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WINAFRED R. BRANTL

EMAIL: wbrantl@kelleydrye.com

November 14, 2017

17-00129

**BY OVERNIGHT MAIL**

Tennessee Public Utility Commission  
c/o Sharla Dillon, Dockets and Records Manager  
502 Deaderick Street, 4th Floor  
Nashville, Tennessee 37243

RE: Joint Application 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

Dear Ms. Dillon:

Enclosed for filing with the Tennessee Public Utility Commission ("Commission"), please find an original, four copies and a duplicate copy of the above-referenced application. This application has been submitted electronically today through the Commission's online filing system.

Please date-stamp the duplicate upon receipt and return it in the pre-addressed envelope provided.

Should there be any questions with respect to this filing, please contact Winafred Brantl at (202) 945-6649 or via email at [wbrantl@kelleydrye.com](mailto:wbrantl@kelleydrye.com). Thank you for your assistance with this matter.

Respectfully submitted,



Winafred Brantl  
Counsel for Network Billing Systems, Inc. and  
Fusion Telecommunications International, Inc.

Enclosures

**Before the  
TENNESSEE PUBLIC UTILITY COMMISSION**

Joint Application 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 )

**JOINT APPLICATION**

BCHI Holdings, LLC (“BCHI Holdings”), Birch Communications, Inc. (“BCI”),<sup>1</sup> Fusion Telecommunications International, Inc. (“FTI”), and Network Billing Systems, LLC (“NBS”),<sup>2</sup> collectively, the “Applicants,” respectfully request, pursuant to Tenn. Code Ann. § 65-4-113, that the Tennessee Public Utility Commission (“Commission”) grant authority for Applicants to consummate the merger transaction described below (the “Merger”), that will transfer a controlling interest in NBS to BCHI Holdings (the “Transaction”). Applicants also seek the Commission’s approval, pursuant to Tenn. Code Ann. § 65-4-109, for NBS and BCI to participate in new financing arrangements to be entered into by FTI in connection with the closing of the Transaction.

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<sup>1</sup> BCHI Holdings and BCI, together with their affiliated operating companies described in **Exhibit 1** hereto (the “Birch Companies” or “Birch”).

<sup>2</sup> Fusion and NBS, together with other Fusion operating companies described in **Exhibit 2** hereto (the “Fusion Companies” or “Fusion”).

Through the Transaction, the Birch Companies and the Fusion Companies (as such terms are defined in footnotes 1 and 2 hereof) intend to combine their business services and cloud services operations. The Transaction is expected to create a major national cloud and business services provider bringing significant benefits to customers of the combined companies and to the communications market place in Tennessee. As a result of the Transaction, BCHI Holdings will acquire majority interests in, and control of, the Fusion Companies, including NBS. In connection with the Transaction, Birch also will restructure its operations to enable a spin-off of its consumer and single-line business customers to the existing shareholders of Birch (“Birch Shareholders”).

Applicants also have filed a Joint Application with the Federal Communications Commission (“FCC”) in WC Docket No. 17-301. In support of the instant filing, Applicants provide the following information:

## **I. THE COMPANIES**

### **A. The Birch Companies**

The Birch Companies operate as a leading 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.<sup>3</sup>

BCHI Holdings is a Georgia limited liability company, with a principal office at 3060 Peachtree Road, NW, Suite 1065, Atlanta, GA 30305. 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 at 320 Interstate North Parkway SE, Atlanta, GA 30339. In Tennessee, the Commission authorized BCI to operate as a competitive local exchange carrier in Docket No. 99-00644 on November 30, 1999. Upon closing of the Transaction, BCI will become an indirect, wholly-owned subsidiary of FTI.<sup>4</sup>

A diagram of the current corporate structure of Birch Holdings is provided in **Exhibit 3**.

## **B. The Fusion Companies**

The Fusion Companies provide digital voice and data communications services, including hosted Voice over Internet Protocol ("VoIP") and Session Initiated Protocol ("SIP") trunking, and other enhanced communications services and features to businesses primarily in the United States. Fusion also provides VoIP services to carriers worldwide.

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<sup>3</sup> Tempo Telecom, LLC, one of the Birch Companies, is a reseller of prepaid wireless voice and Internet access services. Birch also has a subsidiary operating as a competitive local exchange carrier in Canada.

<sup>4</sup> Birch Telecom of the South, Inc. ("BTS") is also authorized by the Commission pursuant to its order in Docket 00-00341 (July 20, 2000) to provide competitive local exchange carrier telecommunications services in Tennessee; however, as explained below in the discussion of the Transaction, BTS will not become a subsidiary of FTI following the closing of the Merger. Prior to that closing, Birch Holdings intends to convert both BCI and BTS into limited liability companies. Separate filings will be made with the Commission to implement these changes in corporate form.

FTI is a publicly traded Delaware corporation (NASDAQ: FSNN), with its headquarters located at 420 Lexington Avenue, Suite 1718, New York, New York 10170. FTI holds Section 214 authority from the FCC 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 Fusion,<sup>5</sup> is a New Jersey limited liability company with corporate headquarters located at 695 U.S. Route 46 West, Fairfield, New Jersey 07004. NBS provides 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 Tennessee, the Commission has authorized NBS to operate as an interexchange service reseller.<sup>6</sup> Additionally, NBS holds authority to offer intrastate telecommunications services in 46 other states. NBS also holds Section 214 authority from the FCC to provide interstate and international telecommunications services.<sup>7</sup>

A diagram of the current corporate structure of FTI is provided in **Exhibit 3**.

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<sup>5</sup> NBS also operates under the d/b/a Solex in a limited number of states.

<sup>6</sup> ID Number 128241.

<sup>7</sup> At this time, FTI also has operating subsidiaries providing telecommunications services in Ohio. In a series of corporate steps, these entities will be consolidated into NBS prior to closing of the Transaction.

## II. DESIGNATED CONTACTS

Questions, correspondence or other communications concerning this Application should be directed to Applicants' counsel as identified below:

### For FTI and NBS

Edward A. Yorkgitis, Jr.  
Winafred Brantl  
Kelley Drye & Warren LLP  
3050 K St., NW #400  
Washington, DC 20007  
Tel: (202) 945-6649  
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Email: [cyorkgitis@kelleydrye.com](mailto:cyorkgitis@kelleydrye.com)  
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### For BCHI Holdings and BCI

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Angela F. Collins  
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[acollins@cahill.com](mailto:acollins@cahill.com)

With copies to:

James P. Prenetta, Jr.  
Executive Vice President and General Counsel  
Fusion Telecommunications International, Inc.  
420 Lexington Avenue, Suite 1718  
New York, NY 10170  
Email: [jprenetta@fusionconnect.com](mailto:jprenetta@fusionconnect.com)

Gordon P. Williams, Jr.  
Senior Vice President & General Counsel  
Birch Communications, Inc.  
320 Interstate North Pkwy SE  
Atlanta, GA 30339  
Email: [chuck.williams@birch.com](mailto:chuck.williams@birch.com)

## III. DESCRIPTION OF THE TRANSACTION

### *Overview*

On August 26, 2017, FTI, Fusion BCHI Acquisition LLC, a direct wholly-owned subsidiary of FTI formed by FTI solely for the purpose of completing the Transaction ("Fusion Merger Sub"), and Birch Holdings, the current holding company for the Birch Companies, entered into an Agreement and Plan of Merger (the "Merger Agreement") to combine the cloud services business of Fusion and the non-consumer, cloud and/or multi-line business services business of Birch (the "Cloud and Business Services Business") into one of the largest publicly-traded North American cloud services providers with projected annual revenue of over \$570

million (“New Fusion Birch”). New Fusion-Birch intends to utilize its 100% Internet protocol (“IP”)-based network to provide fully-integrated, enterprise-level cloud services to over 150,000 business customers.

Under the terms of the Merger Agreement, 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 (“FTI Stockholders”). 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.<sup>8</sup> The FTI Stockholders will hold the remaining approximately twenty-five percent (25%) indirect equity interest in NBS.<sup>9</sup>

*Creating New Fusion-Birch (the Restructuring)*

In anticipation of the Transaction, Birch will implement an intracorporate restructuring that segregates its Cloud and Business Services Business from its consumer and single-line business customers (the “Consumer Business”). Post-restructuring (and pre-close), the Birch entities providing the Cloud and Business Services Business, including BCI, will continue as wholly-owned subsidiaries of Birch Holdings. The Birch entities dedicated to supporting the

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<sup>8</sup> The Transaction will not involve a change of service provider for any NBS customer. The merger is expected to be transparent to these customers. Consequently, notice of the proposed change to the ownership of NBS is not required.

<sup>9</sup> Additionally, as BCI will become a wholly-owned subsidiary of FTI as a result of the Merger, the FTI Stockholders collectively will acquire a minority twenty-five percent (25%) ownership interest in BCI. The Birch Shareholders, however, will continue to hold a majority controlling interests in BCI through their ownership of FTI through Birch Holdings. Applicants’ understanding is that prior Commission approval is not required for the transfer of a non-controlling interest in BCI. Should the Commission deem this element of the Transaction to require prior approval, however, Applicants respectfully request that the Commission grant such approval as part of its disposition of this Application.

Consumer Business, including BTS, which operates in Tennessee pursuant to authority from the Commission, together with their newly formed holding company, Lingo Communications, LLC (“Lingo”), will be spun-off to the Birch Shareholders on or prior to the closing of the Transaction. This spin-off is expected to be achieved primarily through a reorganization of existing Birch operating subsidiaries but also may include intra-corporate asset transfers, as necessary to meet the objectives of segregating the Cloud and Business Services Business from the Consumer Business. The specific details of the spin-off will depend upon logistical considerations and each State’s regulatory requirements. This reorganization will be entirely *pro forma* – both prior to and following the restructuring, the same Birch Shareholders will, at all times, hold a controlling interest in each of the Birch Companies.<sup>10</sup> The reorganization also will be transparent to customers.

At closing of the Transaction, Birch Holdings will merge with and into Fusion Merger Sub and Fusion Merger Sub will be the surviving entity in the merger. As a result, the subsidiaries of Birch Holdings that are engaged in the Cloud and Business Services Business (subsequent to the reorganization described in the previous paragraph), including BCI, will, by operation of law, become indirect wholly-owned subsidiaries of FTI.<sup>11</sup>

For the Commission’s convenience, pre- and post-Transaction corporate organizational charts for FTI and BCHI Holdings are attached hereto as **Exhibit 3**.

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<sup>10</sup> To the extent necessary, additional regulatory filings may be made to address these reorganizational changes. Applicants’ understanding is that Commission approval is not required for these *pro forma* changes; however, if the Commission determines otherwise, Applicants respectfully request that the Commission grant such approval as part of its disposition of this Application.

<sup>11</sup> BTS and the other operating entities engaged in the Consumer Business will be unaffected by the merger of Birch Holdings with Fusion Merger Sub.



### *Participation in Financing Arrangements*

In order to fund the cost of the Transaction (including the repayment of existing debt of Fusion and Birch), facilitate operational consolidations, and provide for future working capital and general corporate requirements, FTI proposes that the New Fusion-Birch companies be able borrow up to \$720 million through one or more new financing arrangements with banks, other financial institutions, and/or other types of funding sources (the “New Financing”).<sup>12</sup> FTI is currently negotiating terms for the New Financing, which may be issued in multiple tranches, which may contain a revolver facility and which also may include an accordion facility to fund future acquisitions by FTI. As a result, the exact amounts and terms of the New Financing will not be finalized until the specific arrangements have been executed, which will likely be shortly before funding of the various transactions and will reflect market conditions then existing. Some of the terms, such as the interest rate, may fluctuate during the term of the New Financing due to changes in market conditions and the financial condition and/or the performance of the borrower entity(ies). The borrower under the New Financing may be FTI or one or more of its subsidiaries. It is expected that, in all cases, the non-borrower entities within New Fusion-Birch, including NBS and BCI, will act as guarantors and some or all of the New Financing may be secured by the assets of FTI (including, potentially, the stock of NBS and/or BCI) and of the guarantor subsidiaries, including NBS and/or BCI. Therefore, pursuant to Tenn. Code Ann. § 65-4-109, Applicants request that, to the extent it may be necessary, the Commission authorize NBS and BCI to provide their respective guarantees, serve as co-borrowers, or otherwise provide security in connection with the New Financing, the terms of which are expected to be substantially within the following parameters:

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<sup>12</sup> The Consumer Business operating entities will not participate in the New Financing.

- Funding Sources:* The funding sources may be banks, financial institutions, private lending institutions, private individuals, and/or other institutions, either individually or as a consortium. The funding group may change over the life of the New Financing. Other types of funding sources may be relied on as well.
- Amount:* Up to \$720 million at any one time outstanding. Portions of the funds may be made in the form of conventional credit facilities such as revolving credits (which can be re-borrowed during the term of the commitment); letters of credit; the issuance of secured or unsecured notes or debentures (including notes convertible into common stock) to banks, financial institutions, private lending institutions, private individuals, and/or other institutions; or term loans. The New Financing may consist of a senior tranche and a subordinated tranche.
- Maturity:* FTI anticipates that the New Financing will consist solely of long-term indebtedness. Specific maturity dates will be subject to negotiation and will depend on credit and market conditions, but are expected to be longer than three (3) years but less than ten (10) years.
- Interest:* The interest rate will likely be the market rate for similar financings and will not be determined until such time as each tranche of the New Financing is funded. As is typical in some such transactions (*e.g.*, bank loans), the interest rate may be fixed (*e.g.*, set at signing or closing based on then-current market conditions) or floating (consisting of a base rate, which will float with a rate index such as LIBOR or Federal Funds Rate, plus an applicable margin), or a combination of fixed and floating rates.
- Security:* Relevant to this Application, some and perhaps all of the funding is expected to be secured by an interest in specified assets of the New Fusion-Birch companies, including NBS and BCI, including, but not limited to, a security interest in their receivables, tangible personal property, equipment, intangible personal property, and intellectual property. The stock of the various New Fusion-Birch companies (or of their direct or indirect parents) may also be pledged as additional security. The New Fusion-Birch companies are also expected to provide guarantees or could serve as a borrower or co-borrower under one or more of these facilities. The security documents will contain appropriate provisions indicating that the exercise of certain rights thereunder may be subject to obtaining prior regulatory approval.

*Use of Proceeds:* Proceeds from the New Financing are expected to be used to repay existing indebtedness,<sup>13</sup> to fund the costs associated with the Transaction, and for general corporate and working capital purposes and for additional acquisitions of other cloud service providers, and/or their assets.

The Applicants intend to consummate the Transaction as soon as possible following receipt of all necessary federal and state regulatory approvals and satisfaction (or waiver) of various other closing conditions.

#### **IV. PUBLIC INTEREST CONSIDERATIONS**

The Applicants submit that approval of the proposed Transaction will promote the public interest, convenience, and necessity. The Transaction will result in the creation of one of the largest, publicly-traded cloud service providers in North America and a leader in the \$200 billion cloud services market. The combined entities will have an extensive nationwide IP-based network serving over 150,000 business customers. The Applicants project annual revenues of over \$570 million a year and project that the combination will result in cost-saving synergies in excess of \$20 million. The Merger will allow New Fusion-Birch to 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. Moreover, the combined entities expect to be able to take advantage of projected cost-saving synergies to offer service with lower cost structures to the benefit of consumers across the United States.

In addition, while the focus of the Transaction is the creation of the New Fusion-Birch business-cloud services enterprise, the consumer and small business services customers of Birch also will benefit from the corporate reorganization in anticipation of the Transaction. The

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<sup>13</sup> As an initial matter, the New Financing will be used to pay off existing financing facilities of FTI and Birch.

Transaction will enable BCHI Holdings to more effectively concentrate resources towards serving these customers.

The Transaction presents no risks to Tennessee consumers. Fusion and Birch are each well-established communications service providers with decades of experience operating in the U.S. communications market. The financial, technical and managerial qualifications of these companies are a matter of record with the Commission, which has reviewed their respective qualifications to operate and own regulated telecommunications carriers on previous occasions. Applicants respectfully request that the existing record of the qualifications of Fusion and Birch be incorporated herein by reference.

Moreover, Fusion and Birch customers will not be harmed in any manner by the Transaction and the associated reorganization. Subscribers to the business and cloud services offered today by NBS and the Birch Companies will continue to receive those services under New Fusion-Birch. Customers of Birch's Consumer Business services will continue to receive their services without interruption. As a result, neither Fusion customers nor Birch customers should experience any disruption of, or diminishment to, their existing services. To the contrary, the operational and financial efficiencies expected to result from the Transaction should lead to significant improvements in the quality of those services.

The Transaction also will not adversely impact competition in the Tennessee and national telecommunications market. The demand for state-of-the-art cloud and Internet protocol-based services continues to grow steadily and new competitors enter the market regularly to meet that demand. Similarly, the markets remain competitive for the traditional intrastate and interstate telecommunications services offered by NBS and BCI.

Finally, approval of Applicants' proposed financing arrangements is also in the public interest. The resources made available through the New Financing will enable the Applicants to implement the proposed Transaction and are expected to provide the New Fusion-Birch with greater ability to grow and expand their business effectively in today's highly competitive telecommunications environment.

## V. CONCLUSION

WHEREFORE, for the reasons set forth above, the Applicants respectfully submit that the public interest, convenience and necessity will be furthered by the Transaction, including the proposed New Financing. Applicants therefore request that the Commission expeditiously grant this Application and such additional relief as it may deem appropriate.

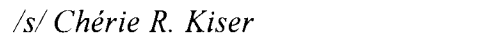
Respectfully submitted,

**Fusion Telecommunications International, Inc.  
Network Billing Systems, LLC**

**BCHI Holdings, LLC  
Birch Communications, Inc.**



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[acollins@cahill.com](mailto:acollins@cahill.com)

Date: November 14, 2017

## **LIST OF EXHIBITS**

- |                  |   |
|------------------|---|
| <b>EXHIBIT 1</b> | The Birch Operating Companies                                 |
| <b>EXHIBIT 2</b> | The Fusion Operating Companies                                |
| <b>EXHIBIT 3</b> | Pre-and Post-Close Organizational Charts for Fusion and Birch |

# EXHIBIT 1

The Birch Operating Companies

## **Exhibit 1**

### **The Birch Operating Companies**

1. Birch Communications, Inc.
2. Birch Communications of Kentucky, LLC (dba Birch Communications)
3. Birch Communications of the Northeast, Inc. (dba Birch Communications)
4. Birch Communications of Virginia, Inc. (dba Birch Communications)
5. Birch Telecom of Kansas, Inc. (dba Birch Communications)
6. Birch Telecom of Missouri, Inc. (dba Birch Communications)
7. Birch Telecom of Oklahoma, Inc. (dba Birch Communications)
8. Birch Telecom of Texas LTD, LLP (dba Birch Communications)
9. Birch Telecom of the Great Lakes, Inc. (dba Birch Communications)
10. Birch Telecom of the South, Inc. (dba Birch Communications)
11. Birch Telecom of the West, Inc. (dba Birch Communications)
12. Cbeyond Communications, LLC (dba Birch Communications)
13. Ionex Communications North, Inc. (dba Birch Communications)
14. Ionex Communications South, Inc. (dba Birch Communications)
15. Ionex Communications, Inc. (dba Birch Communications)
16. Primus Management ULC (Foreign Carrier)
17. Tempo Telecom, LLC



## EXHIBIT 2

### The Fusion Operating Companies

## **Exhibit 2**

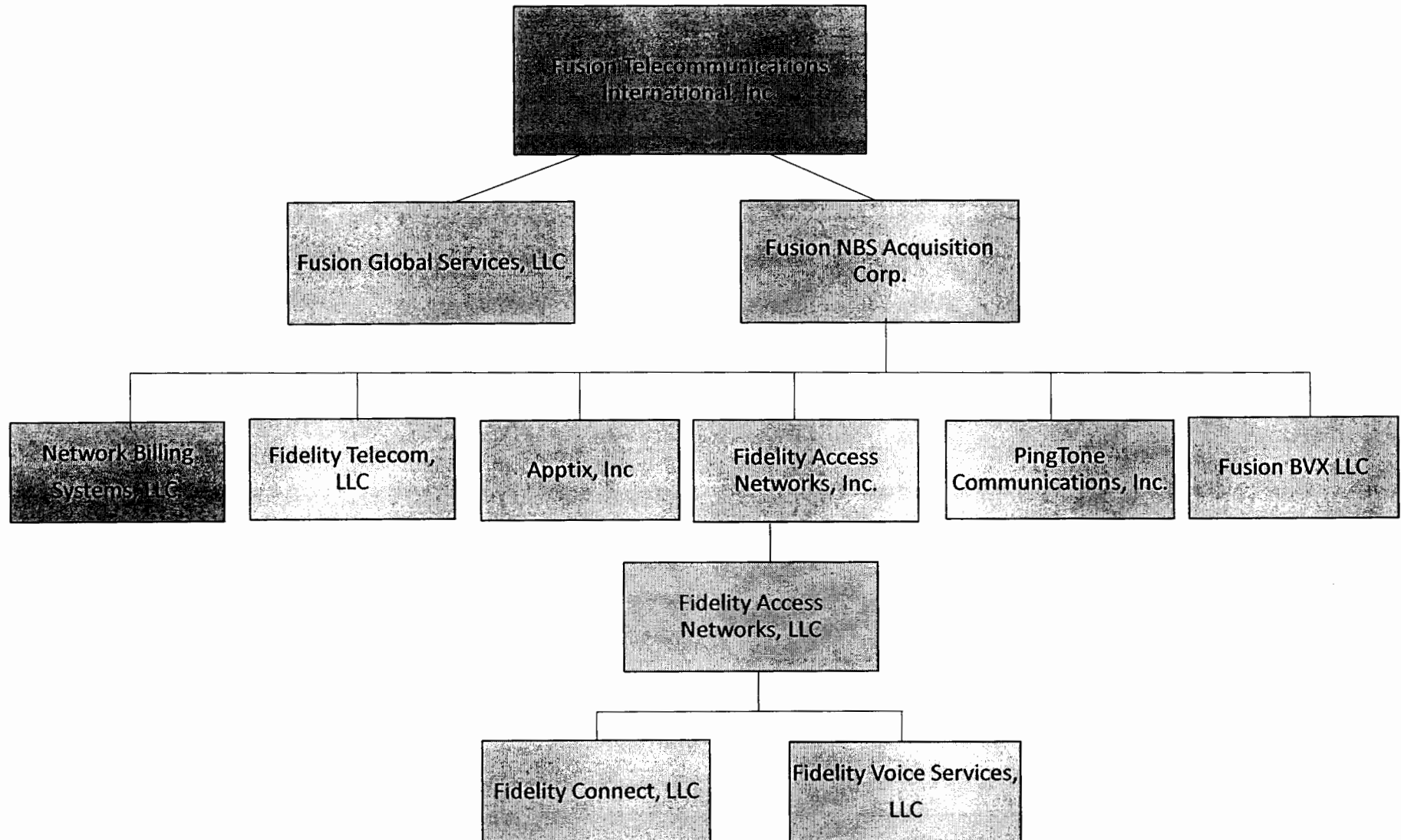
### **The Fusion Operating Companies**

1. Fusion Telecommunications International, Inc.
2. Apptix, Inc.
3. Fidelity Access Networks, LLC
4. Fidelity Connect, LLC
5. Fidelity Telecom, LLC
6. Fidelity Voice Services, LLC
7. Fusion Global Services, LLC
8. Network Billing Systems, LLC
9. PingTone Communications, Inc.

## EXHIBIT 3

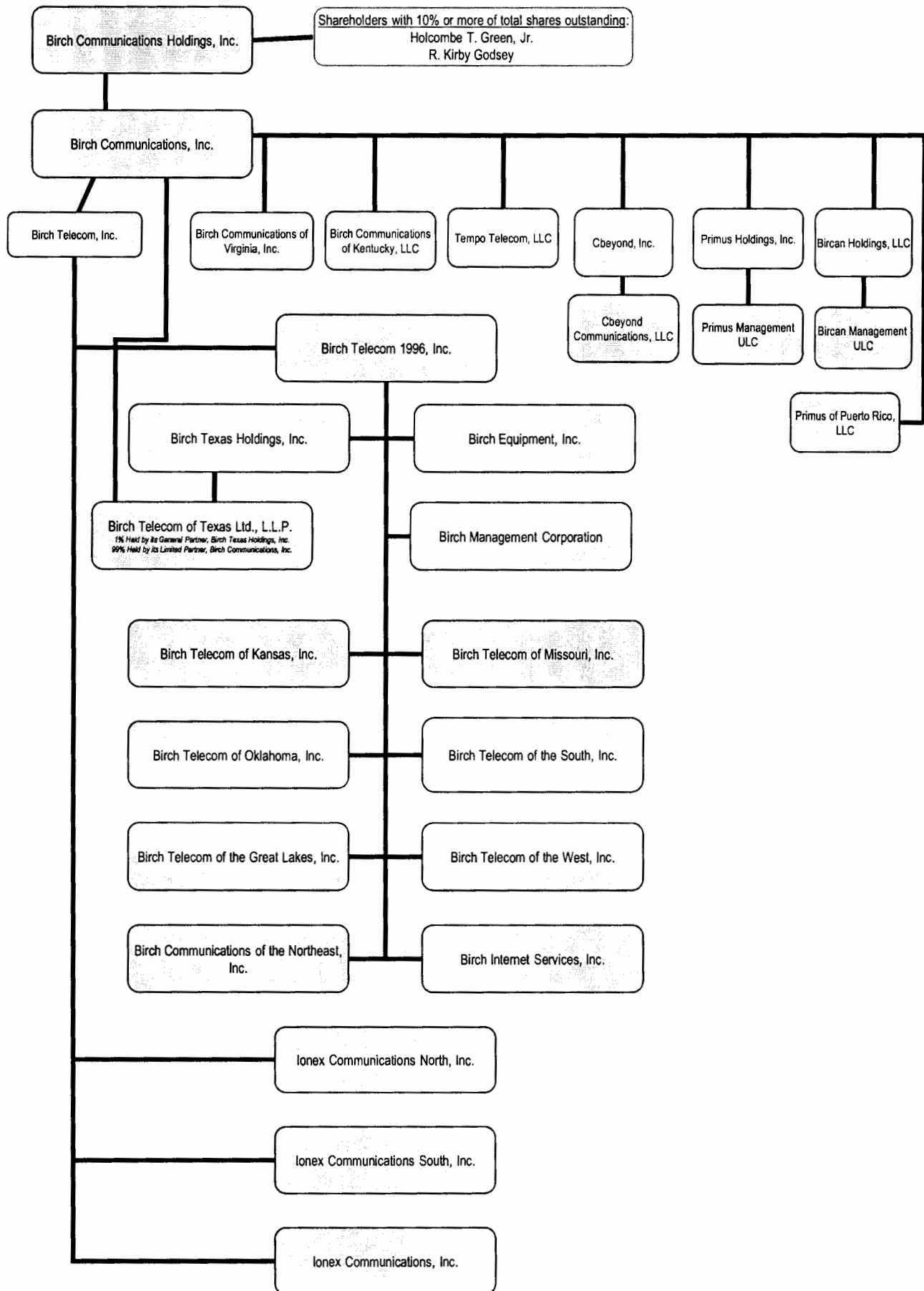
### Pre- and Post-Close Organizational Charts for Fusion and Birch

## Fusion Companies (Pre-Close)

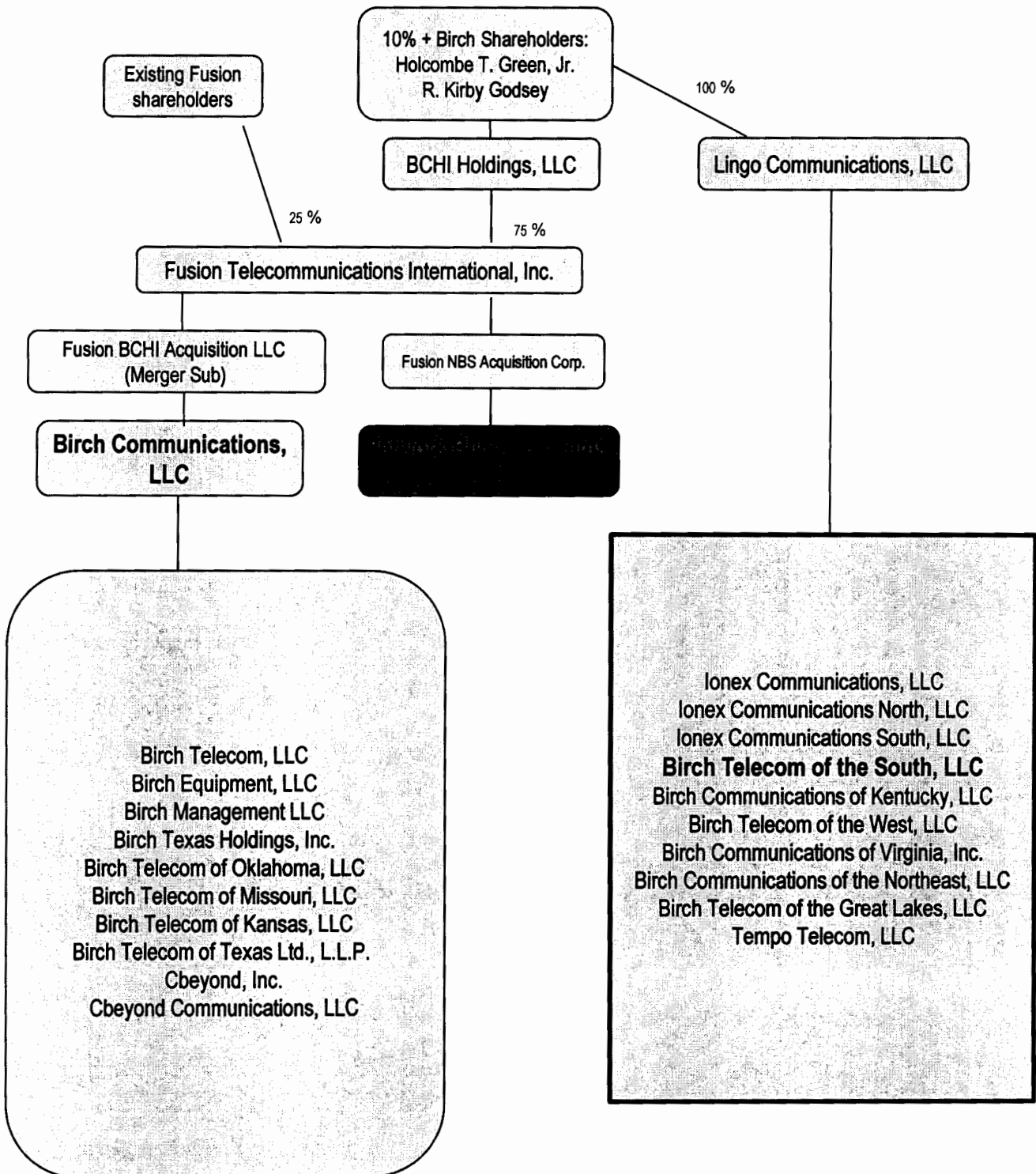


Network Billing Systems, LLC is the only Fusion Telecommunications International, Inc. entity holding a state license.

## Birch Companies Pre-Close Organizational Chart



**Post-close organizational chart for Fusion and Birch**

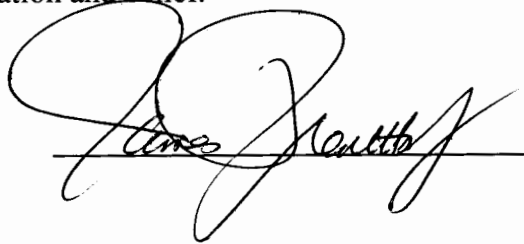


This chart may not include certain Fusion or Birch subsidiaries that are not operating companies or that are foreign carrier affiliates.

**VERIFICATION**

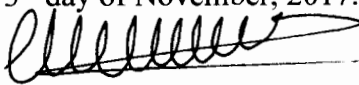
**STATE OF NEW YORK**       §  
   §  
**COUNTY OF NEW YORK**   §

I, James P. Prenetta, Jr., state that I am the Executive Vice President and General Counsel of Fusion Telecommunications International, Inc. ("Fusion"); that I am authorized to make this Verification on behalf of Fusion and its wholly-owned subsidiary, Network Billing Systems, LLC ("NBS"); that I have read the foregoing document; and that the statements in the foregoing document with respect to Fusion and NBS, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.



Subscribed and sworn to before me this 13<sup>th</sup> day of November, 2017.

Notary Public: Laura V. Nadal Uceda



My Commission expires: 02/27/2020

LAURA V NADAL UCEDA  
NOTARY PUBLIC-STATE OF NEW YORK  
No. 01NA6256571  
My Commission Expires 02/27/2020

## VERIFICATION

STATE OF GEORGIA

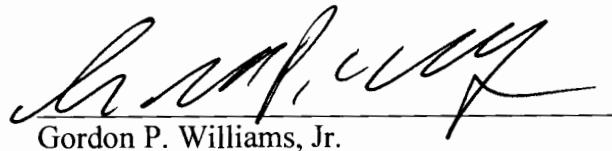
§

COUNTY OF COBB

§

§

I, Gordon P. Williams, Jr., state that I am the Senior Vice President, Secretary and General Counsel of Birch Communications, Inc. and its subsidiaries, including Cbeyond Communications, LLC (collectively, "Birch"); that I am authorized to make this Verification on behalf of Birch; that I have read the foregoing document; and that the statements in the foregoing document with respect to Birch, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.



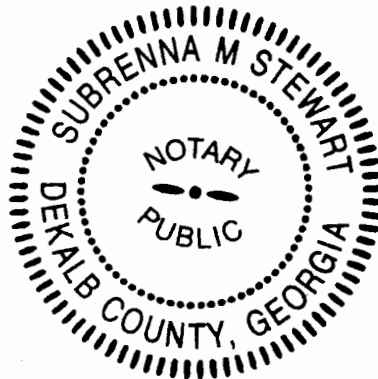
Gordon P. Williams, Jr.

Subscribed and sworn to before me this 13th day of November, 2017.

Notary Public

*Subrenna M. Stewart*

My Commission expires: August 10, 2021

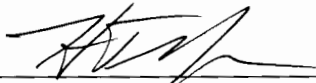




## VERIFICATION

STATE OF GEORGIA       §  
                                  §  
COUNTY OF COBB       §

I, Holcombe T. Green, Jr., state that I am the Sole Member and Manager of BCHI Holdings, LLC; that I am authorized to make this Verification on behalf of BCHI Holdings, LLC; that I have read the foregoing document; and that the statements in the foregoing document with respect to BCHI Holdings, LLC, except as otherwise specifically attributed, are true and correct to the best of my knowledge, information and belief.

  
\_\_\_\_\_  
Holcombe T. Green, Jr.

Subscribed and sworn to before me this 13th day of November, 2017.

Notary Public



My Commission expires: March 26, 2020

