

Decision 89 05 071

MAY 26 1989

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of)
 Fiber Data Systems, Inc. for a)
 certificate of public convenience and)
 necessity authorizing the provision)
 of access to long-distance telephone)
 services and resale of long-distance)
 telephone services. (U-5166-C))

Application 88-05-017
(Filed May 11, 1988)

**INTERIM OPINION
MODIFYING DECISION 89-02-080**

Background

On December 9, 1988 this Commission issued Decision (D.) 88-12-029, which granted Fiber Data Systems, Inc. (FDS) a certificate of public convenience and necessity (CPC&N) to:

1. Construct and operate a telephone system which will provide "access service" to long-distance telephone services within Los Angeles County; and
2. Resell long-distance telephone services offered by other communications common carriers to subscribers located in Los Angeles County.

On January 6, 1989, GTE California Incorporated (GTEC) filed an application for rehearing of D.88-12-029. GTEC's application challenged the grant of authority to FDS to provide access service. Thereafter, Pacific Bell filed a response in support of GTEC's application for rehearing and FDS filed a response in opposition.

On February 24, 1989 the Commission issued D.89-02-080, granting limited rehearing, and partially staying D.88-12-029. In so doing, the Commission opined that it did not necessarily agree with GTEC's list of factors believed to be relevant to

determination of the public convenience and necessity for FDS' proposed access service. The Commission further noted that it is within its discretion to determine the factors material to public convenience and necessity.

However, in order to preserve its options, the Commission's stay of D.88-12-029 encompassed all provision of access service by FDS, whether to the point of presence (POP) of another interexchange carrier (IEC) or to FDS' POP as a reseller IEC. D.89-02-080 effective February 24, 1989 left FDS with only the limited authority to resell interLATA long-distance telephone services offered by other communications common carriers.

On March 9, 1989, FDS petitioned for modification of D.89-02-080, challenging it as contrary to D.88-02-044 issued February 24, 1988. In D.88-02-044 the Commission resolved a long controversy with respect to Wang Communications, Inc's. (Wang) authority to provide access (connections between end users premises and the POP's) of authorized IEC's.

FDS asserted that D.88-02-044 established the "Wang Precedent." Wang had contended that its "Direct Access Service" was beyond the jurisdiction of this Commission, because that access service was to be used in part for interstate communications. The Commission rejected Wang's claim but recognized that Wang would be entitled to provide direct access service by virtue of the Commission's approval of Wang's application for authority to provide interLATA service.

FDS emphasized that it formulated its application for both resale of interLATA services and to construct and operate access facilities¹ between end users and the POPs of interLATA

1 Initially, FDS proposed to provide only fixed (dedicated) access service, but its request was framed broadly to eventually permit it to provide switched access service.

carriers in Los Angeles County on the basis of the Wang precedent. FDS requests reconsideration of the stay imposed in D.89-02-080, and a narrowing of the stay to permit FDS to provide its proposed access service on a private line or special access basis, while the Commission continues its stay relative to authority for switched access service.

FDS states that the more limited stay will still permit GTEC and Pacific Bell a hearing with respect to areas of access service where FDS' application may be breaking new ground with respect to the Commission's approval of competition in intraLATA or interLATA telecommunications services. Conversely, the more limited stay would allow FDS to move ahead with a project that it has been pursuing for more than four years, and for which its resources are nearly exhausted. FDS concludes that if the stay of D.88-12-029 is appropriately modified, there will be no urgency in rehearing the remaining issues specified in D.89-02-080.

After reviewing FDS' request for prompt action, the assigned Administrative Law Judge (ALJ) on March 16, 1989, issued a ruling shortening the period for filing protests to FDS' March 9, 1989 petition to March 20, 1989. A special prehearing conference was then scheduled for April 3, 1989, to receive legal arguments on reasons why the Commission should not grant FDS, prior to an evidentiary hearing, the same authority it had recently granted to other nondominant communications utilities for the provision of high speed private line service.

On March 20, 1989 GTEC filed its protest to FDS' petition and on that same date Pacific Bell and DRA filed responses to the petition.

GTEC in its protest objected to narrowing the scope of rehearing as requested by FDS, claiming that its application for rehearing also vigorously challenged the propriety and correctness of D.88-02-044 on which FDS relies. GTEC then urged that the stay established by D.89-02-080 should remain as ordered "to consider

more thoroughly the factual, legal, and policy issues presented by FDS' application to provide access service on its own network in competition with local exchange companies" without distinction between types of access.

Pacific Bell agreed that GTEC's objections had merit and should be considered. However, in the event that any part of the stay is lifted, Pacific Bell asks that:

1. FDS continue to be prohibited from offering any switched services.
2. FDS be prohibited from offering any private line services at speeds less than 1.544 million bits per second (mbps).
3. FDS be required to refrain from holding out to the public any intraLATA services it is not authorized to provide, and
4. FDS be required to advise its subscribers that intraLATA communications should be placed over facilities of the local exchange carriers.

DRA stated that it was sympathetic to FDS' financial hardship, and supported its petition to modify D.89-02-080 to allow FDS to offer nonswitched access for intraLATA² high-speed digital private line service. However, DRA requested that FDS be required to submit similar reports to those required by D.89-02-027 and other companion orders issued on February 8, 1989.³ DRA asked that the matter of switched access remain an issue for rehearing.

² FDS in A.88-05-017 sought only interLATA access authority and did not contemplate the offering of intraLATA service at this time.

³ The February 8, 1989 orders granted certain nondominant communications utilities the authority to provide high-speed digital private line service under the terms of a settlement reached in I.87-11-033, as subsequently approved by the Commission in D.88-09-059.

**Legal Arguments on the Merits of
FDS' Petition for Modification of
D.89-02-080**

At the April 3, 1989 prehearing conference, the participants were asked to present legal arguments why the Commission should not grant FDS the same authority recently granted to other nondominant communications utilities for the provision of high-speed digital private line service.

Position of GTEC

GTEC argued that the Commission has no authority to grant a CPC&N before a hearing has been held. GTEC contended that it and Pacific Bell were entitled to a hearing before FDS is granted any authority, pursuant to that part of Public Utilities (PU) Code § 1005, Subsection (a) which states: "...upon timely application for a hearing by any person entitled to be heard thereat, the commission, before issuing or refusing to issue the certificate, shall hold a hearing thereon."

GTEC also cited Ventura County Waterworks Dist. v. Public Util. Com. (1964) 61 Cal 2d 462, 464 which stated in part: "A public utility...is entitled to a hearing before the Commission may grant a certificate of public convenience and necessity to a competitor."

GTEC opines that there is a fundamental and significant difference between the type of intraLATA high-speed private line service approved in D.88-09-059 and the access service FDS proposes. GTEC claims that when the Commission first expressed an interest in allowing competition in intraLATA high-speed private line service, it noted the DRA testimony that private line service accounted for about two percent of the local exchange company's (LEC) revenues. GTEC asserts that access services provide anywhere from a quarter to more than one-third of the LEC's revenues.

GTEC also claimed that Wang never actually applied for authority to provide direct access services but instead maintained

that the Commission had no jurisdiction over that service. GTEC then asserted that even though the other parties in the Wang case did not pursue an appeal, that does not bar them forever from asserting their rights to a hearing with regard to each application which may come along. GTEC declared that it did so at this time because the FDS application clearly framed the competition issue.

GTEC also argued that the Wang application dealt with microwave technology as opposed to fiber (fiber optic cable) and fiber could have a greater impact on actual competition than microwave facilities. GTEC then renewed its objection to the ex parte grant to FDS of authority for high-speed access.

Position of Pacific Bell

Pacific Bell contended that GTEC's pleadings have merit, and it did not think that FDS should be granted authority for interexchange service interLATA without hearings. It claimed that issues of exchange access bypass have not been appropriately addressed and would properly be a matter to be addressed in Phase III of the OII in intraLATA competition (I.87-11-033).

Pacific Bell then stated that if the Commission is inclined to grant ex parte authority to FDS, that grant should be based on the same four limitations it had expressed in its March 20, 1989 response to FDS' petition (supra). Pacific Bell also asked that since FDS' application did not request authority to provide direct connection between two end user premises within a LATA, that no such authority be granted at this time.

Pacific Bell then opined that FDS' planned use of fiber had a potential for substantial bypass of the local exchange facilities within the LATA unlike Wang's use of microwave.

Pacific Bell then concluded its argument by pleading that:

"...there needs to be adequate opportunity for hearings before a decision is granted that would allow them [FDS] to offer exchange access which would compete with the local exchange carrier facilities. The proper place for

considering that impact on local exchange carrier access is in Phase 3 of the OII on intraLATA competition." (Tr., pp. 4 and 5.)

Position of FDS

FDS now seeks authority to provide dedicated special access connections between its customers' premises and the POPs of IEC's. FDS contends that it was granted that authority among other things by D.88-12-029, but that such authority was stayed by D.89-02-080. FDS contends that only that portion of its broader application is at issue in its petition for modification of the stay ordered by D.89-02-080.

FDS asserts that this specific type of authority has been provided to Wang by D.88-02-044 and more recently to Teleport Communications of San Francisco (Teleport S.F.) by D.89-02-016, on February 8, 1989 and still more recently to Oak Brook Fiber Systems, Inc. (Oak Brook) by D.89-03-060 dated March 22, 1989.

FDS observed that the Oak Brook decision clearly permitted special access connections between customer premises and IEC POPs without deciding whether that service is inter or intraLATA. FDS concedes that in its application it did not seek any intraLATA authority. It only sought the authority to connect end user premises to a POP.

FDS also admits that it does, at some later date, intend to seek authority to provide intraLATA service despite possible regulatory hurdles.

FDS concludes its argument by challenging GTEC's assertion that the Wang decision should not be used as a precedent to be relied upon by the public and regulated industries for their future conduct.

FDS emphasizes that it did rely upon that decision and whether the characterization of the access service here is interLATA or intraLATA does not really matter. In either case, FDS claims that it would be eligible under present Commission policy to

have that authority granted on an ex parte basis without hearing, as has been done for numerous other applicants within the last six months.

FDS also asserts that any distinction between microwave and fiber technology is and should be moot, since Wang did not limit its request for authority to microwave technology. Wang possesses the right to install fiber as does every other IEC. Moreover, the Commission has never sought to limit the technology to be employed by an IEC in rendering service. That, argues FDS, would indeed be short-sighted and contrary to all Commission precedent.

Finally, in response to a question from the ALJ, FDS' counsel concurred that for the purpose of its petition for modification of D.89-02-080, FDS would be satisfied with authority similar to that recently granted to Oak Brook by D.89-03-060, leaving all other conditions for a potential future hearing.

Position of Other Parties

Counsel for Oak Brook, Bay Area Teleport, Teleport S.F., and DRA all argued in support of granting FDS' petition for modification of D.89-02-080 consistent with the authority given most recently to Oak Brook by D.89-03-060.

DRA's counsel opined that in his view of FDS' application, it would probably be "improper for the Commission to specifically not grant this petition for modification for FDS in view of the fact that similar authority has already been granted to Teleport S.F., Wang, and Oak Brook Fiber."

DRA also argued that:

"If the Commission wants to revisit this issue after some competition has been permitted, it has the authority to do that, but I don't believe at this time it is appropriate to specifically take on Fiber Data Systems, particularly in view of the fact that in Fiber Data's petition for modification they note that the regulatory apparatus itself is the main reason the company would have to file

bankruptcy or has already led to severe financial problems for the applicant." (Tr., p. 31.)

Discussion

We have carefully reviewed the legal arguments presented by GTEC and Pacific Bell and agree that issues regarding switched access of high-speed digital private line service at speeds of 1.544 mbps⁴ or above, and individual voice grade circuits have not yet been addressed fully. These services if offered in competition with the LEC's may certainly have an impact on the LEC's revenues.⁵

GTEC is also correct in its assertion that switched access of message services is a substantial part of any LEC's revenues. Therefore, we will honor GTEC and Pacific Bell's requests for evidentiary hearings before granting FDS a CPC&N to provide "switched" access services of any kind. Thus, we will now only authorize FDS to provide dedicated high-speed private line service which accounts for a much smaller proportion of LEC revenues.

However, as to FDS' request to be granted the same authority we have heretofore granted to Wang by D.88-02-044, to Teleport S.F. by D.89-02-016, and to Oak Brook by D.89-03-060, namely for dedicated nonswitched access for high-speed digital private line services at speeds of 1.544 mbps or above, we will

4 1.544 mbps digital private line service, with proper multiplexing, is capable of handling 24 separate voice channels at one time.

5 GTEC's Test Year 1988 adopted summary of earnings sets forth private line revenues as totaling \$39,610,000 (less than 2% of its \$2,126,290,000 overall California intrastate revenues. The \$39,610,000 is made up of \$3,900,000 in local private line revenue and \$35,710,000 of toll private line revenues. (Source: D.88-12-101 issued December 19, 1988, p. 84 and Appendix D, mimeo.)

honor FDS' request based on its legal arguments and the general support of those arguments by DRA and other parties. The decisions noted above establish that regardless of whether the provision of high-speed digital private line access service to the POPs of IECs is interLATA or intraLATA service, we have allowed competitive entry in the provision of high-speed digital private line service both on an interLATA and intraLATA basis.

In addition, while GTEC and Pacific Bell see fiber facilities as a more significant threat to possible future competition than microwave facilities, we will not limit FDS' use of this technology in rendering the services authorized by this order. To do otherwise could stifle technological innovation to the disadvantage of FDS' customers. Moreover, in both D.89-02-016 (Teleport S.F.) and D.89-03-060 (Oak Brook) we granted authority to applicants who proposed to offer access service on fiber optic facilities.

Furthermore, GTEC is already subject to competition for its toll private line services (yielding annual revenues of approximately \$35,710,000) by other providers of access over high speed 1.544 mbps digital private line service facilities. Most recently we issued D.89-04-044 dated April 12, 1989 in A.88-12-046,⁶ which granted Teleport Communications-Los Angeles, Inc. (TCLA) similar authority to that now sought by FDS, to use fiber optics technology as it had proposed in its application, to provide dedicated access to the POPs of IECs with high speed 1.544 mbps digital private line service, in the greater Los Angeles basin.

GTEC is only entitled to an evidentiary hearing if there are relevant factual issues to decide. Here, the only factual issue that FDS' opponents have raised is the extent to which fiber

⁶ GTEC did not protest TCLA's application (A.88-12-046).

optics technology proposed for use by FDS in competition with LECs threatens the LEC's revenues. However, even if GTEC were to prove its claims that fiber optic technology is more effective in diverting private line service from GTEC to competing carriers, this diversion would at most affect only 1.7% of its revenues.

This 1.7% of GTEC's overall revenues includes income from certain other private line services which are not subject to competition from FDS as proposed in this order, e.g., foreign exchange services, and, interexchange alarm, telemetry, signal, and control circuits which operate at speeds less than 1.544 mbps. We do not believe this impact on GTEC's overall revenues is sufficiently serious to warrant denying FDS the requested authority to provide high-speed private line access service at speeds of 1.544 mbps or above on full period dedicated nonswitched facilities. Moreover, as we have noted above, these revenues are already threatened by others who have previously been authorized to compete with GTEC.

Accordingly, in the absence of any material factual disputes, we will grant FDS the limited authority it now seeks on an ex parte basis. We will, however, hold evidentiary hearings before granting any authority to FDS for provision of switched high speed or voice grade circuit access service. The potential revenue threats from competition on those switched services are sufficient to raise material issues of fact warranting evidentiary hearings.

GTEC and Pacific Bell also suggest that fiber optics facilities, once installed, are capable of numerous uses we have not yet authorized. The inference here is that such uses might be approved by incremental changes on a decision by decision basis. The answer to this argument is that we will hold evidentiary hearings before we decide whether to authorize FDS to use its fiber optic network for switched high speed or voice grade access services. Thus, such factual issues are not relevant to this decision to grant the limited authority presently sought by FDS.

In granting this authority, we will also incorporate the four limitations suggested by Pacific Bell which were all included in the recent Oak Brook order (D.89-03-060). In addition, since FDS does not request authority to provide intraLATA service for direct connection between two end user premises within a LATA, no such authority will be granted at this time.

Proposed Workshop for Remaining Issues

With the understanding that the Commission would address the issue of nonswitched dedicated private line service at transmission speeds of 1.544 mbps or above and dedicated access to IEC's in this interim opinion, FDS suggested that the remaining issues be identified and discussed at a prospective workshop. The proposed workshop would not only identify the remaining issues but would also seek to obtain an informal sense of the parties as to the best way to place these issues before the Commission.

All parties agreed on the desirability of a proposed workshop to identify and explore methods to deal with the remaining issues and also agreed on the date of Thursday, June 15, 1989 for that one-day workshop. DRA agreed to host and chair that workshop which will be held at the Commission's offices in San Francisco and will be open to the public. We will direct the DRA to prepare a timely report to the ALJ after conclusion of the scheduled workshop. The report should include a summary of the positions of the parties attending the workshop as to the remaining issues, and the general consensus relative to the appropriate forum for considering these generic issues, if this proceeding is not that forum.

Findings of Fact

1. FDS by its petition seeks a modification of D.89-02-080 to allow it to provide dedicated nonswitched high-speed private line service between end users and POPs of IECs at speeds equivalent to 1.544 mbps or higher in the State of California with initial service within the County of Los Angeles.

2. We have granted similar authority to that requested in the FDS petition, to Wang, Teleport S.F., to Oak Brook, and to TCLA by D.88-02-044, D.89-02-016, D.89-03-060, and D.89-04-044, respectively.

3. FDS will compete for only a portion of GTEC's toll private line revenues which in aggregate represent about 1.7% (\$35,710,000) of its \$2,126,290,000 authorized annual California intrastate revenues. FDS' dedicated access via high speed 1.544 mbps private line service, under consideration herein, will not likely threaten other GTEC revenues.

4. Even if GTEC could show that FDS' fiber optic system would present a significant threat to its toll private line revenues, that threat upon only a portion of 1.7% of its overall revenues would not be sufficient to cause us to deny FDS similar authority to that we have already granted to others. Especially since those same toll private line revenues are already subject to competition by others.

5. There is no basis for treating FDS differently than other applicants which have been granted similar authority.

6. There is reasonable cause to require the same safeguards in granting the FDS requested authority as we have recently required of Oak Brook in D.89-03-060.

7. There is no lawful basis to authorize FDS to provide switched access service by an ex parte order at this time.

8. There is good cause to maintain the stay of D.88-12-029 in effect pursuant to D.89-02-080, except for the limited issues which are resolved herein.

9. The question of FDS providing access service on a switched network and/or at speeds less than 1.544 mbps, and the proper forum for addressing those requests, will be pursued at a workshop to be hosted by the DRA on June 15, 1989 at the Commission offices in San Francisco.

Conclusions of Law

1. An evidentiary hearing concerning dedicated nonswitched high-speed private line access services between end users and the POPs of IECs should not be held here, where the protestants have not put at issue any facts material to the granting of this authority.

2. FDS' petition to modify D.89-02-080 should be granted to the limited extent set forth below.

3. FDS should be authorized to provide dedicated nonswitched private line access services between end users and POPs of IECs at speeds equivalent to 1.544 mbps or higher, throughout the State of California, with initial service within the County of Los Angeles.

4. FDS should be prohibited from holding out the availability of intraLATA services it is not authorized to provide and should be required to advise its customers that all unauthorized intraLATA communications should be placed over the facilities of an authorized carrier.

5. The effective date of FDS' initial offering of dedicated nonswitched high-speed private line service authority should be five days after its filing of its revised tariff schedules pursuant to the order which follows.

6. In order that FDS may offer these services without any further delay, than required by Conclusion of Law 5 above, this order should be effective today.

7. FDS should not be authorized to provide access service on a switched network and/or at speeds below 1.544 mbps at this time.

INTERIM ORDER

IT IS ORDERED that:

The stay ordered by D.89-02-080 is hereby lifted to the extent set forth in the following paragraphs:

1. A certificate of public convenience and necessity is granted to applicant Fiber Data Systems, Inc. (FDS), a California corporation, to provide access service to and from interLATA carriers' points of presence on dedicated nonswitched high-speed private lines at speeds equivalent to or greater than 1.544 mbps, statewide in California.
2. FDS' initial service will be limited to customers in the County of Los Angeles, California.
3. FDS is hereby directed to file an advice letter and associated tariff sheets to:
 - a. Revise its Preliminary Statement set forth on Original California P.U.C. Sheet No. 4-T, now on file with this Commission, to explain that its provision of access service to and from the various points of presence of other long distance carriers will only be offered over dedicated nonswitched high-speed private lines with capacities equivalent to or greater than 1.544 mbps, and
 - b. To include in its tariff schedules a "New Customer Notice" advising its customers, among other things, that, in addition to reselling the interLATA services of other interexchange carriers,

FDS is only authorized to provide access services over high-speed digital private line services at speeds of 1.544 mbps, or higher and only offers these services on a full-period, 24-hour, round-the-clock, dedicated (nonswitched) basis.

All other telecommunications services needed by the customer should be placed

over the facilities of an authorized carrier.

4. The advice letter and associated tariff sheets described in Ordering Paragraph 3 above shall be filed in compliance with the provisions of General Order (GO) 96-A after the effective date of this order. The revised schedules shall apply only to service rendered after their effective date which shall be at least five days after filing.

5. FDS has not requested authority to provide or resell intraLATA telecommunications services in California and, no such authority is being granted herein.

6. Within 60 days after the effective date of this order, FDS shall prepare and issue to every employee who, in the course of his or her employment, has occasion to enter the premises of customers or subscribers of the corporation an identification card in a distinctive format having a photograph of the employee. FDS shall require every employee to present the card upon requesting entry into any building or structure on the premises of a customer or subscriber, as set forth in PU Code § 708.

7. The certificate granted and the authority to render service under the rates, charges, and rules authorized herein will expire if not exercised within 12 months after the effective date of this order.

8. FDS shall keep its books and records in accordance with the Uniform System of Accounts specified in Part 32 of the FCC Rules.

9. FDS shall file an annual report, in compliance with GO 104-A, on a calendar year basis using CPUC Annual Report Form L and prepared according to the instructions included in that form.

10. The corporate identification number assigned to FDS is U-5166-C, which should continue to be included in the caption of all original filings with this Commission and in the title of other pleadings filed in existing cases.

11. Ordering Paragraphs 3, 5, 6, 7, and 8 of D.88-12-029 shall continue in full force and effect for the reseller activities of FDS and for the additional authority granted herein.

12. The stay ordered by D.89-02-080 except as modified by this order shall remain in full force and effect until further order of this Commission.

13. The DRA is hereby directed to prepare a report on or before June 30, 1989, summarizing the June 15, 1989 workshop record on the remaining issues in this proceeding and setting forth the parties' recommendations for the proper forum for addressing those issues if this proceeding is not that forum.

14. This proceeding shall remain open to consider whether FDS should be granted authority to provide switched access and/or dedicated access services at speeds less than 1.544 mbps and for any other remaining issues occasioned by the stay of D.88-12-029 ordered by D.89-02-080 which we will address upon receipt of the workshop report to be prepared by DRA following conclusion of the June 15, 1989 workshop.

This order is effective today.

Dated MAY 26 1989, at San Francisco, California.

G. MITCHELL WILK
President
FREDERICK R. DUDA
STANLEY W. HULETT
JOHN B. OHANIAN
PATRICIA M. ECKERT
Commissioners

I CERTIFY THAT THIS DECISION
WAS APPROVED BY THE ABOVE
COMMISSIONERS TODAY.


Victor Weisser, Executive Director

PC