**SUPREME COURT OF FLORIDA**

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Case No. SC01-323

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VERIZON FLORIDA INC.,

Appellant,

v.

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

Appellees.

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# REPLY BRIEF OF VERIZON FLORIDA INC.

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MARVIN E. BARKIN, ESQUIRE
Florida Bar No. 003564
MARIE TOMASSI, ESQUIRE
Florida Bar No. 772062
**TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS,**
Professional Association
450 Carillon Parkway, Suite 120
St. Petersburg, Florida 33716
(727) 898-7474

KIMBERLY CASWELL, ESQUIRE
Florida Bar No. 874310
Post Office Box 110, FLTC0007
Tampa, Florida 33601-0110
(813) 483-2617

Attorneys for Verizon Florida Inc.

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## INTRODUCTION

The Florida Public Service Commission requires Verizon to pay regulatory assessment fees on the revenues of Directories, an unregulated affiliate not subject to the jurisdiction of the Commission, that sells yellow pages directory advertising and publishes white and yellow page directories. Verizon challenged the Commission's inclusion of Directories' revenue because the plain language of the regulatory assessment fee statute, § 364.336, only requires Verizon to pay regulatory assessment fees on its own gross operating revenues. The Commission rejected Verizon's challenge, asserting that the plain language of the statute should be disregarded to instead serve what the Commission believes to be underlying legislative policies.

The Commission has no jurisdiction beyond that granted by statute. The Commission attempts to create jurisdiction through an interpretation of § 364.336 that defies the statute's plain language and rests on inapplicable rate of return considerations. For these reasons, the Commission's decision is clearly erroneous and must be reversed.

## FACTS RELEVANT TO DECISION

Verizon is a local exchange telecommunications company, as defined by Florida Statute section 364.02(6). As a local exchange telecommunications company, it is required to distribute a white pages directory listing its customers' telephone numbers. Fla. Admin. Code Rule 25-4.040. Verizon has no obligation, however, to publish a yellow pages directory containing classified advertising. (T. 29, 31-32.)

Verizon has contracted with its corporate affiliate, Directories, to satisfy its white pages obligation. Directories is not a telecommunications company and is not regulated by the Commission. It is a structurally separate corporation that sells yellow pages directory advertising and publishes white pages and yellow pages directories for affiliated and non-affiliated companies. (T. 11, 13; Petition at 2.)

Directories pays Verizon for the services Verizon performs, such as billing and collecting for yellow pages advertising, under the terms of the parties' contract. Verizon includes these payments in its regulated revenues. Verizon does not earn or keep the money it bills and collects for Directories' sales of yellow pages advertising, and so does not record these Directories' revenues on its books. (Petition at 1-2; T. 5-6, 8, 11.)

Florida Statute section 364.336 requires "each telecommunications company" under the Florida Public Service Commission's jurisdiction to pay regulatory

assessment fees on "its gross operating revenues derived from intrastate business." The Commission, however, has interpreted section 364.336 to require Verizon to pay regulatory assessment fees not only on its own gross operating revenues, but also on the revenues of Directories, even though Directories is a separate corporation that is not a telecommunications company subject to the Commission's jurisdiction.

## ARGUMENT

### I. There Is No Lawful Basis for Ignoring the Plain Language of Section 364.336.

In its Initial Brief, Verizon explained that the Commission's interpretation ignores the plain language of section 364.336. The Commission does not deny this fact. Instead, it asserts that "there are valid reasons to conclude that section 364.336 should not be given the literal construction that Verizon urges." (Answer Brief at 14.) These reasons, according to the Commission, are that applying the plain language of the statute would "tend to frustrate" the state's policies of ensuring affordable local service rates and fair treatment for all providers. (Answer Brief at 8-9, 15-17). Even if the Commission were correct about the consequences of a plain reading of the

statute, and it is not,[1] they are not permissible reasons for ignoring the statutory language.

In discerning legislative intent, "the courts are bound by the plain and definite language of the statute . . . ." Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960). See also Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064, 1067 (Fla. 1995) ("We have repeatedly explained that when the language of a statute is unambiguous and conveys a clear and ordinary meaning, there is no need to resort to other rules of statutory construction; the plain language of the statute must be given effect."); Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1, 4-5 (Fla. 1961).

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[1] The Commission's justifications make no sense. It argues, for example, that if Directories' revenues are not included in the fee base, then the Commission will have to raise the fees; companies will pass on the fee increases to their customers; and customers will no longer be able to afford basic local telephone service. Among other flaws, this argument ignores the fact that price-regulated carriers, like Verizon, are not free to raise their basic local service rates. These fees are frozen, by statute, with annual increases permitted only to account for the change in inflation less 1%. Fla. Stat. § 364.051(3).

Another of the Commission's apparent fears is that a plain reading of the statute would allow Verizon to spin off "any number of other activities to affiliates" to avoid paying regulatory assessment fees, thereby reducing Verizon to "a virtual shell." (Answer Brief at 17.) Even if Verizon were imprudent enough to allow regulatory assessment fee obligations to drive its corporate structure, the Commission's argument disregards the fact that affiliates providing telecommunications services would themselves pay regulatory assessment fees (as Commissioner Baez pointed out, T. 57).

"[A] departure from the letter of the statute is permissible only when there are cogent reasons for believing that the letter of the law does not accurately disclose the legislative intent." Shell Harbor Group, Inc. v. Department of Business Regulation, Div. of Alcoholic Beverages & Tobacco, 487 So. 2d 1141, 1142 (Fla. 1st DCA 1986). See also Department of Revenue v. Kemper Investors Life Ins. Co., 660 So. 2d 1124, 1127-28 (Fla. 1st DCA 1995); Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984); Wakulla County v. Davis, 395 So. 2d 540, 542 (Fla. 1981); Smith v. Ryan, 39 So. 2d 281, 283 (Fla. 1949) ("Every Act should be construed with reference to the purpose intended."); Van Pelt v. Hilliard, 75 Fla. 792, 804, 78 So. 693 (Fla. 1918) ("If…the evident intention is different from the literal import of the terms employed to express it…the intention should prevail").

The Commission has offered no reasons, let alone cogent ones, for believing the plain language of section 364.336 does not accurately disclose legislative intent. In fact, the strict letter of section 364.336 perfectly expresses the Legislature's underlying intent. Section 350.113, which established the regulatory assessment fee obligation, states that fees must be paid by "each regulated company under the jurisdiction of the Commission" and that they are to "be related to the cost of regulating such type of regulated company." Fla. Stat. § 350.113(3). The purpose of

the fee is to cover the Commission's costs of performing "its functions and duties as provided by law." Fla. Stat. § 350.113(6).

The Legislature intended to apply the fee only to regulated companies, to cover the cost of regulating them. Directories is not a regulated company under the Commission's jurisdiction, so the Commission does not incur any costs to regulate it. The Commission's assessment of the fee on Directories' revenues thus defeats the stated purpose of the fee, just as it violates the plain language of section 364.336.

The Commission cannot rely on its view of appropriate policy to expand the Legislature's intended scope of section 364.336. The Court's usual deference to Commission orders will not apply where the agency exceeds the authority granted by the Legislature, as it has done here. See, e.g., United Tel. Co. of Florida v. Public Service Commission, 496 So. 2d 116, 118 (Fla. 1986) (The customary "presumption of regularity" will not apply "to support the exercise of jurisdiction where none has been granted by the Legislature"); Radio Tel. Communications, Inc. v. Southeastern Tel. Co., 170 So. 2d 577, 582 (Fla. 1964). "[A]n administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous." Southeastern Utilities Service Co. v. Redding, 131 So. 2d 1, 4-5 (Fla. 1961). Indeed, this Court has reaffirmed that the 1996 revisions to the Administrative Procedure Act strictly limit an agency's power to that granted by statute. Florida

Department of Business and Professional Regulation, Division of Pari-mutuel Wagering v. Investment Corp. of Palm Beach, 747 So. 2d 374 (Fla. 1999). "Any reasonable doubt as to the lawful existence of a particular power that is being exercised by the Commission must be resolved against the exercise thereof, and the further exercise of the power should be arrested." City of Cape Coral v. GAC Utilities, Inc., 281 So. 2d 493, 496 (Fla. 1973) [citations omitted]; United Tel. Co., 496 So. 2d at 118.

## II. Historical Ratemaking Rationale Is Not Relevant to Interpreting Section 364.336.

Verizon has operated under price regulation since 1996. The Commission no longer sets Verizon's rates and Verizon is exempt from Florida's ratemaking statutes, including section 364.037, which allows the Commission to consider directory advertising revenues in the ratesetting process.

Although the Commission nominally acknowledges that Verizon is not subject to section 364.037 or rate-of-return regulation, its Answer Brief is laced with ratemaking references and rate-of-return precedent. Among other things, it tells the Court that the Bell Operating Companies were permitted to keep directory publishing assets upon divestiture of AT&T, so yellow pages revenues could be used to subsidize basic telephone rates (Answer Brief at 3); that Florida and other Commissions have

historically considered directory advertising revenues and expenses in the ratesetting process, in order to support basic rates (Answer Brief at 3, 14); and that local exchange companies have, in the past, booked directory advertising revenues and included them in the base for calculating regulatory assessment fees (Answer Brief at 4-6). The Commission cites its own ratemaking decisions, as well as quoting extensively from a Tennessee rate case. (Answer Brief at 3-5, 18-19.)

Verizon does not dispute that yellow pages revenues have historically been used to support local rates, or that commissions have commonly made affiliate adjustments in the ratemaking context. But that history is irrelevant to the question at hand, which is how to properly interpret section 364.336 for purposes of calculating Verizon's regulatory assessment fee. Section 364.037 is the only imputation authority the Legislature gave the Commission, and it applies to ratesetting and not calculation of the regulatory assessment fee. In any event, the Legislature understood that price regulation moots the historical rationale for imputation of yellow pages revenues (that is, holding down basic local rates).[2] Because Verizon's local rates are strictly constrained by statute, not set by the Commission, imputation of Directories revenues will make no difference in consumers' rates.

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[2] Indeed, prior subsidies from Directories' revenues remain in Verizon's rates today, because those rates did not change when Verizon began to operate under price regulation.

The Commission's persistent ratemaking mindset prevents it from understanding that, as Commissioner Baez pointed out, imputation rests on the *fiction* that the directory company's revenues belong to the regulated company. (Tr. 55-57.) The fact that Verizon, as a rate-of-return regulated carrier, was obliged to impute another company's revenues for regulatory purposes does not mean that those revenues really belonged to Verizon. Verizon does not earn or book any directory advertising revenues (other than those it receives for providing services to Directories under contract),[3] so it is impossible for Verizon to be "diverting" these revenues anywhere.[4] In any case, as Verizon pointed out in its Initial Brief, the Commission's claim that Verizon is "redirecting" services and revenues to affiliates is not a

[3] As Verizon explained in its Initial Brief, the revenues Verizon receives under its contract with Directories are booked by Verizon and included in its regulatory assessment fee base. Likewise, the revenues Verizon receives from the white pages-related services the Commission mentions in its Answer Brief (additional listings, non-listed and non-published numbers) are booked by Verizon. As the Commission points out, Verizon offers these services under tariff (Answer Brief at 1 and App. 2), so the revenues Verizon earns from them are subject to the regulatory assessment fee. These services and revenues are not included in the Directories contract.

[4] Contrary to the Commission's assertions (Answer Brief at 23), Verizon has made no "change in corporate structure" to transfer directory advertising revenues from Verizon to Directories. Directories is a wholly owned subsidiary of Verizon Information Services Inc., which has been a separate corporation since at least 1936. (*See* Appendix to Reply Brief, Tabs 1 and 2.)

legitimate basis for expanding the scope of section 364.336, which limits Verizon's fee to "its gross revenues," not its and its affiliates' revenues.[5]

No amount of outdated ratemaking rationale can supply the requisite statutory authority that is lacking for the Commission's practice of imputing Directories' revenues to Verizon for purposes of calculating the regulatory assessment fee. The Commission ignored the plain language of section 364.336, as well as the Legislature's stated purpose for the regulatory assessment fee. "'[T]he court has no power to go outside the statute in search of excuses to give a different meaning to words used in the statute.'" Florida Real Estate Commission v. McGregor, 268 So. 2d 529, 532 (Fla. 1972), quoting Vocelle v. Knight Bros. Paper Co., 118 So. 2d 664, 667 (Fla. 1st DCA 1960). Because this is precisely what the Commission urges the Court to do, its Declaratory Statement is clearly erroneous and must be reversed.

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[5] The Commission calls Verizon's and BellSouth's reading of section 364.336 "plainly illogical" because it assertedly would exclude all of a price cap carrier's revenues from the regulatory assessment fee calculation. (Answer Brief at 21-22.) That is wrong. The reason for leaving Directories' revenues out of Verizon's fee base is not because these revenues are exempt from ratemaking treatment. Rather, it is because the Directories' revenues are not the "gross operating revenues" of a "telecommunications company" under section 364.336.

## CONCLUSION

The Commission has no authority to force Verizon to pay regulatory assessment fees on Directories' revenues. Verizon thus asks the Court to reverse the Declaratory Statement; determine that the Commission may not require Verizon to pay any regulatory assessment fees on Directories' revenues; and order the Commission to allow Verizon to deduct from future regulatory fee payments the amounts it paid on Directories' revenues since at least July of 2000, when Verizon formally notified the Commission that these amounts were paid under protest.

Respectfully submitted,

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Marvin E. Barkin
Florida Bar No. 003564
Marie Tomassi
Florida Bar No. 0772062
**TRENAM, KEMKER, SCHARF, BARKIN, FRYE, O'NEILL & MULLIS,**
Professional Association
450 Carillon Parkway, Suite 120
St. Petersburg, Florida 33716
(727) 898-7474

and

Kimberly Caswell, Esquire
Florida Bar No. 874310
Post Office Box 110, FLTC0007
Tampa, Florida 33601-0110
(813) 483-2617
Attorneys for Verizon Florida Inc.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Verizon Florida Inc. has been furnished, **by U.S. Mail**, **to**

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

Blanca S. Bayo`, Director
Division of Records and Reporting
**Public Service Commission**
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Raoul G. Cantero, III
Adorno & Zeder, P.A.
2601 South Bayshore Drive, Suite 1600
Miami, FL 33133

on February 15, 2002.

_____
Attorney

## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

_____
Attorney