



Agenda Date: 1/25/23
Agenda Item: IVA

STATE OF NEW JERSEY
Board of Public Utilities
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OFFICE OF CABLE
TELEVISION AND
TELECOMMUNICATIONS

IN THE MATTER OF THE NOTICE OF PEERLESS) ORDER
NETWORK OF NEW JERSEY, LLC AND AIRUS, INC -)
INDIRECT TRANSFER OF CONTROL) DOCKET NO. TM21111235

Parties of Record:

Brian O. Lipman, Esq., Director, New Jersey Division of Rate Counsel
Nancy J. Victory, Esq., on behalf of Peerless Network Holdings, Inc.
James H. Barker, Esq. and Elizabeth R. Park, Esq. on behalf of OpenMarket, Inc.

BY THE BOARD:

By letter dated November 30, 2021 (“November 2021 Letter”) Peerless Network Holdings, Inc. (“Peerless Holdings” or “Transferor”) and OpenMarket Inc. (“OpenMarket” or “Transferee,” and together with Peerless Holdings, the “Parties” or “Petitioners”), notified the New Jersey Board of Public Utilities (“Board”) of a transaction whereby OpenMarket will acquire Peerless Holdings and its subsidiaries (“Proposed Transaction”). The Petitioners indicated that, as a result of the Proposed Transaction, OpenMarket would hold a 100% indirect interest in Peerless Network of New Jersey, LLC (“PNJ”), and Airus, Inc. (“Airus”) (“Licensees”). Upon the completion of the Proposed Transaction, the Licensees would participate in financing arrangements to which OpenMarket and its affiliates are parties. The Petitioners notified the Board that the Proposed Transaction was consummated on July 25, 2022, prior to obtaining Board approval.

Although Peerless Holdings, a Delaware corporation, does not provide telecommunications services, its subsidiaries operate as competitive local exchange carriers (“CLECs”) in 49 states and the District of Columbia and provide interconnection services for carriers and non-carriers via end office, tandem, and advanced routing services. Peerless Network, Inc. (“PNI”) is authorized by the FCC to provide domestic and international telecommunications services¹ and is a direct wholly owned subsidiary of Peerless Holdings and the direct parent to the Licensees.

¹ PNI is authorized to operate as a global or limited global facilities-based and resale carrier. Consistent with 47 C.F.R. § 63.21(h), PNJ and Airus operate pursuant to PNI’s international Section 214 (47 U.S.C. § 214) authorization. See FCC File No. ITC-214- 200080304-00146.

PNJ, a New Jersey company, operates as a facilities-based provider and reseller of telephone service. PNJ was granted authority to provide local exchange service and interexchange service in New Jersey by the Board in 2008.² Airus, a Delaware corporation, operates as a facilities-based provider of telephone service and was granted authority to provide local exchange service and interexchange service in New Jersey by the Board in 2010.³

OpenMarket, a Michigan corporation, provides business communications and messaging services to mobile operators, messaging apps, banks, social networks, tech companies, and aggregators in the United States. OpenMarket leverages the global cloud communications platform of its parent company, Infobip Limited (“Infobip”). Infobip is incorporated and headquartered in the United Kingdom and offers platforms for global cloud communications and customer engagement through a single interface. Infobip, as of the date of the submission of the November 2021 Letter, had more than 3,100 employees and more than 70 offices in over 50 countries.

On October 29, 2021, Peerless Holdings and OpenMarket entered into an Agreement and Plan of Merger pursuant to which OpenMarket will acquire Peerless Holdings. The acquisition was consummated on July 25, 2022 through a merger of a special purpose subsidiary of OpenMarket with and into Peerless Holdings, with Peerless Holdings remaining as the surviving entity. As a result of this merger, Peerless Holdings will be a wholly owned direct subsidiary of OpenMarket, and PNI will be indirectly wholly owned by OpenMarket.

FINANCING ARRANGEMENTS

The Petitioners notified the Board of participation in certain financing arrangements in connection with the consummation of the Proposed Transaction. OpenMarket, Infobip, and certain other subsidiaries of Infobip are also parties to this Proposed Transaction. OpenMarket, Infobip and certain other subsidiaries of Infobip that are organized in the United States, the United Kingdom, Ireland and Croatia have entered into a senior secured term loan credit facility in an aggregate principal amount of \$500 million (“Financing Arrangement”). In addition to providing financing for the Proposed Transaction, the Financing Arrangement enables OpenMarket and certain other subsidiaries of Infobip to use the proceeds of the loans for working capital and general corporate purposes (including for capital expenditures, acquisitions, refinancing of indebtedness, and mobile network operator prepayments and other transactions not prohibited by the Financing Arrangement).

After the acquisition of Peerless Holdings by OpenMarket closes, Peerless Holdings and each subsidiary of Peerless Holdings will be required to join the Financing Arrangement as a guarantor. The Financing Arrangement consists of a term loan credit facility. Additional credit facilities may be in one or more of the following forms of debt instruments: revolving credit facilities, term loan facilities, notes or debentures, or other indebtedness arrangements permitted (or not restricted) by the terms of the Financing Arrangement at the time, or a combination thereof.

² In re the Petition of Peerless Network of New Jersey, LLC for Approval to Provide Local Exchange and Interexchange Telecommunications Services Throughout the State of New Jersey, BPU Docket No. TE08050322, Order Dated July 31, 2008.

³ See In re the Verified Petition of IntelPeer Inc. for Authority to Provide Local Exchange and Interexchange Telecommunications Services Throughout the State of New Jersey, BPU Docket No. TE09110897, Order Dated March 17, 2010.

The Financing Arrangement is secured by a pledge of substantially all the assets of OpenMarket, Infobip, and each guarantor (including, but not limited to, (i) a pledge of the equity securities of each guarantor and OpenMarket, (ii) perfected security interests in, and mortgages on, substantially all tangible and intangible personal property and material fee-owned real property of OpenMarket and each guarantor, (iii) other such pledged and security interest (consistent with the local law of the United Kingdom, Ireland and Croatia), in each case, subject to limitations and exclusions usual and customary for similar facilities. Upon the closing of the acquisition of Peerless Holdings by OpenMarket, Peerless Holdings and each subsidiary of Peerless will be required to grant security as described in the foregoing sentence.

In the November 2021 Letter, the Petitioners also maintained that notice to the Board in this instance is sufficient, and that Board approval of the Transaction and Financing Arrangement pursuant to N.J.S.A. 48:2-51.1 and 48:3-9(b) is not necessary for two (2) reasons. First, because the transfer of regulated entities would occur by virtue of a merger at the parent holding company level only, and not at the “public utility” level contemplated in N.J.S.A. 48:2-51.1. Second, citing “N.J.S.A. 48:2-51.1b; 48:3-7.g; 48:3-9.b; 48:3-10.b,” Petitioners contend that the “New Jersey Legislature has expressly exempted from Board review and approval those financial transactions that occur at the parent holding company level.”

Petitioners pointed out that PNJ’s parent company, Peerless Holdings, does not itself provide regulated telecommunications or telephone access line services in New Jersey. Petitioners further stated that Peerless Holdings “seeks to merge into an entity,” being OpenMarket, that does not directly provide regulated telecommunications” in New Jersey “and does not, directly or through affiliates, own a controlling interest in another entity that does.” In addition, the loan credit facility is issued to OpenMarket and its affiliates, which do not provide regulated telecommunications services. On these facts, the Petitioners contended that Board approval is not required.

By letter dated November 15, 2022, the New Jersey Division of Rate Counsel (“Rate Counsel”) disagreed with the Petitioners that Board approval was unnecessary with respect to the proposed transactions. Rate Counsel stated that “in any sale or merger” Board approval is required and must be based upon the Board’s determination that the transaction will result in positive benefits and be in the public interest. N.J.S.A. 48:2-51.1 *et seq.* and N.J.S.A. 48:3-10. Rate Counsel also stated that Board approval is required in connection “with any encumbrance or mortgage of a telecommunications service provider, otherwise, the transaction is void under New Jersey law.” Furthermore, because the Petitioners’ propose that their assets will secure the debt in part, Board approval must be based upon Board determination that “the debt is made according to the law and that the debt serves a beneficial purpose...” N.J.S.A. 48:3-9 and N.J.A.C. 14:1-5.9.

Nonetheless, Rate Counsel indicated support for the continued provision of innovative, high-quality telecommunications services to the public and the promotion of robust competition in the New Jersey telecommunications market, as affirmed by Petitioners in their filing. Rate Counsel relies on the assertions provided by Petitioners that the funds generated by the enhanced financing will promote increased service offerings and competition in the New Jersey telecommunications market for the ultimate benefit of both residential and business customers in New Jersey. Likewise, Petitioners’ filing provides information required under N.J.S.A. 48:2-51.1 *et seq.*, and N.J.S.A. 48:3-10 in support of positive benefits and approval of the transaction. Accordingly, Rate Counsel does not oppose a Board grant of approval herein, *nunc pro tunc*, based on the Board’s determination that the Transaction and Financial Arrangement connected thereto yield positive benefits to New Jersey customers, are in the public interest and are in accordance with the law and serve a beneficial purpose under N.J.S.A. 48:3-9 and N.J.A.C. 14:1-

5.9.

DISCUSSION AND FINDINGS

Contrary to the Petitioners' position, Board approval is required for the Proposed Transaction and the Financing Arrangement pursuant to N.J.S.A. 48:2-51.1 and N.J.S.A. 48:3-7.

N.J.S.A. 48:2-51.1 contains no blanket exception for changes in control of a public utility if the transaction resulting in the change of control occurs at the holding company level. Specifically, N.J.S.A. 48:2-51.1(a) provides that

[N]o person shall acquire or seek to acquire control of a public utility directly or indirectly through the medium of an affiliated or parent corporation or organization, or through the purchase of shares, the election of a board of directors, the acquisition of proxies to vote for the election of directors, or through any other manner, without requesting and receiving the written approval of the Board of Public Utilities.

[N.J.S.A. 48:2-51.1(a)(emphasis added)].

Here, the Proposed Transaction contemplates that OpenMarket will acquire Peerless Holdings, which is the indirect parent of PNJ and Airus, and thereby, OpenMarket will acquire control of PNJ and Airus, which are public utilities. According to N.J.S.A. 48:2-51.1(a), even if the Proposed Transaction is occurring at the holding company level, Board approval for the Proposed Transaction is generally required.

N.J.S.A. 48:2-51.1 contains an exception to the above requirement. However, the exception does not apply to the Proposed Transaction. N.J.S.A. 48:2-51.1 provides in relevant part:

Nothing herein shall require the review or approval by the board of any parent or affiliate corporation of a telecommunications company if such parent or affiliate corporation does not itself provide regulated telecommunications service or telephone access line service, in this State, and seeks to combine, merge, or consolidate with, or acquire or acquire control of, another corporation or other organization which:

(1) does not directly provide regulated telecommunications services or telephone access line service, in this State; and

(2) does not directly or through one or more affiliates, own a controlling interest in another corporation or other organization which provides regulated telecommunications service or telephone access line service, in this State.

[N.J.S.A. 48:2-51.1(b)(emphasis added)].

The exception applies to a transaction where a parent or affiliate of a telecommunications company seeks to obtain control of another entity when the parent or affiliate does not provide regulated services in New Jersey and the other entity in the transaction "does not directly or through one or more affiliates, own a controlling interest" in an entity that provides "regulated telecommunications service" in New Jersey. Here, the Proposed Transaction involves a plan of

merger whereby “OpenMarket will acquire Peerless Holdings.”⁴ Neither OpenMarket nor Peerless Holdings provide regulated services in New Jersey. However, Peerless Holdings, the “other” entity in the Proposed Transaction, indirectly owns a controlling interest in PNJ and Airus, which provide regulated telecommunications service in New Jersey. Therefore, the exception does not apply to the Proposed Transaction and Board approval is required by N.J.S.A. 48:2-51.1.

With respect to the Financing Arrangement, there is similarly no applicable exception that obviates the need for Board review. “Except as otherwise provided by subsections g. and h. of this section, a public utility shall not, without the approval of the board . . . encumber its property . . .” N.J.S.A. 48:3-7(a). N.J.S.A. 48:3-7(g) provides an exception to the requirement, but it is not applicable to the Financing Arrangement. The exception applies when the parent of the public utility “does not provide regulated telecommunications service” in New Jersey and the parent company seeks to encumber the property of another entity that “does not directly provide regulatory telecommunications service” in New Jersey and “does not directly or through one or more affiliates, own a controlling interest” in another entity that provides regulated telecommunications services in New Jersey. N.J.S.A. 48:3-7(g). Here, Petitioners’ have indicated that “each subsidiary of Peerless will be required to grant security” under the Financing Arrangement, and therefore, the property of public utilities PNJ and Airus is being encumbered pursuant to the Financing Arrangement.⁵ Therefore, the N.J.S.A. 48:3-7(g) exception does not apply and Board approval of the Financing Arrangement is required by N.J.S.A. 48:3-7.

In addition, the Financing Arrangement requires “each direct or wholly owned material subsidiary of Infobip,” including “each subsidiary of Peerless Holdings” to join the Financing Arrangement as a guarantor, and thus Airus and PNJ are guarantors under the Financing Arrangement.⁶ Therefore, Airus and PNJ are public utilities issuing evidence of indebtedness under N.J.S.A. 48:3-9, which also requires Board approval of the Financing Arrangement. Consistent with the foregoing, therefore, Board will consider authorization of the Proposed Transaction and the Financing Arrangement.

In considering a request for transfer of control, the Board shall evaluate the impact of the acquisition on competition, on the rates of ratepayers affected by the acquisition of control, on the employees of the affected public utility or utilities, and on the provision of safe and adequate utility service at just and reasonable rates. N.J.S.A. 48:2-51.1. The Board must be satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1. N.J.A.C. 14:1-5.14(c). Pursuant to N.J.S.A. 48:3-9, the Board shall approve proposed debt “when satisfied that such issue is to be made in accordance with law and the purpose thereof is approved by the board. N.J.S.A. 48:3-9.

After a careful review of this matter, including the November 2021 Letter, Petitioners’ responses to discovery and the comments of Rate Counsel, the Board **FINDS** that the transfer of control under the Proposed Transaction is consistent with the applicable law, is not contrary to the public interest, and will have no material impact on the rates of current customers or on New Jersey employees. The Board also **FINDS** that the proposed transfer of control under the Proposed

⁴ November 2021 Letter at p. 3.

⁵ November 2021 Letter at p. 4.

⁶ November 2021 Letter at p. 4.

Transaction will have no impact on the provision of safe, adequate and proper service, and will positively benefit competition. Therefore, based on the Board's review, the Board **HEREBY AUTHORIZES**, *nunc pro tunc*, the Petitioners to complete the Proposed Transaction as described in the November 2021 Letter.

Review of the record indicates that the Financing Arrangement and the use of the proceeds associated therewith are also appropriate. While there is no guarantee in this regard, especially given the competitive environment in which the Petitioners' and the Licensees operate, the Board is satisfied that the Financing Arrangement will not have an adverse impact on the Licensees' operations in New Jersey.

Therefore, the Board, pursuant to N.J.S.A. 48:3-9, **HEREBY FINDS** that the Financing Arrangement is in accordance with law and is in the public interest, and approving of the purposes thereof, **HEREBY ORDERS** that the Petitioners, PNJ and Airus be and are **HEREBY AUTHORIZED**, *nunc pro tunc*, to enter into the proposed Financing Arrangement in connection with the consummation of the merger. This includes authorization of PNJ and Airus to act as guarantors and to pledge their assets as security to provide necessary guaranties and related pledges of assets as security for the new Financing Arrangement.


This order is subject to the following provisions.

1. This Order shall not affect or in any way limit the exercise of the authority of the Board or of the State in any future petition with respect to rates, franchises, services, financing, accounting, capitalization, depreciation, or any other matters affecting the Petitioners, PNJ or Airus.
2. Notwithstanding anything to the contrary in the documents executed pursuant to the Financing Arrangement or other supporting documents, a default or assignment under such agreement does not constitute an automatic transfer of PNJ and/or Airus and their assets. Board approval must be sought pursuant to N.J.S.A. 48:1-1 et seq. where applicable.
3. This order shall not be construed as directly or indirectly fixing for any purpose whatsoever any value of tangible or intangible assets now owned or hereafter to be owned by Petitioners, PNJ or Airus.
4. Petitioners shall notify the Board, within five (5) business days, of any material changes in the proposed Financing Arrangement, and shall provide complete details of such transactions including any anticipated effects upon service in New Jersey.
5. Petitioners shall notify the Board of any material default on the terms of any of the debt instruments that are components of the Financing Arrangement, for which Airus and PNJ are guarantors, within five (5) business days of any such occurrence.

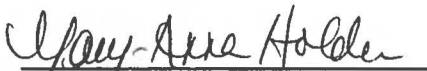
This Order shall be effective on February 1, 2023

DATED: January 25, 2023

BOARD OF PUBLIC UTILITIES
BY:



JOSEPH L. FIORDALISO
PRESIDENT



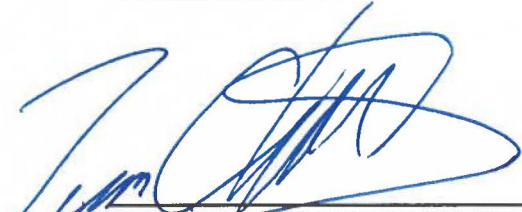
MARYANNA HOLDEN
COMMISSIONER



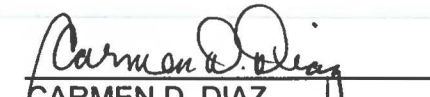
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DR. ZENON CHRISTODOLOU
COMMISSIONER

ATTEST: 

CARMEN D. DIAZ
ACTING SECRETARY

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

IN THE MATTER OF THE NOTICE OF PEERLESS NETWORK OF NEW JERSEY, LLC AND AIRUS, INC -
INDIRECT TRANSFER OF CONTROL

DOCKET NO. TM21111235

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