SUPREME COURT OF FLORIDA

Case No. SC01-2050

LEVEL 3 COMMUNICATIONS, LLC

Appellant,

v.

E. LEON JACOBS, JR., et al.

Appellees.

REPLY BRIEF OF LEVEL 3 COMMUNICATIONS, LLC

Michael R. Romano, Esq.
Greg L. Rogers, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021
(720) 888-7015 (Telephone)
(720) 888-5134 (Telecopier)

Kenneth A. Hoffman, Esq.
Florida Bar No. 307718
Martin P. McDonnell, Esq.
Florida Bar No. 301728
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, Florida 323302

(850) 681-6788 (Telephone)
(850) 681-6515 (Telecopier)

Attorneys for Level 3 Communications, LLC

TABLE OF CONTENTS

Page

TABLE OF CITATIONS

Cases **Page**

Federal Communications Commission Orders

Florida Public Service Commission Orders

Florida Statutes

Federal Statutes

ARGUMENT IN REPLY

The amended answer brief ("Brief") filed by the Florida Public Service Commission ("Commission") includes several concessions that highlight the impropriety of the declaratory statement ("Final Order") challenged by this appeal. First, the Commission concedes that the purpose of regulatory assessment fees is to offset the cost of regulation. The Commission further concedes that Level 3 Communications, LLC's ("Level 3") collocation business is not regulated by the Commission and that collocation is not an enterprise that Level 3 or any alternative local exchange telecommunications company ("ALEC") must engage in pursuant to state or federal law. Nonetheless, the Commission asks this Court to acquiesce to the Commission's attempt to extend its regulatory assessment power to include revenues derived from services beyond the Commission's regulatory authority. The Commission's attempt to extend its assessment authority is not supported by the existing legislation and ignores the purpose of regulatory assessment fees.

The Florida Legislature has restricted the areas within which the Commission has the authority to regulate. With the same restraint, the Legislature has authorized the Commission to collect regulatory assessment fees to offset its regulatory costs. This Court should follow the letter and spirit of Chapters 350 and 364, Florida

Statutes, and rule that the Commission has exceeded its statutory authority in attempting to impose regulatory assessment fees on Level 3's collocation revenues.

I. Standard of Review

The Commission contends that its Final Order, which purports to establish the scope of its regulatory assessment authority, is entitled to the same presumption and deference accorded to orders the Commission enters while performing its regulatory oversight functions. (Brief, pgs. 8-9). Such regulatory orders come before a reviewing court with a presumption that they have been made within the Commission's jurisdiction and powers. The Commission cites *United Telephone Company v. Public Service Commission*, 496 So.2d 116, (Fla. 1986)("*United Telephone*") for the general proposition that "the Commission's interpretation of a statute it is charged with enforcing is entitled to great deference." Level 3 does not dispute that *United Telephone* establishes the standard of review for regulatory decisions of the Commission generally. However, this Court has consistently held that such deference cannot be accorded when the Commission exceeds its authority. *See*, *Tampa Electric Company v. Joe Garcia, et al.*, 767 So.2d 428 (Fla. 2000) ("*Tampa Electric*").

In *Tampa Electric*, this Court made it clear that deference would not be accorded to Commission statutory interpretations outside of specifically delegated

authority. In reversing the Commission's determination of need for a proposed electric power plant that was not fully committed to retail customers, this Court held:

> Our reading of this statutory history leads us to continue to conclude that the present statutory scheme was intended to place the PSC's determination of need *within the regulatory framework allowing Florida regulated utilities to propose new power plants to provide electrical service to their Florida customers at retail rates*.
>
> * * *
>
> Accordingly, we find that the statutory scheme.... was not intended to authorize the determination of need for a proposed power plant output that is not fully committed to use by Florida customers who purchase electrical power at retail rates. Rather, we find that the Legislature must enact express statutory criteria if it intends such authority for the PSC.

Id. at 435 (emphasis added); *see also*, *Citrus County v. Southern States Utilities*, 656 So.2d 1307 (Fla. 1st DCA 1995) ("*Southern States*").[1]

---

[1]In the *Southern States* case, the First District reversed a Commission order approving a rate structure with statewide uniform rates. The court concluded that:

> The Commission's order must be reversed based on our finding that Chapter 367, Florida Statutes, did not give the Commission authority to approve uniform statewide rates for these utility systems which are operationally unrelated in their delivery of utility service. As an administrative agency created by the Legislature, the Commission's power, duties and authority are those and only those that are conferred expressly or impliedly by statute of the State.

Id. at 1311.
Southern States was overruled on other grounds in *Southern States Utilities v.*

The threshold issue in the present case, overlooked by the Commission, is whether the Legislature has granted authority to the Commission to impose the fees at issue since the Commission derives its powers solely from the Legislature. *See*, *Florida Bridge Company v. Bevis*, 363 So.2d 799, 802 (Fla. 1978). Even the *United Telephone* decision relied upon by the Commission recognizes that a presumption to support the exercise of jurisdiction by the Commission cannot be applied without a legislative grant of that jurisdiction. The Court cited *Radio Telephone Communications, Inc. v. Southeastern Telephone*, 170 So. 2d 577, 582 (Fla. 1965), where this Court previously held:

> [O]f course, the orders of the Florida Commission come to this court with a presumption of regularity.... 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 exercise of a particular power that is being exercised, the further exercise of the power should be arrested.

Id. at 118. (statutory citation omitted).

The Commission does not, as it asserts, acquire legislative authority and deference for its interpretations simply by issuing a declaratory statement. (Brief, pg. 8). While Section 120.565 provides general authority to issue declaratory statements,

---

Florida Public Service Commission, 714 So.2d 1046 (Fla. 1st DCA 1998). The latter decision did not disturb the standard of review analysis in the earlier case.

that procedural authority under the Administrative Procedures Act has no bearing on the more fundamental question of whether the substantive interpretation improperly extends beyond the authority granted by the statute. Thus, for example, the Commission cannot issue a declaratory statement interpreting the State's sales tax laws. Similarly, it should not be allowed to expand its revenue generating authority without specific legislative authority.

Because the Commission has not been granted specific authority from the Legislature to regulate Level 3's collocation services, the *Southern States* and *Tampa Electric* decisions establish the standard of review that applies to the case sub judice. Those decisions confirm that the Commission does not have unfettered discretion to interpret legislative enactments and the Commission's statutory interpretation of the scope of its authority is not reviewed under the "clearly erroneous" standard. Ultimately the courts must decide the boundaries of the Commission's authority and the goals of the Legislature. The Commission's determination concerning the extent of its revenue-generating authority does not come before this Court clothed with any presumption of correctness. The legal interpretation of the statutory scheme at issue is properly a matter for de novo consideration by the Court. As previously enunciated by this Court, "if there is a reasonable doubt as to the lawful exercise of a particular power that is being exercised, the further exercise of the power should be arrested."

Radio Telephone, supra. Because the Commission's Final Order is based on a myopic reading of Section 364.336, Florida Statutes, that disregards the overall statutory scheme, it should be reversed.

II. The Commission's Final Order is an Invalid Extension of Commission Authority Beyond the Statutory Scheme

The Commission argues that Sections 350.113 and 364.336, Florida Statutes create an "equation" for the "fair" calculation and collection of regulatory fees. (Brief, pgs. 9-10). The Commission further argues that the requirement of one section of the Florida Statutes is not "necessarily relevant or applicable" to the other. (Brief, pg. 11). The Commission's contradictory assertions - that these statutes at once create "an equation" and yet are not "relevant or applicable" to one another - are telling. The two statutes are in fact inextricably linked and should not be reviewed in isolation.

It is a fundamental tenet of statutory construction that legislative provisions must be construed to operate *in pari materia* or in harmony with each other. When interpreting a statute, the provisions of the whole law and its object and policy should be considered, as opposed to viewing the 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). This Court cannot ignore the plain language of Section 350.113(3), Florida Statutes which provides that regulatory assessment fees

"shall, to the extent practicable, be related to the cost of regulating such type of regulated company." In fact, Section 364.336, Florida Statutes, specifically references Section 350.113(3), Florida Statutes.

Section 364.337(5), Florida Statutes, limits the Commission's regulatory oversight over Level 3 and other ALECs to "the provision of basic local exchange telecommunications service." The Commission concedes in its brief and the record is clear that the Commission does not regulate Level 3's or any other ALEC's collocation services in any way. (V.1, R.55). Unlike Incumbent Local Exchange Carriers ("ILECs"), ALECs such as Level 3 are under no obligation to enter into any collocation agreements.[2] Because the Commission incurs no cost of regulation regarding any aspect of Level 3's collocation services, there is no basis in law for the Commission to assess Level 3's revenues derived from collocation. It is remarkable that the Commission fails to address the absurdity of its position that would effectively

[2]ILECs are obligated to provide collocation pursuant to federal law, as discussed *infra* at pgs. 10-12. In its brief, the Commission attempts to blur the line between ILEC and ALEC collocations by arguing that interconnection between carriers is sometimes accomplished through collocation and therefore all collocation revenues are subject to regulatory assessment fees. (Brief, pgs. 19-20). Collocation may be a technical means of establishing interconnection between carriers if they so choose, but just because it *might* be used as a technical way to interconnect, does not mean all collocations are therefore subject to regulatory assessment fees. In fact, the record is clear that most of Level 3's collocations are for the provision of internet-related services; not for intrastate business. *See* Section III of reply brief, *infra*.

empower the Commission to levy a regulatory assessment fee on revenues generated from any and all unregulated intrastate business of an ALEC, whether the revenue was generated from an orange grove, a hot dog stand, or a soda machine in the lobby of the company's building.

The Commission erroneously argues that "[t]he regulatory statutes provide no clear basis for treating ALEC collocation revenues any differently than ILEC collocation revenues." (Brief, pg. 16). Contrary to the Commission's assertion, the regulatory statutes treat ALEC-offered and ILEC-offered collocations differently on the most fundamental level. ILEC-offered collocations are statutorily mandated and regulated. Collocations offered by ALECs such as Level 3 are not mandatory and are not regulated.[3] This difference in regulatory treatment highlights the reason why the Commission should not collect regulatory assessment fees based upon revenues generated from the leasing of space to third parties by an ALEC. Quite simply, the Commission does not regulate those collocations. While there is a regulatory cost to the Commission regarding the provision of collocation by ILECs, there is *no* regulatory cost whatsoever to the Commission with respect to ALEC collocations. In sum, there is a clear statutory basis for treating ALEC collocation revenues

[3]Compare 47 USC § 251(b) (obligations of ILECs and ALECs, which does not include collocation) with 47 USC § 251 (c) (obligation of ILEC to permit collocation).

differently than ILEC collocation revenues. The Final Order fails to take into account this fundamental difference in the regulatory framework and the decision is therefore fatally flawed. See, *Tampa Electric*, *supra*, 767 So.2d at 435.

Allowing the Commission to impose regulatory assessment fees on Level 3's collocation revenues merely because Level 3 is a certificated ALEC discourages competition in the local telecommunications industry and is therefore contrary to the stated legislative intent of Chapter 364, Florida Statutes. Section 364.01(4)(b), Florida Statutes, states that the Commission shall exercise its jurisdiction to:

> (b) Encourage competition through flexible regulatory treatment among providers of telecommunications services. . .

The Final Order penalizes those ALECs who happen to offer unregulated services in Florida. Indeed, the Final Order creates a disincentive to seeking ALEC certification since a company would be subjecting its entire Florida revenue stream to Commission regulatory fees. Because the Final Order discourages competition, it contravenes Section 364.01(4)(b), Florida Statutes.

III. The Commission's Contention that Level 3's Collocation Agreements Generate "Gross Intrastate Revenues" is Not Supported by the Record

In the Final Order and in its Brief, the Commission contends that revenues generated by Level 3's collocation business constituted "gross revenues from intrastate business" and are therefore subject to regulatory assessment fees pursuant to Section 364.336, Florida Statutes. There is absolutely no factual support in the record for this conclusion. Indeed, the record is to the contrary. The unrebutted evidence is that Level 3 derives collocation revenues from the leasing of space to third parties in its "gateway" facilities. These facilities are technology centers where communication and information services customers can 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). See also the discussion regarding the interstate nature of Internet-related services in Level 3's initial brief at pages 23-24, and *In re: Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, FCC 01-131, CC Dockets 96-98 and 99-68 (2001). Because there is *no* factual support in the

record for the Commission's conclusion that the revenues generated by Level 3's collocations enterprise constitute "intrastate" business, the Final Order must be reversed. *See, Citizens v. Florida PSC*, 425 So.2d 534, 538 (Fla. 1982).

IV. The Commission's Precedents Do Not Support the Final Order

The Commission recently addressed its authority to collect regulatory assessment fees on revenues generated by Verizon Florida, Inc., a certificated ILEC.[4] The Commission's analysis in *Verizon* correctly focused on whether the revenues were derived from a regulated or required service. There is no statutory or legal basis for applying a different analysis in the present case. In *Verizon*, the Commission ruled that the imposition of regulatory assessment fees was appropriate because the revenues at issue were generated from activities that Verizon was required by law to provide. By contrast, Level 3's collocations are *not* related to any activity required by law or regulated by the Commission. Thus, the analytical framework followed by the Commission in *Verizon* supports the conclusion that Level 3's collocation revenues should not be subject to any regulatory assessment fees.

---

[4]*In re: Petition by Verizon Florida, Inc. for Declaratory Statement on Applicability of Section 364.336, F.S. and Rule 25-4.0161, FAC, Regulatory Assessment Fees,* Docket No. 001556-TL, Order No. PSC-01-0097-DS-TL issued January 11, 2001 ("Verizon"), appeal pending, S.Ct. Case No. SC01-323.

The proper focus is whether the revenues at issue were generated by an activity that is regulated by the Commission or required by law.[5]

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

The Commission seeks to avoid this Court's examination of the Final Order pursuant to the equal protection clause of the United States Constitution by arguing that "Level 3 did not raise any equal protection issues in the proceeding below and the Commission did not have the opportunity to consider them in its decision interpreting its regulatory assessment fee statutes." (Brief, pg. 21). This argument erroneously presupposes that the Commission has authority to resolve constitutional claims. *See, Myers v. Hawkins*, 362 So.2d 926 (Fla. 1978).

The doctrine of exhaustion of administrative remedies is not applicable if the pursuit of an administrative remedy would be to no avail. It is proper for an appellate court to pass on the constitutionality of a statute when such is necessary in reviewing agency action, although there has been no agency decision on the constitutional question. *See, Rice v. Department of Health and Rehabilitative Services*, 386 So.2d

[5]In its brief, the Commission inaccurately creates an inference that Level 3's collocations are a "telecommunications service," and therefore should be subject to regulatory assessment fees. (Brief, pgs. 19-20). As noted in Level 3's initial brief, pgs. 6-7, the definition of "telecommunications service" in the Act does not include collocation.

844, (1st DCA 1980). Nevertheless, the concept of equal protection was clearly presented and acknowledged by the Commission. In fact, the Commission, at the Agenda Conference, noted that they would be regulating Level 3 and not other similarly situated collocation providers. (V. 1, R. 68-69).

The Commission claims that Level 3 is not discriminated against because it occupies the same status as other ALECs in Florida, all of whom are subject to the same regulatory assessment fee requirements. (Brief, pgs. 21-22). This claim by the Commission misses the point by focusing only upon regulated businesses and other ALECs - the Commission ignores that its decision discriminates against Level 3 vis-a-vis other, non-certificated providers of the unregulated service at issue here.

Collocation is but one of the many business enterprises of Level 3 in Florida. Level 3 competes against other entities that provide collocation but do not hold an ALEC certificate. Level 3 is similarly situated with companies that hold no ILEC or ALEC certificate or are subsidiaries of companies with ALEC certificates but engage in the provision of collocation services in Florida. Because Level 3's non-certificated competitors in the collocation business pay no regulatory assessment fees to the Commission, it is an equal protection violation to force Level 3 to pay regulatory assessment fees on revenues generated in the same manner as its competitors.

All those similarly situated should be included in one class, at least where there are no practical differences that are sufficient to legally warrant a further or special classification in the interest of the general welfare. *Eslin v. Collins*, 108 So.2d 889, (Fla. 1959). The Commission clearly does not, and cannot, collect regulatory assessment fees on collocation revenues generated by non-certificated entities that offer collocation services in Florida. The broad extension of the Commission's assessment authority to cover non-regulated revenues of Level 3 is not justified based on any legislative goal and unduly discriminates against collocation companies that are also ALECs. Even if the ends sought to be accomplished by a legislative act are within the police power of the state, the methods provided can be deemed constitutionally objectionable when they are unreasonable and arbitrary, deny equal protection of the laws, and are not truly designed to carry out the real purpose of the act. *Segal vs. Simpson*, 121 So.2d. 790, (Fla. 1960). The Final Order which purports to confirm Commission authority assessing regulatory assessment fees on Level 3's collocation revenues discriminates against Level 3 in the collocation marketplace and violates Level 3's rights to equal protection.

Conclusion

For the foregoing reasons, the Commission's attempt to subject Level 3's collocation revenues to regulatory assessment fees should be rejected and the Final Order should be reversed.

Respectfully submitted,

___Michael R. Romano, Esq.
Greg L. Rogers, Esq.
Level 3 Communications, LLC
1025 Eldorado Boulevard
Broomfield, Colorado 80021
(720) 888-7015 (Telephone)
(720) 888-5134 (Telecopier)

Kenneth A. Hoffman, Esq.
Florida Bar No. 307718
Martin P. McDonnell, Esq.
Florida Bar No. 301728
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O . Box 551
Tallahassee, FL 32302
(850) 681-6788 (telephone)
(850) 681-6515 (telecopier)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Reply Brief of Level 3 Communications, LLC was furnished by U. S. Mail this 22nd day of January, 2002, to the following:

Harold McLean, Esq.
General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 301
Tallahassee, Florida 32399-0850

Martha Carter Brown, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850

Kenneth A. Hoffman, Esq.

CERTIFICATE OF COMPLIANCE

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.

Kenneth A. Hoffman, Esq.

Level3\replybrief