SUPREME COURT OF FLORIDA

Case No. SC01-2050

LEVEL 3 COMMUNICATIONS, LLC

Appellant,

v.

E. LEON JACOBS, JR., et al.

Appellees.

AMENDED INITIAL BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

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STATEMENT OF THE CASE AND FACTS

Level 3 Communications, LLC ("Level 3") is a multi-faceted communications and information services company. Level 3 currently holds a certificate from the Florida Public Service Commission ("Commission") as an alternative local exchange telecommunications company ("ALEC").[1] Level 3 generates revenues in Florida from business activities that are not regulated by the Commission. Level 3 also generates revenues in Florida from the provision of telecommunications services that are regulated by the Commission. (V. 1, R. 4-5).

As a certificated ALEC in Florida, Level 3 is required to pay an annual regulatory assessment fee to the Commission of 0.0015 per cent of "its gross operating revenues derived from intrastate business" pursuant to Sections 350.113 and 364.336, Florida Statutes (2001),[2] and Rules 25-4.0161 and 25-24.835, Florida Administrative Code. The fee is to be deposited in the State Treasury to the credit of the Florida Public Service Regulatory Trust Fund and used "in the operation of the

[1]Section 364.337(1), Florida Statutes, governs the issuance of certificates to provide alternative local exchange service by the Commission.

[2]Unless otherwise noted, all references in this Initial Brief are to the year 2001 version of the Florida Statutes.

Commission in the performance of the various functions and duties required of it by law."[3]

Prior to the advent of competition in the local telecommunications market in Florida, the incumbent local exchange carriers ("ILECs") enjoyed monopoly status in specific geographic areas and generally controlled the telecommunications hardware networks within their area.[4] One of the many duties imposed on the ILECs by the federal Telecommunications Act of 1996 was the duty to interconnect their networks with the networks of the new ALECs who sought entry into that particular market. See 47 U.S.C. §251(c)(2). Level 3 and many other ALECs interconnected with the ILECs' networks. As part of the ILECs' interconnection obligations, ILECs are required to allow the ALECs to physically collocate their necessary equipment at the ILECs' premises. Section 47 U.S.C. §251(c)(6) governs the ILECs' collocation obligations:

(6) Collocation

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[3]§350.113(1), Fla. Stat.

[4]An ILEC is defined in both federal and Florida law as the traditional monopoly provider of local service. Federal law defines an ILEC, in pertinent part, as the "local exchange carrier that ... on February 8, 1996, provided telephone exchange service...." 47 U.S.C. §251(h). Florida law refers to an ILEC as "local exchange telecommunications company" and defines same as "any company certificated by the Commission to provide local exchange telecommunications service in this state on or before June 30, 1995." §364.02(6), Fla. Stat.

> The duty to provide, on rates, terms, and conditions that are just, reasonable, and non-discriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the state commission that physical collocation is not practical for technical reasons or because of space limitations.

The federally mandated duty of the ILECs to allow ALECs to collocate equipment in the ILEC central offices was intended to allow the ALECs, who were new entrants into the market, access to ILEC facilities necessary to conduct business on equal footing with the ILECs so as to "facilitate competitive deployment of advanced services."[5] ALECs, unlike ILECs, are under no statutory duty to offer collocation to any parties.[6]

An important part of Level 3's business plan for Florida is to lease space in its "Gateway" buildings to independent business enterprises who wish to interconnect with Level 3's networks, other telecommunications, data and Internet carriage

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[5]In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, *First Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 98-147 (Rel. March 31, 1999), at ¶18, *vacated in part in GTE Service Corporation v. Federal Communications Commission*, 205 F.3d 416 (D.C. Cir. 2000).

[6]*Compare* 47 U.S.C. §251(b) (obligations of ILECs and ALECs which does not include collocation) with 47 U.S.C. §251(c) (obligations of ILECs which include collocation).

networks, or use the leased space for whatever purpose a third party enterprise deems appropriate. (V. 1, R. 33). Level 3 recognized the expanding market demand for collocation services and has more than 5.5 million square feet of technical space around the world to lease to collocators. (V. 1, R. 34) Level 3 derives revenues from these leases of collocation space in the "Gateway" facilities. Level 3's Gateway facilities are sophisticated technology centers where communications and information services customers can physically locate their equipment in order to connect directly to networks and equipment maintained by Level 3 or any other entity that may be leasing space there as well. (V. 1, R. 33). Most of the equipment in Level 3's Gateways is used in conjunction with the provision of Internet-related services that, pursuant to federal law, are interstate services that are not subject to the Commission's jurisdiction. (V. 1, R. 30).[7]

For calendar year 1999, Level 3 reported and filed with the Commission gross intrastate revenues that reflected the gross intrastate revenues that Level 3 generated from business activities, i.e., telecommunications services, that are regulated by the Commission. Level 3 did not report or file with the Commission the revenues it

[7]Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* FCC 01-131, CC Docket Nos. 96-98, and *Intercarrier Compensation for ISP-bound Traffic,* CC Docket No. 99-68 (2001).

generated from its non-regulated collocation enterprises with telecommunication carriers and other third parties.

On August 9, 2000, the Auditing Services Division of the Commission informed Level 3 that it had been randomly selected to have its 1999 regulatory assessment fee filing audited. After conducting the audits, Commission staff concluded that Level 3 should include collocation revenues from 1999 (in the amount of $381,342.00) as part of its "gross operating revenues derived from intrastate business to calculate the regulatory assessment fee due." (V. 1, R. 4).

In response to the Commission staff's conclusion, Level 3 filed a Petition for a Declaratory Statement (hereinafter "Petition") requesting a determination by the Commission that the revenues generated by providing collocation to third parties in Level 3 Gateways should not be included for the purpose of calculating Level 3's regulatory assessment fees.

In its Petition, Level 3 first asserted that Level 3's collocation revenues resulting from the leasing of real property to other carriers or entities is not a "two-way telecommunications service," and therefore does not fall within the Commission's regulatory authority over "telecommunications companies" under Section 364.02(12),

Florida Statutes.[8] Although the term "telecommunications service" is not defined under Chapter 364, Florida Statutes, relevant definitions are found in the federal Telecommunications Act of 1996. Specifically, under 47 U.S.C. §153(43), the term "telecommunications" is defined to mean:

> . . . the transmission between or among points specified by the user, or information of the user's choosing, without change in the form or content of the information as sent and received.

Similarly, under 47 U.S.C. §153(46), the term "telecommunications service" is defined to mean:

> . . . the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used.

The Commission issued its Declaratory Statement on August 14, 2001 (the "Final Order"), wherein it held that whether Level 3's collocation revenues were derived from a "two-way telecommunications service" is irrelevant to determining the

[8]Pursuant to Rule 28-105.003, Florida Administrative Code, the Commission may rely on the statements of fact set out in a Petition for Declaratory Statement without taking any position with regard to the validity of the facts. The Commission did not dispute the recitation of facts set forth in Level 3's Petition or in Level 3's responses to the Commission Staff's data requests. (V. 1, R. 117-125).

Commission's authority to collect regulatory assessment fees from the revenues (V. 1, R. 120-122).

Secondly, Level 3 argued in its Petition that the Commission's authority to collect regulatory assessment fees is limited to recovering its costs of regulation under Section 350.113(3), Florida Statutes.[9] As noted above, only ILECs are under any legal obligation to offer collocation in Florida. Level 3's collocation agreements are not subject to Commission regulation or control. Oral argument was heard by the Commission at the July 24, 2001 Agenda Conference, and the following exchange between Commissioner Jaber and staff counsel confirms the complete lack of regulatory oversight by the Commission over Level 3's collocation agreements:

> Commissioner Jaber: Ok. So I'm trying to get my hands around what work we performed for Level 3's collocation agreements. . . . . Do we require them to file their collocation agreements?
>
> Ms. Brown: No.
>
> Commissioner Jaber: Does our staff review any of their collocation agreements?
>
> Ms. Brown: No.
>
> Commissioner Jaber: Are they ever included in arbitration matters?

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[9]Section 350.113(3), Florida Statutes, provides, in pertinent part, that regulatory assessment fees "shall, to the extent practicable, be related to the cost of regulating such type of regulated company...."

Ms. Brown: No.

See Transcript of July 24, 2001 Agenda Conference (V. 1, R. 55).

Third, Level 3 argued in its Petition that a recent Declaratory Statement issued by the Commission supported its position that regulatory assessment fees are only to be assessed on business activities regulated by the Commission.[10] Verizon Florida, Inc. ("Verizon") filed a petition with the Commission seeking a declaration that it is not required to pay regulatory assessment fees on directory advertising revenues. In *Verizon*, the Commission determined that Verizon is required to pay regulatory assessment fees on the directory advertising revenue of its directory affiliate (Verizon Directories Corp.). This decision is instructive to the issues at hand in the Level 3 matter because in reaching its conclusion, the Commission stated:

> Verizon's directory affiliate may not itself meet the terms of a 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. Section 364.02(2), Fla. Stat. (2000).[11]

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[10]*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, Order No. PSC-01-0097-DS-TL issued January 11, 2001 ("*Verizon*").

[11]Id., at 4.

Thus, under *Verizon*, the Commission's basis for concluding that it could assess the revenues of the affiliate was that the service the affiliate was providing is one that Verizon must offer by virtue of its status as a regulated entity. Proceeding from this logical conclusion, Level 3 argued in its Petition that the rationale for the Commission's decision in *Verizon* supports Level 3's position that collocation revenue is not subject to regulatory assessment fees. In contrast to the regulated service that Verizon is required to provide (either directly or through its affiliate), Level 3 is under no legal obligation to provide collocation to other carriers. While the Commission apparently reached its conclusion in part due to the concern that ILECs and ALECs would be treated differently, ILEC and ALEC regulation has always been asymmetrical. A look at the lower level of obligations placed on ALECs under Section 251(b) of the Act as compared to those more stringent duties placed on ILECs under Section 251(c) of the statute, as discussed *infra*, confirms this point. Moreover, at the Agenda Conference, counsel for Level 3 noted that:

> [T]he fundamental underpinnings of telecommunications regulatory law dictate in this instance that ILECs and ALECs be treated differently, and that is the result of the Telecommunications Act itself, that ILECs are regulated as a monopoly provider, and ALECs are regulated as competitive providers. And that exists in Florida ... [statutes] ... in many examples. Tariffing, rate determinations, unbundling of networks, all those are

> examples of differen[ces] between how ILECs are treated and ALECs are treated.

See Transcript of July 24, 2001 Agenda Conference (V. 1, R. 44). In other words, there is nothing inherently problematic with the position that Sections 350.113 and 364.336, Florida Statutes, were never intended to impose regulatory assessment fees on the revenues of a regulated telecommunications company that are derived from a non-regulated service even when a similar service offered by an ILEC is a regulated service which is subject to regulatory assessment.

To underscore the point that collocation revenues are not subject to Commission regulation, Level 3's counsel noted that companies that are solely in the collocation business are not subject to regulatory assessment fees:

> ALECs are not required to provide any service. However, if they choose to provide services that are regulated, they should be assessed regulatory assessment fees for those services. But there are ALECs that are providing collocation in a corporate structure such that collocation is broken out as a non-regulated entity, and there are non-ALECs who are providing collocation as a non-regulated service because it is not a telecommunications service, and thus, the Commission does not have the jurisdiction to regulate that service, and those providers that are not ALECs are not required to become certificated.

See Transcript of July 24, 2001 Agenda Conference (V. 1, R. 46-47).

Thus, if the same collocation revenues that the Commission seeks to collect regulatory assessment fees from Level 3 were generated by a company that was not a certificated ALEC or was a non-regulated subsidiary of an ALEC, that company would not be required to pay regulatory assessment fees on its collocation revenues despite the fact that the revenues were generated in the precise way that Level 3 generates its collocation revenues. In other words, just because Level 3 holds a certificate, the Commission's ruling allows it to assess everything Level 3 does in Florida, notwithstanding whether the Commission plays any role in overseeing the function in question.

Level 3's assertion that unregulated companies or non-regulated affiliates of certificated ALECs can generate these same collocation revenues and not be subject to regulatory assessment fees was conceded by Commission staff at the July 24, 2001 Agenda Conference as evidenced by the following exchange:

> Commissioner Palecki: [I]f Level 3 had broken out a separate real estate business that was separate and apart from its telecommunications operation and it was called Level 3 Real Estate then we would not have an issue with regard to regulatory assessment fees here, would we?
>
> Ms. Brown: No.

See Transcript of July 24, 2001 Agenda Conference (V. 1, R. 68).

In its Final Order, the Commission either explicitly or implicitly rejected all of Level 3's contentions and held:

> the statutes plainly provide that regulatory assessment fees shall be paid by all telecommunications companies based upon 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.

Final Order, at 6. (emphasis supplied).

Level 3 filed this appeal asserting that the Commission's Final Order determining that the collection of the regulatory assessment fees from revenues generated by Level 3's collocation agreements exceeds the statutory authority of the Commission to regulate ALECs. This court has mandatory jurisdiction over this appeal pursuant to Article V, Section 3(b)(2), Florida Constitution, and Section 364.381, Florida Statutes.

SUMMARY OF ARGUMENT

The Commission has no authority to collect regulatory assessment fees from revenues generated by business activity that the Commission is not legislatively authorized to regulate. The Commission's expansive holding that it has the power to collect regulatory assessment fees from revenues generated by business activities it

does not regulate exceeds its statutory authority and discriminates against Level 3 in the competitive market of collocation.

Prior to 1995, the local telecommunications market in Florida was exclusively comprised of ILECs who had monopoly service rights in specific geographic areas. Because each local service market was a monopoly, the Legislature granted the Commission significant regulatory powers over the monopoly ILECs as a "surrogate for competition for monopoly services provided by local exchange telephone companies."[12] In 1995, the Legislature opened the local telecommunications markets to competition through amendments to various sections in Chapter 364, Florida Statutes. The Legislature ordered, among other things: 1) that the Commission grant a certificate of authority to provide alternative local exchange service to any company upon a showing that the applicant has sufficient technical, financial and managerial capability to provide such service in the geographic area proposed to be served;[13] 2) that the Commission eliminate unnecessary regulatory restraints over ALECs;[14] and 3)

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[12]*See* §364.01(3)(f), Fla. Stat. (1993), now numbered as §364 .01(4)(i), Fla. Stat.

[13]*See* §364.337, Fla. Stat. (1995).

[14]*See* §§364.01(4)(g), Fla. Stat. (1995).

ordered the Commission to subject ALECs to a lesser level of regulatory oversight than the local exchange telecommunications companies.[15]

Level 3 is a diverse company engaging in telecommunications and other businesses. Level 3 sought and received a certificate from the Commission to become a telecommunications provider (an ALEC) in Florida. The certificate *authorizes* Level 3 to provide "basic local telecommunications service." Such services - - the only ALEC services the Commission regulates - - do not include collocation.

The stated purpose for granting the Commission the authority to collect a regulatory assessment fee is to generate the revenue necessary to offset the costs for the Commission's performance of its regulatory duties.[16] It clearly and logically follows that regulatory assessment fees must be related to the cost of regulation. The Commission admittedly does not regulate Level 3's collocation enterprise in any respect. The only collocation agreements the Commission regulates - and thus the only collocation arrangements that generate any regulatory cost for the Commission - are those that ILECs are *required* to offer pursuant to the Act. There is no cost of regulation and no function for the Commission to perform in regard to Level 3's collocation business. The leasing of floor space to third parties in Level 3's buildings

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[15]*See* §364.01(4)(d), Fla. Stat. (1995).

[16]*See* §350.113(3), Fla. Stat.

is simply not an activity that is regulated by the Commission. The Commission's Final Order penalizes Level 3 by placing it in the position of competing against other companies leasing similar collocation space who pay no regulatory assessment fees to the Commission solely because they are not also ALECs.

The Commission's attempt to assess Level 3's unregulated collocation revenues as "gross operating revenues that are derived from intrastate business" must fail. The record is clear that the predominant portion of Level 3's collocation revenues is associated with interstate services. However, even if the revenues were derived from intrastate business, the precedent arising from the Commission's interpretation of Section 364.336 is onerous and contrary to the Legislature's intent to promote local service competition. Based on this Final Order, all unregulated intrastate business of a telecommunications company, whether it's an orange grove, a hot dog stand or collocation, would be subject to regulatory assessment fees. Indeed, under the Commission's expansive ruling, any revenues Level 3 might derive from the placement of a soda machine in the lobby of its Gateways could now be considered subject to a regulatory assessment.

As noted in Commissioner Jaber's dissent, 47 U.S.C. §251 and Section 364.01(4), Florida Statutes, reflect the intent of Congress and the Florida Legislature to promote local exchange competition by subjecting ALECs such as Level 3 to a

lower level of regulatory oversight. The Commission's Final Order ignores this mandate.

Finally, the Commission's imposition of regulatory assessment fees on Level 3's unregulated collocation rentals violates Level 3's constitutional right to equal protection in the unregulated, competitive collocation market.

ARGUMENT

I. The Standard of Review

This appeal involves purely a question of law. Accordingly, the traditional deference granted to Commission decisions which reflect the Commission's consideration of evidentiary issues has no application in this appeal. See *Tampa Electric Company v. Garcia*, 767 So.2d 428 (Fla. 2000) ("*Tampa Electric*"). The only question of law presented in this appeal is whether the Commission exceeded its statutory authority and violated Florida law in ordering regulatory assessment fees on revenues generated from Level 3's collocation agreements. In determining whether the Commission exceeded its statutory authority in this case, the Court need only determine the plain meaning of the controlling statutes. No special agency expertise is required to determine the plain meaning of the statutes; therefore the Court need not

defer to the Commission's construction or application of the statutes.[17] In *Tampa Electric*, this court reiterated the well-settled standard of review for an appeal challenging the Commission's statutory authority to order the action which is the subject of the appeal:

> As we stated in *United Telephone Company of Florida v. Public Service Commission*, 496 So.2d 116 (Fla. 1986): we note preliminarily that orders of the Commission come before this court clothed with the statutory presumption that they have been made within the Commission's jurisdiction and powers, and that they are reasonable and just and such as ought to have been made. *General Telephone Co. v. Carter*, 115 So.2d 554, 556 (Fla. 1959). (footnote omitted). See also *Citizens v. Public Service Commission*, 448 So.2d 1024, 1026 (Fla. 1984).
>
> Such deference, however, cannot be accorded when the Commission exceeds it authority. At the threshold, we must establish the grant of legislative authority to act since the Commission derives its power solely from the Legislature. *See Florida Bridge v. Bevis*, 363 So.2d 799, 812 (Fla. 1978). As we said in *Radio Telephone Communications, Inc. v. Southeastern Telephone Company*, 170 So.2d 577, 582 (Fla. 1964):
>
> [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity, Section 364.20, Florida Statutes. But we cannot apply such presumption to support the exercise of jurisdiction where none has been granted by the Legislature. If there is a reasonable doubt as to the lawful existence of a particular power that is being

[17]*And Justice For All Inc. d/b/a Legal Club of America v. Fl. Dept. of Insurance*, 26 FLW D2304 (Fla. 1st DCA, September 26, 2001).

> exercised, the further exercise of the power should be arrested. 496 So.2d at 118.

Tampa Electric, at 433.

Because the only issue before this Court is the threshold legal issue of whether the Commission exceeded its statutory authority, this Court must look to the power granted to the Commission by the Legislature. As stated by the Court in *Tampa Electric*, if there is a reasonable doubt as to the lawful existence of the power exercised by the Commission, the further exercise of that power should be arrested.

II. The Commission Exceeded its Statutory Authority by Imposing Regulatory Assessment Fees on Level 3's Collocation Revenues

A. Section 350.113(3), Florida Statutes, limits the imposition of regulatory assessment fees to revenues derived from regulated services.

The Commission's power to regulate is not unbridled. As an administrative agency created by the Legislature, the Commission derives its powers, duties and authority solely from the Legislature. *Teleco Communications Co. v. Clark*, 695 So.2d 304 (Fla. 1997). The Legislature has never conferred upon the Commission any general authority to regulate. As this Court has stated: "Throughout our history, each time a public service of this state has been made subject to the regulatory power of the Commission, the Legislature has *first* enacted a comprehensive plan of regulation and control *and then conferred upon the Commission the authority to administer such*

plan." *City of Cape Coral v. GAC Utilities, Inc., of Florida*, 281 So.2d 493 (Fla. 1973)(emphasis in original).

The power granted to the Commission to regulate telecommunications companies is derived from Chapters 350 and 364, Florida Statutes. In holding that revenues that Level 3 generates from its collocation arrangements are subject to regulatory assessment fees, the Commission unlawfully limited its analysis to Section 364.336, Florida Statutes, while ignoring other relevant statutes that place specific limits on the Commission's authority to impose regulatory assessment fees and confirm the Legislature's intent to promote local service competition by lessening the level of regulation over ALECs.

Section 350.113, Florida Statutes, created the "Florida Public Service Regulatory Trust Fund" and states that the fund "shall be used in the operation of the Commission and the performance of the various functions and duties required of it by law."[18] Subsection 350.113(3), Florida Statutes, defines the regulatory assessment fees that the Commission is authorized to collect from each telephone company to support the Regulatory Trust Fund and states in pertinent part:

> Each regulated company under the jurisdiction of the commission, which company was in operation for the proceeding six month period, shall pay to the commission

[18]*See* §350.113(1), Fla. Stat.

> within thirty days following the end of each six month period, commencing June 30, 1977, a fee based upon the gross operating revenues for such period subject to the limitations of this subsection. The fees *shall*, to the extent practicable, *be related to the cost of regulating such type of regulated company* and shall in no event be greater than:
>
> . . .
>
> (b) for each telephone company licensed or operating under chapter 364, 1/8 of 1% of its gross operating revenues derived from intrastate business. (Emphasis added).

Despite the clear and plain language used in Section 350.113(3) requiring that the regulatory fees collected by the Commission *be related to the cost of regulating*, and the fact that the Regulatory Trust Fund is to be used to support the Commission's "performance of the various functions and duties required of it by law," the Commission completely ignored those statutory mandates in the Final Order. Instead, the Commission relied solely on Section 364.336, Florida Statutes,[19] which states:

> Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding six month period, shall pay to the Commission, within thirty days following the end of each six-month period, a fee that may not exceed 0.25% annually of its *gross operating revenues derived from intrastate business, except, for purposes of this section and the fee specified in Section 350.113(3),* any amount paid to another telecommunications company for

[19]*See* Final Order, at 6.

> the use of any telecommunications network shall be deducted from the gross operating revenue for purposes of computing the fee due. (Emphasis supplied).

It is a fundamental tenet of statutory construction that statutes on the same subject and having the same general purpose should be construed *in pari materia* to provide a compatible and harmonious interpretation of both statutes. *V.C.F. v. State*, 569 So.2d 1364, 1365 (Fla. 1st DCA 1990). Moreover, Section 364.336 which contains the ambiguous language "gross revenues derived from intrastate business" must be interpreted in the context of the more specific statute, Section 350.113, which deals with the same general subject (regulatory assessment fees). *St. Johns River Water Management District v. Consolidated - Tomoka Land Co.*, 717 So.2d 72, 80 (Fla. 1st DCA 1998), *rev. den.*, 727 So.2d 904 (Fla. 1999). Indeed, the Legislature's clear and express reference to Section 350.113(3) in Section 364.336 reflects the Legislature's intent to treat Section 350.113(3) as part of Section 364.336:

> Reference statutes are those:
>
> which refer to and by the reference wholly or partially adopt pre-existing statutes.
>
> In the construction of such statutes the statute referred to is treated and considered as if it were incorporated into and formed part of that which makes the reference....

State v. J. R.M., 388 So.2d 1227, 1229 (Fla. 1980), quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 808-09, 18 So. 693, 698 (1918).

The harmonious application of Sections 350.113(3) and 364.336 requires a finding, prior to assessing regulatory assessment fees, that the revenues of a telecommunications company are both: (1) derived from intrastate business; and (2) related to the cost of regulation performed by the Commission.

First, as confirmed by this record, Level 3's collocation product, which is typically used to house customers' equipment is predominantly interstate. (V. 1, R. 30). As previously noted, collocation does not in and of itself involve the provision of telecommunications service (V.1, R. 29-30), but rather is more akin to a real property transaction. To the extent the real property transaction may be related to telecommunications or information services, it is important to note that most of the equipment that is placed in Level 3's Gateways facilities is used for the provision of Internet-related services. The Internet is "an international network of interconnected

computers that enables millions of people to communicate with one another in 'cyberspace' and to access vast amounts of information from around the world." *Reno v. ACLU*, 521 U.S. 844 (1997). The Federal Communications Commission ("FCC") has consistently held that Internet-bound telecommunications traffic is predominantly "interstate" in nature.[20]

Therefore, assuming arguendo, that the Commission has some authority to regulate even the unregulated "intrastate business" of an ALEC, there is no record support for the conclusion that revenues generated by Level 3's collocation agreements are generated by "intrastate business." Rather, they are revenues associated with providing support for Internet services, which according to the FCC are inherently interstate in nature.

Second, Level 3's collocation is not regulated by the Commission. The only revenues of Level 3 that are subject to Commission regulation are those revenues

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[20]See *In the matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, 14 FCC Rcd. 3689, (1999), reversed on other grounds, *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 (CADC 2000). Recently, on April 27, 2001, the FCC reiterated its longstanding position that traffic destined for location via the Internet is predominantly interstate and not subject to state commission jurisdiction. *See*, Order on Remand and Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, FCC 01-131, CC Docket Nos. 96-98, 99-68 (2001).

derived from Level's provision of "basic local telecommunications service"[21] which is defined under Section 364.02(2), Florida Statutes, and does not include the provision of collocation space.

The Commission ignored these critical facts in reaching its decision. Worse still, the Commission could not even support its own interpretation of Section 364.336. Under the Commission's interpretation, it must find that Level 3's collocation revenues are "derived from intrastate business." The most the Commission could say, indeed speculate, was that Level 3's collocation revenues are "directly related to its intrastate business and the use of telecommunication facilities."[22] Such speculation has no support in the record and lends no legal support to the Commission's position. Clearly, Level 3's rental of space to another entity so that the other entity can provide Internet, data related information services or telecommunications service (interstate or intrastate) has nothing to do with Level 3's regulated, intrastate telecommunications revenues.

Lost in the Commission's myopic analysis of Section 364.336, Florida Statutes, is the clear mandate in Section 350.113(3), Florida Statutes, that "the fees shall, to the extent practicable, be related to the cost of regulating such type of regulated

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[21]*See* §364.337(5), Fla. Stat.

[22]Final Order, at 5 (emphasis supplied).

company." This mandate was not lost on Commissioner Jaber, who stated in her dissent:

> 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.
>
> . . .
>
> 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.

Final Order, at 8.

Further, Florida law recognizes that a true fee, imposed as part of a regulatory process, has to be directly related to the actual costs of the regulatory process or the services rendered. See *Finlayson v. Conner*, 167 So.2d 569, 573 (Fla. 1964). Section 350.113(3) meets that test, yet it was ignored by the Commission.

A statute should be construed and applied so as to give effect to the evident legislative intent and legislative intent should be gathered from consideration of the statute as a whole rather than from any part thereof. *Florida Jai-Alai, Inc. v. Lake*

Howell Water and Reclamation District, 274 So.2d 522 (Fla. 1973). These principles of statutory construction require the Court to achieve a harmonious interpretation of Sections 350.113(3) and 364.336. Otherwise, Section 364.336 would authorize the Commission to collect regulatory assessment fees from revenues generated by any "intrastate business" that an ALEC may choose to engage in regardless of its relationship to its functions as an ALEC - - e.g., hot dog stands, computer sales, etc. The Legislature clearly never intended to give the Commission such power.

B. The Commission erroneously failed to consider the entire statutory scheme in determining that revenues collected from Level 3's collocation agreements constitute "intrastate business" subject to regulatory assessment fees.

The Commission's conclusion that Level 3's collocation revenues are subject to regulatory assessment fees because they are derived from "intrastate business" must also be reversed because the Commission failed to consider other sections of Chapter 364 in interpreting what "intrastate business" the Commission is authorized to regulate.

The term "intrastate business" is not specifically defined in Chapter 364, Florida Statutes. Therefore, this Court must look elsewhere to determine what the Legislature intended when it authorized the Commission to collect regulatory assessment fees for revenues generated from "intrastate business." It is unreasonable to assume that the Legislature intended the term "intrastate business" to include any

business conducted by Level 3 in Florida, whether regulated by the Commission or not. Section 350.113(1) very clearly provides that regulatory assessment fees be collected by the Commission and deposited in the Florida Public Service Regulatory Trust Fund are to be used by the Commission only for the performance of the various functions and duties required of it by law.[23]

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). In reviewing the provisions of a statute, a court is to look to the provisions of the whole law, and to its object and policy, rather than consider 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). The rules of statutory construction provide that when the meaning of a statute is at all doubtful, the law favors a rational, sensible construction. *Realty Bond and Share Co. v. Englar*, 143 So. 152 (Fla. 1932). Courts are to avoid an interpretation of a statute that would produce unreasonable consequences. Id. To interpret the term "intrastate business" in Section 364.336 to include, without limitation, any intrastate business activity that an ALEC engages in, as the Commission did in the Final Order, is an irrational construction, leads to absurd results, and would indeed

[23] §350.113(1), Fla. Stat.

produce unintended, harmful consequences to new entrants in Florida's local telecommunication market.

As previously noted, Section 364.337(5), Florida Statutes, limits the Commission's regulatory oversight over ALECs to "the provision of basic local exchange telecommunications service." The term "telecommunications service," although not defined in the Florida Statutes, is defined in 47 U.S.C. §153(46), to mean:

> ... the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used.

Level 3's rental of collocation space does not constitute a "telecommunications service." Nonetheless, in the Final Order, the Commission held:

> 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 telecommunications company's communications service", as Level 3 has suggested.[24]

The Commission's attempt to expand its jurisdiction must be rejected. While Section 364.336, Florida Statutes, does not explicitly address the Commission's regulatory authority over ALECs, Section 364.337(5), Florida Statutes, clearly does.

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[24]Final Order, at 4-5.

Section 364.337(5) explicitly limits the scope of the Commission's regulatory authority over ALECs to the provision of basic local exchange telecommunications service - - and nothing else.[25] The Commission has no other legislative authority to regulate ALECs. Section 364.337(5), Florida Statutes, was enacted after Section 364.336, Florida Statutes,[26] and thus should be viewed as the clearest and most recent expression of legislative intent. *See Palm Beach Canvassing Board v. Harris,* 772 So.2d 1220 (Fla. 2001).

An analysis of the entire statutory scheme granting the Commission its authority to regulate leads to the inescapable conclusion that the Commission can collect

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[25]By contrast, the Commission bears the responsibility of - and is actively involved in - regulating collocation services provided by ILECs pursuant to Section 251(c)(6) of the Federal Telecommunications Act of 1996, 47 USC §251(c)(6). Indeed the Federal Telecommunications Act makes clear that the state commissions are specifically charged with ensuring compliance with the provisions of the statute, which include the ILECs collocation obligations in Section 251(c)(6). *See*, 47 U.S.C. §§252(b) and (c) (providing for state commissions to oversee arbitrations and requiring state commissions to ensure that the results comply with the requirements of Section 251.) Because the Commission is actively involved in regulating ILEC collocation services, it can reasonably be said that it incurs a cost in undertaking such regulation, and best that it is entitled to assess the ILECs for the cost of such regulation. Thus, in no way is inconsistent with the Florida statutes to assess the ILECs on their regulated collocation services while limiting the Commission's ability to assess the provisions of non-regulated collocation.

[26]Section 364.336 was enacted in 1990. *See* Ch. 90-244, §§33, 49, Laws of Florida. Section 364.337(5) was enacted in 1995. *See* Ch. 95-403, §23, Laws of Florida.

regulatory assessment fees only on the intrastate revenues of Level 3 that it regulates -- telecommunications services.

C. In 1995, the Legislature Authorized Competition in the Local Telecommunications Market and Significantly Curtailed the Commission's Regulatory Authority Over Local Telecommunications Carriers

In 1995, the Legislature substantially revised Chapter 364, Florida Statutes, authorizing competition in the local telecommunications market.[27] The Legislature clearly, expressly, and repeatedly stated its intent to promote local service competition by subjecting ALECs to a lower level of regulatory oversight and diminished regulation:

> (4) The Commission shall exercise its exclusive jurisdiction in order to:
>
> . . .
>
> (b) *Encourage competition through flexible regulatory treatment* among providers of telecommunications services in order to insure the availability of the widest possible range of consumer choice in the provision of all telecommunications services.
>
> . . .
>
> (d) Promote competition by encouraging new entrants into telecommunications markets and by *allowing a transitional period in which new entrants are subject to a lesser level*

[27] See Ch. 95-403, Laws of Florida.

> *of regulatory oversight* than local exchange telecommunications companies.
>
> (e) Encourage all providers of telecommunications service to introduce new or experimental telecommunications services *free of unnecessary regulatory restraints*.
>
> (f) *Eliminate any rules and/or regulations which will delay or impair the transition to competition*. (emphasis added)

While at the same time, the Legislature distinguished the role of the Commission in regulating ILECs by stating in 364.01(4)(i):

> The Commission shall exercise its exclusive jurisdiction in order to:
>
> (i) Continue its historical role as a surrogate for competition for monopoly services provided by local exchange telecommunications companies.

The clear legislative intent reflected in Section 364.01 was to grant the Commission less regulatory oversight over the new competitive entrants into the telecommunications market than it had over the historical monopoly local exchange companies.

Less than one year later, in the federal Telecommunications Act of 1996, Congress also recognized the need for asymmetrical regulation of ILECs and ALECs to achieve local competition by imposing significantly more obligations on ILECs.

Specifically, under 47 U.S.C. §251(b), Congress imposed certain obligations on all local exchange carriers concerning their duties to interconnect with each other,[28] while in 47 U.S.C. §251(c), Congress imposed additional obligations on ILECs only, including the duty to collocate.[29] Congress did not impose a collocation obligation on ALECs.

The clear legislative intent to reduce the regulatory oversight of the Commission by Congress and the Legislature was evident to Commissioner Jaber, who stated in her dissent:

> 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

[28]47 U.S.C. §251(b) imposes the following obligations on all local exchange carriers: (1) resale; (2) number portability; (3) dialing parity; (4) access to rights of way and (5) reciprocal compensation.

[29]47 U.S.C. §251(c) imposes the following additional obligations on incumbent local exchange carriers: (1) duty to negotiate; (2) duty to provide interconnection; (3) duty to provide unbundled access to its network; (4) duty to offer its services for resale; (5) duty to provide notice of changes in its network; and, (6) duty to collocate.

> exchange company and an example of the companies the federal and state Telecommunications Acts encourage us to promote by lesser regulation.

Order, at pages 7-8. The Commission, in the Final Order, failed to recognize the clear legislative mandate to encourage competition and reduce the Commission's regulatory powers. Level 3, as an ALEC, is subject to the Commission's regulatory authority over only its basic local telecommunications services. However, Level 3, as a provider of unregulated services, should be free to compete in the Florida marketplace for other services free from the Commission's regulatory restraints. The mere grant of an ALEC license should not subject all of a company's operations to the Commission's regulation (or assessment) without a specific legislative mandate authorizing regulation by the Commission.

D. The Commission has previously held that regulatory assessment fees apply only to revenues generated by business activities regulated by the Commission irrespective of the corporate structure of the regulated company.

Recently, in *Verizon*, *supra*, the Commission addressed its authority to collect regulatory assessment fees from Verizon, a certificated ILEC.[30] In that docket, Verizon petitioned the Commission for a Declaratory Statement that it should not be required to pay regulatory assessment fees on directory advertising revenues because the revenues were earned by an affiliate, Verizon Directories Corp.

The Commission denied Verizon's petition holding that the revenues at issue were subject to a regulatory assessment fee. The Commission, in finding that a regulatory assessment fee could be collected on the revenues, did not focus on the corporate structure of Verizon, but instead properly focused on whether the revenues generated were from a business practice regulated by the Commission. The Commission held:

> 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."

[30] *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, Order No. PSC-01-0097-DS-TL issued January 11, 2001 ("*Verizon*").

> *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 listing. Section 364.02(2), Florida Statutes (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 for the regulatory assessment fee statute.

Verizon, at 4 (emphasis supplied).

The Commission in *Verizon* held that because revenue from telephone directory advertising is derived from a required service, it is subject to a regulatory assessment fee, irrespective of the corporate structure of the company collecting the fee. In holding that a regulatory assessment fee should be assessed upon the business or service that the Commission is legislatively authorized to regulate, and not based upon a regulated company's corporate structure, it stated that "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' ... revenues were subject to regulatory assessment fees and others were not, merely because of differences in corporate structure*." Id. at 4. (Emphasis added).

Despite this clear statement by the Commission in *Verizon* that differences in corporate structure should not lead to companies being treated differently for the purposes of regulatory assessment fees, that is the precise result of the Final Order issued by the Commission in the instant case. As confirmed by the record, Level 3's collocation agreements are not regulated by the Commission. (V. 1, R. 55).

Thus, contrary to its own recent holding in *Verizon*, the Commission has unlawfully seized upon Level 3's corporate status as an ALEC to ignore the requirement of Section 350.113(3) and impose regulatory assessment fees on non-regulated collocation revenues.

III. The Imposition of Regulatory Assessment Fees on Level 3's Collocation Revenues Discriminates Against Level 3 And Violates Level 3's Constitutional Right to Equal Protection

It is well settled law that all similarly situated persons are equal under the law and must be treated alike. *See, Ocala Breeders Sales Company, Inc. v. Florida Gaming Centers, Inc.*, 793 So.2d 899 (Fla. 2001). The Commission's order assessing regulatory assessment fees on revenues generated from Level 3's collocation business violates this fundamental constitutional tenet. If Level 3 provided collocation as a separate business, the revenues generated therefrom would not be subject to the Commission's regulatory assessment fees. (V. 1, R. 68). Moreover, businesses that do not have an ALEC certificate that rent collocation space in the same manner as

Level 3 does today - - direct competitors of Level 3 in this particular line of business - - also avoid the assessment that is being imposed upon Level 3.

ALECs are subject to Commission regulation over the provision of "basic local exchange telecommunications service."[31] Nothing under Florida law authorizes the Commission to regulate any other services offered by a company that may happen to hold an ALEC certificate. Thus, ALECs are free to engage in any lawful unregulated intrastate or interstate business free from regulatory oversight. Assessing regulatory assessment fees on a company's revenue generated in a competitive market that is not regulated by the Commission (such as an orange grove, a hot dog stand, or collocation) simply because the company possesses an ALEC certificate is discriminatory.

Section 364.336, Florida Statutes, empowers the Commission to collect fees from an ALEC's "gross operating revenues derived from intrastate business." That legislative directive may not be *facially* discriminatory, but the Commission's broad interpretation of Section 364.336 in the Final Order results in discriminatory treatment against Level 3 in the collocation marketplace. It is well settled under traditional equal protection analysis that a law, non-discriminatory on its face, may nevertheless be declared unconstitutional as applied, if its effect is to discriminate between those

[31] *See* §§364.02(2) and 364.337(5), Fla. Stat.

similarly situated. *See Yick Wo v. Hopkins*, 118 U.S. 356 (1886), and *Wiggins v. City of Jacksonville*, 311 So.2d 406 (1st DCA 1975).

This Court has consistently ruled that regulatory statutes that discriminate for or against competing businesses are not constitutional. In *Fronton, Inc. v. Florida State Racing Commission*, 82 So.2d 520 (Fla. 1955), this Court invalidated a licensing statute which had the effect of requiring a jai alai permit holder in Palm Beach County to seek annual voter approval of the permit while not subjecting jai alai permit holders in other counties to the same requirement. The court held:

> Classifications by counties or otherwise for the purpose of prescribing regulations or exactions that in effect impose burdens on some of the citizens of the state that in kind or extent are not imposed upon other citizens of the state **under practically similar conditions, with no conceivably just basis for the classifications or discriminations, constitute a denial to those injuriously affected of the equal protection of the laws in violation of the Fourteenth Amendment to the federal Constitution.**

Id. at 523 (emphasis supplied).

This Court has also held that a statute that afforded a competitive advantage to one business entity over its competitors violated the competitors' right to equal protection and was therefore unconstitutional. In *Hialeah Race Course, Inc. v. Gulfstream Park Racing Association*, 245 So.2d 625 (Fla. 1971), the Court stated:

> There is nothing in the record to indicate that any track except Hialeah "may reasonably be expected" to exceed the revenue produced by Hialeah, so long as Hialeah has the advantage of the prime racing dates. The trial judge found that the statute has the effect of granting and perpetuating to Hialeah "an unconscionable advantage" in the selection of racing dates and of denying to other persons "similarly circumstanced the right to participate in the business of horse racing on any basis equal to or in excess of the privilege granted to Hialeah." We agree. We can only conclude, as did the trial court, that the statute in question has the effect of denying to Gulfstream equal protection and due process of law.

Id. at 629.

Similarly, in *West Flagler Kennel Club v. Florida State Racing Commission*, 153 So.2d 5 (Fla. 1963), this Court struck down a statute on equal protection grounds which conveyed special treatment to certain permit holders. The Court found:

> [S]uch an enactment lacks uniformity and equality of operation among those who may now or hereafter be situated similarly in all material respects....

Id. at 9.

In this case, Level 3 is the same or similar type of corporate entity as any other corporate entity (other than an ILEC) that provides competitive collocation space. It just so happens that Level 3 also provides regulated telecommunications services, a fact seized upon by the Commission to impose regulatory assessment fees on all of Level 3's intrastate revenues. The Commission does not and presumably would not

impose regulatory assessment fees on competitive collocation companies since such providers do not provide Commission regulated services. The same, of course, is true of Level 3's collocation services, and to impose regulatory assessment fees on Level 3's collocation services, but not on the collocation services of non-ILEC competitive providers, is discriminatory and violates Level 3's constitutional right to equal protection.

In the present case, the Final Order discriminates against Level 3, lacks uniformity and equality of operation, and affords an unfair advantage to competing providers of collocation that do not happen to hold ALEC certificates. Such discrimination violates the constitutional right of equal protection as articulated by this Court in the above decisions.

Without exception, all statutory classifications that treat one person or group differently than others must bear some reasonable relationship to a legitimate state objective and cannot be discriminatory, arbitrary, or oppressive. See, *Abdala v. World Omni Leasing, Inc.*, 583 So.2d 330 (Fla. 1991). The imposition of regulatory assessment fees on revenues generated by Level 3 from its *unregulated* collocation business agreements bears no relationship to any legitimate state objective. Level 3 should be allowed to compete in the collocation marketplace, or any other unregulated marketplace in Florida it chooses, free of the Commission's regulatory ball and chain.

CONCLUSION

Level 3's collocation agreements are simply not the business of the Commission. The Commission's attempt to subject Level 3's collocation revenues to regulatory assessment fees exceeds its statutory authority. It is also unconstitutional. The Final Order must be reversed.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Amended Initial Brief of Level 3 Communications, LLC was furnished by U. S. Mail this _____ day of November, 2001, to the following:

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In compliance with the Court's Administrative Order dated July 13,1998, the font size used in this Brief is Times New Roman, size 14.

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