

Commissioners:  
J. TERRY DEASON, CHAIRMAN  
E. LEON JACOBS, JR.  
LILA A. JABER  
BRAULIO L. BAEZ



DIVISION OF APPEALS  
DAVID SMITH  
DIRECTOR  
(850) 413-6245

# Public Service Commission

September 6, 2000

Mr. Carroll Webb  
Joint Administrative Procedures  
Committee  
Room 120 Holland Building  
Tallahassee, Florida 32399-1300

**Re: PSC Docket No. 001261-TP**

Dear Mr. Webb:

The Commission has received a Petition for Declaratory Statement from Gemini Networks FL, Inc., on August 29, 2000. A copy of the petition is enclosed. A notice will be published in the Florida Administrative Weekly on Friday, September 22, 2000.

Sincerely,

Mary Anne Helton  
Associate General Counsel

MAH  
Enclosure

- APP \_\_\_\_\_ cc: Division of Records and Reporting
- CAF \_\_\_\_\_
- CMP \_\_\_\_\_
- COM \_\_\_\_\_
- CTR \_\_\_\_\_
- ECR \_\_\_\_\_
- LEG \_\_\_\_\_
- OPC \_\_\_\_\_
- PAI \_\_\_\_\_
- RGO \_\_\_\_\_
- SEC
- SER \_\_\_\_\_
- OTH \_\_\_\_\_

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DOCUMENT NUMBER - DATE

10979 SEP-68

FPSC-RECORDS/REPORTING

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Gemini Networks FL, )  
Inc. for Declaratory Statement )  
Regarding Florida Public Service )  
Commission Jurisdiction Under Sections )  
364.02(12) and 364.337, Florida Statues. )

Docket No. 001261-78

Filed: August 29, 2000

**PETITION OF GEMINI NETWORKS FL,  
INC. FOR DECLARATORY STATEMENT**

Petitioner Gemini Networks FL, Inc. ("Gemini"), pursuant to Section 120.565, Florida Statutes, and Rule 28-105.001, *et. seq.*, Florida Administrative Code, hereby requests the Florida Public Service Commission ("Commission") to issue a declaratory statement determining that Gemini's anticipated operations in the State of Florida are not subject to Commission jurisdiction under Sections 364.02(12) and 364.337, Florida Statutes. In support of this Petition, Gemini states as follows:

**A. PRELIMINARY INFORMATION**

1. The name, address, telephone number and facsimile number of the Petitioner is:

Gemini Networks FL, Inc.  
c/o Richard C. Rowlenson  
Vice President & General Counsel  
280 Trumbull Street  
24th Floor  
Hartford, CT 06103-3585  
(860) 293-4281 (telephone)  
(860) 293-4297 (telecopier)

2. The names, address, telephone number and facsimile number of the attorneys authorized to represent Gemini in this proceeding are:

DOCUMENT NUMBER-DATE  
10684 AUG 29 8  
FPSC-RECORDS/REPORTING

Kenneth A. Hoffman, Esquire  
John R. Ellis, Esquire  
Rutledge, Ecenia, Purnell & Hoffman, P.A.  
215 South Monroe Street, Suite 420  
Post Office Box 551  
Tallahassee, FL 32302-0551  
(850) 681-6788 (telephone)  
(850) 681-6515 (telecopier)

3. Gemini seeks a declaratory statement concerning the applicability, if any, of Sections 364.02(12) and 364.337, Florida Statutes (1999)<sup>1</sup>, to Gemini's anticipated operations in Florida. Based on the statement of facts describing Gemini's operations set forth below, Gemini maintains that it is not a "telecommunications company" under Section 364.02(12), Florida Statutes, and, therefore, not subject to Commission jurisdiction and regulation over intrastate interexchange telecommunications carriers ("IXCs") or alternative local exchange telecommunications companies ("ALECs") under Section 364.337, Florida Statutes.

#### **B. THE STATUTES AT ISSUE**

4. Section 364.01(1) and (2), Florida Statutes, grants the Commission exclusive jurisdiction to exercise the powers conferred by Chapter 364, Florida Statutes, in all matters set forth in Chapter 364, Florida Statutes, in the regulation of "telecommunications companies."<sup>2</sup>

5. Section 364.02(12), Florida Statutes, defines a "telecommunications company" to include:

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<sup>1</sup>Unless otherwise stated, all references to the Florida Statutes refer to the 1999 version of the Florida Statutes.

<sup>2</sup>The authority granted to the Commission under Section 364.01(2), Florida Statutes, "...shall not affect the authority and powers granted in s. 166.231(9) or s. 337.401", which are not relevant to Gemini's Petition.

every corporation, partnership, and person and their lessees, trustees, or receivers appointed by any court whatsoever, and every political subdivision in the state, offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility.<sup>3</sup>

Section 364.02(12) also provides a number of specific exclusions from the definition of a "telecommunications company." The statute provides, in pertinent part, that the term "telecommunications company" does not include:

- (a) Any entity which provides a telecommunications facility exclusively to a certificated telecommunications company;
- (b) Any entity which provides a telecommunications facility exclusively to a company which is excluded from the definition of a telecommunications company under this subsection;
- (c) A commercial mobile radio service provider;
- (d) A facsimile transmission service;
- (e) A private computer data network company not offering service to the public for hire; or
- (f) A cable television company providing cable service as defined in 47 U.S.C. s. 522.

6. The Commission's jurisdiction over ALECs and IXC's under Sections 364.335 and 364.337, Florida Statutes, applies only to entities that meet the definition of a "telecommunications company" under Section 364.02(12), Florida Statutes. Gemini maintains that its anticipated operations in Florida are not subject to Commission jurisdiction because the facilities and wholesale services provided by Gemini: (a) are interstate in nature; (b) would not constitute the provision of "two-way telecommunications service to the public for hire within this state"; and/or (c) constitute the provision of telecommunication facilities to certificated telecommunications companies and/or

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<sup>3</sup>A "'telecommunications facility' includes real estate, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state." § 364.02(13), Fla. Stat.

companies excluded by Section 364.02(12), Florida Statutes, from the definition of a telecommunications company.

### C. GEMINI'S ANTICIPATED NETWORK AND OPERATIONS

7. Gemini intends to construct a state-of-the-art hybrid fiber-coaxial cable network in Florida that is designed for digital broadband communications. Upon the construction of its network, Gemini will operate as a "carrier's carrier," that is, as a wholesale capacity provider. It will offer access to its facilities and related services on an open and nondiscriminatory basis to retail carriers that wish to provide Internet access and other services to end users in various parts of Florida. Gemini expects that the bulk of its capacity and related services will be purchased by Internet Service Providers ("ISPs"). Gemini will not sell Internet access at retail. Because ISPs do not provide two-way telecommunications service to the public, Gemini's provision of facilities and wholesale services to ISPs would exclude Gemini from the definition of a regulated "telecommunications company" under Section 364.02(12)(b), Florida Statutes.

8. Although Gemini's network is designed primarily to provide Internet access, not residential and/or business dialtone service (i.e., "basic local telecommunications service" as defined by Section 364.02(2), Florida Statutes), ALECs may purchase capacity on Gemini's network to provide such services. In such instances, Gemini would not be providing services to the public, but would be providing services to certificated ALECs that would in turn provide regulated services to the public. Gemini will not itself provide basic local telecommunications service and expects that any ALEC utilizing Gemini's network would obtain the proper certification from the Commission. Because ALECs are regulated telecommunications companies and not members of the consuming

public<sup>4</sup>, the provision of services to ALECs does not subject Gemini to regulation as a telecommunications company under Section 364.02(12)(a), Florida Statutes.

9. It is possible that retail carriers other than ISPs and ALECs may wish to purchase capacity on Gemini's network. However, Gemini's provision of facilities and wholesale service to these carriers would not subject Gemini to regulation as a "telecommunications company" under Section 364.02(12)(b), Florida Statutes. If these carriers utilize Gemini's network and services to provide telecommunications services to the general public, and the carrier's services are subject to regulation, then these carriers would be required to be certified as ALECs or IXCs. Because Gemini would be providing services to a certificated telecommunications company, Gemini would not itself be subject to Commission regulation. A similar analysis would apply if Gemini's wholesale customer were a cable television company since the provision of facilities and/or wholesale service to a cable television company would trigger the exclusion under Section 364.02(12)(b), Florida Statutes. In any event, all of Gemini's contracts will require its customers to obtain any necessary regulatory approvals as a result of its use of Gemini's network and services.

10. Gemini will also offer its customers, whether they be ISPs or ALECs, the technical ability to provide their subscribers with "streaming video," or "movies on demand" to its customers that wish to provide this option to their subscribers. Gemini will not offer streaming video capabilities to retail customers. Gemini will not provide video content. Video content, however,

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<sup>4</sup>Gemini's customers would not include members of the general public but only companies who provide internet access, telecommunications and/or video services at retail to the public. Compare P.W. Ventures, Inc. v. Nichols, 533 So.2d 281 (Fla. 1988), where the court affirmed the Commission's determination that the provision of electric service to one large customer (as opposed to the general public) constituted the supply of electricity "to or for the public within this state" under Section 366.02(1), Florida Statutes (1985).

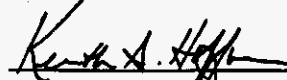
whether provided at retail by ISPs, ALECs, or other retail carriers, will at all times originate outside the State of Florida. Because use of Gemini's network for the delivery of streaming video, Gemini's video is interstate in nature, the service should be regulated at the federal level, if at all.

**D. CONCLUSION AND REQUEST FOR RELIEF**

11. In conclusion, Gemini maintains that the facilities and wholesale services it intends to provide in the State of Florida to Commission-certificated carriers and to companies excluded from Commission jurisdiction are: (a) interstate in nature; (b) do not constitute two-way telecommunications service to the public for hire within this state; and/or (c) exclude Gemini from the definition of a "telecommunications company" under Section 364.02(12)(a) and/or (b), Florida Statutes.

WHEREFORE, for the foregoing reasons, Gemini respectfully requests that the Commission issue a declaratory statement determining that the facilities and wholesale services that Gemini intends to provide in the State of Florida would not subject Gemini to Commission jurisdiction as a "telecommunications company" under Section 364.02(12), Florida Statutes, and, therefore, would not subject Gemini to certification and other regulatory requirements and oversight under Section 364.337, Florida Statutes.

Respectfully submitted,



Kenneth A. Hoffman, Esq.

John R. Ellis, Esq.

Rutledge, Ecenia, Purnell & Hoffman, P.A.

P. O. Box 551

Tallahassee, FL 32302

(850) 681-6788 (Telephone)

(850) 681-6515 (Telecopier)

Attorneys for Gemini Networks FL, Inc.