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Decision 97-07-008 July 16, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Application and Request for Immediate Ex Parte Authority by Brooks Fiber Communications of Stockton, Inc., (U-5546-C), a Delaware corporation, to expand its Certificate of Public Convenience and Necessity to include Switched IntraLATA and InterLATA Interexchange Services.

Application 97-04-016
(Filed April 7, 1997)

Application and Request for Immediate Ex Parte Authority by Brooks Fiber Communications of Fresno, Inc., (U-5545-C), a Delaware corporation, to expand its Certificate of Public Convenience and Necessity to include Switched IntraLATA and InterLATA Interexchange Services.

Application 97-04-017
(Filed April 7, 1997)

Application and Request for Immediate Ex Parte Authority by Brooks Fiber Communications of Sacramento, Inc., (U-5419-C), a Nevada corporation, to expand its Certificate of Public Convenience and Necessity to include Switched IntraLATA and InterLATA Interexchange Services.

Application 97-04-018
(Filed April 7, 1997)

Application and Request for Immediate Ex Parte Authority by Brooks Fiber Communications of Bakersfield, Inc., (U-5544-C), a Delaware corporation, to expand its Certificate of Public Convenience and Necessity to include Switched IntraLATA and InterLATA Interexchange Services.

Application 97-04-019
(Filed April 7, 1997)

Application and Request for Immediate Ex Parte Authority by Brooks Fiber Communications of San Jose, Inc., (U-5420-C), a Nevada corporation, to expand its Certificate of Public Convenience and Necessity to include Switched IntraLATA and InterLATA Interexchange Services.

Application 97-04-020
(Filed April 7, 1997)

construct the fiber-based facilities used to provide such services.³ By these applications, the Brooks Fiber Companies now seek authority to offer switched inter- and intraLATA services as well as local exchange services.

By D. 84-01-037 (14 CPUC2d 317 (1984)) and later decisions, we authorized interLATA entry generally. However, we limited the authority conferred in these decisions to interLATA service, and we subjected the applicants to the condition that they not hold themselves out to the public as providing intraLATA service. Subsequently, by D.94-09-065, we authorized competitive intraLATA services effective January 1, 1995, for carriers meeting specified criteria.

The Commission has established two major criteria for determining whether a CPCN to offer intra- and interLATA services should be granted to applicants such as the Brooks Fiber Companies. First, the applicant must demonstrate that it has a minimum of \$100,000 in cash or cash equivalents (as described in D.91-10-041, Appendix A, Paragraph 5.1 (41 CPUC2d 505 at 520)), reasonably liquid and readily available to meet the firm's start-up expenses. As part of this showing, the applicant must also document any deposits required by local exchange carriers (LECs) or interexchange carriers (IECs) and demonstrate that it has additional resources to cover such deposits. Second, the applicant is required to make a reasonable showing of

³ Authority to offer digital private line services and to construct the facilities necessary to do so was granted to Brooks-Stockton in D. 96-04-008, Brooks-Fresno in D.96-04-017, and Brooks-Bakersfield in D.96-04-016.

Brooks-Sacramento and Brooks-San Jose came into being as a result of D.94-10-003, which approved a stock purchase agreement whereby the then-parent of Brooks-Sacramento and Brooks-San Jose, Brooks Fiber Properties, Inc., acquired all of the stock and operating authority of Phoenix FiberLink Incorporated (Phoenix I) and Phoenix FiberLink II, Inc. (Phoenix II). Phoenix I was granted a CPCN to provide intraLATA high speed digital private line services in D.94-03-079. Phoenix II was granted such authority in D.94-06-029. After the stock purchase agreement took effect, Phoenix I became Brooks-Sacramento, and Phoenix II became Brooks-San Jose.

O P I N I O N

In these five related applications, Brooks Fiber Communications of Stockton, Inc. (Brooks-Stockton), Brooks Fiber Communications of Fresno, Inc. (Brooks-Fresno), Brooks Fiber Communications of Sacramento, Inc. (Brooks-Sacramento), Brooks Fiber Communications of Bakersfield, Inc. (Brooks-Bakersfield), and Brooks Fiber Communications of San Jose, Inc. (Brooks-San Jose) (which are collectively referred to hereinafter as the Brooks Fiber Companies or applicants)¹ each seek a certificate of public convenience and necessity (CPCN) under Public Utilities (PU) Code § 1001 to permit them to resell switched interLATA and intraLATA telephone services in California.² Applicants propose to offer these services by using their own facilities, as well as by reselling the facilities of other certificated interexchange carriers. Applicants also seek exemption from the requirements of PU Code §§ 816-830, dealing with the issuance of stocks and other evidences of ownership, and bonds, notes, and other evidences of indebtedness.

In a reversal of the usual situation, each of the Brooks Fiber Companies has previously been granted a CPCN by this Commission to offer local exchange services as a Competitive Local Carrier (CLC). This authority was granted in Decisions (D.) 95-12-057 and 96-02-072. In addition, each of the applicants has previously been granted authority by this Commission to offer digital private line services, and to

¹ Brooks-Sacramento and Brooks-San Jose are both Nevada corporations qualified to do business in California. All of the other applicants are Delaware corporations qualified to do business in California.

² California is divided into ten Local Access and Transport Areas (LATAs) of various sizes, each containing numerous local telephone exchanges. "InterLATA" describes services, revenues, and functions that relate to telecommunications originating in one LATA and terminating in another. "IntraLATA" describes services, revenues, and functions that relate to telecommunications originating and terminating within a single LATA.

duties included work on loop and switch engineering and the development of AT&T's SONET product line of multiplexors and switches.

Based on this very substantial showing, we will authorize the switched interLATA and intraLATA services that the applicants seek to provide.

However, before concluding this discussion, we think it is important to note that each of the applicants has stated that while it intends to offer the switched services authorized herein through its own facilities and by reselling service purchased from other local exchange carriers, in the event this combination proves insufficient, construction may occur, and that "if construction occurs in the future, [applicant] will proceed pursuant to authority granted by the Federal Communications Commission."

In granting CPCNs to Brooks-Stockton, Brooks-Fresno and Brooks-Bakersfield, we noted that in each case, the proposed construction involved the use of existing rights of way, so it could be said with certainty that there would not be a significant effect upon the environment.⁴ However, we cautioned each of these applicants that as to any future construction, "applicant shall comply with all applicable state and federal environmental laws and regulations. . ." (Emphasis supplied.)⁵ The same caution applies here, and it will be up to each of the applicants to determine whether state as well as federal authorization is required to proceed with any future construction.

Findings of Fact

1. A notice of the filing of each of the five applications at issue here appeared in the Daily Calendar on April 11, 1997.
2. No protests have been filed.
3. No opposition to the motion of each of the applicants for confidentiality of their respective customer projections has been filed.
4. A hearing is not required.

⁴ D.96-04-008, mimeo. at 5-6, Finding of Fact (FOF) 12; D.96-04-016, mimeo. at 5-6, FOF 12; D.96-04-017, mimeo. at 5-6, FOF 12.

⁵ D.96-04-008, Ordering Paragraph (OP) 12; D.96-04-016, OP 12; D.96-04-017, OP 12.

technical expertise in telecommunications or a related business. (D.90-08-032, 37 CPUC2d (130, at 147-48, 156, 158).)

As part of their respective applications, each of the Brooks Fiber Companies has provided audited financial statements for their parent corporation. These financial statements demonstrate that collectively, the applicants have well in excess of \$500,000 in cash or cash equivalents. This showing satisfies our criteria that the resources be reasonably liquid and readily available to meet the applicants' needs.

Each of the applicants has filed a motion for a protective order concerning its estimate of the number of customers it expects to serve after one and five years. These projections are attached as Exhibit G to each of the five applications. Each of the applicants alleges that these estimates are confidential information, the release of which to the public would harm their business planning and investor relationships, as well as their ability to compete as nondominant interexchange carriers (NDIECs). No opposition to these motions has been filed, and we have granted similar motions by other applicants. Accordingly, the motions of each of the five Brooks Fiber Companies to file Exhibit G to their respective applications under seal will be granted.

Each of the applicants has also provided information on its key officers, indicating their education, technical training, and experience. Clifford G. Rudolph, who is president of each of the applicants, has twenty-five years of combined experience in the telecommunications and computer industries. Prior to joining the Brooks Fiber Companies, he served, among other places, at U.S. West Communications, where he was Vice President, Marketing-Business and Government Services.

Kathryn L. Thomas is the Director of Government and Regulatory Affairs for each of the applicants. Prior to joining the Brooks Fiber Companies, she served as the Assistant Director for Telecommunications at the Washington Utilities and Transportation Commission. She is also a certified public accountant.

Robert F. Saunders is the Senior Vice President for Operations of each of the applicants. Before joining the Brooks Fiber Companies earlier this year, Mr. Saunders worked for a total of 23 years at Pacific Bell and AT&T Bell Laboratories, where his

Conclusions of Law

1. Applicants have the financial ability to provide the proposed service.
2. Applicants have made a reasonable showing of technical expertise in telecommunications.
3. Public convenience and necessity require the interLATA and intraLATA services to be offered by applicants.
4. Each of the applicants is subject to:
 - a. The current 3.2% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the Universal Lifeline Telephone Service (PU Code § 879; Resolution T-15799, November 21, 1995);
 - b. The current 0.36% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Relay Service and Communications Devices Fund (PU Code § 2881; Resolution T-16017, April 9, 1997);
 - c. The user fee provided in PU Code §§ 431-435, which is 0.11% of gross intrastate revenue for the 1997-1998 fiscal year (Resolution M-4786);
 - d. The current surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-A (PU Code § 739.30; D.96-10-066, pp. 3-4, App. B, Rule 1.C; set by Resolution T-15987 at 0.0% for 1997, effective February 1, 1997);
 - e. The current 2.87% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California High Cost Fund-B (D.96-10-066, p. 191, App. B, Rule 6.F.); and
 - f. The current 0.41% surcharge applicable to all intrastate services except for those excluded by D.94-09-065, as modified by D.95-02-050, to fund the California Teleconnect Fund (D.96-10-066, p. 88, App. B, Rule 8.G.).
5. Applicants are exempt from Rule 18(b).
6. Applicants should be exempted from PU Code §§ 816-830.
7. Applicants should be exempted from PU Code § 851 when the transfer or encumbrance serves to secure debt.
8. The applications should be granted to the extent set forth below.

5. By prior Commission decisions, we authorized competition in providing interLATA telecommunications service but generally barred those offering such service from holding out to the public the provision of intraLATA service.

6. By D.94-09-065, we authorized competitive intraLATA services effective January 1, 1995, for carriers meeting specified criteria.

7. Each of the applicants has demonstrated that it has a minimum of \$100,000 in cash or cash equivalents, reasonably liquid and readily available to meet its respective start-up expenses.

8. Each of the applicants has also demonstrated that it has the financial ability to provide any deposits that may be required of it by any LEC or IEC whose services it resells.

9. Each of the five applicants has the same officers, who together have over 60 years of experience in telecommunications, regulated industries, and the computer business.

10. Each of the applicants has submitted with its application a complete draft of its initial tariff. These tariffs comply with the requirements established by the Commission, including prohibitions on unreasonable deposit requirements.

11. Each of the applicants has represented that no one associated with or employed by it was previously associated with an NDIEC that filed for bankruptcy or went out of business.

12. Since no facilities are to be constructed, it can be seen with certainty that the proposed operations will not have a significant effect upon the environment. However, applicants should comply with all applicable state and federal environmental laws and regulations as to any future construction.

13. By D.97-06-107, applicants for nondominant interexchange authority are exempt from Rule 18(b).

14. Exemption from the provisions of PU Code §§ 816-830 has been granted to other resellers. (See, e.g., D.86-10-007 and D.88-12-076.)

15. The transfer or encumbrance of property of nondominant carriers has been exempted from the requirements of PU Code § 851 whenever such transfer or encumbrance serves to secure debt. (See D.85-11-044.)

- "a. Inclusion of FCC-approved rates for interstate services in California public utilities tariff schedules shall become effective on one (1) day's notice.
- "b. Uniform rate reductions for existing services shall become effective on five (5) days' notice.
- "c. Uniform rate increases, except for minor rate increases, for existing services shall become effective on thirty (30) days' notice, and shall require bill inserts, a message on the bill itself, or first class mail notice to customers of the pending increased rates.
- "d. Uniform minor rate increases, as defined in D.90-11-029, for existing services shall become effective on not less than five (5) working days' notice. Customer notification is not required for such minor rate increases.
- "e. Advice letter filings for new services and for all other types of tariff revisions, except changes in text not affecting rates or relocations of text in the tariff schedules, shall become effective on forty (40) days' notice.
- "f. Advice letter filings merely revising the text or location of text material which do not cause an increase in any rate or charge shall become effective on not less than five (5) days' notice."

4. Applicants may deviate from the following provisions of GO 96-A:

(a) paragraph II.C.(1)(b), which requires consecutive sheet numbering and prohibits the reuse of sheet numbers, and (b) paragraph II.C.(4), which requires that "a separate sheet or series of sheets should be used for each rule." Tariff filings incorporating these deviations shall be subject to the approval of the Commission's Telecommunications Division. Tariff filings shall reflect all fees and surcharges to which applicants are subject, as reflected in Conclusion of Law 4. Applicants are also exempt from GO 96-A, paragraph III.G. (1) and (2) which requires service of advice letters on competing and adjacent utilities, unless such utilities have specifically requested such service.

5. Applicants shall file as part of their respective initial tariffs, after the effective date of this order and consistent with Ordering Paragraph 3, a service area map.

6. Prior to initiating service, each applicant shall provide the Commission's Consumer Services Division with the applicant's designated contact person(s) for

9. Because of the public interest in competitive interLATA and intraLATA services, the following order should be effective immediately.

O R D E R

IT IS ORDERED that:

1. A certificate of public convenience and necessity (CPCN) is granted to each of Brooks Fiber Communications of Stockton, Inc. (Brooks-Stockton), Brooks Fiber Communications of Fresno, Inc. (Brooks-Fresno), Brooks Fiber Communications of Sacramento, Inc. (Brooks-Sacramento), Brooks Fiber Communications of Bakersfield, Inc. (Brooks-Bakersfield), and Brooks Fiber Communications of San Jose, Inc. (Brooks-San Jose) (collectively, applicants) to operate as resellers of switched interLocal Access and Transport Area (interLATA) and, to the extent authorized by Decision (D.) 94-09-065, intraLocal Access and Transport Area (intraLATA) switched telecommunication services offered by communication common carriers in California.

2. Each of the applicants shall file a written acceptance of the certificate granted to it in this proceeding.

3. a. Each of the applicants is authorized to file with this Commission, a tariff schedule for the provision of switched interLATA and intraLATA services. Applicants may not offer switched interLATA and/or intraLATA service until such tariffs are on file. Applicants' initial filings shall be made in accordance with General Order (GO) 96-A, excluding Sections IV, V, and VI, and shall be effective not less than one day after filing. Applicants shall comply with the provisions in their respective tariffs.

b. Applicants are nondominant interexchange carriers (NDIECs). The effectiveness of their future tariffs is subject to the schedules set forth in Ordering Paragraph 5 of D.90-08-032 (37 CPUC2d 130 at 158), as modified by D.91-12-013 (42 CPUC2d 220 at 231) and D.92-06-034 (44 CPUC2d 617 at 618), as follows:

"5. All NDIECs are hereby placed on notice that their California tariff filings will be processed in accordance with the following effectiveness schedule:

purposes of resolving consumer complaints, and those persons' telephone numbers. This information shall be updated at least annually, or whenever the name or telephone number of the contact person(s) changes.

7. Within five days after switched interLATA service is first rendered to the public by an applicant that is the subject of this decision, such applicant shall notify this Commission of that fact in writing. Written notice shall also be provided to this Commission within five days after an applicant subject to this decision first renders switched intraLATA service to the public.

8. Applicants shall keep their respective books and records in accordance with the Uniform System of Accounts specified in Title 47, Code of Federal Regulations, Part 32.

9. In the event any of the respective books and records of the applicants are required for inspection by the Commission or its staff, applicants shall either produce such records at the Commission's offices, or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to the office of the applicant(s) in question.

10. Each of the applicants shall file an annual report, in compliance with GO 104-A, on a calendar-year basis using the information request form developed by the Commission Staff and contained in Attachment A.

11. Applicants shall ensure that their respective employees comply with the provisions of Public Utilities (PU) Code § 2889.5 regarding solicitation of customers.

12. The certificates 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.

13. The corporate identification numbers to be used by applicants shall be the same as those previously assigned to them, and these numbers shall be included in the caption of all original filings with this Commission, and in the titles of other pleadings filed in existing cases. These corporate identification numbers are: U-5546-C for Brooks-Stockton, U-5545-C for Brooks-Fresno, U-5419-C for Brooks-Sacramento, U-5544-C for Brooks-Bakersfield, and U-5420-C for Brooks-San Jose.

14. Within 60 days of the effective date of this order, applicants shall comply with PU Code § 708, Employee Identification Cards, and notify the Director of the Telecommunications Division in writing of their compliance.

15. Applicants are exempted from the provisions of PU Code §§ 816-830.

16. Applicants are exempted from PU Code § 851 for the transfer or encumbrance of property, whenever such transfer or encumbrance serves to secure debt.

17. If any of the applicants is 90 days or more late in filing an annual report or in remitting the fees listed in Conclusion of Law 4, Telecommunications Division shall prepare for Commission consideration a resolution that revokes that applicant's CPCN, unless such applicant has received the written permission of Telecommunications Division to file or remit late.

18. Applicants' respective motions for permission to file under seal, their estimates of the number of customers each of them will be serving in one and five years, are granted. Such documents will remain under seal for one year from today, unless an applicant makes a timely request for extension of confidential treatment of its customer estimates with good cause shown.

19. Each of the applicants shall comply with all applicable state and federal environmental laws and regulations as to any future construction.

20. The applications are granted, as set forth above.

21. Applications 97-04-016, 97-04-017, 97-04-018, 97-04-019, and 97-04-020 are closed.

This order is effective today.

Dated July 16, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners

TO: ALL INTEREXCHANGE TELEPHONE UTILITIES

Article 5 of the Public Utilities Code grants authority to the California Public Utilities Commission to require all public utilities doing business in California to file reports as specified by the Commission on the utilities' California operations.

A specific annual report form has not yet been prescribed for the California interexchange telephone utilities. However, you are hereby directed to submit an original and two copies of the information requested in Attachment A no later than March 31st of the year following the calendar year for which the annual report is submitted.

Address your report to:

California Public Utilities Commission
Auditing and Compliance Branch, Room 3251
505 Van Ness Avenue
San Francisco, CA 94102-3298

Failure to file this information on time may result in a penalty as provided for in §§ 2107 and 2108 of the Public Utilities Code.

If you have any question concerning this matter, please call (415) 703-1961.

ATTACHMENT A

Information Requested of California Interexchange Telephone Utilities.

To be filed with the California Public Utilities Commission, 505 Van Ness Avenue, Room 3251, San Francisco, CA 94102-3298, no later than March 31st of the year following the calendar year for which the annual report is submitted.

1. Exact legal name and U # of reporting utility.
2. Address.
3. Name, title, address, and telephone number of the person to be contacted concerning the reported information.
4. Name and title of the officer having custody of the general books of account and the address of the office where such books are kept.
5. Type of organization (e.g., corporation, partnership, sole proprietorship, etc.).
If incorporated, specify:
 - a. Date of filing articles of incorporation with the Secretary of State.
 - b. State in which incorporated.
6. Commission decision number granting operating authority and the date of that decision.
7. Date operations were begun.
8. Description of other business activities in which the utility is engaged.
9. A list of all affiliated companies and their relationship to the utility. State if affiliate is a:
 - a. Regulated public utility.
 - b. Publicly held corporation.
10. Balance sheet as of December 31st of the year for which information is submitted.
11. Income statement for California operations for the calendar year for which information is submitted.

(END OF ATTACHMENT A)