

ORIGINAL



0000091811

MEMORANDUM

39

TO: Docket Control

FROM: Ernest G. Johnson
Director
Utilities Division

SA for EGJ

DATE: December 12, 2008

RE: IN THE MATTER OF THE APPLICATION OF PEERLESS NETWORK OF ARIZONA, LLC FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO PROVIDE RESOLD LOCAL EXCHANGE, RESOLD LONG DISTANCE, FACILITIES-BASED LOCAL EXCHANGE, AND FACILITIES-BASED LONG DISTANCE TELECOMMUNICATIONS SERVICES (DOCKET NO. T-20590A-08-0175)

Attached is the Staff Report for the above referenced application. The applicant is applying for approval to provide the following telecommunications services:

- Resold Local Exchange
- Resold Long Distance
- Facilities-Based Local Exchange
- Facilities-Based Long Distance

Staff is recommending approval of the application.

EGJ:CLA:kdh

Originator: Candrea Allen

Attachment: Original and Thirteen Copies

Arizona Corporation Commission
DOCKETED

DEC 12 2008

DOCKETED BY *MA*

RECEIVED
DEC 12 11:55
ARIZONA CORPORATION COMMISSION

SERVICE LIST FOR: PEERLESS NETWORK OF ARIZONA, LLC
DOCKET NO. T-20590A-08-0175

Mr. Jeffrey W. Crockett, Esq.
Snell & Wilmer, LLP
One Arizona Center
Phoenix, Arizona 85004-2202

Mr. Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ms. Janice M. Alward
Chief Counsel, Legal Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

Ms. Lyn Farmer
Chief Administrative Law Judge, Hearing Division
Arizona Corporation Commission
1200 West Washington Street
Phoenix, Arizona 85007

STAFF REPORT
UTILITIES DIVISION
ARIZONA CORPORATION COMMISSION

PEERLESS NETWORK OF ARIZONA, LLC.
DOCKET NO. T-20590A-08-0175

IN THE MATTER OF THE APPLICATION OF PEERLESS NETWORK OF ARIZONA, LLC
FOR APPROVAL OF A CERTIFICATE OF CONVENIENCE AND NECESSITY TO
PROVIDE RESOLD LOCAL EXCHANGE, RESOLD LONG DISTANCE, FACILITIES-
BASED LOCAL EXCHANGE, AND FACILITIES-BASED LONG DISTANCE
TELECOMMUNICATIONS SERVICES

DECEMBER 12, 2008

STAFF ACKNOWLEDGEMENT

The Staff Report for the application of Peerless Network of Arizona, LLC for approval of a Certificate of Convenience and Necessity to provide Resold Local Exchange, Resold Long Distance, Facilities-Based Local Exchange, and Facilities-Based Long Distance Telecommunications Services (Docket No. T-20590A-08-0175) was the responsibility of the Staff member listed below. Candrea Allen was responsible for the review and analysis of the application.

A handwritten signature in black ink, appearing to read 'Candrea Allen', written over a horizontal line.

Candrea Allen
Public Utilities Analyst

TABLE OF CONTENTS

	<u>PAGE</u>
1. INTRODUCTION.....	1
2. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES.....	1
3. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES	1
4. ESTABLISHING RATES AND CHARGES	2
5. LOCAL EXCHANGE CARRIER SPECIFIC ISSUES	2
5.1 NUMBER PORTABILITY	2
5.2 PROVISION OF BASIC TELEPHONE SERVICE AND UNIVERSAL SERVICE	3
5.3 QUALITY OF SERVICE	3
5.4 ACCESS TO ALTERNATIVE LOCAL EXCHANGE PROVIDERS.....	3
5.5 911 SERVICE	3
5.6 CUSTOM LOCAL AREA SIGNALING SERVICE	4
6. REVIEW OF COMPLAINT INFORMATION.....	4
7. COMPETITIVE SERVICES ANALYSIS	4
7.1 COMPETITIVE SERVICES ANALYSIS FOR LOCAL EXCHANGE SERVICES	5
7.2 COMPETITIVE SERVICES ANALYSIS FOR INTEREXCHANGE SERVICES	6
8. RECOMMENDATIONS.....	7
8.1 RECOMMENDATIONS ON THE APPLICATION FOR A CC&N	8
8.2 RECOMMENDATION ON THE APPLICANT’S PETITION TO HAVE PROPOSED SERVICES CLASSIFIED AS COMPETITIVE.....	9

1. INTRODUCTION

On March 25, 2008, Peerless Network of Arizona, LLC (“Peerless,” “Applicant,” or “Company”) filed an application for a Certificate of Convenience and Necessity (“CC&N”) to provide resold local exchange, resold long distance, facilities-based local exchange, and facilities-based long distance telecommunications services within the State of Arizona. The Applicant petitioned the Arizona Corporation Commission (“Commission”) for a determination that its proposed services should be classified as competitive.

Staff’s review of this application addresses the overall fitness of the Applicant to receive a CC&N. Staff’s analysis also considers whether the Applicant’s services should be classified as competitive and if the Applicant’s initial rates are just and reasonable.

2. TECHNICAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

In its application, Peerless indicated that it is not currently authorized to provide nor is it providing service in any jurisdiction. According to the application, the Applicant has three key management employees who possess a combined fifty-two years of experience in the telecommunications industry. Based on this, Staff believes Peerless possesses the technical capabilities to provide the services it is requesting the authority to provide.

3. FINANCIAL CAPABILITY TO PROVIDE THE REQUESTED SERVICES

In its application, Peerless indicated that it will rely on the financial resources of its parent company, Peerless Network, LLC. The Applicant has indicated that Peerless Network, LLC, as a recently formed company, does not have financial statements for the years prior to 2007. On July 21, 2008, the Applicant provided unaudited financial statements of its parent company, Peerless Network, LLC for the year ending December 31, 2007. These financial statements list assets of \$180,068.09; negative equity of \$574,794.11; and a negative income of \$775,032.28. The Applicant did not provide notes related to the financial statements.

The Applicant states in its Local Exchange Services Tariff (reference Section 2.5 on Page 12) and its Interexchange Services Tariff (reference Section 2.8.7 on Page 26) that it does not collect advances or deposits from its customers. Staff believes that the Applicant’s customers should be protected by the procurement of a performance bond or irrevocable sight draft Letter of Credit equal to \$225,000. The minimum performance bond or irrevocable sight draft Letter of Credit amount of \$225,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant’s customers. The performance bond or irrevocable sight draft Letter of Credit amount should be increased in increments of \$112,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within \$22,500 of the performance bond or irrevocable sight draft Letter of Credit amount. If the Applicant desires to discontinue service, it must file an application with the Commission pursuant to A.A.C. R14-2-1107. Additionally, the Applicant must notify each of its customers and the Commission 60 days prior to filing an application to

discontinue service. Failure to meet this requirement should result in forfeiture of the Applicant's performance bond or irrevocable sight draft Letter of Credit. Staff further recommends that the Applicant file the original performance bond or irrevocable sight draft Letter of Credit with the Commission's Business Office and file copies with Docket Control, as a compliance item in the docket, within 30 days of the effective date of this Order and the performance bond or irrevocable sight draft Letter of Credit must remain in effect until further Order of the Commission.

4. ESTABLISHING RATES AND CHARGES

The Applicant would initially be providing service in areas where an incumbent local exchange carrier ("ILEC"), along with various competitive local exchange carriers ("CLECs") and interexchange carriers are providing telephone service. Therefore, the Applicant would have to compete with those providers in order to obtain subscribers to its services. The Applicant would be a new entrant and would face competition from both an incumbent provider and other competitive providers in offering service to its potential customers. Therefore, the Applicant would generally not be able to exert market power. Thus, the competitive process should result in rates that are just and reasonable.

Both an initial rate (the actual rate to be charged) and a maximum rate must be listed for each competitive service offered, provided that the rate for the service is not less than the Company's total service long-run incremental cost of providing the service pursuant to A.A.C. R14-2-1109.

The rates proposed in this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information from the Company indicating that its fair value rate base is zero. Accordingly, the Company's fair value rate base is too small to be useful in a fair value analysis. On March 25, 2008, Peerless submitted a tariff reflecting the actual rates that Peerless will be charging for its local and interexchange services. Staff has reviewed these rates and believes they are comparable to the rates charged by competitive local carriers, local incumbent carriers and major long distance carriers operating in the State of Arizona. Therefore, while Staff considered the fair value rate base information submitted by the Company, the fair value rate base information provided should not be given substantial weight in this analysis.

5. LOCAL EXCHANGE CARRIER SPECIFIC ISSUES

Issues related to the provision of that Local Exchange service are discussed below.

5.1 NUMBER PORTABILITY

The Commission has adopted rules to address number portability in a competitive telecommunications services market. Local exchange competition may not be vigorous if customers, especially business customers, must change their telephone numbers to take

advantage of a competitive local exchange carrier's service offerings. Consistent with federal laws, federal rules and A.A.C. R14-2-1308(A), the Applicant shall make number portability available to facilitate the ability of a customer to switch between authorized local carriers within a given wire center without changing this telephone number and without impairment to quality, functionality, reliability or convenience of use.

5.2 PROVISION OF BASIC TELEPHONE SERVICE AND UNIVERSAL SERVICE

The Commission has adopted rules to address universal telephone service in Arizona. A.A.C. R14-2-1204(A) indicates that all telecommunications service providers that interconnect into the public switched network shall provide funding for the Arizona Universal Service Fund ("AUSF"). The Applicant will make the necessary monthly payments required by A.A.C. R14-2-1204(B).

5.3 QUALITY OF SERVICE

Staff believes that the Applicant should be ordered to abide by the quality of service standards that were approved by the Commission for Qwest (fka USWC) in Docket No. T-01051B-93-0183 (Decision No. 59421). Because the penalties developed in that docket were initiated because Qwest's level of service was not satisfactory and the Applicant does not have a similar history of service quality problems, Staff does not recommend that those penalties apply to the Applicant. In the competitive market that the Applicant wishes to enter, the Applicant generally will have no market power and will be forced to provide a satisfactory level of service or risk losing its customers. Therefore, Staff believes that it is unnecessary to subject the Applicant to those penalties at this time.

5.4 ACCESS TO ALTERNATIVE LOCAL EXCHANGE PROVIDERS

Staff expects that there will be new entrant providers of local exchange service who will install the plant necessary to provide telephone service to, for example, a residential subdivision or an industrial park much like existing local exchange companies do today. There may be areas where the Applicant installs the only local exchange service facilities. In the interest of providing competitive alternatives to the Applicant's local exchange service customers, Staff recommends that the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve such areas. This way, an alternative local exchange service provider may serve a customer if the customer so desires. Access to other providers should be provided pursuant to the provisions of the 1996 Telecommunications Act, the rules promulgated there under and Commission rules on interconnection and unbundling.

5.5 911 SERVICE

The Commission has adopted rules to address 911 and E911 services in a competitive telecommunications services market. The Applicant has certified that in accordance with A.A.C. R14-2-1201(6)(d) and Federal Communications Commission 47 CFR Sections 64.3001 and

64.3002, it will provide all customers with 911 and E911 service, where available, or will coordinate with ILECs and emergency service providers to provide 911 and E911 service.

5.6 CUSTOM LOCAL AREA SIGNALING SERVICE

Consistent with past Commission decisions, the Applicant may offer Caller ID provided that per call and line blocking, with the capability to toggle between blocking and unblocking the transmission of the telephone number, are provided as options to which customers could subscribe with no charge. Also, Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated, indicating that the number has been blocked, must be offered.

6. REVIEW OF COMPLAINT INFORMATION

The Applicant has stated it has neither had an application for service denied, nor revoked in any state. Also, the Applicant indicates that there are, and have been, no formal complaint proceedings involving the Applicant. In addition, the Applicant states that there have not been any civil or criminal proceedings against the Applicant. The Applicant indicated that none of its officers, directors or partners has been involved in any civil or criminal investigations, or any formal or informal complaints. The Applicant also indicated that none of its officers, directors or partners has been convicted of any criminal acts in the past ten (10) years. A search of the Federal Communications Commission's ("FCC") website found that there have been no formal or informal complaints filed against the Applicant or any of its officers, directors or partners.

Because the Applicant is not providing service in other jurisdictions and because the Applicant's officers, directors, or partners hold the same offices with the Applicant's affiliates, Staff conducted a search of the Applicant's affiliates that are currently providing service in other states. Staff found that Peerless Network of New York, LLC and Peerless Network of Pennsylvania, LLC have had no complaints filed with the New York Public Service Commission or the Pennsylvania Public Utility Commission, respectively. On June 12, 2008, before the Illinois Northern District Court, Neutral Tandem, Inc. filed a patent infringement complaint against the Applicant's parent company, Peerless Network, LLC and its affiliate, Peerless Network of Illinois, LLC and an induced infringement complaint against Peerless' Chief Executive Officer, John Barnicle. This case before the Illinois Northern District Court is currently pending¹. Consumer Services reports no complaints, inquiries, or opinions have been filed for Peerless in Arizona. The Corporations Division states that Peerless is in good standing.

7. COMPETITIVE SERVICES ANALYSIS

The Applicant has petitioned the Commission for a determination that the services it is seeking to provide should be classified as competitive.

¹ Because this case is currently pending before the Illinois Northern District Court, Staff did not give this case significant weight in its analysis.

7.1 COMPETITIVE SERVICES ANALYSIS FOR LOCAL EXCHANGE SERVICES

7.1.1 A DESCRIPTION OF THE GENERAL ECONOMIC CONDITIONS THAT EXIST, WHICH MAKES THE RELEVANT MARKET FOR THE SERVICE ONE THAT IS COMPETITIVE.

The local exchange market that the Applicant seeks to enter is one in which a number of new CLECs have been authorized to provide local exchange service. Nevertheless, ILECs hold a virtual monopoly in the local exchange service market. At locations where ILECs provide local exchange service, the Applicant will be entering the market as an alternative provider of local exchange service and, as such, the Applicant will have to compete with those companies in order to obtain customers. In areas where ILECs do not serve customers, the Applicant may have to convince developers to allow it to provide service to their developments.

7.1.2 THE NUMBER OF ALTERNATIVE PROVIDERS OF THE SERVICE.

Qwest and various independent LECs are the primary providers of local exchange service in the State. Several CLECs and local exchange resellers are also providing local exchange service.

7.1.3 THE ESTIMATED MARKET SHARE HELD BY EACH ALTERNATIVE PROVIDER OF THE SERVICE.

Since Qwest and the independent LECs are the primary providers of local exchange service in the State, they have a large share of the market. Since the CLEC and local exchange resellers have only recently been authorized to offer service they have limited market share.

7.1.4 THE NAMES AND ADDRESSES OF ANY ALTERNATIVE PROVIDERS OF THE SERVICE THAT ARE ALSO AFFILIATES OF THE TELECOMMUNICATIONS APPLICANT, AS DEFINED IN A.A.C. R14-2-801.

None.

7.1.5 THE ABILITY OF ALTERNATIVE PROVIDERS TO MAKE FUNCTIONALLY EQUIVALENT OR SUBSTITUTE SERVICES READILY AVAILABLE AT COMPETITIVE RATES, TERMS AND CONDITIONS.

ILECs have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly many of the CLECs and local exchange resellers also offer substantially similar services.

7.1.6 OTHER INDICATORS OF MARKET POWER, WHICH MAY INCLUDE GROWTH AND SHIFTS IN MARKET SHARE, EASE OF ENTRY AND EXIT, AND ANY AFFILIATION BETWEEN AND AMONG ALTERNATIVE PROVIDERS OF THE SERVICE(S).

The local exchange service market is:

- a. One in which ILECs own networks that reach nearly every residence and business in their service territories and which provide them with a virtual monopoly over local exchange service. New entrants are also beginning to enter this market.
- b. One in which new entrants will be dependent upon ILECs:
 1. To terminate traffic to customers.
 2. To provide essential local exchange service elements until the entrant's own network has been built.
 3. For interconnection.
- c. One in which ILECs have had an existing relationship with their customers that the new entrants will have to overcome if they want to compete in the market and one in which new entrants do not have a long history with any customers.
- d. One in which most customers have few, if any, choices since there is generally only one provider of local exchange service in each service territory.
- e. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.

7.2 COMPETITIVE SERVICES ANALYSIS FOR INTEREXCHANGE SERVICES

7.2.1 A DESCRIPTION OF THE GENERAL ECONOMIC CONDITIONS THAT EXIST, WHICH MAKES THE RELEVANT MARKET FOR THE SERVICE ONE THAT IS COMPETITIVE.

The interexchange market that the Applicant seeks to enter is one in which numerous facilities-based and resold interexchange carriers have been authorized to provide service throughout the State. The Applicant will be a new entrant in this market and, as such, will have to compete with those companies in order to obtain customers.

7.2.2 THE NUMBER OF ALTERNATIVE PROVIDERS OF THE SERVICE.

There are a large number of facilities-based and resold interexchange carriers providing both interLATA and intraLATA interexchange service throughout the State. In addition, various ILECs provide intraLATA interexchange service in many areas of the State.

7.2.3 THE ESTIMATED MARKET SHARE HELD BY EACH ALTERNATIVE PROVIDER OF THE SERVICE.

The large facilities-based interexchange carriers (AT&T, Sprint, MCI WorldCom, etc.) hold a majority of the interLATA interexchange market, and the ILECs provide a large portion of the intraLATA interexchange market. Numerous other interexchange carriers have a smaller part of the market and one in which new entrants do not have a long history with any customers.

7.2.4 THE NAMES AND ADDRESSES OF ANY ALTERNATIVE PROVIDERS OF THE SERVICE THAT ARE ALSO AFFILIATES OF THE TELECOMMUNICATIONS APPLICANT, AS DEFINED IN A.A.C. R14-2-801.

None.

7.2.5 THE ABILITY OF ALTERNATIVE PROVIDERS TO MAKE FUNCTIONALLY EQUIVALENT OR SUBSTITUTE SERVICES READILY AVAILABLE AT COMPETITIVE RATES, TERMS AND CONDITIONS.

Both facilities-based and resold interexchange carriers have the ability to offer the same services that the Applicant has requested in their respective service territories. Similarly many of the ILECs offer similar intraLATA toll services.

7.2.6 OTHER INDICATORS OF MARKET POWER, WHICH MAY INCLUDE GROWTH AND SHIFTS IN MARKET SHARE, EASE OF ENTRY AND EXIT, AND ANY AFFILIATION BETWEEN AND AMONG ALTERNATIVE PROVIDERS OF THE SERVICE(S).

The interexchange service market is:

- a. One with numerous competitors and limited barriers to entry.
- b. One in which established interexchange carriers have had an existing relationship with their customers that the new entrants will have to overcome if they want to compete in the market.
- c. One in which the Applicant will not have the capability to adversely affect prices or restrict output to the detriment of telephone service subscribers.

8. RECOMMENDATIONS

The following sections contain the Staff recommendations on the application for a CC&N and the Applicant's petition for a Commission determination that its proposed services should be classified as competitive.

8.1 RECOMMENDATIONS ON THE APPLICATION FOR A CC&N

Staff recommends that the Applicant's application for a CC&N to provide intrastate telecommunications services, as listed in this Report, be granted. In addition, Staff further recommends:

1. That the Applicant complies with all Commission Rules, Orders and other requirements relevant to the provision of intrastate telecommunications services;
2. That the Applicant abides by the quality of service standards that were approved by the Commission for Qwest in Docket No. T-01051B-93-0183;
3. That the Applicant be prohibited from barring access to alternative local exchange service providers who wish to serve areas where the Applicant is the only provider of local exchange service facilities;
4. That the Applicant be required to notify the Commission immediately upon changes to the Applicant's name, address or telephone number;
5. That the Applicant cooperates with Commission investigations including, but not limited to customer complaints;
6. The rates proposed by this filing are for competitive services. In general, rates for competitive services are not set according to rate of return regulation. Staff obtained information from the company and has determined that its fair value rate base is zero. Staff has reviewed the rates to be charged by the Applicant and believes they are just and reasonable as they are comparable to other competitive local carriers, local incumbent carriers and major long distance companies offering service in Arizona and comparable to the rates the Applicant charges in other jurisdictions. The rate to be ultimately charged by the company will be heavily influenced by the market. Therefore, while Staff considered the fair value rate base information submitted by the company, the fair value information provided was not given substantial weight in this analysis;
7. That the Applicant offer Caller ID with the capability to toggle between blocking and unblocking the transmission of the telephone number at no charge;
8. That the Applicant offer Last Call Return service that will not return calls to telephone numbers that have the privacy indicator activated;
9. Staff further recommends that the Commission authorize the Applicant to discount its rates and service charges to the marginal cost of providing the services;

10. That the Applicant submit local exchange and interexchange tariffs which state that it does not collect advances, deposits and or prepayments.

Staff further recommends that the Applicant be ordered to comply with the following. If it does not do so, the Applicant's CC&N shall be null and void after due process.

1. The Applicant shall docket conforming tariffs for each service within its CC&N within 365 days from the date of an Order in this matter or 30 days prior to providing service, whichever comes first. The tariffs submitted shall coincide with the application and state that the Applicant does not collect advances, deposits and/or prepayments from its customers.
2. The Applicant shall:
 - a. Procure a performance bond or an irrevocable sight draft Letter of Credit equal to \$225,000. The minimum performance bond or irrevocable sight draft Letter of Credit in the amount of \$225,000 should be increased if at any time it would be insufficient to cover advances, deposits, and/or prepayments collected from the Applicant's customers. The performance bond or irrevocable sight draft Letter of Credit amount should be increased in increments of \$112,500. This increase should occur when the total amount of the advances, deposits, and prepayments is within \$22,500 of the performance bond or irrevocable sight draft Letter of Credit amount.
 - b. File the original performance bond or irrevocable sight draft Letter of Credit with the Commission's Business Office and file copies with Docket Control, as a compliance item in this docket, within 30 days of the effective date of this Order and the performance bond or irrevocable sight draft Letter of Credit must remain in effect until further order of the Commission.

8.2 RECOMMENDATION ON THE APPLICANT'S PETITION TO HAVE PROPOSED SERVICES CLASSIFIED AS COMPETITIVE

Staff believes that the Applicant's proposed services should be classified as competitive. There are alternatives to the Applicant's services. The Applicant will have to convince customers to purchase its services, and the Applicant has no ability to adversely affect the local exchange or interexchange service markets. Therefore, the Applicant currently has no market power in the local exchange or interexchange service markets where alternative providers of telecommunications services exist. Staff therefore recommends that the Applicant's proposed services be classified as competitive.