

SUPREME COURT OF FLORIDA
Case No. SC01-323

VERIZON FLORIDA INC., :
Appellant, :
v. :
E. LEON JACOBS, JR., et al., :
Appellees. :

APPELLANT'S SECOND NOTICE OF SUPPLEMENTAL AUTHORITY

Appellant, Verizon Florida Inc. ("Verizon"), pursuant to Florida Rule of Appellate Procedure 9.225, hereby calls this Court's attention to the declaratory statement regarding regulatory assessment fees issued by the Florida Public Service Commission (the "Commission") in In re: Petition for Declaratory Statement by Level Three Communications, LLC, Docket No. 010650-TX (PSC August 14, 2001) ("Level Three declaratory statement").

The position of the Commission in the Level Three declaratory statement, a true and correct copy of which is attached hereto, is to be contrasted with the

Commission's position in the Verizon declaratory statement at issue in this appeal that the imposition of regulatory assessment fees on directory advertising revenues is

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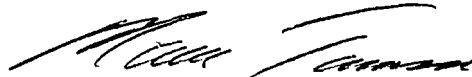
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appropriate because the fees follow a required service. (See order on appeal at pp. 4 and 7).

Also, the Level Three declaratory statement is based on a plain reading of the regulatory assessment fee statutes (attached, p. 5), in contrast with the Commission's interpretation in the instant case. (See Answer Brief, pp. 12-14).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Appellant's

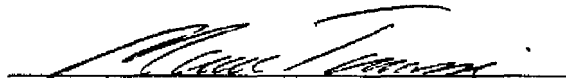
Second Notice of Supplemental Authority has been furnished, by U.S. Mail, to

Dale Mailhot, Commission Staff
Harold McLean, Counsel to Commission and
Christiana T. Moore, on behalf of the Commission Staff
Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Blanca S. Bayo, Director
Division of Records and Reporting
Public Service Commission
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on August 31, 2001.



Attorney

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement by Level 3 Communications, LLC, that collocation revenues reported by Level 3 should not be included as "gross operating revenues derived from intrastate business" as contemplated by Rule 25-4.0161, F.A.C., and Sections 350.113(3)(b) and 364.336, F.S., for purposes of calculating regulatory assessment fee for calendar year 1999.

DOCKET NO. 010650-TX
ORDER NO. PSC-01-1662-DS-TX
ISSUED: August 14, 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

Level 3 Communications, LLC (Level 3) is a certificated Alternative Local Exchange (ALEC) and Interexchange (IXC) telecommunications service provider in Florida. On May 1, 2001, Level 3 filed a Petition for Declaratory Statement pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code. In its petition, Level 3 states that its request for a declaratory statement arises from an audit of its 1999 Alternative Local Exchange Company regulatory assessment fee filing, in which the Commission staff took exception to Level 3's exclusion of \$381,342.00 in collocation revenues from its assessment fee calculation.¹ Level 3 asks the Commission to declare that the revenue an ALEC generates from collocation should be excluded from the fee calculation. For the reasons explained below we find to the contrary. Level 3 is required to include

¹ At the current assessment fee rate of 0.0015, the amount in dispute is \$572.01.

revenues derived from collocation in its regulatory assessment fee calculation.

LEVEL 3'S PETITION

The facts of this case, gleaned from Level 3's petition, its May 30, 2001, letter to our staff, and marketing information that it publishes on its website, indicate that Level 3 leases space in its Florida "Gateways" telecommunications facilities to other communications providers for the collocation of their communications equipment. Level 3 describes its Gateways facilities as "sophisticated technology centers where customers can physically locate their equipment in order to connect directly to Level 3's and other service providers' networks." As Level 3 explains on its website, collocation in Level 3's Gateways centers provides "direct access to Level 3's Network services," "an open facility - many other carriers are able to deliver service to customers directly within the Level 3 facility, enabling diverse routing and easy communications supplier choice and support service,"² and a variety of other services, like air conditioning, power supplies, and the like.

Level 3 states that a collocation space typically houses customer equipment that is used for the provision of telecommunications and/or information services. Level 3 also states that a lease of collocation space does not necessarily mean that Level 3 is supplying that entity with network facilities. "It is possible to use Level 3's collocation space as a place to locate equipment that is connected to other carriers' networks and thus is not necessarily solely associated with using Level 3's backbone network." Level 3 also explains that its collocation customers may provide interstate services, and most of the equipment that is placed in Level 3's Gateways is used for the provision of Internet-related services. Level 3 states that it cannot easily determine whether its customers are using collocation to ultimately provide regulated or unregulated services.

Level 3 asserts that it does not owe assessment fees on its collocation revenues, because they are not "gross operating revenues derived from intrastate business" contemplated by sections 350.113(3)(b) and 364.336, Florida Statutes. Level 3 contends that since its collocation revenues are generated from a service that it is not required to provide, those revenues should be excluded from

² www.level3.com.

the fee calculation. For this proposition Level 3 relies upon this Commission's recent declaratory statement that Verizon is required to pay regulatory assessment fees on the directory advertising revenues of its affiliate. Docket No. 001556-TL, Order No. PSC-01-0097-DS-TL, issued January 11, 2001. Although the Commission found that Verizon was required to pay assessment fees on directory publishing revenues, Level 3 argues that it did so because Verizon's directory affiliate was providing a service Verizon is required to provide as a certificated local telecommunications company. "The final order in the Verizon Declaratory Statement proceeding makes it clear that Sections 350.113(b) and 364.336, Florida Statutes, were never intended to impose a regulatory assessment fee on the revenues of a regulated telecommunications company that are not derived from a required component of the telecommunications company's communications service."

Contending that its collocation revenues "represent nothing more than lease payments for occupying space in Level 3's facilities," Level 3 characterizes collocation as a "simple real property transaction" that does not involve the provision of telecommunications services by Level 3. Level 3 argues that because collocation is neither a telecommunications service, nor a service required in conjunction with the provision of telecommunications service, collocation revenues should be excluded from its gross operating revenues for regulatory fee calculations.

DECISION

Threshold Declaratory Statement Requirements

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part it provides:

(1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Level 3's petition meets the statutory requirements for a declaratory statement. Level 3 does not believe that the regulatory assessment fee statute applies to its collocation revenues, but it will be required to pay the additional fee under our staff's interpretation. Level 3's substantial interests are

affected by this disagreement, and therefore we will issue a declaratory statement to resolve it.

Analysis

The regulatory assessment fee statutes at issue here do not contemplate the exclusion of Level 3's collocation revenues from its regulatory assessment fee calculation. In fact, the introductory language of section 364.336, Florida Statutes, militates against any construction of that statute or related statutes that would exclude revenues not expressly excluded by the statute itself. Section 364.336, Florida Statutes, provides;

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 supplied.)

The statute further provides that any amount paid to another telecommunications company for the use of any telecommunications network shall be deducted from the gross operating revenues for purposes of computing the fee due.³

Section 350.113(3), Florida Statutes, also requires each regulated company under the jurisdiction of this Commission to pay a fee based upon its gross operating revenues. Section 350.113(3) also provides that the fees collected shall to the extent practicable, be related to the "cost of regulating such type of regulated company."

Thus there are only two specific statutory limitations on the inclusion of a telecommunications company's gross operating revenues for regulatory assessment fee purposes in Florida. The revenues must be intrastate revenues, and they may exclude any amounts paid to another telecommunications company for the use of its facilities. The statutes make no other provision for the deduction or exclusion of operating revenues from the fee calculation. The statutes do not limit the regulatory fee calculation to revenue acquired either from telecommunications services or services "derived from a required component of the

³ Under that provision, any certificated telecommunications company leasing collocation space or other network facilities from Level 3 would be entitled to exclude amounts paid to Level 3 from their regulatory fee calculation.

telecommunications company's communications service.", as Level 3 has suggested.⁴

In fact, the regulatory assessment fee statutes do not tie the fees to services of any particular kind at all, but to a regulated company's "intrastate business," a term that is clearly more inclusive than what Level 3 proposes. That is because the Commission regulates the telecommunications company and the business it conducts, not only the specific services that it provides. The language of the statute accounts for the fact that the Commission's regulation encompasses much activity that cannot be tied to any specific services that a regulated company may offer.

There are limits to the scope of the regulatory assessment fee statutes, but they are prescribed by the statutes themselves. They do not apply to a company's interstate business, and they do not include amounts paid to other companies for the use of their facilities. The revenues in question in this case do not fall within the statutory limitations. They derive from collocation, which is, despite Level 3's assertions to the contrary, directly related to its intrastate business and the use of telecommunications facilities. But for the access to communications networks and facilities, providers would not collocate in Level 3's Gateways facilities, and Level 3 would not receive revenue from the lease of those facilities. Section 364.02(13), Florida Statutes, provides that a telecommunications facility "includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state."

Collocation revenue is rent revenue from the lease of telecommunications facilities, like revenue from the lease of space on telephone poles and in telecommunications vaults and conduits. Rent revenue has traditionally been included in telephone company assessment fee calculations, and the statutes do not provide for any different treatment here. Level 3 acknowledges that Incumbent Local Exchange Telecommunications companies (ILECs) are required to provide collocation to competitive telecommunications carriers under the local competition provisions of the Telecommunications Act of 1996, as implemented by this Commission and the FCC. Under the Uniform System of Accounts, ILECs record that collocation

⁴ Level 3's reliance upon the Verizon declaratory statement is misplaced. In that case the Commission was addressing the imputation of advertising revenues generated by Verizon's affiliate publishing company to Verizon for regulatory assessment fee purposes, given the consideration that Verizon's affiliate was not a telecommunications company. Here there is no question that Level 3 is a telecommunications company and the collocation revenues are its own revenues.

revenue along with other rent revenue from the lease of facilities in account 5240, and they include it in their regulatory assessment fee calculation. According to Level 3's argument, ILECs would pay assessment fees on the revenues they collect from collocation, because they are required to provide collocation, but Alternative Local Exchange companies (ALECs) would not, because they are not required to provide collocation. Level 3 contends that this dissimilar treatment of the same revenues for regulatory assessment fee calculation is permissible because it encourages the development of competition pursuant to the directives of section 364.01, Florida Statutes. The assessment fee statutes, however, do not provide for dissimilar treatment of these revenues, and without specific statutory direction we do not have the discretion to treat them that way.

Level 3's interpretation would require us to read exceptions and exclusions into the regulatory assessment fee statutes that are simply not there. The statutes plainly provide that regulatory assessment fees shall be paid by all telecommunications companies based on their "gross operating revenues derived from intrastate business," and the revenues in question here are gross operating revenues derived from intrastate business. The introductory language of section 364.336 clearly indicates that no other exclusions should be implied by reference to other statutes. Furthermore, Level 3's proposed interpretation would not limit the amount of regulatory assessment fees the Commission would collect. It would limit the base of revenue upon which the Commission could assess the fees, placing a greater burden on other telecommunications providers and their customers. For these reasons, we find that Level 3's collocation revenues should be included in its regulatory assessment fee calculation.

Now, therefore, it is

ORDERED by the Florida public Service Commission that the Petition for a Declaratory Statement 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 shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of August, 2001.

/s/ Blanca S. Bayó
BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

This is a facsimile copy. Go to the
Commission's Web site,
<http://www.floridapsc.com> or fax a request

to 1-850-413-7118, for a copy of the order
with signature.

(S E A L)

MCB

Commissioner Jaber dissents from the majority opinion as follows:

The issue before us in this request for a declaratory statement is simply whether Level 3 is required to pay regulatory assessment fees on the revenues it receives from unregulated, unrequired collocation services it provides in its Florida "Gateway" facilities. Level 3 has not sought to address some larger, policy question or the applicability of regulatory assessment fees on any other company or for any other service.

Section 364.336, Florida Statutes, requires each telecommunications company licensed or operating in Florida to pay a regulatory assessment fee based on "its gross operating revenues derived from intrastate business". This section was enacted in 1990, pursuant to Chapter 90-244, Section 33, Laws of Florida. In 1995, the Florida Legislature enacted comprehensive legislation with the clear intent of opening up local exchange services to competition. The Legislature's intent in connection with this legislation to promote competition and to allow for a "transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies" is expressly set forth in Sections 364.01(3) and (4),

Florida Statutes. In 1996, the Federal Telecommunications Act was also changed to require and encourage competition in local markets. Level 3 is a relatively new competitive local exchange company and an example of the companies the Federal and State Telecommunications Acts encourage us to promote by lesser regulation.

Regulatory assessment fees fund regulation. The purpose of regulatory assessment fees is to compensate the agency for the costs of its regulatory activities. It is clear that the Commission conducts no regulatory oversight of the collocation service provided by Level 3. Level 3 is a competitive provider. As such, Level 3 is not required to file its collocation agreements. Our staff does not review these agreements and they are not subject to arbitration matters. Further, it was established that if Level 3 was to create a separate corporation that provided only collocation services, the new corporation would not have to pay the regulatory assessment fees. This application of the regulatory assessment fee statute in this manner defies logic. So, to me, the question is whether, given these facts, does the statute direct us to collect regulatory assessment fees on Level 3's revenue from unregulated, unrequired competitive collocation service.

In making my decision in this matter, I looked to all of Chapter 364 for direction. By analogy, courts look to the provisions of the whole law rather than various statutory subsections in isolation from one another and out of context. Klonis v. State Department of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000). Legislative provisions must be construed to operate in harmony with each other, City of Jacksonville v. Cook, 765 So.2d 289 (Fla. 1st DCA 2000). As to the notion that the Legislature did not amend Section 364.336 to provide for a lesser or different treatment of regulatory assessment fees for new entrants into the telecommunications area in 1995 when it could have, I do not believe it is reasonable to expect that the Legislature could have contemplated every situation before the PSC when changing statutory provisions. Here, the PSC is the body created by the Legislature to effectuate the policy that the Legislature could not have been expected to flesh out with great detail. In a time of telecommunications deregulation, it does not seem logical to me to collect regulatory assessment fees from a company for an unregulated service it began offering in the new competitive environment. This is a slippery slope. In an extreme situation, this decision has the potential of inhibiting innovation and creative competitive services. This seems contrary to the direction of the Legislature in Section 364.01(4)(f) to "(e)liminate any rules and/or regulations which will delay or impair the transition to competition." Our staff acknowledged that the majority's decision will require our staff to audit revenues to ensure that the accurate amount of regulatory assessment fees have been submitted. This constitutes regulation.

In conclusion, I do not believe that Section 364.336, when taken together with Sections 364.01(3) and (4), requires the Commission to impose regulatory assessment fees on the collocation revenues of an alternative local exchange company (ALEC) such as Level 3. On the contrary, the most recently enacted statutory provisions direct us to encourage competition through lesser oversight of new entrants free of regulatory impediments. Further, Section 350.113(3), Florida Statutes, provides that the fees collected shall to the extent practicable, be related to the cost of regulation. Since the Commission performs no regulatory oversight of collocation services provided by ALECs, there is no cost of regulation associated with this service for which the PSC needs to be compensated.

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 the Commission Clerk and Administrative Services, 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 the Commission Clerk and Administrative Services 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.