

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

Application for Consent )  
To Transfer of Control Filed By )  
AT&T Inc. and Deutsche Telekom AG )  
\_\_\_\_\_ )

WT Docket No. 11-65

**PETITION TO DENY OF PEERLESS NETWORK, INC.**

Andrew D. Lipman  
Russell M. Blau  
Bingham McCutchen LLP  
2020 K Street, N.W.  
Washington, DC 20006  
(202) 373-6000

PEERLESS NETWORK, INC.  
John Barnicle  
President and Chief Executive Officer  
222 S Riverside Plaza, Suite 2730  
Chicago, IL 60606

Dated: May 31, 2011

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION .....	1
II. STANDARD OF REVIEW .....	2
III. NATURE OF WHOLESALE SWITCHING AND TRANSPORT MARKETS .....	5
IV. AT&T CAN FORECLOSE WHOLESALE COMPETITION THROUGH CON- SOLIDATION .....	7
V. AT&T CAN ENGAGE IN OTHER EXCLUSIONARY CONDUCT.....	9
VI. THE COMMISSION MUST EITHER IMPOSE CONDITIONS OR DENY THE MERGER .....	11
VII. CONCLUSION.....	13



carrier's network and terminate on another's), and tandem switching and transport of switched access traffic, among other things.

The Commission is already aware of the potential impacts of a combination between AT&T and T-Mobile on competition in wireless markets; and Peerless anticipates that materials filed in this docket by a number of other parties will emphasize the competitive impacts on mobile services. The Commission should also take note, however, of the significant role that T-Mobile plays in markets for wholesale switching and transport services, and the potential harm to competition in those markets from consolidation of AT&T's and T-Mobile's respective traffic volumes (especially, but not exclusively, where AT&T is also the incumbent LEC). As explained in these Comments, the reduction in competition in these wholesale markets will cause substantial harm to consumers, and the merger will be contrary to the public interest unless sufficient conditions to prevent such harm are adopted and enforced.

## **II. STANDARD OF REVIEW**

As a threshold standard, the Commission must determine whether the proposed transfer of control of Commission licenses will further the public interest, convenience and necessity.<sup>1</sup> As part of that determination, it must consider whether the transfer of control could result in public interest harms by substantially frustrating or impairing the objectives or implementation of the Communications Act.<sup>2</sup> Its public interest evaluation includes "a deeply rooted preference for preserving and enhancing competition in relevant markets."<sup>3</sup> Competition is not only national policy overarching the telecom market, it is also clearly in the public interest because it lowers

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<sup>1</sup> *SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, ¶ 16 (2005) ("*SBC/AT&T Merger Order*").

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*, at ¶ 17.

rates for consumers, increases efficiency, and spurs the introduction of new services, packages, and features.

The Commission considers “the competitive effects of the transaction” such as market shares, but its “analysis under the public interest standard is somewhat broader; for example, it considers whether a transaction will *enhance*, rather than merely preserve existing competition.”<sup>4</sup> Finally, the FCC’s analysis of public interest benefits and harms includes an analysis of the potential competitive effects of the Merger that is informed by, but not limited to, traditional antitrust principles.<sup>5</sup>

The Commission has long recognized that:

the same consequences of a proposed merger that may be beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create or enhance market power, increase barriers to entry by potential competitors, and/or create opportunities to disadvantage rivals in anticompetitive ways.<sup>6</sup>

As the Commission has held, “the Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction serves the public interest.”<sup>7</sup> If “the record presents a

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<sup>4</sup> *Applications of AT&T, Inc. and Celco Partnership d/b/a Verizon Wireless; for Consent to Assign or Transfer Control of Licenses and Authorizations and Modify a Spectrum Leasing Arrangement*, WT Docket No. 09-104, 25 FCC Rcd. 8704 at ¶ 24 (June 22, 2010) (“*AT&T/Verizon Order*”) (emphasis added); *AT&T v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001).

<sup>5</sup> *Ameritech Corp., Transferor and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporation Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22,24,25, 63, 90, 95 and 101 of the Commission’s Rules*, 14 FCC Rcd 14712, 14737 at ¶ 49 (1999) (“*Ameritech/SBC Order*”).

<sup>6</sup> *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 06-74, FCC 06-189, ¶ 12 (rel. Mar. 26, 2007) (“*AT&T/BellSouth Merger Order*”).

<sup>7</sup> *Applications Filed by Frontier Communications Corporation and Verizon Communications Inc. for Assignment or Transfer of Control*, WC Docket No. 09-95, Memorandum Opinion and Order, 25 FCC Rcd 5972, FCC 10-87, ¶ 9 (rel. May 21, 2010) (“*Frontier/Verizon Merger Order*”).

substantial and material question of fact, [the Commission] must designate the applications for hearing.”<sup>8</sup>

The Commission “considers whether a transaction will enhance, rather than merely preserve, let alone denigrate, existing competition.”<sup>9</sup> In evaluating merger applications, the Commission asks “whether the combined entity will be able, and is likely, to pursue business strategies resulting in demonstrable and verifiable benefits that could not be pursued but for the combination.”<sup>10</sup> Claimed benefits must be transaction- or merger-specific.<sup>11</sup> The claimed benefit “must be likely to be accomplished as a result of the merger but unlikely to be realized by other means that entail fewer anticompetitive effects.”<sup>12</sup> “Efficiencies that can be achieved through means less harmful to competition than the proposed merger ... cannot be considered to be true pro-competitive benefits of the merger.”<sup>13</sup> Claimed benefits must also be verifiable.<sup>14</sup> The Applicants must demonstrate that the proposed merger “is a reasonably necessary means” to achieve the purported benefits.<sup>15</sup> “A mere recitation by the Applicants that they will provide some benefit if and only if their license transfer is approved cannot suffice to show that such a

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *SBC/AT&T Merger Order*, ¶ 182.

<sup>11</sup> *Id.*, ¶ 184.

<sup>12</sup> *Id.* (citing *Application of Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp., Transferors, and Echostar Communications Corp., Transferee*, CS Docket No. 01-348, Hearing Designation Order, 17 FCC Rcd 20559, ¶ 189 (2002) (“*EchoStar/DirectTV Order*”)).

<sup>13</sup> *Id.* n.517 (citing *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 158 (1997) (“*Bell Atlantic/NYNEX Merger Order*”)).

<sup>14</sup> *Id.* ¶ 184.

<sup>15</sup> *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, ¶ 267 (1999) (“*SBC/Ameritech Merger Order*”).

benefit is merger specific.”<sup>16</sup> “[S]peculative benefits that cannot be verified will be discounted or dismissed.”<sup>17</sup> The Commission applies a sliding scale approach under which substantial and likely harms require that claimed benefits show a higher degree of magnitude and likelihood than it would otherwise demand.<sup>18</sup>

As shown herein, the proposed merger demonstrably fails this standard. Rather than enhancing competition, it would only further enhance AT&T’s dominant market position in wholesale switching and transport markets. Accordingly, the Commission must either impose conditions sufficient to prevent AT&T from abusing that dominant market power in ways contrary to the public interest, or deny approval of the transaction.

### **III. NATURE OF WHOLESALE SWITCHING AND TRANSPORT MARKETS**

The provision of seamless service allowing any party on the Public Switched Telephone Network to call any other party, regardless of which carrier serves each of them, requires extensive interconnection of carrier networks “behind the scenes” in every geographic market around the country. Every carrier offering PSTN services in a particular area, whether incumbent LEC, competitive LEC, interexchange, or mobile, must connect to every other carrier that serves telephone numbers in that area. This interconnection is mandated by national policy, as codified in 47 U.S.C. § 251(a)(1). Although this interconnection is normally invisible to consumers, it nonetheless has a material impact on the overall cost and therefore the market prices of switched voice services, both wireline and mobile.

There are essentially two ways that any given pair of carriers can interconnect: directly or indirectly. Direct interconnection generally involves dedicated transmission facilities connecting one or more switches of each carrier to one or more switches of the other. When one of the

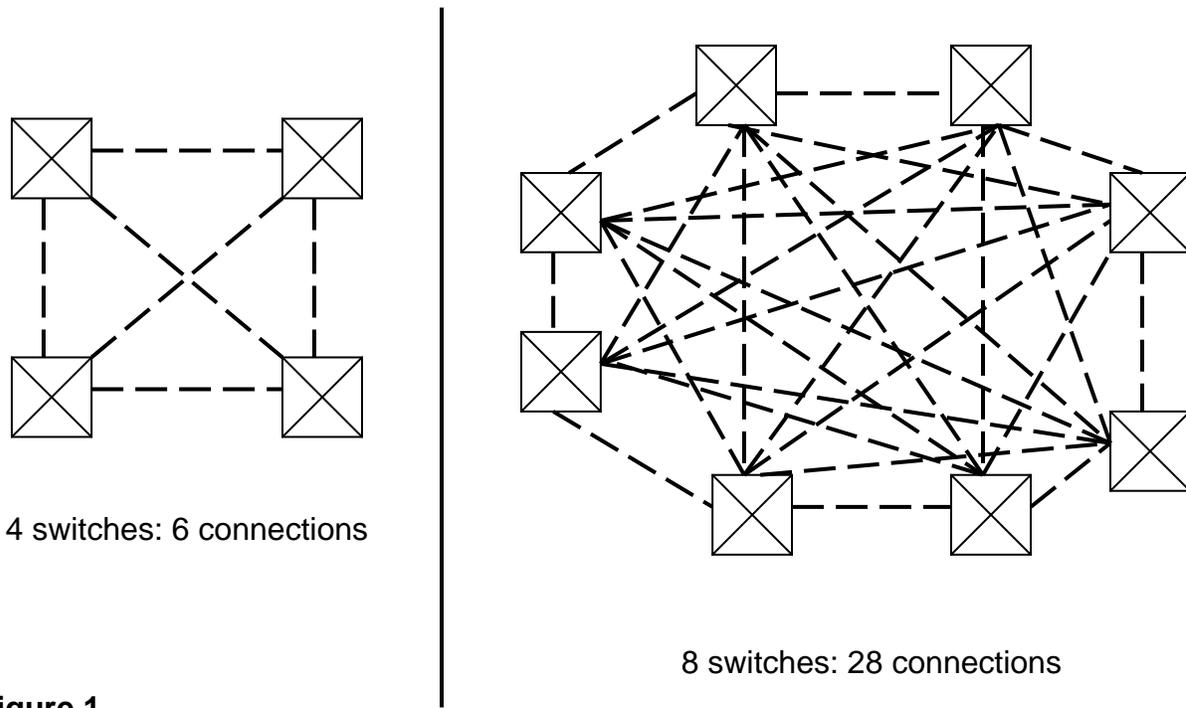
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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*, ¶ 185; *see id.*, ¶ 256 (1999) (citing *Bell Atlantic/NYNEX Merger Order*, ¶ 157).

carriers involved in the interconnection is an incumbent LEC or a facilities-based wireline competitor, they will likely be able to supply these transmission facilities themselves; in other cases, however, the two carriers may need to lease the underlying transmission facilities from a third party. Although direct interconnection is comparatively simple, it can become very costly because the number of connections required increases faster than the number of switches to be interconnected; see Figure 1, below. Doubling the number of switches in a market requires more than *quadruple* the number of connections among them.



**Figure 1**

Indirect interconnection, by contrast, makes use of tandem switching and common transport services, including IP transport, to route traffic between and among carriers. These wholesale switching and transport services have historically been provided by the incumbent LEC, but over the past five years new entrants, including Peerless, have begun to offer competing services and have eroded the LECs' market share in this area.<sup>19</sup> This competitive opportunity exists only

<sup>19</sup> Note that incumbent LEC tandem switches play a dual role; they offer both *direct* interconnection to the LEC's own end offices subtending that tandem, and *indirect* interconnection or

because of the existence of multiple telecommunications carriers serving telephone numbers within a given geographic market.

#### **IV. AT&T CAN FORECLOSE WHOLESALE COMPETITION THROUGH CONSOLIDATION**

AT&T has the ability to foreclose competition in wholesale switching and transport services through consolidation of formerly competing telecommunications carriers. This has already occurred in many markets where AT&T is the incumbent LEC. In these markets, AT&T will deliver traffic to other carriers from any of its affiliates, including AT&T Corp.'s interexchange traffic and AT&T Mobility's mobile traffic, only through interconnections to AT&T LEC tandems.<sup>20</sup> It is safe to assume that, if permitted to do so after consummation of the acquisition, AT&T will cause all T-Mobile's outgoing traffic to be routed through these tandems as well. Further, even in markets where AT&T is not an ILEC, the combination between AT&T and T-Mobile will convert what is now inter-carrier traffic exchanged between T-Mobile and AT&T Corp. or AT&T Mobility into intra-carrier traffic that presumably will either be migrated to a single switch, or exchanged over direct connections. Each of these actions will reduce the volume of inter-carrier traffic available in the competitive market for wholesale transit services.

AT&T has similar power over terminating traffic. If its non-incumbent LEC affiliates refuse to permit wholesale carriers to interconnect directly to their switches, they can force all other carriers to route transit traffic through the AT&T incumbent LEC tandems. In those markets where AT&T is the ILEC, this would effectively remove a large percentage of inter-

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transit service that permits delivery of calls to other carriers' switches that are also connected to the tandem. By contrast, entrants like Peerless generally are only able to compete for the transit service component. For purposes of this Petition, "transit" encompasses all interconnection arrangements in which a third party switches traffic originating and terminating on two other carriers' networks, including interexchange (access), intraMTA mobile, and local wireline traffic.

<sup>20</sup> In addition, Teleport Communications Group, a subsidiary of AT&T Corp., operates as a competitive LEC and also exchanges local traffic with other carriers.

carrier traffic, probably more than 50% in most geographic areas, from the competitive marketplace, and effectively compel use of AT&T's transit and tandem-switching services. Further, since there would be no way to deliver any traffic to telephone numbers served by AT&T affiliates other than through AT&T's tandem, AT&T would control a bottleneck facility and could charge excessive prices for access to it. This obviously would benefit AT&T's LEC subsidiaries by allowing them to dominate the wholesale markets, but at the expense of all other carriers in the market and their customers, who would be subjected to the dangers of monopoly pricing and discriminatory service.

In fact, AT&T has made it very difficult for wholesale carriers to interconnect with its non-incumbent LEC switches for purposes of terminating traffic, especially in the markets where it is also the incumbent LEC. Peerless has repeatedly sought interconnection with AT&T affiliates to terminate traffic to their switches. AT&T Corp. and its CLEC affiliates have consistently refused these requests. AT&T Mobility has sometimes refused and sometimes accepted direct connections, but has made the process extremely difficult and slow. In many cases, Peerless has experienced delays of nine to twelve months in provisioning trunk connections to AT&T Mobility switches (which, for other carriers, generally take a few weeks), both for new connections and for augmentation of existing trunk groups. Of course, each of these delays permits more traffic to pass over the AT&T LEC tandem switch, generating more revenue for AT&T, while Peerless is unable to complete traffic over its direct connections.

If AT&T were permitted to acquire T-Mobile, it would be able to concentrate an even higher percentage of local exchange traffic on its own tandems, by the use of these exclusionary tactics, than it does now. It is clear, therefore, that the merged AT&T/T-Mobile would have both the ability and the incentive to exercise market power over local transit, tandem switching, and wholesale transport of switched voice traffic. Because the merger would increase the risk of anti-

competitive behavior, and such behavior would be harmful to consumers, it is not in the public interest.

## **V. AT&T CAN ENGAGE IN OTHER EXCLUSIONARY CONDUCT**

AT&T has used a variety of other tactics to restrict wholesale competition and raise obstacles to entry by new competitors in wholesale markets. Without adequate conditions to restrain this conduct, AT&T could use the additional traffic generated by the acquisition of T-Mobile to extend and strengthen its control over wholesale markets, which would be contrary to the public interest.

First, AT&T's ILEC subsidiaries have a national transit agreement with AT&T Mobility. This agreement allows AT&T Mobility to buy transit services at below market rates in a number of AT&T LEC territories. For example, AT&T charges AT&T Mobility a little over \$.003 per minute when it charges everyone else \$.005 to \$.0065 per minute, with no minimum volume commitment. Peerless requested the same transit terms as AT&T extends to its affiliates, but AT&T flatly refused to make these terms available.

Second, AT&T has actively opposed efforts to modify the Local Exchange Routing Guide (LERG) to permit an end office carrier to designate more than one homing tandem. The current technical standard for the LERG, which was inherited from legacy pre-Telecom Act standards, only has one field for designation of a homing tandem, which works to the advantage of the incumbents. AT&T has steadfastly resisted efforts by Peerless and others to change this standard in the Common Interest Group on Rating and Routing, the Telcordia advisory committee that manages these technical standards and has effectively vetoed them.<sup>21</sup>

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<sup>21</sup> Each LEC operating subsidiary of a holding company has a separate vote in CIGRR, allowing AT&T and a few other incumbent holding companies to dominate the group's recommendations.

Third, in a few instances, Peerless or another competitive wholesale provider has been identified ourselves as the sole homing tandem for select CLEC and Wireless telephone number blocks. These efforts have been hampered either because AT&T Corp. long distance or AT&T's ILEC affiliates (or both) refuse to recognize such arrangements and route traffic pursuant to them. AT&T Corp., as already noted, refuses to interconnect with Peerless, and AT&T's ILECs refuse to route traffic to another tandem provider if that tandem provider is located within their historical franchise territory. Of course, neither of these companies have any problem with routing calls to ILEC tandems that are located outside of AT&T's franchise boundaries. No CLEC will choose to have an alternative tandem provider provide this service if they cannot receive calls from carriers of AT&T's size.

Fourth, AT&T LECs have made it extremely difficult for competitive wholesale providers to obtain or to modify interconnection agreements under Sections 251 and 252 of the Act. The Commission has long been aware of these exclusionary tactics, and included conditions in both the SBC/Ameritech and AT&T/BellSouth merger orders to require AT&T to permit more flexible adoption of interconnection agreement terms.<sup>22</sup> But, as soon as each of those merger conditions expired, AT&T went back to its old tricks. If AT&T is permitted to acquire T-Mobile, it will have every opportunity and incentive to use these tactics to make it difficult for competitive wholesale providers to route transit traffic through AT&T's network to T-Mobile or AT&T Mobility switches.

Fifth, because of its size and control of a large fraction of all telecommunications traffic, which will be even larger if the acquisition is approved, AT&T can exercise coercive power over competitors by withholding payment for interconnection services, dragging its feet on resolution

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<sup>22</sup> *Ameritech/SBC Order*, ¶ 237 n.443, ¶¶ 240, 388; *AT&T/BellSouth Merger Order*, Appendix F, pp. 149-150 (“Reducing Transaction Costs Associated with Interconnection Agreements”).

of disputes, and similar strategies. Peerless has experienced this first-hand, as AT&T has unilaterally refused to pay portions of Peerless' invoices for access services. Despite the fact that Peerless entered into a contract on AT&T's terms for the provision of access service and complied with the terms of that contract, AT&T has "re-rated" Peerless' bills.<sup>23</sup> While Peerless has repeatedly requested a specific explanation of these disputes, AT&T has responded only with very broad assertions, with no supporting evidence, and has never quantified the specific charges or amounts that it claims to dispute. Because of AT&T's dominant position in the market, Peerless has no choice but to continue routing traffic to and from AT&T even though it has no assurance of receiving payment for its services. If Peerless is forced to pursue legal remedies for collection, it anticipates that AT&T will once again use delaying tactics to drag out the duration and increase the cost of litigation, eating up much of the disputed funds in legal fees.

Irrespective of any conditions imposed as discussed in the following section, the Commission should not approve the merger unless AT&T can show, before the adoption of any approval order, that it has paid in full all amounts due to Peerless under its contract for access services, and has committed as an enforceable condition of the merger to timely payment of Peerless' invoices going forward.

## **VI. THE COMMISSION MUST EITHER IMPOSE CONDITIONS OR DENY THE MERGER**

As shown in the previous sections, the proposed acquisition of T-Mobile would be contrary to the public interest because it would enhance AT&T's already-dominant position in the wholesale transit market, and would increase the potential for AT&T to abuse that position. If

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<sup>23</sup> Although AT&T has never provided any detailed statement of the charges it "re-rated," it appears from its correspondence that the "re-rating" includes replacing Peerless' end office switching charges with tandem switching charges, even though Peerless actually did provide end office switching on the calls in question. However, the magnitude of AT&T's "re-rating" appears to be too large to be explained by this change alone, and Peerless remains unaware of the basis for any other credits claimed by AT&T.

the Commission does approve the merger, it must do so subject to conditions sufficient to prevent any such abuse, and those conditions must be definite and enforceable to prevent AT&T from evading them.

Peerless submits that, at a minimum, the following conditions would be essential to prevent AT&T from abusing its dominant position:

1. Each AT&T subsidiary/affiliate that is not an incumbent LEC that provides switched voice service, including but not limited to both AT&T Mobility and T-Mobile, must permit other carriers to establish direct trunk connections to their end office switches, upon bona fide request, for the transport and termination of all forms of switched telecommunications traffic (*i.e.*, both access and non-access traffic). The requesting carrier may be required to bear the cost of establishing all necessary transport facilities for this connection, unless otherwise agreed by AT&T. However, AT&T must offer reasonable and non-discriminatory terms for direct interconnection.

2. In any geographic market in which T-Mobile is obtaining transit services from one or more wholesale carriers for delivery of traffic originating on the T-Mobile wireless network, AT&T must commit to purchase a comparable amount of transit service from wholesale carriers other than its own affiliated LECs for a minimum of five years.

3. Each AT&T incumbent LEC must offer transit services to third parties on terms no less favorable than those it offers to any of its own affiliates.

4. Each AT&T incumbent LEC must modify its standard interconnection terms and conditions for Section 251/252 agreements to permit an interconnecting CLEC to designate a non-AT&T tandem switch as its homing tandem, and to permit any carrier operating such a homing tandem to interconnect with AT&T tandems and/or end offices for the exchange of

telecommunications traffic on reasonable, non-discriminatory terms. AT&T may not refuse to route any traffic to a non-AT&T tandem that is designated as a homing tandem in the LERG.

5. The Commission should re-impose conditions 1-4 under the heading “Reducing Transaction Costs Associated with Interconnection Agreements” from Appendix F of the *AT&T/Bell South Merger Order*.

## **VII. CONCLUSION**

AT&T’s proposed acquisition of T-Mobile would be contrary to the public interest because it would enhance AT&T’s ability to exercise dominant market power in wholesale switching and transport markets. Accordingly, the Commission should either adopt conditions as outlined above, or deny the applications.

Respectfully submitted,

*/Electronically signed/*

Andrew D. Lipman  
Russell M. Blau  
Bingham McCutchen LLP  
2020 K Street, N.W.  
Washington, DC 20006  
(202) 373-6000

PEERLESS NETWORK, INC.  
John Barnicle  
President and Chief Executive Officer  
222 S Riverside Plaza, Suite 2730  
Chicago, IL 60606

Dated: May 31, 2011

**SERVICE LIST**

I, Sonja Sykes-Minor, hereby certify that on this 31st day of May 2011, I have caused a copy of the foregoing Petition to Deny of Peerless Network, Inc. to be served, as specified, upon the parties listed below:

<p>Peter J. Schildkraut Scott Feira Arnold &amp; Porter LLP 555 Twelfth Street NW Washington, DC 20004 peter_schildkraut@aporter.com scott_feira@aporter.com <i>Outside Counsel to AT&amp;T Inc.</i> <b>(Via Electronic Mail)</b></p>	<p>Nancy J. Victory Wiley Rein LLP 1776 K Street NW Washington, DC 20006 nvictory@wileyrein.com <i>Outside Counsel to Deutsche Telekom AG and T-Mobile USA, Inc.</i> <b>(Via Electronic Mail)</b></p>
<p>Kathy Harris, Mobility Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 kathy.harris@fcc.gov <b>(Via Electronic Mail)</b></p>	<p>Kate Matraves Spectrum and Competition Policy Division Wireless Telecommunications Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 catherine.matraves@fcc.gov <b>(Via Electronic Mail)</b></p>
<p>David Krech, Policy Division International Bureau Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 david.krech@fcc.gov <b>(Via Electronic Mail)</b></p>	<p>Jim Bird, Office of General Counsel Federal Communications Commission 445 12th Street, S.W. Washington, D.C. 20554 jim.bird@fcc.gov <b>(Via Electronic Mail)</b></p>
<p>Best Copy and Printing, Inc. 445 12th St., S.W. Washington, D.C. 20554 FCC@BCPIWEB.COM <b>(Via Electronic Mail)</b></p>	

\_\_\_\_\_/s/  
Sonja Sykes-Minor