IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-323

VERIZON FLORIDA, INC.,

Appellant,

vs.

E. LEON JACOBS, JR., et al.,

Appellees.
_____/

ON APPEAL FROM A FINAL DECISION OF THE
FLORIDA PUBLIC SERVICE COMMISSION

BRIEF OF AMICUS CURIAE, BELLSOUTH TELECOMMUNICATIONS, INC.

April 26, 2001

ADORNO & ZEDER, P.A.
Raoul G. Cantero, III
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133

Attorneys for *amicus curiae*,
BellSouth Telecommunications, Inc.

TABLE OF CONTENTS

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Rules of Procedure

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

Other authorities

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

INTRODUCTION

This an appeal from a declaratory statement of the Florida Public Service Commission ("PSC") concerning the payment of regulatory assessment fees ("RAFs") on directory advertising revenues. This Court has jurisdiction. Art. V, § 3(b)(2), Fla. Const. (1980); § 364.381, Fla. Stat. (1997); Fla. R. App. P. 9.030(a)(1)(B)(ii). The issue on appeal is whether a local exchange carrier ("LEC") that has elected price regulation under section 364.051(1)(a), Florida Statutes, should be required to pay regulatory assessment fees under section 364.336, Florida Statutes, for directory advertising revenues earned by an affiliate.

BellSouth Telecommunications, Inc. submits this brief as *amicus curiae* in support of Appellant Verizon Florida, Inc.'s position on appeal. Both Verizon Florida and *amicus* BellSouth are LECs. As with Verizon Florida, an affiliate of BellSouth and not BellSouth itself receives revenues for directory advertising. Both Verizon Florida and BellSouth have opted for price regulation. Therefore, they are now exempt from many statutes regulating other telecommunications companies under rate-of-return regulation. *See* § 364.051(1)(c), Fla. Stat. (1997).

While BellSouth concurs with all of the arguments in Verizon Florida's brief, including Verizon Florida's statutory interpretation argument, BellSouth focuses here on the effect of price regulation, instituted in 1995, on the authority of the PSC to consider directory advertising revenues in setting RAFs. The PSC's failure to fully

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

consider the effect of this new statutory framework -- and the fact that Verizon has chosen to be regulated within that framework -- alone requires reversal.

SUMMARY OF ARGUMENT

The PSC does not have the statutory authority to impute the directory advertising revenues of Verizon's affiliate in calculating RAFs owed. Verizon, like BellSouth, has elected price regulation. That election imposed both privileges and obligations. Verizon was required to cap its rates at the level in effect at the time of its election. In return, it would be exempt from several statutes regulating telecommunications companies. *See* § 364.051(1)(a), Fla. Stat. (1995). One of these statutes is section 364.037, which requires the PSC to consider directory advertising revenues when setting rates. Because the PSC does not set Verizon Florida's rates and thus cannot consider such revenues, it also cannot include such revenues in determining the amount of RAFs. Further, once a company elects price regulation, the basis for imputing directory advertising revenues for the purpose of calculating RAFs no longer applies. Simply put, for price-regulated companies, directory advertising revenues have been removed from the regulatory framework. The declaratory judgment violates that framework. No statutory authority supports it.

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

ARGUMENT

The PSC lacks the statutory authority to require telecommunications companies who have chosen price regulation to pay regulatory assessment fees on their affiliates' directory advertising revenues because the statute allowing the PSC to consider such revenues in determining rates does not apply to price-regulated companies

The PSC cannot act outside its statutory authority. The legislature has not granted the PSC the general authority to regulate utilities, but has only given it specific powers. *See Radio Tel. Com., Inc. v. Southeastern Tel. Co.* 170 So. 2d 577, 581 (Fla. 1964). The PSC based its declaratory statement on the authority of section 364.336, Florida Statutes. That statute requires telecommunications companies to pay RAFs. It provides, in relevant part, that "[e]ach telecommunications company licensed or operating under this chapter for any part of the preceding 6-month period, shall pay the commission . . . a fee that may not exceed .25 percent annually of its gross operating revenues derived from intrastate business." § 364.336, Fla. Stat. (1999). The issue here, however, is not whether the PSC may impose RAFs. It clearly has that authority. Rather, the issue is whether the PSC may impute directory advertising revenue of a telecommunications company's affiliate in determining the amount of RAFs payable. To impute such revenues to price-regulated companies would ignore the express, unambiguous language of sections 364.037 and 364.051.

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

In 1995, the Florida Legislature enacted the Florida Telecommunications Act of 1995. *See* Ch. 95-403, Laws of Fla. As this Court has recognized, "by enacting section 364.051, the Legislature intended to reduce the Commission's authority over price-cap regulated companies." *GTC, Inc. v. Garcia*, 25 Fla. L. Weekly S1042, S1044 (Fla. Nov. 16, 2000), *opinion revised*, 26 Fla. L. Weekly S98 (Fla. Feb. 21, 2001). The 1995 Act granted telecommunications companies the option of converting from traditional rate-of-return regulation -- whereby they were guaranteed and limited to a stated rate of return -- to price regulation, whereby rates were capped but companies were not limited to a specific rate of return. *See* § 364.051(1)(a), Fla. Stat. (1995). When a company elects price regulation, its rates for basic local telecommunications service are capped at the rates in effect on the date of election. *See* § 364.051(2)(b), Fla. Stat. (1995). In exchange for these price caps, the companies are exempted from several statutory requirements. *See* § 364.051(1)(c), Fla. Stat. (1995).

As this Court has noted, if a company elects price regulation, "the statute expressly states that such companies shall be exempt from rate base, rate of return regulation, and the requirements in several enumerated statutes." *GTC,* 25 Fla. L. Weekly at S1042. For example, section 364.14, Florida Statutes (1999), grants the PSC the power to determine and fix rates whenever it determines that the rates are unjust, unreasonable, unjustly discriminatory, unduly preferential or otherwise in violation of law. Section 364.051 exempts LECs that have elected price regulation

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

from section 364.14. *See* § 364.051(1)(c), Fla. Stat. (1999). It also exempts price-regulated companies from sections 364.17 and 364.18, Florida Statutes, which deal with the accounts and records of telecommunications companies.

As this Court acknowledged in *GTC*, 25 Fla. L. Weekly at S1043, one of the statutes from which price-regulated companies are exempt is section 364.037, Florida Statutes. *See* § 364.051(1)(c), Fla. Stat. (1999). That section requires the PSC to consider revenues derived from advertising in telephone directories in setting rates. In provides, in part, that

> The commission shall consider revenues derived from advertising in telephone directories when establishing rates for telecommunications services. When establishing such rates, the gross profit from all directory advertising in the local franchise area of a telecommunications company shall be allocated between the regulated portion and the non-regulated portion of its operation as provided in this section.

§ 364.037, Fla. Stat. (1999). Thus, based on the express terms of section 364.037, it does not apply to a company once it elects price regulation.

Moreover, as noted in the dissent, the PSC's practice of imputing affiliate revenues was based on section 364.037's "intent to 'secure most of the benefits of such profits for telephone companies' ratepayers . . .'" (order at 12, quoting *In re Investigation into the regulatory assessment fee calculations for 1985 and 1986 of*

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

United Telephone Co. of Fla., Order No. 21171, 89 F.P.S.C. 5:83, 1989 Fla. PUC Lexis 642 (1989)). Thus, in addition to its express terms, the intent of section 364.037 clearly establishes that its application is limited to accurately setting a telephone company's rates under rate of return regulation, which does not apply to Verizon Florida.

Section 364.037 allows the PSC to consider a LEC's directory advertising revenues in determining its rates. Companies that elect price regulation, however, are no longer governed by section 364.037. Thus, the Legislature intended that the PSC *cannot* consider directory advertising revenues for price-regulated companies. Because the PSC cannot consider such revenues, it also cannot include such revenues in determining the amount of RAFs. As the dissent in the PSC noted (order at 13), "once directory advertising revenues are exempt from rate of return calculation, the basis for imputing them for revenue calculations for RAFs no longer applies." Simply put, for price-regulated LECs, directory advertising revenues have been removed from the regulatory framework. The LECs have paid a price for that removal: they have agreed to cap their rates at the level in effect on the date they elected price regulation. Their agreement, however, was based on the knowledge that, among other things, directory advertising revenues will no longer be subject to fees.

The PSC's decision to continue considering directory advertising revenues in determining RAFs offends this statutory framework. Imputation of directory

Adorno & Zeder, P.A.
2601 SOUTH BAYSHORE DRIVE • SUITE 1600 • MIAMI, FLORIDA 33133 • TELEPHONE (305)858-5555 • TELEFAX 858-4777

advertising revenues violates the Legislature's intent to exempt price-regulated companies from the procedural treatment governing rate-of-return companies. As the dissent below argued (order at 14), "[t]o hold that the Legislature intended to abrogate the inclusion of affiliate revenue from directory advertising, an otherwise unregulated service, in the rate regulation process, yet preserved inclusion of those revenues for purposes of calculating RAFs, implies an authority over unregulated services for which [the PSC] has no basis in statute."

CONCLUSION

For the reasons stated, the PSC's declaratory statement, explaining that the PSC will consider directory advertising revenues of price-regulated telecommunications companies in determining RAFs, should be reversed.

Respectfully submitted,

ADORNO & ZEDER, P.A.

_____

Raoul G. Cantero, III
Florida Bar No. 552356
2601 South Bayshore Drive
Suite 1600
Miami, Florida 33133

Attorneys for *amicus curiae*,
BellSouth Telecommunications, Inc.

CERTIFICATE OF SERVICE

I CERTIFY that a copy of this brief was mailed on April 26, 2001 to:

Marie Tomassi
Trenam, Kemker, et al.
450 Carillon Parkway
Suite 120
St. Petersburg, FL 33716

Attorneys for Verizon Florida, Inc.

Christiana Moore
Division of Appeals
Fla. Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399

Attorneys for Public Service Comm'n

_____

CERTIFICATE OF FONT SIZE

I CERTIFY that this brief was printed using the 14-point Times New Roman font on the WordPerfect word processing program.

_____

356644/008037.0095