 29, 2017, Petitioners object to the condition proposed by Rate Counsel as unduly intrusive into the management of companies that provide solely competitive services. Petitioners argue the condition is not consistent with what the Board has ordered in similar dockets where the Board has required companies to report after the fact, for three years following closing, headcount reductions in New Jersey greater than 15%.

DISCUSSION, FINDINGS AND CONCLUSIONS

In considering a transfer of control request, the Board shall evaluate the impact of acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates. N.J.S.A. 48:2-51.1(a). The Board must be satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1 and N.J.A.C. 14:1-5.14(c). Also, pursuant to N.J.S.A. 48:3-7 and N.J.S.A. 48:3-10, the Board must determine whether the public utility, or a wholly-owned subsidiary thereof, may be unable to fulfill its pension obligations to any of its employees.

After a careful review of this matter, the Board is satisfied that positive benefits will flow to customers based upon the record, and that the combined enterprise would not be able to exercise market power to raise prices above competitive levels or exclude competitors from the marketplace. The Board therefore **FINDS** that the proposed transaction will have little impact on competition. The Board additionally **FINDS** that there will be no negative impact on rates or the present provision of safe, adequate and proper service since Petitioners' New Jersey customers will continue to receive the same services at the same rates and under the same terms and conditions. The provision of service quality on competitive offerings is in the public interest.

The Board shares the concern of Rate Counsel to avoid the potential for diminished service, service quality and customer service capability based on post-transaction employment attrition. BCHI Holdings, LLC and Birch Communications, Inc. have no employees in New Jersey and Fusion Telecommunications International, Inc. and Network Billing Systems, LLC combined have less than seventy (70) employees in New Jersey. Petitioners stated that there are no expected changes in New Jersey employee headcount as a result of the transaction. Board precedent requires companies to report headcount reductions in New Jersey greater than 15% for a 3-year period after the date of closing. See, In the Matter of the Verified Joint Petition of Broadview Network Holdings, Inc. et al., Docket No. TM10404333 (June 30, 2017). There is no reason to disturb Board precedent based on these facts. The Board, therefore, **FINDS** that Petitioners must notify the Board, providing a written explanation if there is a net loss of New Jersey employees of Petitioners that is greater than fifteen percent (15%) of its total employee headcount for a 3-year period after the date of closing. As Petitioners have assured that existing employee retirement plans will be retained, the Board is persuaded, consistent with N.J.S.A. 48:3-7 and N.J.S.A. 48:3-10, that Petitioners are not unable to fulfill pension obligations.

As to the proposed financing arrangements, the Board **FINDS** that the proposed transaction will not have a negative impact on competition, the rates of current customers, or New Jersey

employees. Therefore, after investigation and consideration of the record and information submitted in this proceeding, the Board **FINDS** that the expanded financing arrangements are in accordance with the law and in the public interest, and **HEREBY AUTHORIZES** Petitioners to participate in financing arrangements up to an aggregate amount of \$775 million, and to take those actions necessary to effectuate such financing arrangements.

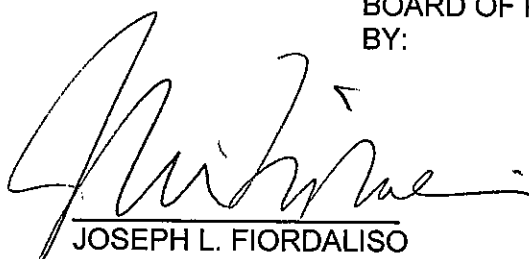
This Order is issued subject to the following provisions:

1. The Order is subject to Petitioners notifying the Board Secretary and the Office of Cable Television and Telecommunications, in writing, within five (5) days of the date of the closing of the proposed transaction.
2. This Order shall not affect or in any way limit the exercise of the authority of the Board or the State of New Jersey in any future petition or in any proceeding regarding rates, costs of service, franchises, service, financing, accounting, capitalization, depreciation or any other matters affecting Petitioners.
3. Petitioners shall notify the Board, within five business days, of any material changes in the proposed financing and shall provide complete details of such transactions, including any anticipated effects upon service in New Jersey.

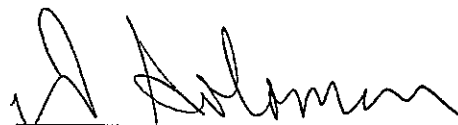
This Order shall be effective February 10, 2018.

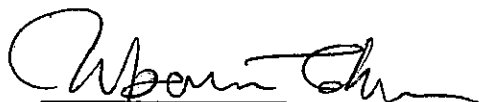
DATED: 1/31/18

BOARD OF PUBLIC UTILITIES
BY:


JOSEPH L. FIORDALISO
PRESIDENT


MARY-ANNA HOLDEN
COMMISSIONER


DIANNE SOLOMON
COMMISSIONER


UPENDRA J. CHIVUKULA
COMMISSIONER


RICHARD S. MROZ
COMMISSIONER

ATTEST:


CARMEN D. DIAZ
ASSISTANT BOARD SECRETARY

I HEREBY CERTIFY that the within document is a true copy of the original in the files of the Board of Public Utilities.

**IN THE MATTER OF THE VERIFIED PETITION OF BCHI HOLDINGS, LLC, BIRCH COMMUNICATIONS, INC., FUSION TELECOMMUNICATIONS INTERNATIONAL, INC., AND NETWORK BILLING SYSTEMS, LLC FOR CONSENT TO A TRANSACTION THAT WILL RESULT IN A MATERIAL CHANGE TO THE OWNERSHIP AND CONTROL OF NETWORK BILLING SYSTEMS, LLC AND FOR APPROVAL TO PARTICIPATE IN NEW FINANCING ARRANGEMENTS
DOCKET NO. TF17111167**

SERVICE LIST

James H. Laskey, Esq.
Norris McLaughlin & Marcus, PA
400 Crossing Blvd, 8th Floor
Bridgewater, NJ 08807-5933
jlasky@nmmlaw.com

Cherie R. Kiser
Angela Collins
Cahill Gordon & Reindel LLP
1990 K Street, NW, Suite 950
Washington, DC 20006
ckiser@cahill.com
acollins@cahill.com

Edward A. Yorkgitis, Jr.
Denis N. Smith
Kelley Drye & Warren LLP
3050 K St., NW, Suite 400
Washington, DC 20007
cyorkgitis@kelleydrye.com
dsmith@kelleydrye.com

James P. Prenetta, Jr.
Executive VP and General Counsel
Fusion Telecommunications International, Inc.
420 Lexington Avenue, Suite 1718
New York, NY 10170
jprenetta@fusionconnect.com

Gordon P. Williams, Jr.
Senior VP and General Counsel
Birch Communications, Inc.
320 Interstate North Pkwy SE
Atlanta, GA 30339
chuck.williams@birch.com

David Mayer
General Counsel & Executive Vice President
Lighttower Fiber Networks
80 Central Street
Boxborough, MA 01719
dmayer@lighttower.com

Carol Artale, Esq.
Legal Specialist
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, NJ 08625-0350
Carol.artale@bpu.nj.gov

Lawanda R. Gilbert, Director
Office of Cable Television and
Telecommunications
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
Lawanada.gilbert@bpu.nj.gov

Rocco Della Serra
Office of Cable Television and
Telecommunications
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
rocco.della-serra@bpu.nj.gov

Christine Lin
Administrative Analyst
Economist Office
Board of Public Utilities
44 South Clinton Avenue, 3rd Floor, Suite 314
Post Office Box 350
Trenton, New Jersey 08625-0350
Christine.lin@bpu.nj.gov

Veronica Beke
Deputy Attorney General
Department of Law & Public Safety
Division of Law
124 Halsey Street
Post Office Box 45029
Newark, NJ 07101-45029
veronica.beke@law.njoag.gov

Stefanie A. Brand, Esq., Director
Division of Rate Counsel
140 East Front Street
Post Office Box 003
Trenton, NJ 08625-0003
sbrand@rpa.state.nj.us