BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

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| In re: Petition by Verizon Florida Inc. for declaratory statement on applicability of Section 364.336, F.S., and Rule 25-4.0161, F.A.C., Regulatory Assessment Fees. | DOCKET NO. 001556-TL<br>ORDER NO. PSC-01-0097-DS-TL<br>ISSUED: January 11, 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

DECLARATORY STATEMENT

BACKGROUND

By petition filed on October 13, 2000, Verizon Florida Inc. (Verizon), formerly known as GTE Florida Incorporated, requested a declaratory statement pursuant to Section 120.565, Florida Statutes, and Chapter 28-105, Florida Administrative Code. Verizon is an incumbent local exchange telecommunications company (ILEC). Verizon asks the Commission to declare that it is not required to pay regulatory assessment fees on directory advertising revenues. The statute and rule that are at issue are Section 364.336, Florida Statutes, and Rule 25-4.0161, Florida Administrative Code, governing the payment of regulatory assessment fees.

Verizon contends that it should not be required to pay regulatory assessment fees on directory advertising revenues because the revenues are earned and booked by an affiliate, Verizon Directories Corp., formerly GTE Directories Corporation. Verizon states that it has a contract with the directory affiliate under which Verizon earns revenues from providing certain services to the directory affiliate, such as billing and collections. The directory company receives and books the revenues from the sale of advertising; thus, Verizon claims they are not its own revenues.

Verizon asserts that none of the alternative local exchange companies (ALECs) that compete with Verizon must impute revenue from any of their affiliates when they calculate regulatory assessment fees. It asserts that this imposes an "artificial regulatory disadvantage" on Verizon.

Verizon states that our basis for including directory advertising revenues in the revenues on which the fees are paid has been Section 364.037, Florida Statutes, and Rule 25-4.0405, Florida Administrative Code. Section 364.037 directs the Commission to consider revenues derived from advertisements in telephone directories when establishing rates for telecommunications companies. Rule 25-4.0405 implements the statute and applies to "rate-of-return regulated local exchange telecommunications companies."

Verizon asserts that because it is not a rate-of-return regulated company, it is exempt from the requirements of Section 364.037. § 364.051, Fla. Stat. According to Verizon, Section 364.037, and Rule 25-4.0161, do not require imputing the revenues to Verizon. For the year 2000, Verizon will pay approximately $285,000 less in regulatory assessment fees if the directories revenue is not imputed to it.

DISCUSSION

Section 364.336, Florida Statutes, provides, in pertinent part:

> Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding 6-month period, shall pay to the commission, within 30 days following the end of each 6-month period, a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business.

Rule 25-4.0161, Florida Administrative Code, provides for the calculation and time for payment of the regulatory assessment fees.

We have previously addressed the treatment of directory advertising revenues with regard to regulatory assessment fees where it is an affiliate of the telecommunications company that receives and books the revenue. In re: Investigation into the regulatory assessment fee calculations for 1985 and 1986 of United Telephone Company of Florida, Order No. 21364 issued June 9, 1989, in Docket 880149-T.L.. The facts in that docket are very similar to the ones presented by the petitioner here.

United Telephone Company of Florida (United) stopped reporting its advertising revenues in its regulatory assessment fee reports after it entered into a publishing agreement with Directories America (DA), a subsidiary of United's parent company. The agreement covered the production, publication and distribution of United's telephone directories. United billed its customers for directory advertising and remitted the revenues to DA. After the agreement, United reported as revenue only the fees paid to it by DA.

We issued an order for United to show cause why it should not pay regulatory assessment fees on all gross intrastate revenues derived from directory advertising irrespective of the recipient. Order No. 21206, issued May 10, 1989. In that order, we found that the advertising revenues "ought to be attributed to United in order to prevent the circumvention of Section 350.113(3)(b) through a redirection of revenues to affiliated companies."

Section 350.113, Florida Statutes, was adopted in 1980 and requires each regulated company, including "each telephone company", under the jurisdiction of the Commission to pay a fee based upon its gross operating revenues. Section 364.336, Florida Statutes, addresses only telecommunications companies, and it also requires each company to pay a fee on its gross operating revenues derived from intrastate business. Section 364.336 was not adopted until 1990, after the United order, but there are no differences between Sections 350.113 and 364.336 that would dictate or support a change in the outcome of the United proceeding.

The show cause proceeding was ultimately resolved by United's agreement to pay the fees on the revenues from the directories for areas within its certificated territory. We concurred with United that fees were not due on the revenues associated with directories published by the affiliates for areas outside its territory. In addition, United was not required to record the directory revenues and associated expenses of the affiliate on United's books and records. Order No. 21364, issued June 9, 1989. Thus, the revenue was imputed to the local exchange company (LEC), even though it was recorded on the books of the affiliate. Section 350.113, Florida Statutes, was referenced as the authority for collecting the fee.

The fact that the revenues at issue were booked by an affiliate was not determinative in the United proceeding, nor is it here. Verizon's directory affiliate may not itself meet the terms of the definition of a telecommunications company if it does not offer "two-way telecommunications service". Nevertheless, it is providing a service that Verizon is required to provide by virtue of Verizon being certificated to provide basic local telecommunications service, defined to include an alphabetical directory listing. § 364.02(2), Fla. Stat. (2000). The fact that Verizon chooses to contract with an affiliate company, rather than perform the function itself, does not exempt that service from regulation under Chapter 364, Florida Statutes. The company may not simply redirect services and revenues to affiliates, and thereby circumvent regulation of its services or the regulatory assessment fee statute.

Under Section 364.336, we have the responsibility to determine how gross revenues are calculated. It is not for Verizon or its parent company to dictate which revenues will be included, through a corporate restructuring diverting directory revenues to an affiliate of the telecommunications company. In addition, it would not be fair if some companies' advertising revenues were subject to regulatory assessment fees and others were not, merely because of differences in corporate structure. We do not believe the legislature intended such a narrow interpretation of the governing statute, or one which would allow such an arbitrary application.

Verizon asserts that none of the ALECs that compete with it must impute revenue from any of their affiliates when they calculate regulatory assessment fees. Verizon's assertion,

however, is not supported with any facts, and we are not aware of any facts to support such an assertion. There is no reason that we know of that an ALEC in the same circumstances as Verizon would be treated differently in this regard.

Verizon is correct that because it is a price cap regulated company, Section 364.051(1)(c), Florida Statutes, exempts it from the requirements of Section 364.037. Verizon is not correct, however, that its exemption from the various ratesetting provisions of Chapter 364 also exempts its advertising revenues from assessment for purposes of the regulatory assessment fee. If Verizon were correct, then none of its revenues would be subject to the regulatory assessment fee because none of its revenues are subject to the ratesetting provisions of Chapter 364. That is not logical. Neither Section 364.051(1)(c) or any other statute exempts Verizon from from the regulatory assessment fee provisions of Sections 364.336 and 350.113.

In addition, Section 364.037 has not been considered the source of our authority for assessment of regulatory fees on advertising revenues. Prior to its adoption, we included all of the company's advertising revenues in the gross operating revenues for regulatory assessment fee purposes, and all of those revenues in the revenues for ratesetting purposes. With the adoption of 364.037 in 1983, a portion of the advertising profits no longer was considered in the ratesetting process for the benefit of the ratepayers. Instead, part of the profits went to the company for the benefit of its shareholders as an incentive to the company to maximize its profits from telephone directory advertising. General Telephone Company v. Marks, 500 So. 2d 142 (Fla. 1986).

Prior to the adoption of Section 364.037, all investment, expenses, taxes, and revenues attributable to the publication and sale of yellow pages advertising were included in determining rates. The issue of excluding directory advertising revenues from consideration in setting rates was proposed by a LEC for the first time in 1981. In re: Petition of Southern Bell Telephone and telegraph Company for a rate increase, Docket No. 810035-TP, Order No. 10449, issued December 15, 1981.

In the Southern Bell rate case, the company asserted that its directory advertising revenues should be removed for ratemaking

purposes. Southern Bell's directory activities resulted in $64,000,000 in revenues with a $500,000 investment. Id. at page 17. We determined that the revenues should not be removed, even though we did not regulate the rates charged for advertisements. We were not persuaded by the company's claim of competition from other directory publishers, and we recognized that the company enjoyed a position not available to other publishers of yellow pages in that only the telephone company has entry into every subscriber's home or business place via its directory and only the company has complete up-to-date information concerning numbers. Id. at pages 16-18. We also noted that the majority of other states also included yellow page revenues for ratemaking purposes.[1]

More recently, we concluded that yellow page advertising revenues should be included in the basic local exchange revenues available as a source of support for universal service on an interim basis. Order No. PSC-95-1592-FOF-TP, issued December 27, 1995, in Docket 950696-TP: Re Universal Service and Carrier of Last Resort Responsibilities. GTE Florida Incorporated, now known as Verizon, was a party in that proceeding. The fact that directories for several major ILECs are published by affiliates was not an issue raised by the ILECs. Corporate structure had no bearing on whether or not certain revenues should be included.

Much has changed in the telecommunications industry since the 1981 Southern Bell order, however, Verizon does not allege that it has competition from other yellow page publishers, much less significant competition. Nor does Verizon allege that it does not still enjoy a position of dominance in the provision of local exchange service and a concomitant ability for it or its affiliate

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[1]In deciding that the Utilities Commission could properly include Southern Bell's directory advertising revenues for ratemaking purposes, the North Carolina Supreme Court found that the company's preferred position in the field of directory advertising, with all its benefits and revenues, was directly related to and the result of the company's public utility function. State, ex rel. Utilities Commission v. Southern Bell Telephone and Telegraph company, 299 S.E. 2d 763 (N.C. 1983).

to derive great profits from directory advertising because of Verizon's dominance.[2]

Verizon's rates may no longer be regulated by the Commission, but our jurisdiction to regulate Verizon's service continues. §§ 364.01(4), 364.02(2), 364.025, and 364.051, Fla. Stat. (1999). Part of that service regulation are the requirements that Verizon regularly publish and update telephone directories, that it furnish a copy of a directory to each subscriber, and that specified information is published in all directories. Rule 25-4.040, Florida Administrative Code. Verizon chooses to publish and distribute its yellow page directory as a part of, or in conjunction with, its required white page directory, and it uses the opportunity to sell advertising in the process to it or its affiliate's great advantage. The publication and furnishing of a yellow page directory does not, on the record here, appear to be a separate function or activity from the publication and furnishing of the directory Verizon is required by law to publish and distribute.

There is nothing in Verizon's petition to demonstrate that Verizon does not still enjoy a great advantage over all competitors in the field of directory advertising, if Verizon has such competition. We believe this preferred position is directly related to and the result of the company's dominance in the provision of local exchange telecommunications service. We further believe that the market for Verizon's affiliate's yellow page advertisements is directly related to Verizon's position as the ILEC and its publication of the required directory listings.[3]

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[2]According to the December, 2000, report, "Competition in Telecommunications Markets in Florida", incumbent LECs' total market share of access lines is 93.9 percent. The percentage of business access lines 85.8. Of residential lines alone, the percentage is 97.3. Report, p. 7, 46.

[3] While Verizon Directories Corp. (formerly GTE Directories Corporation) publishes Verizon's (formerly GTE) directories, the yellow page directory customer information pages assure customers that "GTE Directories is backed by the integrity and resources of GTE, one of the largest telecommunications companies in the world." (GTE's June 2000 telephone directory for Bartow,

Because every customer must be furnished with a directory, every yellow page advertiser can be assured that its advertisement will be received by every one of Verizon's telecommunications services subscribers. There is no information in the record here that any other directory publisher has this advantage or ability. To the extent Verizon has any competition for its yellow page advertising, we believe that customers still view the ILEC's directory as the primary and most reliable one.

In summary, Verizon has not alleged any particular circumstances different from those presented in the United order. Nor has Verizon cited a change in the law that would appear to dictate a different result. Section 364.336 still requires telecommunications companies to pay a regulatory assessment fee based on its gross operating revenues derived from intrastate business. Section 364.051(1)(c), which exempts Verizon from certain other statutes, does not exempt it from 364.336. Thus, the fact that Verizon is no longer subject to rate regulation does not exempt its revenues from regulatory assessment fees.

We believe that if the legislature had intended to exclude the company's directory advertising revenues from the gross operating revenues for regulatory assessment fees, it would have done so. Just as the legislature amended Section 364.336 to except amounts paid to another telecommunications company for the use of any telecommunications network for purposes of calculating the fee, it could have excepted directory advertising revenues. The legislature also could have specified different treatment of those revenues for regulatory assessment fee purposes when it specified different treatment of the revenues from directory advertising for ratesetting purposes by adopting Section 364.037. And, when the legislature enacted Section 364.051(1)(c) and listed statutes from which price regulated companies would be exempt, it could have included the regulatory assessment fee statute. But the legislature took none of those actions, and it must be presumed to know that we have construed "revenues" to include directory advertising revenues. See, State ex rel. Szabo Food Services, Inc. of N.C. v. Dickinson, 286 So.2d 529 (Fla. 1973).

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Florida, page 45; GTE's June 2000 White Pages for Clearwater, Florida, page 59.)

For these reasons, we conclude that the directory advertising revenues from the directories for areas within Verizon's certificated territory that are billed and collected by Verizon, but which are booked by Verizon's affiliate, should continue to be imputed to Verizon and Verizon is required to pay regulatory assessment fees on those revenues.

Verizon presented very few facts in this proceeding about its contract and relationship with its affiliate, or about the activities of its affiliate. Our declaratory statement is limited, as it must be, to the circumstances presented. Any variation in circumstances or additional circumstances could change the answer to the issue presented.

Now, therefore, it is

ORDERED by the Florida Public Service Commission that the Petition for a Declaratory Statement filed by Verizon Florida Inc. is granted. It is further

ORDERED that the substance of the Declaratory Statement is as set forth in the body of this order. It is further

ORDERED that this docket should be closed.

By ORDER of the Florida Public Service Commission this 11th Day of January, 2001.

BLANCA S. BAYÓ, Director
Division of Records and Reporting

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

( S E A L )

CTM

Commissioner Baez dissented with the following opinion:

The central question in this matter is whether the Commission may impute revenues of an affiliate for purposes of calculating regulatory assessment fees (RAFs), when such revenues may no longer be imputed for any other purpose. I believe that, under the circumstances, the answer to this question is in the negative. But for specific statutory authority in Section 364.037, Florida Statutes, the revenues in question, derived from an otherwise unregulated service, could not be subject to imputation. The Commission's authority to include such revenues for purposes of calculating RAFs springs from that same statutory authority.

When interpreting the meaning of statutes, it is a well settled principle of law that "when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect." Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064 (1995)[4].

Section 364.336, Florida Statutes, states in pertinent part:

> Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding 6-month period, shall pay to the commission, within 30 days following the end of each 6-month period, a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business. (Emphasis added).

Rule 25-4.0161, Florida Administrative Code, implementing the above statute, states in pertinent part, "each company shall pay a regulatory assessment fee in the amount of 0.0015 of its gross

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[4] See also, Southeastern Utilities Co. v. Redding, 131 So. 2d 1, (1961)(If the terms and provisions of a statute are plain, there is no room for judicial or administrative interpretation).

operating revenues derived from intrastate business." (Emphasis added).

The language of Section 364.336 and Rule 25-4.0161 is plain and presents no ambiguity when it states that telecommunications companies must pay RAFs only on their gross revenues derived from their business within the state of Florida.

Verizon Florida Inc. ("Verizon") argues that under the above language, it is not required to pay RAFs on revenues earned by its affiliate, Verizon Directories Corporation ("VDC"), for revenues gained from directory advertising. Under its contract with VDC, Verizon does not book directory advertising revenues earned by VDC. All revenues derived from directory advertising are booked solely by VDC.

The majority, however, imputes the revenues of Verizon's affiliate to Verizon for the purpose of calculating the "gross operating revenues" on which Verizon must pay regulatory assessment fees. Yet, nothing in Section 364.336 serves as a basis to impute revenues to Verizon from its affiliate.

The Commission's practice of imputing affiliate revenues is based on In re: Investigation into the regulatory assessment fee calculations for 1985 and 1986 of United Telephone Company of Florida, Order No. 21171, 89 F.P.S.C. 5:83, 1989 Fla. PUC LEXIS 642 (1989).

In that case, the Commission found that:

> In light of our obligation to enforce Section 364.037[5], we find that United's reporting of gross profits from directory advertising is insufficient. We believe that United's reporting practice fails to furnish us with adequate data that will permit us to implement the mandate of Section 364.037, i.e., to allocate an

[5] Section 364.037 "sets out the regulatory treatment of the gross profits derived by telephone companies from directory advertising." In re: United, 89-5 FPSC 83 (1989).

increasing portion of these gross profits to ratepayers in setting rates.

The Commission imputed to United the revenues of its affiliate based on the intent of Section 364.037 to "secure most of the benefits of such profits for telephone companies' ratepayers..." Id. The only authority for this Commission to impute such revenues, even under rate of return regulation, is found in Section 364.037 and its accompanying administrative rules.

The publication of the directory from which the directory advertising revenues are generated is not a telecommunications service, is not being performed by a telecommunications company, and, therefore would not be subject to regulation by the Commission[6], but for the mandate of Section 364.037. Absent that, this Commission would have no clear authority to impute such revenues for ratemaking purposes, much less to impute them for purposes of calculating RAFs.

Verizon is exempt from the requirements of 364.037 by Section 364.051, Florida Statutes, which states that price cap carriers[7] "shall be exempt from rate base, rate of return regulation and the requirements of ss . . . 364.037."

The functional effect of this exemption removes directory advertising revenues from the definition of general revenues used to calculate rate of return. Since imputation is based on the above formula, once directory advertising revenues are exempt from rate of return calculation, the basis for imputing them for revenue calculations for RAFs no longer applies.

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[6] The Commission requires all Incumbent Local Exchange Carriers (ILECs) to publish a directory listing (usually white pages) for the benefit of its customers. The revenues in question are not derived from the required directory, but from alternative directories (usually yellow pages) which are not required by law and over which the Commission has no regulatory authority.

[7] Verizon became a price cap regulated company in January 1996.

In fact, no other affiliate revenues are imputed for rate setting or other purposes - only directory advertising revenues - and now that this no longer applies to price cap regulated companies by virtue of Section 364.051, these revenues should not be imputed to calculate RAFs.

Given the exemption created by Section 364.051, the rationale for imputation of directory advertising revenues, for purposes of calculating RAFs, no longer exists. In fact, imputation goes against the Legislature's intent to exempt price cap regulated companies from the procedural treatment governing rate of return companies. To hold that the Legislature intended to abrogate the inclusion of affiliate revenues from directory advertising, an otherwise unregulated service, in the rate regulation process, yet preserved inclusion of those revenues for purposes of calculating RAFs, implies an authority over unregulated services for which this Commission has no basis in statute.

This leaves Section 364.366 as the only controlling statute governing the calculation of gross revenues for the purpose of RAFs. Nothing in that statute gives the Commission the authority to impute directory advertising revenues gained by Verizon's affiliate to Verizon for the purpose of calculating RAFs. Therefore, I respectfully dissent from the Commission's Order on this matter.

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, 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.