

OPEN MEETING ITEM



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COMMISSIONERS
KRISTIN K. MAYES - Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP



MICHAEL P. KEARNS
Interim Executive Director

ARIZONA CORPORATION COMMISSION

ORIGINAL

DATE: APRIL 9, 2009
DOCKET NOS: T-20590A-08-0175

Arizona Corporation Commission

DOCKETED

APR - 9 2009

TO ALL PARTIES:

DOCKETED BY [Signature]

Enclosed please find the recommendation of Administrative Law Judge Belinda A. Martin. The recommendation has been filed in the form of an Opinion and Order on:

PEERLESS NETWORK OF ARIZONA, LLC
(CC&N RESELLER/FACILITIES-BASED)

Pursuant to A.A.C. R14-3-110(B), you may file exceptions to the recommendation of the Administrative Law Judge by filing an original and thirteen (13) copies of the exceptions with the Commission's Docket Control at the address listed below by **4:00** p.m. on or before:

APRIL 20, 2009

The enclosed is NOT an order of the Commission, but a recommendation of the Administrative Law Judge to the Commissioners. Consideration of this matter has tentatively been scheduled for the Commission's Open Meeting to be held on:

APRIL 28, 2009 and APRIL 29, 2009

For more information, you may contact Docket Control at (602) 542-3477 or the Hearing Division at (602) 542-4250. For information about the Open Meeting, contact the Executive Director's Office at (602) 542-3931.

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BEFORE THE ARIZONA CORPORATION COMMISSION

COMMISSIONERS

KRISTIN K. MAYES, Chairman
GARY PIERCE
PAUL NEWMAN
SANDRA D. KENNEDY
BOB STUMP

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

DOCKET NO. T-20590A-08-0175

DECISION NO. _____

OPINION AND ORDER

DATE OF HEARING: March 5, 2009
PLACE OF HEARING: Phoenix, Arizona
ADMINISTRATIVE LAW JUDGE: Belinda A. Martin
APPEARANCES: Mr. Jeffrey W. Crockett, Snell & Wilmer, LLP, on behalf of Peerless Network of Arizona, LLC; and
Ms. Nancy Scott, Staff Attorney, Legal Division, on behalf of the Utilities Division of the Arizona Corporation Commission.

BY THE COMMISSION:

Having considered the entire record herein and being fully advised in the premises, the Commission finds, concludes, and orders that:

FINDINGS OF FACT

1. On March 25, 2008, Peerless Network of Arizona, LLC (“Peerless” or “Company”), filed with the Arizona Corporation Commission (“Commission”) an application for a Certificate of Convenience and Necessity (“CC&N” or “Certificate”) to provide competitive resold local exchange, resold long distance, facilities-based local exchange, and facilities-based long distance telecommunications services in Arizona (“Application”).
2. On May 27, 2008, the Commission’s Utilities Division (“Staff”) filed its First Set of

1 Data Requests ("Data Requests") in this matter.

2 3. On July 21, 2008, Peerless filed its responses to the Data Requests.

3 4. On September 15, 2008, Peerless filed its responses to additional Data Requests.

4 5. On November 13, 2008, Peerless filed Revised Tariff Sheets.

5 6. On December 12, 2008, Staff filed its Staff Report recommending approval of the
6 Application.

7 7. On December 17, 2008, a Procedural Order was issued setting the hearing in the
8 matter for March 5, 2009.

9 8. On January 26, 2009, Peerless filed its Affidavit of Publication.

10 9. On March 5, 2009, a full public hearing was held before a duly authorized
11 Administrative Law Judge of the Commission at its offices in Phoenix, Arizona. The Company and
12 Staff appeared through counsel and presented evidence and testimony. No members of the public
13 appeared to give public comments in this matter. At the conclusion of the hearing, the matter was
14 taken under advisement pending submission of a Recommended Opinion and Order of the
15 Commission.

16 10. Peerless is an Arizona limited liability company and a wholly-owned subsidiary of
17 Peerless Network, LLC ("Parent Company").

18 11. Staff recommends approval of Peerless' Application for a CC&N and its petition for a
19 determination that its proposed telecommunications services should be classified as competitive.

20 12. Staff further recommends that:

- 21 a. Peerless comply with all Commission Rules, Orders, and other requirements
22 relevant to the provision of intrastate telecommunications services;
- 23 b. Peerless abide by the quality service standards that were approved by the
24 Commission for Qwest in Docket No. T-01051B-93-0183;
- 25 c. Peerless be prohibited from barring access to alternative local exchange service
26 providers who wish to serve areas where the Company is the only provider of
27 local exchange service facilities;
- 28 d. Peerless be required to notify the Commission immediately upon changes to
Peerless' name, address or telephone number;
- e. Peerless cooperate with Commission investigations including, but not limited
to customer complaints;

- 1 f. Although Staff considered the fair value rate base ("FVRB") information
2 submitted by Peerless, the fair value information provided should not be given
3 substantial weight;
4 g. Peerless be required to offer Caller ID with the capability to toggle between
5 blocking and unblocking the transmission of the telephone number at no
6 charge;
7 h. Peerless be required to offer Last Call Return service that will not return calls
8 to telephone numbers that have the privacy indicator activated;
9 i. Peerless be authorized to discount its rates and service charges to the marginal
10 cost of providing the services;
11 j. Peerless be required to submit local exchange and interexchange tariffs
12 indicating that it may collect advances, deposits and/or prepayments; and
13 k. Peerless' rates should be classified as competitive.

14 13. Staff further recommends that Peerless comply with the following conditions within
15 the timeframes outlined below or Peerless' CC&N should be considered null and void, after due
16 process.

- 17 a. Staff recommends that Peerless docket conforming tariffs for each service
18 within its CC&N within 365 days from the date of an Order in this matter or 30
19 days prior to providing service, whichever comes first. The tariffs submitted to
20 the Commission should coincide with the Application.
21 b. Staff recommends that Peerless should procure either a performance bond or
22 an irrevocable sight draft letter of credit equal to \$225,000. The minimum
23 performance bond or irrevocable sight draft letter of credit amount of \$225,000
24 should be increased if at any time it would insufficient to cover advances,
25 deposits, and/or prepayments collected from the Company's customers. The
26 performance bond or irrevocable sight draft letter of credit should be increased
27 in increments of \$112,500. This increase should occur when the total amount
28 of the advances, deposits, and prepayments is within \$22,500 of the
performance bond or irrevocable sight draft letter of credit amount.
c. Staff recommends that Peerless should docket proof of the original
performance bond or irrevocable sight draft letter of credit with the
Commission's Business Office and copies of the performance bond or
irrevocable sight draft letter of credit with Docket Control, as a compliance
item in this docket, within 30 days of the effective date of a Decision in this
matter. The performance bond or irrevocable sight draft letter of credit must
remain in effect until further order of the Commission.

26 Technical Capabilities

27 14. The Company is not authorized to provide service in any other jurisdictions; however,
28 Peerless' affiliates are currently authorized to provide telecommunications services in 21 states and

1 the District of Columbia, and are providing service in five of those states. Peerless anticipates
2 beginning service in Arizona by the end of 2009.

3 15. Peerless does not have any employees in Arizona, but will hire employees if needed.

4 16. Staff noted that the three key personnel for Peerless have a combined total of over 52
5 years experience in the telecommunications industry.

6 17. The Company intends to resell local exchange and long distance services in Arizona
7 from Qwest Communications ("Qwest") to business customers.

8 18. Customer service will be provided through a toll-free customer service number, as
9 well as through computer access.

10 19. Given the foregoing, Staff concludes that Peerless has the technical capabilities to
11 provide the telecommunications services it seeks to provide in Arizona.
12

13 **Financial Capabilities**

14 20. In its Application, the Company indicated it intends to rely up the financial resources
15 of its Parent Company. Peerless provided the unaudited financial statements of the Parent Company
16 for the twelve months ending December 31, 2007. This financial statement lists total assets of
17 \$180,068, negative equity of \$574,794, and a negative income of \$574,794. Because the Parent
18 Company is a recently formed company, it did not provide Staff with financial statements for prior
19 years.
20

21 21. Peerless' proposed tariff states that the Company will not collect deposits or advances
22 from its customers. Therefore, Staff concludes that Peerless should not be required to provide a
23 performance bond for its resold long distance telecommunications services.
24

25 22. For the Company's remaining telecommunications services, Staff recommends that
26 Peerless be required to obtain a performance bond or an irrevocable sight draft letter of credit, as
27 described in Finding of Fact No. 13, above, in order to protect Arizona customers.
28

1 23. Pursuant to Arizona Administrative Code ("A.A.C.") R-14-2-1107, if Peerless desires
2 to discontinue service in Arizona, it must file an application with the Commission and notify its
3 customers and the Commission sixty days prior to filing the application to discontinue service.

4 **Rates and Charges**

5 24. Pursuant to A.A.C. R-14-2-1109, Peerless may charge rates for service that are not
6 less than its total service long-run incremental costs of providing service.

7 25. Staff noted that information received from the Company indicated Peerless' FVRB is
8 zero.
9

10 26. Additionally, given the competitive markets in which the Company will operate,
11 Peerless' FVRB may not be useful as the sole determinant of rates.

12 27. Peerless' proposed rates are for competitive services. In general, rates for competitive
13 services are not set according to the rate of return regulation.

14 28. Based on Staff's review, Peerless' proposed rates are comparable with other
15 competitive local carriers, local incumbent carriers and major long distance carriers operating in
16 Arizona.
17

18 29. FVRB should not be given substantial weight in this analysis.

19 30. Peerless' proposed rates are just and reasonable and should be approved.

20 **Local Exchange Carrier Specific Issues**

21 31. Pursuant to A.A.C. R14-2-1308(A) and federal laws and rules, Peerless will make
22 number portability available to facilitate the ability of customers to switch between authorized local
23 carriers within a given wire center without changing their telephone number and without impairment
24 to quality, functionality, reliability or convenience of use.
25

26 32. In compliance with A.A.C. R14-2-1204, all telecommunications service providers that
27 interconnect into the public switched network shall provide funding for the AUSF.
28

1 33. Peerless will contribute to the AUSF as required by the A.A.C., and make the
2 necessary monthly payments as required under A.A.C. R14-2-1204(B).

3 34. In Commission Decision No. 59421 (December 20, 1995) the Commission approved
4 quality of service standards for Qwest which imposed penalties due to an unsatisfactory level of
5 service. In this matter, Peerless does not have a similar history of service quality problems, and
6 therefore the penalties in that decision should not apply.

7 35. In the areas where Peerless is the only local exchange service provider, Peerless is
8 prohibited from barring access to alternative local exchange service providers who wish to serve the
9 area.
10

11 36. Peerless will provide all customers with 911 and E911 service where available, or will
12 coordinate with ILECs, and emergency service providers to facilitate the service.

13 37. Pursuant to prior Commission Decisions, Peerless may offer customer local area
14 signaling services such as Caller ID and Call Blocking, so long as the customer is able to block or
15 unblock each individual call at no additional cost.
16

17 38. Peerless must also offer Last Call Return service, which will not allow the return of
18 calls to the telephone numbers that have the privacy indicator activated.

19 **Complaint Information**

20 39. Peerless has not had an application for service denied, or revoked in any state.

21 40. Staff conducted a search of the Company's affiliates that currently are providing
22 service in other states. Staff found that no customer complaints have been filed against any of
23 Peerless' affiliates.
24

25 41. Except as noted in Finding of Fact No. 43, below, none of Peerless' officers, directors
26 or partners have been involved in any civil or criminal investigations, or formal or informal
27 complaints, and none of its officers, directors or partners have been convicted of any criminal acts in
28

1 the past ten years.

2 42. Staff notes that the Commission's Consumer Services Division reports no complaints,
3 inquiries, or opinions have been filed against Peerless, and the Corporations Division states that
4 Peerless is in good standing.

5 43. Peerless disclosed that on June 12, 2008, a complaint was filed in the Northern Illinois
6 District Court by Neutral Tandem, Inc. The suit named the Parent Company, Peerless Network of
7 Illinois, LLC, and John Barnicle (the Chief Executive Officer of the Parent Company and Peerless).
8 Peerless is not a named party to the suit.¹

9
10 44. According to Company witness, Daniel Meldazis, the Company's Director of
11 Regulatory Affairs, the underlying basis for the complaint is a patent infringement claim relating to
12 the provision of tandem network services.²

13 45. Mr. Meldazis testified that although he believes the suit has no merit, a detrimental
14 outcome would have no effect on the impact of Peerless' Arizona operations.³

15 46. Staff witness, Candrea Allen, testified that although Peerless will rely on the financial
16 resources of the Parent Company, Staff believes that should the lawsuit be resolved against the Parent
17 Company, the performance bond or irrevocable sight draft letter of credit obtained by Peerless will
18 sufficiently protect Arizona customers from any negative financial impact to the Parent Company.⁴

19
20 **Competitive Services Analysis**

21 47. Peerless has requested that its telecommunications services in Arizona be classified as
22 competitive. Peerless' proposed services should be classified as competitive because there are
23 alternatives to the Company's proposed services; ILECs and large facilities-based interexchange
24 carriers hold a virtual monopoly in local exchange markets and in the interLATA interexchange
25

26
27 ¹ Transcript at 14.

² *Id.*, at 29.

³ *Id.*, at 27-28.

28 ⁴ *Id.*, at 40.

1 market; Peerless will have to convince customers to purchase its services; Peerless has no ability to
2 adversely affect the local exchange or interexchange market as several CLECs and ILECs provide
3 local exchange and interexchange services; and Peerless therefore will have no market power in those
4 local exchange markets or interexchange markets where alternative providers to telecommunications
5 services exists.

6 48. Staff's recommendations enumerated in Findings of Fact Nos. 11, 12, and 13 are
7 reasonable and should be adopted.

8 49. Regarding the required performance bond or irrevocable sight draft letter of credit, we
9 find that the Commission may draw on the performance bond or irrevocable sight draft letter of credit
10 on behalf of, and for the sole benefit of, the Company's customers if the Commission finds, in its
11 discretion, that the Company is in default of its obligations arising from its Certificate. The
12 Commission may use the performance bond or irrevocable sight draft letter of credit funds as
13 appropriate to protect the Company's customers and the public interest and take any and all actions
14 the Commission deems necessary, in its discretion, including, but not limited to, returning
15 prepayments or deposits collected from the Company's customers.

16 50. We further find that Peerless must abide by the Commission-adopted rules that
17 address Universal Service in Arizona, A.A.C. R14-2-1204(B), requiring Peerless to make the
18 necessary monthly payments into the AUSF.

19 CONCLUSIONS OF LAW

20 1. Peerless Network of Arizona, LLC, is a public service corporation within the meaning
21 of Article XV of the Arizona Constitution and A.R.S. §40-281 and 40-282.

22 2. The Commission has jurisdiction over Peerless Network of Arizona, LLC, and the
23 subject matter of the Application.

24 3. Notice of the Application was given in accordance with the law.

25 4. A.R.S §§ 40-282 allows a telecommunications company to file an application for a
26

1 CC&N to provide competitive telecommunications services.

2 5. Pursuant to Article XV of the Arizona Constitution, as well as the Arizona Revised
3 Statutes, it is in the public interest for Peerless Network of Arizona, LLC, to provide the
4 telecommunications services set forth in its Application.

5 6. Peerless Network of Arizona, LLC, is a fit and proper entity to receive a CC&N
6 authorizing it to provide resold local exchange, resold long distance, facilities-based local exchange,
7 and facilities-based long distance telecommunications services in Arizona, subject to Staff's
8 recommendations set forth herein.

9 7. The telecommunications services that Peerless Network of Arizona, LLC, intends to
10 provide are competitive within Arizona.

11 8. Pursuant to Article XV of the Arizona Constitution as well as the Competitive Rules,
12 it is just and reasonable and in the public interest for Peerless Network of Arizona, LLC, to establish
13 rates and charges that are not less than the Peerless Network of Arizona, LLC's total service long-run
14 incremental costs of providing the competitive services approved herein.

15 9. Staff's recommendations, as well as those findings in Findings of Fact Nos. 49 and 50,
16 are reasonable and should be adopted.

17 10. Peerless Network of Arizona, LLC's rates, as they appear in its proposed tariffs, are
18 just and reasonable and should be approved.

19 **ORDER**

20 IT IS THEREFORE ORDERED that the Application of Peerless Network of Arizona, LLC,
21 for a Certificate of Convenience and Necessity for authority to provide competitive resold local
22 exchange, resold long distance, facilities-based local exchange, and facilities-based long distance
23 telecommunications services in Arizona is hereby granted subject to the conditions in Findings of
24 Facts Nos. 12 and 13, as well as those findings in Findings of Fact Nos. 49 and 50.

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IT IS FURTHER ORDERED that if Peerless Network of Arizona, LLC, fails to comply with the timeframes stated in Findings of Fact Nos. 13 and 50, herein, the Certificate of Convenience and Necessity granted herein shall be considered null and void, after due process.

IT IS FURTHER ORDERED that this Decision shall become effective immediately.

BY ORDER OF THE ARIZONA CORPORATION COMMISSION.

CHAIRMAN _____ COMMISSIONER

COMMISSIONER _____ COMMISSIONER _____ COMMISSIONER

IN WITNESS WHEREOF, I, MICHAEL P. KEARNS, Interim Executive Director of the Arizona Corporation Commission, have hereunto set my hand and caused the official seal of the Commission to be affixed at the Capitol, in the City of Phoenix, this ____ day of _____, 2009.

MICHAEL P. KEARNS
INTERIM EXECUTIVE DIRECTOR

DISSENT _____

DISSENT _____

1 SERVICE LIST FOR: PEERLESS NETWORK OF ARIZONA, LLC

2 DOCKET NO.: T-20590A-08-0175

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