MINNESOTA DEPARTMENT OF COMMERCE

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February 3, 2014 **PUBLIC DOCUMENT**

Burl W. Haar
Executive Secretary
Minnesota Public Utilities Commission
121 7th Place East, Suite 350
St. Paul, Minnesota 55101-2147

RE: **PUBLIC Comments of the Minnesota Department of Commerce**
Docket No. P6832/PA-14-16

Dear Dr. Haar:

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

> In the Matter of the Joint Application of Peerless Network, Inc. for Approval of a Transfer of Control of an Authorized Telecommunications Provider.

The petition was filed on January 2, 2014:

> Denise N. Smith
> Counsel for Peerless Network, Inc.
> Kelley Drye & Warren, LLP
> 8050 K Street NW
> Washington, DC 20007-5108

The Department recommends **approval**, and is available to answer any questions the Commission may have.

Sincerely,

/s/ BRUCE L. LINSCHEID
Financial Analyst

BLL/lt
Attachment

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

PUBLIC COMMENTS OF THE
MINNESOTA DEPARTMENT OF COMMERCE

DOCKET NO. P6832/PA-14-16

I. BACKGROUND

On January 2, 2014, the Minnesota Department of Commerce (the Department) received a copy of a joint application (Application) from Peerless Network Inc. (Peerless) and IntelePeer, Inc. (IntelePeer) (together, Peerless and IntelePeer, the Applicants) to the Minnesota Public Utilities Commission (Commission) regarding the ultimate change of ownership of IntelePeer (the Transaction). IntelePeer became a wholly owned direct subsidiary of Peerless as a result of the Transaction, and IntelePeer does not have end user communications customers in Minnesota.

A. THE APPLICANTS

IntelePeer was authorized to provide facilities-based local exchange telecommunications services and intrastate interexchange services in Docket No. 09-1355 on December 29, 2009. IntelePeer holds similar authorities to provide intrastate interexchange and local exchange services in 45 other states and the District of Columbia. IntelePeer described the technology and facilities that it will use to provide service as follows in its 09-1355 new authority application:

> IntelePeer will provide a fully managed, hosted, on-demand peering infrastructure to directly exchange voice traffic over Internet Protocol (IP) or legacy time-division multiplexing or TDM [a method of putting multiple data streams in a single signal that allows for variation in the number of signals being sent along the line, and constantly adjusts the time intervals to make optimum use of the available bandwidth, *e.g.*, the Internet] networks between any application and any telephony device.[1]

[1] IntelePeer's application for approval to provide telecommunications services in Minnesota, Docket No. 09-1335; response to Requirement 5, Provide a brief summary of the technology and facilities that you will use to provide the services that you intend to offer.

Commission approval was granted to a Peerless company, Peerless Network of Minnesota, LLC, to provide facilities-based local exchange telecommunications services and intrastate interexchange services in Minnesota in Docket No. 06-1131 on October 30, 2006. Peerless relies on IP technology to provide signaling and call setup support for calls originating, terminating or traversing its network. It operates as a Competitive Local Exchange Carrier (CLEC), competitive tandem provider and long distance company throughout the United States. In 2012, Peerless' revenues were approximately $63 million.

Peerless was founded in 2008 and has invested nearly $30 million in over 40 major markets. It has built a combined TDM and IP network connected to nearly every major domestic carrier offering call origination and termination services in over 100 Local Access Transport Areas (LATAs) and 30 Major Trading Areas (MTAs). It provides service in 27 states and Washington, D.C.

Peerless employs centralized redundant call routing databases to route calls on a national level rather than the industry norm of localized switching and signaling control. It uses regional media gateways to direct calls from multiple LATAs through its national IP network for transport and termination to one of the hundreds of carriers with whom it has direct interconnection arrangements.

B. THE TRANSACTION

On November 29, 2013, Peerless closed an Agreement with IntelePeer and its owners whereby Peerless agreed to purchase all of the common stock in IntelePeer, and the Transaction resulted in IntelePeer becoming a wholly owned subsidiary of Peerless. The Transaction solely affected the identity of the party holding stock in IntelePeer and did not result in the assignment away from IntelePeer of any certificates or any intrastate telecommunications assets in Minnesota (see attached pre-close and post-close organization charts).

No adverse impact is expected on IntelePeer's provision of service. IntelePeer retains its certificates following the change of ownership and each of the IntelePeer tariffs remains in full force and effect. IntelePeer currently does not have any end user communications customers in Minnesota to be affected by the Transaction. Following completion of the Transaction, IntelePeer provides the same wholesale telecommunications services to service provider customers that it did prior to the Transaction.

C. PUBLIC INTEREST

The Applicants state that the Transaction is expected to enhance IntelePeer's ability to compete in the telecommunications and information services market place through the financial, technical, and managerial resources of Peerless. Prior to the Transaction, financial constraints were limiting IntelePeer's ability to grow. Combining the Peerless network with IntelePeer's cloud-based communications services is expected to accelerate and expand the national availability of customer services and interconnection options. There will be no impairment or interruption of service to either company's customers as a result of this Transaction. The only significant change following the closing of the Transaction from the customers' perspective is that IntelePeer has a new owner.

II. STATEMENT OF ISSUES

A. Does the proposed transfer of ownership require Commission approval?

B. Is the transfer of ownership in the public interest?

C. Have the Applicants complied with Minnesota law requiring prior Commission approval of the transfer of ownership?

D. Is there a requirement to provide Commission notice for the assignment of interconnection agreements?

E. Does the proposed transfer have any impact on 911 Plans that require regulatory approvals?

F. What is the status of IntelePeer's certificate of authority?

G. Does the Transaction have additional regulatory requirements?

III. LEGAL REFERENCES

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

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

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

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

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

Minnesota Rule 7812.2210, subp. 3C states that the filing requirements for a CLEC must not be more stringent than the filing requirements governing any LEC with 50,000 or more subscribers in whose service area the CLEC is providing local service.

Minnesota Rule 7812.2210, subp. 16 also addresses mergers and acquisitions and states:

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

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

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

Minn. Stat. §237.74, subd. 11 says that a person who knowingly and intentionally violates this section . . . shall forfeit and pay to the state a penalty, in an amount to be determined by the court, of at least $100 and not more than $1,000 for each day of each violation . . ..

IV. ANALYSIS

A. COMMISSION ACTION IS NEEDED FOR THIS TRANSACTION.

The Commission has established a consistent precedent for requiring approval for any change of ownership affecting Minnesota telephone companies and telecommunications carriers. Commission approval is required for transactions where the ultimate ownership or control of either a telephone company or telecommunications carrier authorized to operate in Minnesota changes, or a telephone company's or a telecommunications carrier's Minnesota operations are affected by a merger or acquisition transaction. Commission approval is not required for corporate reorganizations in which ultimate ownership or control does not change or the operating company is not impacted by the reorganization.[2] Ultimate ownership and control of IntelePeer transfers to Peerless, and the Commission should review the transaction to determine if it is in the public interest of affected customers.

B. THE PROPOSED TRANSFER OF CONTROL IS IN THE PUBLIC INTEREST.

Peerless appears to have the financial, technical and managerial resources necessary to ensure that IntelePeer continues providing reliable telecommunications services. [**TRADE SECRET DATA HAS BEEN EXCISED]**

More recently, IntelePeer was experiencing exigent financial issues, making the immediate transition of IntelePeer to Peerless critical to ensure continuity of uninterrupted service to IntelePeer's customers.[3] By expediting the Transaction, the Applicants ensured that IntelePeer received direct access to Peerless resources in order to resolve the situation without any adverse effect upon customers.[4]

The proposed transaction should be the public interest. IntelePeer does not have end user communications customers in Minnesota. Rather, it provides wholesale telecommunications services to service provider customers. Peerless appears to have the financial, managerial and technical resources to ensure that the customers of IntelePeer continue to receive reliable services. The Transaction was critical to ensure continuity of uninterrupted service to IntelePeer's customers. There will be no impairment or interruption of service to the customers

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

[3] January 14, 2014 electronic reply from Kelley Drye & Warren, Counsel for Peerless, in response to the Department's January 7, 2014 electronic information request asking for the position of Peerless regarding the possible violation of Minn. Stat. § 237.74 requiring the prior approval of the acquisition of IntelePeer.

[4] 2 *Id.*

of either IntelePeer or Peerless as a result of the Transaction, and the only significant impact of the Transaction, from the customers' perspective, is that IntelePeer has a new owner.

C. THE APPLICANTS DID NOT COMPLY WITH THE REQUIREMENT FOR PRIOR COMMISSION APPROVAL OF THE PROPOSED TRANSFER OF CONTROL, AND A SETTLEMENT IN LIEU OF THE PURSUIT OF PENALTIES IS RECOMMENDED.

The Transaction closed without prior Commission approval, and the Commission did not have an opportunity to review the Transaction to determine if it was in the public interest. The Agreement was entered into and consummated on the November 29, 2013 closing date.

Minnesota law requires prior Commission approval for the acquisition activities of a telecommunications carrier,[5] and provides for penalties of at least $100 and not more than $1,000 for each day of a knowing and intentional violation.[6] A settlement in lieu of penalties is recommended for the violation of state law for the following reasons:

- IntelePeer will provide the same wholesale telecommunications services to service provider customers that it did prior to the Transaction. The only significant change following the closing of the Transaction, from the customers' perspective, is that IntelePeer has Peerless as a new owner.

- Potential penalties under law could range from approximately $6,000 to $60,000 if the period of time from the closing of the Transaction until the Commission has had time to consider this matter is approximately 60 days.

- Greater customer harm may have been averted by the actions of the Applicants in expediting the Transaction and ensuring uninterrupted service to IntelePeer's customers. Despite the violation of state law, and although not an admission of a knowing and intention violation of state law, a settlement agreement in lieu of the pursuit of penalties was reached in which Peerless and the Department have agreed to a payment of $1,000 by Peerless.[7]

D. THERE IS NO REQUIREMENT TO ASSIGN INTERCONNECTION AGREEMENTS.

The Commission's 60-day notice requirement for the assignment of interconnection agreements[8] does not apply to the proposed Transaction. IntelePeer does not currently have an

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[5] Minn. Stat. §§ 237.23 and 237.74, subd. 12.

[6] Minn. Stat. §237.74, subd. 11.

[7] January 21, 2014 electronic response from Kelley Drye & Warren, Counsel for Peerless, in response to the Department's January 17, 2014 electronic information request proposing a settlement in lieu of penalties for the violation of Minn. Stat. §237.74, subd. 12.

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

interconnection agreement in Minnesota, and the existing interconnection agreements between Peerless and Qwest Corporation dba CenturyLink QC[9] will remain in effect as Peerless is expected to continue its operations in Minnesota.

E. THE NEED TO SEEK 911 APPROVALS REGARDING THE PROPOSED TRANSFERS IS NOT ANTICIPATED.

Applicants generally must inform the Minnesota Department of Public Safety (DPS) and the Metropolitan Emergency Services Board (MESB) to coordinate any required changes to affected 911 Plans if the proposed transaction will result in a network change or any change to a county 911 Plan for customers. Both Peerless and IntelePeer have 911 Plans in Minnesota,[10] and there appears to be no need to update their 911 Plans due to the Transaction.

F. THE CERTIFICATE OF AUTHORITY FOR INTELEPEER SHOULD BE RETAINED.

IntelePeer is expected to continue to offer service to existing customers with no change in its rates, terms or conditions of service as a result of the Transaction. The transfer of ultimate control of IntelePeer will not result in a change of carrier for customers or any transfer of authorization. No requirement for customer notice appears necessary. The Applicants intend to continue the operations of IntelePeer, and its certificate of authority should be retained.

G. THE APPLICANTS SHOULD MAKE THE FOLLOWING REGULATORY FILINGS: A 2013 TELEPHONE ASSISTANCE PLAN (TAP) REPORT UNDER DOCKET NO. 13-01 FOR BOTH APPLICANTS AND CONTINUED SUBMISSION OF JURISDICTIONAL ANNUAL REPORTS, AND REGULATORY ASSESSMENTS.

The transaction is expected to be transparent to IntelePeer’s customers, and:

- No requirement for customer notice is anticipated.
- No tariff changes as an immediate result of the transaction is expected as IntelePeer will continue the same tariffed local and interexchange services post-transaction as it does at present.
- No need to release or return NXX codes to the North American Numbering Plan Administration (NANPA) is required because there is no change in service due to the Transaction.
- No need to inform the Universal Service Administrative Committee (USAC) is required because IntelePeer does not receive Universal Service payments.

[9] Docket Nos. 08-922 and 12-460.

[10] Peerless has an approved 911 plan in Docket No. 09-1122 and a 911 plan pending approval in 11-692. IntelePeer has 911 plans approved in Docket Nos. 09-1395 and 10-629.

The Applicants must continue to file jurisdictional annual reports and other regulatory filings, as well as pay any regulatory fees. 2013 TAP reports should be unaffected since each company will continue to operate as it did prior to the closing of the Transaction.

V. COMMISSION ALTERNATIVES

1. Approve the transfer of control of IntelePeer, Inc.
    - Applicants shall continue to file jurisdictional annual reports, TAP reports and pay regulatory assessments.
    - IntelePeer, Inc. will continue to operate under its existing certificate of authority.
    - Applicants violated Minn. Stat. §237.74, subd. 12. A settlement in the amount of $1,000 payable to the Department of Commerce has been negotiated between the Applicants and the Department of Commerce. Agreement to this settlement is not an admission of a knowing and intentional violation of Minnesota law. Payment of this settlement is due within 30 days of the receipt of this Order. The Department of Commerce will deposit the remittance into the State of Minnesota General Fund. Docket No. 14-16 should be notated on the payment.

2. Approve the Application with modifications.

3. Reject the Application.

VI. RECOMMENDATION

The Department recommends Alternative 1.

1. Approve the transfer of control of IntelePeer, Inc.
    - Applicants shall continue to file jurisdictional annual reports, TAP reports and pay regulatory assessments.
    - IntelePeer, Inc. will continue to operate under its existing certificate of authority.
    - Applicants violated Minn. Stat. §237.74, subd. 12. A settlement in the amount of $1,000 payable to the Department of Commerce has been negotiated between the Applicants and the Department of Commerce. Agreement to this settlement is not an admission of a knowing and intentional violation of Minnesota law. Payment of this settlement is due within 30 days of the receipt of this Order. The Department of Commerce will deposit the remittance into the State of Minnesota General Fund. Docket No. 14-16 should be notated on the payment.

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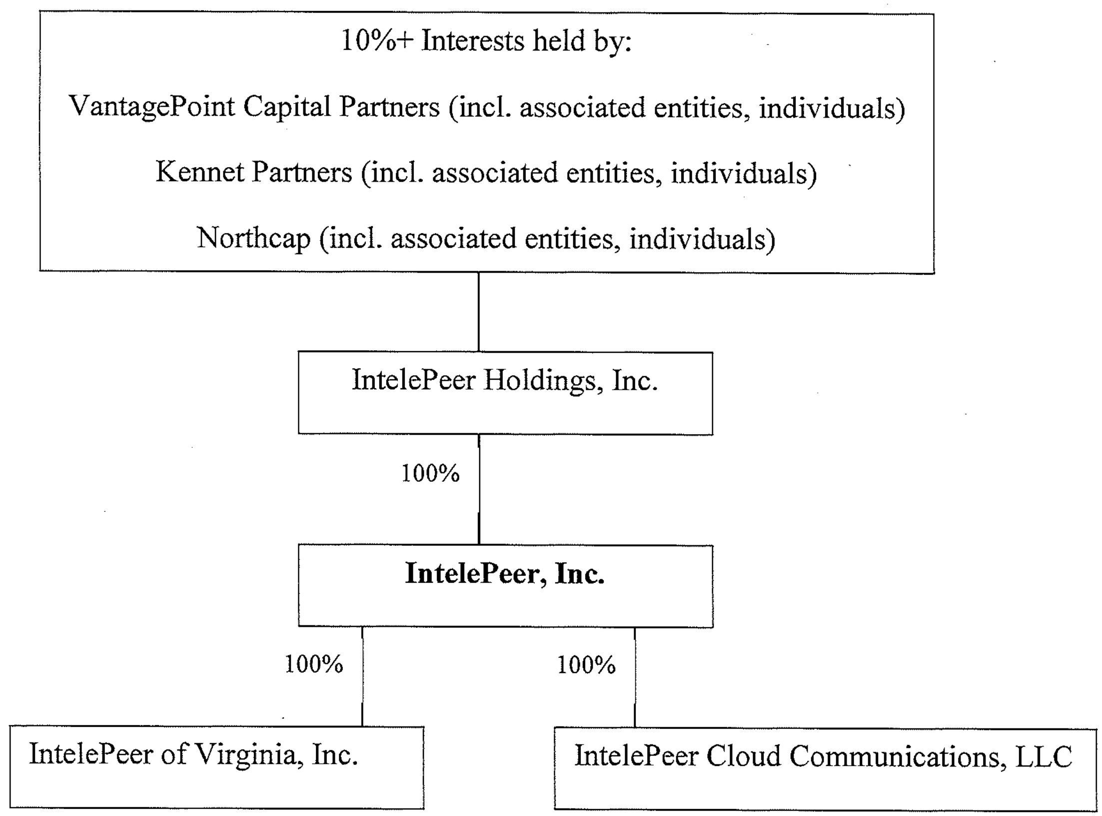
IntelePeer, Inc. Ownership
Pre-close



Peerless Network, Inc. & Intelepeer, Inc. Ownership
Post-Close