**IN THE SUPREME COURT OF FLORIDA**

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| VERIZON FLORIDA, INC. | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | CASE NO. SC01-323 |
| v. | ) | |
| | ) | |
| E. LEON JACOBS, JR. et al. | ) | |
| | ) | |
| Appellees. | ) | |
| _____ | ) | |

APPEAL FROM THE
FLORIDA PUBLIC SERVICE COMMISSION

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# ANSWER BRIEF OF FLORIDA PUBLIC SERVICE COMMISSION

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## SYMBOLS AND DESIGNATION OF THE PARTIES

Appellee, the Florida Public Service Commission, will be referred to in this brief as "the Commission." Appellant Verizon Florida, Inc., formerly known as GTE Florida Incorporated, will be referred to as "Verizon." Amicus Curiae, BellSouth Telecommunications, Inc., formerly known as Southern Bell Telephone and Telegraph Co., will be referred to as "BellSouth."

References to the one volume record on appeal are designated by page (R.___). References to the appendix to this brief are designated (Appendix ___). The Commission Order that is the subject of this appeal, Order No. PSC-01-0097-DS-TL, will be referred to as the "Final Order." References to Florida Statutes are to Florida Statutes 2000 unless noted otherwise.

## STATEMENT OF THE CASE AND FACTS

The Commission accepts Verizon's Statement of the Case and Statement of the Facts as generally adequate to inform the Court of the nature and course of the proceedings below. The Commission believes, however, that additional background information and an understanding of the mechanics of assessing regulatory assessment fees would assist the Court in resolving this appeal.

Verizon mistakenly claims in its brief that neither it nor its directory affiliate receives any revenue for providing a white pages directory. (Brief p. 17) That is incorrect. Verizon's tariffs filed with the Commission demonstrate that it charges its customers for such white page services as additional listings, non-listed numbers, and non-published numbers. (Appendix 2)

By statute, the regulatory assessment fee is set as a percentage of a company's revenues derived from intrastate business. The percentage is capped by statute and varies according to industry. The various caps range from a low of .015625 percent for each municipal electric utility and rural electric cooperative, to 4.5 percent for water and wastewater companies. §366.14, 367.145, Fla. Stat. For telecommunications companies, the fee is capped at .25 percent. §364.336. Fla. Stat. Section 350.113(3), Florida Statutes, provides that the fees "shall, to the extent practicable, be related to the cost of regulating such type of regulated company." Fees collected from electric, gas, and telecommunications companies may not be used to pay the cost of

regulating water and wastewater systems, and fees from water and wastewater systems may only be used to cover the cost of regulating those systems. §367.145(3), Fla. Stat.

Although the statutory cap for fees from telecommunications companies is .25 percent of gross operating revenues, the Commission currently assesses the lower amount of .15 percent (.0015). Fla. Admin. Code R. 25-4.0161. The Commission routinely tracks industry revenues and its cost of regulating each separate industry, and will amend its rules to adjust the percentage accordingly. E.g., In re: Proposed Amendment of Rule 25-7.0131, F.A.C., Investor-Owned Gas Utility Regulatory Assessment Fees, 98 F.P.S.C. 12:192 (1998); In re: Proposed Amendment of Rule 25-6.0131, F.A.C., Investor-Owned Electric Company Regulatory Assessment Fees, 98 F.P.S.C. 12:196 (1998) (Increasing fees for investor-owned gas utilities and decreasing fees for investor-owned electric utilities). If the total revenues for an industry decrease, the Commission will amend its rules to increase the percentage in order to collect additional revenue to cover its cost of regulating, as long as the percentage is under the cap. The amounts collected are deposited in the Florida Public Service Regulatory Trust Fund and are appropriated to the Commission by the Legislature. §350.113(2), Fla. Stat.

Directory advertising revenues have historically been treated by public utility commissions as a source of support for affordable basic local telecommunications service. During the AT&T

divestiture case, United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 194 (D.C. D.C. 1982), the court determined that it was in the public interest for the Bell operating companies to retain directory publishing assets, in part, because profits from yellow pages revenues could continue to be used to subsidize local telephone rates as a means of furthering the goal of universal telephone service.

In Florida, all of a local exchange company's (LEC) directory advertising revenues and all of the expenses of producing telephone directories were historically considered in the ratemaking process. General Telephone Company v. Marks, 500 So. 2d 142 (Fla. 1986). All of the directory advertising revenues were also subject to regulatory assessment fees. Southern Bell challenged the Commission's authority to include these revenues for ratesetting purposes in its 1981 rate case and subsequent appeal. The issue was rendered moot, however, when the legislature determined that the investments, revenues and expenses associated with the publication of the yellow pages are properly included in the ratesetting process. Ch. 83-73, Laws of Fla.; Southern Bell Telephone and Telegraph Co. v. Florida Public Service Comm'n, 443 So. 2d 92 (Fla. 1983).

The Florida Legislature enacted section 364.037 to provide an incentive to the companies to maximize their advertising profits for the benefit of the ratepayers and for their shareholders. Thereafter, within certain parameters, approximately two-thirds of

the profits were considered in the ratemaking process for the benefit of the companies' ratepayers, and one-third of the profits were allocated to the company for the benefit of the shareholders.

Even after the law was changed, LECs continued to include 100 percent of their directory revenues in their gross operating revenues for purposes of regulatory assessment fees pursuant to section 350.113, and subsequently section 364.336. In 1988, the Commission issued an order to show cause to United Telephone Company of Florida (United) which stopped reporting its advertising revenues in its regulatory assessment fee reports after it entered into a publishing agreement with Directories America (DA), a subsidiary of United's parent company. In re: Investigation into the regulatory assessment fee calculations for 1985 and 1986 of United Telephone Company of Florida, 89 F.P.S.C. 5:198 (1989). The agreement covered the production, publication and distribution of United's telephone directories. United billed its customers for directory advertising and remitted the revenues to DA. After the agreement, United reported to the Commission only the fees paid to it by DA.

The Commission stated in its show cause order that the advertising revenues should be "attributed to United in order to prevent the circumvention of Section 350.113(3)(b) through a redirection of revenues to affiliated companies." Id. at 199. The show cause proceeding was ultimately resolved by United's agreement to pay the fees on the revenues from the directories for

areas within its certificated territory. The Commission did not require United to record the directory revenues and associated expenses of the affiliate on United's books and records, but the revenue was thereafter imputed to United for purposes of the regulatory assessment fee calculation. In re: Investigation into the regulatory assessment fee calculations for 1985 and 1986 of United Telephone Company of Florida, 89 F.P.S.C. 6:226 (1989).

The Commission noted in its 1989 United order that GTE (Verizon) and Southern Bell (BellSouth), like United, had contracted with affiliates for the publication of their directories. Both companies, however, continued to include all of the directory revenues in their gross revenues for regulatory assessment fee purposes. 89 F.P.S.C. 5:198.

In 1995, the Florida Legislature substantially revised the regulatory scheme for telecommunications companies in Chapter 364, Florida Statutes. Ch. 95-403, Laws of Fla. Shortly thereafter, Verizon and BellSouth elected price-cap regulation. Pursuant to section 364.051(1)(c), price-cap regulated companies were exempted from rate base, rate of return regulation and the requirements of several statutes pertaining to ratesetting, including section 364.037 regarding the inclusion of directory advertising revenues, and other statutes pertaining to company records and reports. Section 364.051 did not, however, provide an exemption from either section 364.336 or section 350.113, the regulatory assessment fee statutes.

After they elected price-cap regulation, Verizon and BellSouth, among other incumbent LECs, continued to include directory advertising revenues in their gross operating revenues and pay regulatory assessment fees on those amounts. In October, 2000, Verizon filed a petition for a declaratory statement. (R. 2) Amicus BellSouth did not intervene in the proceeding. Verizon argued that because it contracted with an affiliate to publish and distribute its directories, and the directory revenues billed to and collected by Verizon from its customers were then received and recorded on the affiliate's books, those revenues were not Verizon's and were not subject to the regulatory assessment fee. (R. 3) Verizon stated that its regulatory assessment fees for the directory revenues for the year 2000 were $285,000. (R. 4; Brief p. 5) That amount represents .15 percent of gross revenues for directory advertising in the amount of $190,000,000. Fla. Admin. R. 25-4.0161.

The Commission granted Verizon's petition and issued a Declaratory Statement concluding that the directory advertising revenues were subject to regulatory assessment fees. In its final order, the Commission explained:

> Verizon's directory affiliate may not itself meet the terms of the definition of a telecommunications company if it does not offer "two-way telecommunications service". Nevertheless, it is providing a service that Verizon is required to provide by virtue of Verizon being certificated to provide basic local telecommunications service, defined to include an alphabetical directory listing. § 364.02(2), Fla. Stat. (2000). The fact that

> Verizon chooses to contract with an affiliate company, rather than perform the function itself, does not exempt that service from regulation under Chapter 364, Florida Statutes. The company may not simply redirect services and revenues to affiliates, and thereby circumvent regulation of its services or the regulatory assessment fee statute.
>
> Under section 364.336, we have the responsibility to determine how gross revenues are calculated. It is not for Verizon or its parent company to dictate which revenues will be included, through a corporate restructuring diverting directory revenues to an affiliate of the telecommunications company. In addition, it would not be fair if some companies' advertising revenues were subject to regulatory assessment fees and others were not, merely because of differences in corporate structure. We do not believe the legislature intended such a narrow interpretation of the governing statute, or one which would allow such an arbitrary application.

Final Order p. 4. The Commission also concluded that Verizon's exemption from the various ratesetting provisions of Chapter 364 by virtue of its election of price-cap regulation did not exempt any of its revenues from regulatory assessment fees. Final Order p. 5.

This appeal followed.

**SUMMARY OF THE ARGUMENT**

Section 364.336, Florida Statutes, requires each telecommunications company to pay regulatory assessment fees on "its gross revenues derived from intrastate business." Verizon's creation of an unregulated affiliate to publish its telephone directories and receive the associated revenues does not shield those revenues from the operation of section 364.336. The

Commission correctly determined that the revenues from the sale of directory advertising in Verizon's directories are Verizon's revenues for regulatory assessment fee purposes.

A literal interpretation of a statute is not required if it will lead to an unreasonable result, at variance with the purpose of the legislation as a whole. In addition, a regulated company cannot evade regulatory requirements by contracting its services and revenues to an unregulated affiliate. There is no language in section 364.336 or elsewhere in Chapter 364 to support Verizon's narrow construction of the statute. Nor is it reasonable to conclude that the legislature intended to condone such a transparent avoidance of the statute's requirements. The longstanding policy of the state in its regulation of telecommunications companies has been to include directory advertising revenues not only for ratesetting purposes but also for purposes of paying for the cost of regulation, in order to promote the objective of affordable rates. In addition, it is the policy of the state that all providers of telecommunications services are to be treated fairly. Both policies would be frustrated under Verizon's construction of the statute.

If directory advertising revenues are taken out of the gross revenues subject to the regulatory fee, the result will be that the customers' share of the costs of regulation will increase, reducing the affordability of service. Verizon's construction would also result in inequities because some LEC's directory advertising

revenues will be subject to the fee, and some will not, merely because of differences in corporate structure and how revenues are characterized. The Commission's construction, on the other hand, treats all companies' directory revenues the same.

Under the applicable standard of review, it is insufficient for Verizon to demonstrate that another interpretation of the statute is possible, or even preferable to the Commission's. Verizon must show that the Commission's interpretation is clearly erroneous.

Verizon's and BellSouth's argument that because they are price-cap regulated companies, their directory advertising revenues are not subject to regulatory fees is plainly illogical. If revenues are not subject to regulatory fees because they are not subject to ratesetting, then none of a price-cap regulated company's revenues would be subject to the fees. In view of the fact that the Commission still regulates a myriad of price-cap regulated LEC's activities other than the rates they charge, it strains credulity to conclude that the companies are not required to pay the costs of their regulation. Nor is there anything in the statute that provides such an exemption.

Verizon contends that "gross operating revenues" do not include any revenues derived from services it is not required to provide, but the statute makes no such distinction. The revenues realized from directory advertising are a direct result of Verizon's business as a telecommunications company and its

required, regulated activities, including the requirement to furnish a directory. They are properly included to support the costs of regulation and thereby benefit the public.

The Commission's decision was reasonable and does not give it unbridled discretion. The Commission has simply drawn the line at Verizon's attempt to divert revenues that historically have been telecommunications revenues subject to a regulatory fee.

Verizon's complaint that the Commission can make its decision without evidence and without an opportunity for hearing is plainly specious. Verizon chose to proceed under the declaratory statement procedures and it did not request a hearing. Clearly, however, the opportunity for hearing is afforded, not only under the declaratory statement rules, but pursuant to other provisions of Chapter 120, Florida Statutes, the uniform rules, and Commission rules.

Verizon has failed to show that the Commission's decision is clearly erroneous. The Commission's order should be affirmed.

**STANDARD OF REVIEW**

This Court has stated many times the standard of review of Commission orders:

> Commission orders come to this Court 'clothed with a presumption of validity.' Florida Interexchange Carriers Ass'n v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996) (quoting City of Tallahassee v. Mann, 411 So. 2d 162, 164 (Fla. 1981)). Additionally, an agency's interpretation of a statute that it is charged with enforcing is entitled to great deference and will be approved by this Court unless it is clearly erroneous. Florida Interexchange Carriers Ass'n, 678 So. 2d at 1270; Florida Cable Television Ass'n v. Deason, 635 So. 2d

> 14, 15 (Fla. 1994). The burden of overcoming these presumptions is on the party challenging the Commission's order, and it must be shown that there has been a departure from the essential requirements of the law. Florida Interexchange Carriers Ass'n, 678 So. 2d at 1270; City of Tallahassee v. Mann, 411 So. 2d at 164.

BellSouth Telecommunications, Inc. v. Johnson, 708 So. 2d 594, 596-597 (Fla. 1998). This is a heavy burden, and Verizon has failed to meet it.

## ARGUMENT

### I. THE COMMISSION CORRECTLY DETERMINED THAT VERIZON'S GROSS OPERATING REVENUES INCLUDE DIRECTORY ADVERTISING REVENUES FOR THE PURPOSE OF CALCULATING REGULATORY ASSESSMENT FEES.

Section 364.336, Florida Statutes, requires each telecommunications company to pay a regulatory assessment fee based on its gross operating revenues derived from intrastate business. The Commission determined that Verizon's gross operating revenues include the revenues from the sale of advertising that is published in Verizon's directory. The Commission's decision was correct.

Verizon urges a literal interpretation of section 364.336, one that would allow it, through a corporate restructuring and a change in the method of recognizing revenues, to circumvent the effect of the statute and frustrate the legislative purpose. Verizon or its parent has created an unregulated affiliate that does not meet the definition of "telecommunications company" to handle its directory publication and distribution. It has then relabelled the revenues that Verizon bills and collects from its advertisers as the affiliate's revenues and thus, conveniently concludes that those revenues are no longer "its" revenues and no longer subject to the regulatory fee. There is no language in section 364.336, elsewhere in Chapter 364, or in the legislative history that supports such a narrow construction of the statute. Nor is it reasonable to conclude that the legislature intended to condone such a transparent avoidance of the statute's requirements.

As this Court held in Radio Telephone Communications, Inc. v. Southeastern Telephone Company, 170 So. 2d 577, 580 (Fla. 1965), a literal interpretation of a statute is not required if it will lead to an unreasonable result, at variance with the purpose of the legislation as a whole. In that case, the Court found that a radio communication service interconnection with a telephone line could make it a "telephone company" under the statute if the words of the statute were given their literal meaning. The Court concluded, however, that the legislature could not have intended to regulate and control the service at issue at the time it adopted the statute, and that such an interpretation would be directly opposed to the policy of the state in its regulation of public utilities.

The court in Shell Harbor also declined to adopt a literal meaning of a statute where the statute in question provided that a special restaurant liquor license may be issued to an applicant that is "equipped" to serve meals to 150 persons. Shell Harbor Group, Inc. v. Department of Business Regulation, 487 So. 2d 1141 (Fla. 1st DCA 1986). The appellant challenged the denial of the license and argued that it was physically able to serve the required number of people even though it was not legally able to do so because of zoning regulations. The court affirmed the denial, concluding that the legislative intent of the statute was that these licenses be for bona fide restaurants primarily engaged in serving food. Given that intent, the reasonable--if not the literal--interpretation of the word "equipped" encompassed the

legal ability to serve 150 people as well as the physical ability to do so.

In the instant case, there are valid reasons to conclude that section 364.336 should not be given the literal construction that Verizon urges. First, the longstanding policy of the state in its regulation of telecommunications companies has been to include directory advertising revenues not only for ratesetting purposes but also for purposes of paying for the cost of regulation. Second, it is the policy of the state that all providers of telecommunications services are to be treated fairly. Both policies would be frustrated under Verizon's construction of the statute.

The policy of the state has been to further the goal of universal service by insuring reasonable and affordable prices for basic local telephone service. Directory advertising revenues have historically been considered in the ratesetting process to support the goal of universal service and to support local rates, and they have been subject to regulatory assessment fees. Contrary to Verizon's assertion, universal service remains a goal of the legislature during the transition to a competitive market and afterwards. §364.025(1), Fla. Stat. It is not merely a relic of rate of return regulation. Thus, the Commission is specifically directed in the current statute to exercise its exclusive jurisdiction to:

> Protect the public health, safety, and welfare by ensuring that basic local

> telecommunications services are available to all consumers in the state at reasonable and affordable prices.

§364.01(4)(a), Fla. Stat. Indeed, the legislature specifically stated its intent in the 1995 Telecommunications Act that during the transition to competition, "the ubiquitous nature" of local exchange telecommunications companies shall be used to satisfy the goal of universal service, and that each telecommunications company should contribute its fair share to its support. §364.025(1)(2), Fla. Stat.

The Commission decided in 1995 that directory advertising revenues should continue to be used to support universal service, at least on an interim basis. In re: Universal Service and Carrier of Last Resort Responsibilities, 95 F.P.S.C. 12:375 (1995). As the Commission noted in its Declaratory Statement at issue here, GTE Florida Incorporated (Verizon), was a party in that proceeding. The issue of corporate structure and the fact that directories for several major incumbent LECs, including Verizon and BellSouth, are published by unregulated affiliates was not even an issue raised by the incumbent LECs.

Verizon's construction of the statute would tend to frustrate the legislature's objective of affordable local service rates. That is because the costs of regulation are passed on to customers in their rates to the extent they are not funded from sources such as fees on directory advertising revenues. If directory advertising revenues are taken out of the gross revenues subject to

the regulatory fee, the Commission must increase the percentage assessed on all companies' remaining revenues to cover its costs. The fee paid by all telecommunications companies, and therefore their customers, will undoubtedly increase.

Contrary to Verizon's claim, the fee on its directory revenues is in no way a "windfall" for the Commission. Brief at 13. The Commission has the authority under the law to increase the fee when the revenues decrease. However the statute is interpreted, the decision will be revenue neutral for the Commission, but not for the customers.

Verizon's construction would also tend to frustrate the legislature's objective that all providers are treated fairly. §364.01(4)(g), 364.051(5)(b), Fla. Stat. Verizon's construction of section 364.336 would result in inequities because some LEC's directory advertising revenues will be subject to the fee, and some will not, merely because of differences in corporate structure. The Commission correctly concluded that the legislature could not have intended such a narrow interpretation of the governing statute, or one which would allow such an arbitrary application. Final Order at 4.

In addition, if such a narrow construction is given to section 364.336, there is no reason that Verizon and other, primarily large companies, could not spin-off any number of other activities to affiliates and avoid having to pay even more of the regulatory assessment fees than they are now required to pay. By merely

recharacterizing revenues as belonging to the affiliate, or reassigning revenues by contract, Verizon could claim that the revenues were not "its" revenues. In this manner, Verizon--the "telecommunications company"--could theoretically be reduced to a virtual shell, with a minimum of revenues recorded on its own books. The Commission's regulatory duties with regard to Verizon and other companies, however, would not change. The purpose of the statute, that each company pay its fair share of the cost of regulation, would be defeated.

The fact that Verizon has already contracted with an affiliate to publish and distribute its directories, and that Verizon passes on the revenues from directory advertising to that affiliate, should not prevent the revenues from being attributed to Verizon for regulatory purposes. Verizon is a regulated company, conducting a business imbued with a public interest and subject to the regulatory oversight of the Commission for the benefit of the citizens of the state. Regulated companies cannot evade regulatory requirements by contracting their services and revenues out to a non-regulated affiliate. Hudson County Water Co. v. McCarter, 209 U.S. 349, 357, 52 L.Ed. 828, 28 S.Ct. 529 (1908) ("[O]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them"); cited in H. Miller & Sons, Inc. v. Hawkins, 373 So. 2d 913 (Fla. 1973) (To allow a private party to circumvent by contract the police power of the state is impermissible); and U.S. West

Communications, Inc. v. Colorado Public Utilities Comm'n, 978 P. 2d 671, 677 (Colo. 1999) ("a regulated monopoly may not evade regulatory requirements simply by contracting a service with a non-regulated third-party and then claiming that future rules concerning the service are invalid if they interfere with the contract").

The practice of utilities creating unregulated affiliates, transferring highly profitable activities to those affiliates, and attempting to divert the revenues from the control of regulators is not an uncommon practice in the history of telecommunication companies. Evan D. White and Michael F. Sheehan, Monopoly, The Holding Company, and Asset Stripping: The Case of Yellow Pages, Journal of Economic Issues, Vol. XXVI, No. 1, March, 1992, pp. 159-181. Numerous state utility commissions have dealt with the issue.

In Tennessee Public Service Commission v. Nashville Gas Company, 551 S.W. 2d 315, 319-20 (Tenn. 1977), the Supreme Court addressed the authority for a regulatory agency to impute revenues of a parent corporation to a subsidiary:

> [a] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil", which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and

> revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public, fair and reasonable rates of return.

The Tennessee Court noted that company management may have legitimate reasons for structuring their subsidiaries as they do, but this does not prevent a public regulatory body from looking past the corporate lines.

> Otherwise, it would be a simple matter, through the device of holding companies, spin-offs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers. See Industrial Gas Co. v. Public Utilities Comm's of Ohio, 135 Ohio St. 408, 21 N.E.2d 166 (1939).

Id. at 320.

Verizon's treatment of its various directory revenues demonstrates how its interpretation of section 364.336 permits manipulation and incongruous and unreasonable results. Verizon argued to the Commission that the directory advertising revenues are not its revenues. It did not take the position that the white page directory revenues are not its revenues, or that it should not pay regulatory fees on those revenues. But Verizon contracts with its directory affiliate to publish directories that include both the white pages and the yellow pages. (Final Order p. 7)

Verizon handles the billing and collection for both the additional white page services and the yellow pages advertising. Verizon's contract, at least for the directory advertising, designates the advertising revenues as the affiliate's revenues and it passes them on to the affiliate. (R. 3) Verizon has not said how its contract with its affiliate designates the white page revenues. If it designates those revenues as its affiliate's, then under Verizon's interpretation, no regulatory fees are owed for the revenue. If it designates them as its own revenues, then the regulatory fees are owed. The Commission's construction, on the other hand, treats all telecommunications companies' directory revenues the same.

Under the applicable standard of review, it is insufficient for the appellant to demonstrate that another interpretation of the statute is possible, or even preferable to the Commission's. D.A.B. Constructors, Inc. v. State Dept. of Transportation, 656 So. 2d 940 (Fla. 1st DCA 1995). In order to succeed, the appellant must show that the Commission's decision is clearly erroneous. Florida Interexchange Carriers Ass'n v. Clark, 678 So. 2d 1267 (Fla. 1996). Verizon has failed to make this showing.

## II. THE FACT THAT A TELECOMMUNICATIONS COMPANY IS PRICE REGULATED RATHER THAN RATE REGULATED IS IRRELEVANT TO ITS OBLIGATION TO PAY REGULATORY ASSESSMENT FEES.

Verizon argues that even if section 364.336, Florida Statutes, could be interpreted to permit the imputation of directory advertising revenues, the basis for imputing them was eliminated

for price-cap regulated companies like itself and Amicus BellSouth. BellSouth also argues that a price-cap regulated company is not required to pay regulatory fees on directory advertising revenues. The basis for their argument is they are exempted from rate regulation by section 364.051, Florida Statutes. Section 364.051(1)(c), however, exempts price-cap regulated companies not only from section 364.037 and having directory advertising revenues included in the ratesetting process, but also from the other ratesetting statutes. Thus, no revenues of a price-cap regulated company are considered by the Commission for ratesetting purposes.

Verizon's and BellSouth's argument is plainly illogical. If the only basis for including any of Verizon's revenues in the revenues for regulatory assessment fee purposes is that the revenues are included for ratesetting purposes, none of Verizon's or BellSouth's revenues would be subject to regulatory assessment fees. In view of the fact that the Commission still regulates a myriad of price-cap regulated LEC's activities other than the rates they charge, it strains credulity to imagine that the legislature intended such a result. Nor has Verizon argued that none of its revenues are subject to regulatory assessment fees.

Contrary to Amicus BellSouth's assertion, the 1995 Telecommunications Act did not remove directory advertising revenues from "the regulatory framework" for price-cap regulated companies. All that the Act did in this regard was exempt those companies from the ratesetting statutes, including the one

providing for consideration of directory advertising revenues in ratesetting. The Act made no changes to section 364.336 other than to authorize the Commission to permit companies to pay regulatory assessment fees on an annual rather than semiannual basis. Ch. 95-403, §22, Laws of Fla.

The fact is that neither section 364.051(1)(c) nor any other statute exempts Verizon from the regulatory assessment fee provisions of sections 364.336 and 350.113. As the Commission noted in its order, it would have been a simple matter for the legislature to include "364.336" in the list of statutes from which price-cap regulated companies are exempt. Final Order p. 8. It did not. Neither Verizon nor BellSouth has shown that there is anything in the Telecommunications Act or in its legislative history to indicate that the legislature intended or anticipated that there would be any change in the application of the regulatory fee statutes when it permitted companies to elect price regulation.

Verizon contends that no change to section 364.336 was required because it already did not include directory advertising revenues. That is wrong. The only revenues that section 364.336 excludes are amounts paid to another telecommunications company for the use of any telecommunications network. The legislature has never excluded directory advertising revenues from the regulatory fee calculation, and in reenacting the statute it is presumed to know and adopt the construction placed on it by the agency

administering it. State ex rel. Szabo Food Services, Inc. v. Dickinson, 286 So. 2d 529 (Fla. 1973).

The Commission's longstanding interpretation has been that directory advertising revenues are included in gross revenues for regulatory assessment fees, and the companies for many years continued to include those revenues in their gross revenues. The only real basis for Verizon's claim now that these revenues should not be included is not a change in the law, but its change in corporate structure and the way it assigns and records the revenues.

## III. THE FACT THAT VERIZON IS NOT REQUIRED TO PROVIDE DIRECTORY ADVERTISING IS NOT DETERMINATIVE OF WHETHER IT MUST PAY REGULATORY ASSESSMENT FEES ON THE REVENUES.

Section 364.336, Florida Statutes, requires the payment of regulatory fees on a company's "gross operating revenues derived from intrastate business." Verizon now contends that "gross operating revenues" do not include any revenues derived from services it is not required to provide. (Brief at 17) The statute, however, does not make that distinction. The Commission found that Verizon's directory advertising activities are not so distinct from its required white page activities.

Verizon is required by statute and Commission rule to publish a telephone directory, to update it, to furnish a copy to every subscriber to its telephone service, and to print specified information in all directories. §364.02(2), Fla. Stat.; Fla. Admin.

Code R. 25-4.040. Verizon has not been required to provide a yellow page directory, or to offer advertising in that directory. Nevertheless, Verizon chooses to provide that directory and to sell advertising in it to its subscribers and others. It also publishes and distributes that directory as a part of, or in conjunction with, the required directory. Because every customer must be furnished with a directory, every directory advertiser can be assured that its advertisement will be received by every one of Verizon's telecommunications services subscribers.

The Commission concluded that the market for the yellow page advertisements is directly related to Verizon's position as the incumbent LEC and its publication of the required directory listings. Final Order p. 7. Because the revenue realized is a direct result of Verizon's business as a telecommunications company, the revenue should continue to be subject to regulatory assessment fees, to share in the cost of regulation and thereby benefit the ratepayers. There is nothing in the statute to support a different result.

The scope of the Commission's regulation is broad and encompasses and crosses over many activities and services of telecommunications companies, including price-cap regulated companies. GTC, Inc. v. Garcia, 778 So. 2d 923, 928-29 (Fla. 2000). As a practical matter, no simple or straightforward boundary lines exist so that the costs of regulation can readily be segregated or allocated. Indeed, it would greatly increase the

cost of regulation to attempt to pinpoint, track and allocate costs to every discrete service or activity of every company. Wisely, the statute does not require that effort.

## IV. THE COMMISSION'S DECISION WAS REASONABLE AND WAS WITHIN ITS DISCRETION.

The legislature has granted the Commission the authority to determine what revenues constitute a company's gross operating revenues. The fact that the Commission may determine which revenues are properly considered the telecommunications company's revenues does not give it unbridled discretion, and it does not create a situation in which the Commission's decisions cannot be reviewed by this Court.

Verizon complains that the effect of the Commission's interpretation of section 364.336 is to grant the Commission such broad discretion that the interpretation is unreasonable. Verizon then speculates about all the possible actions the Commission could take under such an interpretation.

The Commission has not gone off willy nilly in search of additional revenues to impute. The Commission has simply drawn the line at Verizon's attempt to divert revenues that historically have been telecommunications company revenues that are subject to the regulatory fee. The Commission's decision was based on sound reasons. The possibility that the Commission might in the future abuse its delegated power does not mean the statute delegating such powers is invalid. Southern Bell Telephone and Telegraph Co. v. Florida Public Service Comm'n, 443 So. 2d 92 (Fla. 1983)(Commission

has authority to determine, as a policy issue, whether charitable contributions are to be included in a utility's operating expenses, provided that Commission's action is not arbitrary or capricious or a violation of due process).

Verizon also complains that the Commission can make its decision without evidence and without an opportunity for hearing. That is totally incorrect.

Verizon chose to proceed under the declaratory statement procedures. §120.565, Fla. Stat.; Fla. Admin. Code R. Chapter 28-105 (Uniform Rules of Procedure). Under the uniform rule, an agency is entitled to rely on the statements of fact set out in the petition and it is not required to take a position with regard to their validity. Fla. Admin. Code R. 28-105.003. An agency is not required, however, to ignore its own knowledge and common sense.

The uniform rules specifically provide that the agency may hold a hearing to consider a petition for declaratory statement. Fla. Admin. Code R. 28-105.003. Verizon did not request a hearing. Clearly, however, the opportunity is afforded under the declaratory statement rules and other provisions of Chapter 120, Florida Statutes, the uniform rules and Commission rules providing for protests of agency action. E.g., In re: Investigation into the regulatory assessment fee calculations for 1985 and 1986 of United Telephone Company of Florida, 89 F.P.S.C. 6:226 (1989) (Order to pay fees issued as Proposed Agency Action, providing opportunity to

protest); §120.569, 120.57, Fla. Stat.; Fla. Admin. Code R. 25-22.029. Verizon's assertion is plainly specious.

## CONCLUSION

Verizon has not met its burden to overcome the presumption of validity that attaches to Commission orders. It has not shown that the Commission's decision is clearly erroneous or that it departs from the essential requirements of law. The Commission's order should be affirmed.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief has been furnished by United States mail this 21st day of May, 2001, to the following:

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I HEREBY CERTIFY that the font type used in this brief is Courier New 12 Point.

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APPENDIX

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| Appendix 1 | Final Order, Order No. PSC-01-0097-DS-TL |
| Appendix 2 | Verizon Florida Inc., General Services Tariff A6. Directory Listings, Effective March 1, 2001 |