

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement by LighTrade, Inc., pursuant to 120.565, F.S., concerning applicability of the term "telecommunications company" as that term is defined in 364.02(12), F.S., to its planned activities in the State of Florida.

DOCKET NO. 001672-TP
ORDER NO. PSC-01-0369-DS-TP
ISSUED: February 12, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

ORDER GRANTING IN PART AND DENYING IN PART, LIGHTRADE,
INC.'S PETITION FOR DECLARATORY STATEMENT

BACKGROUND

On November 6, 2000, LighTrade, Inc. (LighTrade) filed a Petition for Declaratory Statement (Petition) pursuant to Section 120.565, Florida Statutes. The Petition inquires as to whether LighTrade's service providing a central interconnection point that permits the real time provisioning and delivery of bandwidth between sellers and purchasers of bandwidth capacity is or is not telecommunications service requiring certification. As LighTrade describes the service it plans to offer, its pooling points

will enable the instantaneous transfer of bandwidth between multiple entities and will serve as a catalyst both for the development of a more efficient bandwidth market and a ubiquitous series of aggregation points for broadband services.

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Petition, p. 3. Simply put, LighTrade facilitates the provision by sellers of telecommunications capacity to buyers for precisely specified periods of time.

LighTrade's pooling points will incorporate the Lucent Wave Star Bandwidth Manager, which, together with support equipment, will typically be co-located in so-called "Telco Hotels". LighTrade will not, however, own or operate the inter-city transport facilities (rings) or buy/sell the inter-city capacity provided by the carriers.

LighTrade's petition includes addressing the regulatory status of three listed scenarios. LighTrade inquires whether:

1) The described use of a LighTrade facility by more than one certificated telecommunications company would be exempt pursuant to Section 364.02(12)(a), Florida Statutes, from the requirement of certification.

2) The described use of a LighTrade facility by more than one company excluded from the definition of telecommunications company would be exempt pursuant to Section 364.02(12)(b), Florida Statutes, from the requirement of certification.

3) The described use of a LighTrade facility by more than one certificated telecommunications company and one or more companies excluded from the definition of telecommunications company would be exempt pursuant to Sections 364.02(12)(a) and (b), Florida Statutes, from the requirement of certification.

While these questions can be responded to relatively easily, the situation is complicated by the fact that LighTrade has not, either in its Petition, included materials, or in staff's conversations with LighTrade's representative, ruled out the possibility that buyers of the bandwidth would also include large end-users, like universities, which are not listed in Section 364.02(12), Florida Statutes. Since those large end-users would contract with LighTrade to utilize its pooling points to facilitate the purchase of bandwidth, they would constitute a fourth scenario, different from the first three, which only include entities listed

in the exemption provisions of Section 364.02(12), Florida Statutes.

DISCUSSION

We find that LighTrade's interest in resolving uncertainties regarding the need for certification is a proper subject for a petition pursuant to Section 120.565, Florida Statutes. We also find that LighTrade is exempt from the requirement for certification in Section 364.33, Florida Statutes, if it only provides service to sellers and buyers of telecommunications capacity which are listed in Section 364.02(12), (a)-(f), Florida Statutes. Pursuant to the definitions in Section 364.02(12),

"Telecommunications company" includes every . . . person . . . offering two-way telecommunications service to the public for hire within this state by the use of a telecommunications facility. The term "telecommunications company" does not include:

- a) An entity which provides a telecommunications facility exclusively to a certificated telecommunications company;
- b) An 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. §522.

The first three scenarios listed in the case background, and set out on p. 3 of LighTrade's Petition, are permutations involving

LighTrade's service to and between more than one telecommunications company, service exempt under Section 364.02(12)(a), LighTrade's service to and between more than one company excluded from the definition of telecommunications company, service exempt under Section 364.02(12)(b), and the combination of both categories, service exempt under Sections 364.02(12)(a) and (b). LighTrade is therefore exempt if its service is in fact limited to and between the entities listed in Section 364.02(12), (a)-(f), Florida Statutes.

We find, however, that LighTrade is not exempt from the requirement for certification in Section 364.33, Florida Statutes, if it provides service to large end-users, like universities, not listed in Section 364.02(12), (a)-(f), Florida Statutes. Pursuant to Section 364.33, Florida Statutes, a certificate of necessity (i.e., "prior approval") is a prerequisite to "providing telecommunications services to the public..." The scenario of LighTrade's provision of service to large end-users, like universities, goes beyond the three scenarios described above and listed on p. 3 of the Petition. Such service would be provided to the public for hire and would require LighTrade to be certified.

We could hypothesize contractual arrangements involving only LighTrade and a telecommunications company whereby certification might not be required. In effect, the buyer would contract only with the seller, and the seller would contract with LighTrade. However, LighTrade has not petitioned about such an arrangement. All of the contractual scenarios discussed in LighTrade's Petition involve a contract between LighTrade and both sellers and buyers of bandwidth. In that situation, certification would be required if the buyers ("end-users") were members of the public, rather than exempt entities listed in Section 364.02(12), Florida Statutes.

In view of the above, it is

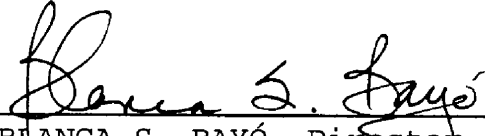
ORDERED that LighTrade, Inc.'s Petition for Declaratory Statement is granted with respect to the provision of its service as described to the exempt entities listed in Section 364.02(12), (a)-(f), Florida Statutes. It is further

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ORDERED that LighTrade, Inc.'s Petition for Declaratory statement is denied with respect to the provision of its service as described to end-users not listed in Section 364.02, (a)-(f), Florida Statutes. It is further

ORDERED that this docket is closed.

By ORDER of the Florida Public Service Commission this 12th day of February, 2001.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee,

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Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of Records and reporting and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.