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BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

IN RE: DOCKET NO. 001556-TL - Petition by Verizon
Florida, Inc. for declaratory statement on
applicability of Section 364.336, F.S., and
Rule 25-4.0161, F.A.C., Regulatory Assessment
Fees.

BEFORE: CHAIRMAN E. LEON JACOBS, JR.
COMMISSIONER J. TERRY DEASON
COMMISSIONER LILA A. JABER
COMMISSIONER BRAULIO L. BAEZ
COMMISSIONER MICHAEL A. PALECKI

PROCEEDINGS: AGENDA CONFERENCE

ITEM NUMBER: 3

DATE: Tuesday, January 2, 2001

PLACE: 4075 Esplanade way, Room 148
Tallahassee, Florida

TRANSCRIBED BY: MARY ALLEN NEEL
Registered Professional Reporter

ACCURATE STENOGRAPHY REPORTERS
100 SALEM COURT
TALLAHASSEE, FLORIDA 32301
(850)878-2221

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PARTICIPANTS:

KIM CASWELL, Verizon Florida, Inc.
DALE MAILHOT, Commission Staff.
HAROLD MCLEAN, Counsel to the Commission.
CHRIS MOORE, on behalf of the Commission Staff.

STAFF RECOMMENDATION

Issue 1: Should the Commission issue a declaratory statement that Verizon is not required to pay regulatory assessment fees on the directory advertising revenues booked by its affiliate company?

Recommendation: No. The Commission should issue a declaratory statement that Verizon is required to pay regulatory assessment fees on the directory advertising revenues from the directories for areas within its certificated territory.

Issue 2: Should this docket be closed?

Recommendation: Yes. If the Commission votes to dispose of the petition for declaratory statement the docket should be closed.

1 CHAIRMAN JACOBS: Very well. That brings
2 us back to Item 3.

3 MS. MOORE: Commissioners, Item No. 3 is
4 the petition for declaratory statement by
5 Verizon Florida, Inc., formerly GTE Florida.
6 Verizon has asked the Commission to declare that
7 it is not required to pay regulatory assessment
8 fees on its yellow page advertising revenues,
9 revenues that are billed and collected by
10 Verizon, but which are booked by its directory
11 affiliate. Verizon argues that the revenues are
12 not its own, but belong to the affiliate, and
13 therefore it shouldn't have to pay regulatory
14 assessment fees on those amounts.

15 The Commission has previously treated
16 yellow page revenues as revenues of the
17 telecommunications company, even though there is
18 an affiliate involved, and it did so in a 1989
19 show cause order stating that the
20 telecommunications company cannot circumvent the
21 regulatory assessment fee statute by redirecting
22 the revenues to an affiliate.

23 Historically, they've been considered the
24 telecommunications company's revenues for both
25 regulatory assessment fee purposes and for

1 ratemaking. The fact that Verizon is not rate
2 regulated doesn't change the -- there's nothing
3 in the RAF statute, the regulatory assessment
4 fee statute that has changed, and price
5 regulated companies are not exempt from that
6 statute. The Commission has considered the
7 revenues those of the company because they're
8 made possible and integrally related to its
9 business of providing local exchange service.

10 In sum, staff doesn't believe that Verizon
11 has shown any circumstances or changes in
12 circumstances or the law that would justify the
13 Commission changing its policy.

14 CHAIRMAN JACOBS: That completes your
15 summary?

16 MS. MOORE: That's correct.

17 CHAIRMAN JACOBS: Very well. The Company
18 is here to address this issue?

19 MS. CASWELL: Yes. Commissioners, the
20 question in this case is whether Verizon Florida
21 is required to pay regulatory assessment fees
22 only on its own revenues or whether it needs to
23 pay a fee on the revenues of its directory
24 affiliate as well.

25 Mr. Christian has passed out the relevant

1 statutes so you can follow along with the legal
2 argument, which is very simple and
3 straightforward.

4 Section 364.336 of the Florida Statutes
5 states that each telecommunications company
6 licensed in this state must pay the Commission a
7 fee each year on its gross operating revenues
8 derived from intrastate business. Commission
9 Rule 25-4.0161, which implements the statute,
10 reflects the same language.

11 It's a basic principle of statutory
12 construction that if the language of a statute
13 is unambiguous, then there's no need to look
14 beyond the statute to interpret it. In this
15 case, there is no ambiguity in the statutory
16 language. The regulatory assessment fee can be
17 collected only from certificated
18 telecommunications companies and only on the
19 revenues they earn in this state. So only
20 Verizon Florida, a certificated
21 telecommunications company, must pay a fee, and
22 only on the revenues Verizon Florida itself
23 earns in this state.

24 Verizon Florida does not earn or book any
25 directories revenues. Rather, Verizon

1 Directories pays Verizon Florida for the
2 services it performs under contract.

3 Staff, however, takes the position that
4 Verizon Florida must pay a fee not only on its
5 own revenues, but on the revenues of its
6 directories affiliate. In other words, Verizon
7 Florida has to pretend it has earned and booked
8 these revenues for purposes of calculating its
9 fee.

10 There is no basis in Section 364.336 to
11 require any company to pay a regulatory
12 assessment fee on other companies' revenues.
13 Indeed, staff doesn't base its position on the
14 statutory language itself, and instead it points
15 to a case from 1989 concerning United
16 Telephone. Staff says the factual circumstances
17 in that case are no different than the ones
18 presented here and that Verizon hasn't cited any
19 change in law that would dictate a different
20 result.

21 Staff may be right about the similarity of
22 the facts of the United case and this one, but
23 staff is not correct about Verizon's failure to
24 cite any change in law that would dictate a
25 different result. On the contrary, the change

1 that Verizon cites could hardly be more
2 dramatic, and that is, in 1995 the Florida
3 Legislature dramatically overhauled Chapter 364
4 to open the local exchange to competition. In
5 return, ILECs were given the opportunity to
6 elect price regulation, thus doing away with
7 traditional rate-of-return regulation.

8 Verizon became a price capped carrier on
9 January 1st, 1996. With that election, Verizon
10 was exempted by statute from earnings regulation
11 and the requirements of all the statutes
12 associated with that type of regulation,
13 including Section 364.037, which requires
14 imputation of directories revenues for
15 ratemaking purposes.

16 Again, the date on the United case is 1989,
17 several years before the advent of price
18 regulation here. The United case was never
19 litigated, but the show cause and settlement
20 orders there were ostensibly a function of the
21 Commission's ratemaking authority. The show
22 cause order indicated that the directories
23 revenues should be attributed to United to
24 prevent the circumvention of regulatory
25 assessment fees through, quote, a redirection of

1 revenues to affiliated companies. This is the
2 same rationale the staff uses in its analysis
3 here.

4 In fact, it goes even further, stating that
5 Verizon Florida's dealings with its directories
6 affiliate is not an arm's-length transaction.
7 This is rate case language, pure and simple.
8 The staff is recommending an affiliate
9 adjustment for purposes of calculating the
10 regulatory assessment fee.

11 Verizon vigorously disputes the staff's
12 conclusions about Verizon Florida's relationship
13 with its directories affiliate. Verizon's
14 contracts with all its affiliates fully comply
15 with the FCC's affiliate transactions rules,
16 and Verizon Florida is not redirecting revenues
17 anywhere. It doesn't earn any revenues from
18 directories other than those it obtains from
19 providing services under contract.

20 In any event, the nature of Verizon
21 Florida's relationship with its affiliates is
22 not a relevant consideration here. First and
23 foremost, the regulatory assessment fee statute
24 gives you no discretion to include affiliate
25 revenues in a telecommunications carrier's fee

1 calculation. As you know, the Commission only
2 has the authority delegated to it by the
3 Legislature, and the law is very clear that if
4 there is any doubt about the existence of a
5 power, the further exercise of that power should
6 be arrested.

7 In addition, the Commission cannot engage
8 in the kind of ratemaking analysis that is
9 reflected in the recommendation. This would
10 violate the legislative prohibition on applying
11 ratemaking treatment to price capped carriers,
12 including the explicit prohibition on
13 directories revenues imputation.

14 Under staff's analysis, you would be
15 permitted to direct any telecommunications
16 carrier to include in its fee base any or all of
17 the revenues of any of the carrier's affiliated
18 companies. So before you vote today, you should
19 ask yourself whether you're sure the Legislature
20 has given you this broad discretion, and you
21 should be able to clearly identify the source of
22 that discretion in the statute.

23 Staff recommends that if you wish to
24 re-evaluate your longstanding policy on
25 imputation of directories revenues, then you

1 should hold a hearing to develop a record to
2 support the change. But that kind of hearing
3 won't answer the question we've asked in our
4 petition, which is whether you have the legal
5 authority to maintain the policy in the first
6 place. A hearing about Verizon's relationship
7 with its affiliate would assume you have the
8 authority to continue to make an affiliate
9 adjustment for purposes of calculating the fee
10 base.

11 If you want a legal brief to further
12 explore the issue we've raised, we would be
13 happy to provide it, and you can defer this
14 matter until you've had an opportunity to
15 further examine the legal issues we've raised.
16 But a hearing about Verizon's affiliate
17 relationships isn't going to help you rule on
18 the petition for declaratory ruling.

19 Verizon urges you to deny the
20 recommendation and find that the statute did not
21 require Verizon Florida to pay a regulatory
22 assessment fee on revenues that it neither earns
23 nor books in this state.

24 Thank you.

25 CHAIRMAN JACOBS: Commissioners?

1 I have a question. Could you walk me
2 through how your directory process is handled?
3 As I understand it, there is a separate
4 affiliate; correct?

5 MS. CASWELL: Correct.

6 CHAIRMAN JACOBS: And that affiliate
7 actually publishes the directory?

8 MS. CASWELL: Correct.

9 CHAIRMAN JACOBS: And the advertising in
10 that directory is billed by that affiliate?

11 MS. CASWELL: What happens is that we have
12 a contract -- Verizon Florida, the ILEC, has a
13 contract with the directories affiliate to
14 perform certain functions, such as billing and
15 collection, for the advertising in the
16 directories, so that Verizon, the ILEC, earns
17 only the revenues that it is due under that
18 contract. There are no other revenues. Verizon
19 Florida doesn't keep any revenues. It doesn't
20 book any revenues. It doesn't make anything
21 other than what it makes under the contract with
22 Directories. And Directories has these sorts of
23 contracts with other non-affiliated entities as
24 well, so it's the same sort of relationship.

25 CHAIRMAN JACOBS: You're only acting as a

1 billing agent for your directory --

2 MS. CASWELL: Yes. There may be other
3 functions they perform, but billing and
4 collection is the primary feature, I believe, of
5 that contract.

6 CHAIRMAN JACOBS: Those revenues are booked
7 totally absent whatever fee, processing fee is
8 paid to the ILEC? They're booked totally to the
9 affiliate?

10 MS. CASWELL: They're booked by the
11 directories company because it's the directories
12 company that earns those revenues. The ILEC
13 does not earn any revenues other than what it
14 does under the contract.

15 CHAIRMAN JACOBS: Now, you argue that
16 364.037, I believe --

17 MS. CASWELL: Yes.

18 CHAIRMAN JACOBS: -- controls?

19 MS. CASWELL: well, I mean, what controls
20 here is 364.336, which is the regulatory --

21 CHAIRMAN JACOBS: I'm sorry. I'm sorry.
22 Right.

23 MS. CASWELL: Yes. That's the regulatory
24 assessment fee statute, and that's very clear.
25 And I've got the most relevant portions

1 underlined. It says each telecommunications
2 company licensed or operating under this chapter
3 has to pay a fee on its gross operating revenues
4 derived from intrastate business.

5 The directories company is not a
6 telecommunications company under the definition
7 in Chapter 364, and Verizon Florida doesn't book
8 any operating revenues from the directories
9 company. So all we need to do is look at this
10 statute to determine what your decision should
11 be.

12 In the past, we were under the belief that
13 staff had -- this has been going on for quite
14 some time. United raised the issue in 1989. We
15 raised the issue in 1996. Each time we raised
16 the issue, we were told that staff was going on
17 the directories revenue imputation statute,
18 which was 364.037. And you also have a
19 Commission rule which -- I'll have to cite to
20 it. 25-4.0405, which is not included in your
21 packet. That governs the ratemaking treatment
22 for telephone directory advertising revenues and
23 expenses. We had been told that staff was using
24 that statute and that rule to impute the
25 revenues, to continue to make us impute the

1 revenues.

2 This recommendation, however, says, "No,
3 that's not staff's view. We're just going on
4 the precedent under the statute and the
5 Commission's general authority to do this sort
6 of thing."

7 So if you don't have 364.037 working -- and
8 you do not, because we're exempt from that under
9 the price cap statute -- then what authority do
10 you have? I don't find any.

11 Again, we need to look to the language of
12 the statute. And staff, in my opinion, does not
13 do that at all in the recommendation. They
14 ignore the language of the statute, and you
15 can't do that. You've got the discretion only
16 that the Legislature has given you, and nothing
17 more.

18 And I don't know if the United decision was
19 ever correct, but certainly in the wake of the
20 price cap regulation, the Commission and the
21 Legislature's explicit directive that you cannot
22 apply ratemaking treatment, and the explicit
23 prohibition on directories revenues imputation,
24 there is absolutely no basis to continue to
25 impute those directories revenues to Verizon,

1 the ILEC, for any purpose, including the
2 regulatory assessment fee calculation. It's a
3 strict legal issue.

4 COMMISSIONER JABER: Mr. Chairman, I have a
5 question of staff, if I --

6 CHAIRMAN JACOBS: Go ahead.

7 COMMISSIONER JABER: Ms. Caswell several
8 times now I think has made the argument that you
9 can't read into the statute more than the
10 authority that was given to you by the
11 Legislature. Can you just briefly comment on
12 what you think the plain meaning of the statute
13 is?

14 MS. MOORE: Well, I think it does give the
15 Commission the authority and the discretion to
16 determine what revenues are -- to determine how
17 gross operating revenues from intrastate
18 business are to be calculated. And in doing
19 that, I don't think that the corporate
20 restructuring can dictate what the Commission
21 interprets the revenues to be.

22 Those were -- prior to Section 364.037
23 being adopted, the Commission always treated
24 all, 100% of the revenues from advertising
25 revenues as those of the telecommunications

1 company. And when .037 was adopted, that merely
2 took some of those profits away for the benefit
3 of the shareholders. I think the Commission has
4 stated that it was an incentive to -- a
5 profit-making incentive. But the Commission has
6 always said that it had the authority, and I
7 think it does under the statute, to determine
8 how the gross operating revenues are calculated.

9 COMMISSIONER DEASON: Let me ask --
10 Ms. Caswell, let me ask you this question. As I
11 understand your argument, you're indicating that
12 since Verizon, the incumbent LEC, is now exempt,
13 since it is no longer subject to rate-of-return
14 regulation, it is exempt from the requirement to
15 impute directory advertising revenues, and
16 because of that, then the Commission no longer
17 has the legal authority to include directory
18 advertising as part of your revenue for
19 calculation of regulatory assessment fees; is
20 that correct?

21 MS. CASWELL: Yes, that's how it's stated
22 in the petition, because 364.051, which is the
23 price regulation statute, specifically exempts
24 price capped carriers from 364.037. I --

25 COMMISSIONER DEASON: well, let me ask you,

1 we no longer have any jurisdiction at all over
2 the establishment of your rates.

3 MS. CASWELL: Correct.

4 COMMISSIONER DEASON: So we have no
5 jurisdiction over making a calculation as to
6 what your intrastate revenues are, or your
7 intrastate rate base, or your authorized rate of
8 return? What's the difference -- under that
9 argument, it seems to me that you could just as
10 well argue that we have no jurisdiction over any
11 of your revenues for calculation --

12 MS. CASWELL: You have jurisdiction to
13 calculate the fee basis on my revenues, what it
14 says here, its gross operating revenues, which
15 means the ILEC's gross operating revenues.

16 COMMISSIONER DEASON: And we defer to you
17 to make that definition as to what constitutes
18 your revenue?

19 MS. CASWELL: No. We look at the statute
20 where it says each telecommunications company,
21 and you look at me, the ILEC, the
22 telecommunications company, and you look at my
23 revenues. But you don't have a basis for
24 looking at the revenues of my affiliate, because
25 that's not a telecommunications company, and I

1 don't book any of those revenues.

2 COMMISSIONER DEASON: But we do require you
3 to publish and distribute -- and you may have an
4 affiliate do it, but it is your, the incumbent
5 LEC's responsibility to publish and distribute,
6 according to our rule and requirement, a
7 directory listing to each subscriber.

8 MS. CASWELL: That's correct.

9 COMMISSIONER DEASON: And you're the one --
10 you choose then to use that as a basis to sell
11 advertising and to gain greater revenue;
12 correct?

13 MS. CASWELL: Verizon, the affiliate, uses
14 the directory to sell advertising.

15 COMMISSIONER DEASON: And because you
16 decide to provide this regulated service -- and
17 I know yellow page advertising is not regulated
18 per se.

19 MS. CASWELL: Correct.

20 COMMISSIONER DEASON: You are not required
21 to do that, but you are required to publish and
22 distribute the directory listings. Because of
23 that regulated requirement, and you choose to
24 have an affiliate do that, and there are
25 revenues derived from that process, we have to

1 ignore that when it comes to regulatory
2 assessment fees because you choose to have an
3 affiliate do that.

4 MS. CASWELL: Yes, because those are not my
5 revenues. Those are not revenues of the
6 telecommunications affiliate -- I'm sorry.
7 Those are not revenues of the telecommunications
8 carrier, and I do not book those revenues. So,
9 yes, it's my view that you cannot take those
10 into consideration when calculating the fee.

11 COMMISSIONER DEASON: So anytime you set up
12 a separate affiliate to do anything, well, then
13 the company is exempt from regulatory assessment
14 fees?

15 MS. CASWELL: That may well be true.

16 COMMISSIONER DEASON: So what if you start
17 -- you set up a separate affiliate to provide
18 private line service?

19 MS. CASWELL: Then that would be a tel --
20 well, when you say private line, I mean, we're
21 talking about a telecommunications service here;
22 correct? I mean, most of the things that come
23 before you will be telecommunications services.
24 So if I put like my long distance in a separate
25 affiliate, that's a telecommunications service,

1 and you're going to get regulatory assessment
2 fees on that.

3 The regulatory assessment fees are tied to
4 the costs of regulating telecommunications
5 companies, because that's what's under your
6 jurisdiction. They're not tied to regulating
7 non-telecommunications companies, because that
8 would make no sense. Those companies are not
9 under your jurisdiction.

10 Directories has been a special case,
11 because when divestiture occurred, the thinking
12 was that this would be an implicit subsidy for
13 -- to prop up the --

14 COMMISSIONER DEASON: Well, let me ask this
15 question. What if -- the way you define
16 telecommunications services then, if you set up
17 a separate affiliate to do repair work on your
18 network, okay, and the customers are charged for
19 like a repair on inside wire or something, would
20 that be exempt then from regulatory assessment
21 fees?

22 MS. CASWELL: It probably would. If you --

23 COMMISSIONER DEASON: Because that's a
24 repair, and it doesn't meet the definition of
25 telecommunications --

1 MS. CASWELL: It's not a telecommunications
2 service, because you don't regulate inside
3 wire. You may regulate repairs, though. You
4 know, I would have to think about that. But,
5 yes, if it's non-telecommunications service --

6 COMMISSIONER BAEZ: Are there examples
7 besides directories where we are not imputing
8 revenues from affiliates, customer services?

9 MS. CASWELL: Yes, lots of examples. We've
10 got, you know, data -- well, it used to the GTE
11 Data Services, GTE Supply, GTE Communications
12 Company. We have those, you know, affiliates
13 now under the name of Verizon, and none of those
14 get imputed, just like you don't impute any of
15 the revenues of any of the ALECs' affiliates.
16 You make those sorts of adjustments in rate
17 cases. In our 1992 rate case, for instance, you
18 did make some affiliate adjustments for Data
19 Services Company, and there were a couple of
20 others. Directories may have been one of them.
21 Those were reversed on appeal.

22 But the fact is that that's a ratemaking
23 function. The only reason why directories I
24 think persists is that it was codified in the
25 statute that you could make, in effect, this

1 imputation on an ongoing basis without a rate
2 case because it was statutory. But it was a
3 ratemaking function. It's anachronistic now
4 because we are no longer a rate regulated
5 company, and the Legislature has spoken and
6 said, "Look, this is what you do under a rate
7 based regulation scheme. It's not what you do
8 under a price cap scheme."

9 In all the states I know of, we are never
10 treated -- we have no imputation issues where we
11 are a price capped carrier. We do have them
12 where we're a rate of return carrier.
13 Commissions typically want to take some of these
14 revenues in rate cases and impute them to the
15 company, just as they make other affiliate
16 adjustments. You know, it's not unusual
17 certainly to see these kinds of things in rate
18 cases, with directories as well as with, you
19 know, lots of other affiliates.

20 And Commissioner Baez, you know, taking it
21 to its logical conclusion, staff's argument
22 would mean that you could impute any of the
23 revenues from any of these affiliates anytime
24 you felt that perhaps there was not an
25 arm's-length relationship.

1 COMMISSIONER BAEZ: I'm seeing -- based on
2 Commissioner Deason's comments, I'm seeing some
3 distinction. I mean, if -- and I think you
4 brought it up yourself. If it was an affiliate
5 that was providing a telecommunications service,
6 then I think there would be an issue as to what
7 -- you know, there would be an imputation issue,
8 because that would go directly to Commissioner
9 Deason's inference that if we say, "All right,
10 no affiliate imputation," then you can just by
11 way of corporate restructuring take all the
12 gross revenues out, take all of your revenues
13 out, or at least the door is open for that.

14 MS. CASWELL: Yes, but I would --

15 COMMISSIONER BAEZ: And that would -- I'm
16 sorry. Go ahead.

17 MS. CASWELL: Yes. I would just suggest
18 that a corporation is not going to make a
19 decision on, you know, how it's structured on
20 the basis of regulatory --

21 COMMISSIONER BAEZ: Of regulatory
22 assessment fees. I agree.

23 MS. CASWELL: But all of the ILECs have
24 separate directories affiliates here. So, I
25 mean, staff raises in its recommendation the

1 point about it being unfair that we can, quote,
2 get around the regulatory assessment fee statute
3 by doing this. I don't see that point, because
4 all the ILECs have separate directories
5 affiliates.

6 CHAIRMAN JACOBS: You would agree, though,
7 that a valid factor to scrutinize here is the
8 level to which this is an arm's-length
9 transaction?

10 MS. CASWELL: Absolutely not. That is
11 absolutely not relevant.

12 CHAIRMAN JACOBS: Why not?

13 MS. CASWELL: Because this is not a rate
14 case, and my relationship with that affiliate is
15 not relevant to looking at the statute and
16 seeing what revenues you can consider for
17 calculating the regulatory --

18 CHAIRMAN JACOBS: So we should look to
19 determine how your directory affiliate got its
20 mailing list?

21 MS. CASWELL: No. I mean, what you should
22 look at is the contract. The relevant fact is
23 that the ILEC gets revenues from billing and
24 collections and perhaps some other things under
25 the contract. It gets nothing else. It books

1 nothing else.

2 CHAIRMAN JACOBS: So if in your contract
3 with your directory publishing affiliate there
4 is no value exchanged for the marketing or the
5 mailing list that they get to go out and solicit
6 advertising, is that something that we should
7 not look at?

8 MS. CASWELL: I'm not sure if that's an
9 element of the contract, what you're referring
10 to as the mailing list. I don't know if it's in
11 the contract.

12 CHAIRMAN JACOBS: Lets look -- let's take
13 another aspect of it. In your contract between
14 the affiliate, the publishing affiliate and the
15 ILEC, should we look at the extent to which
16 those customers advertise in that affiliate
17 because of some value from the Verizon name?

18 MS. CASWELL: No. No. You should look at
19 the --

20 CHAIRMAN JACOBS: Why not?

21 MS. CASWELL: -- statute and what the
22 statute allows you to do. If that were true,
23 Chairman, you could go to the data services
24 affiliate, and you could see what sort of value
25 you think they derive from being associated with

1 the ILEC. You could go to our CLECs. You could
2 go to, you know, any one of our affiliates and
3 do the same kind of analysis.

4 And you're going to have to do it every six
5 months when the fee is to be submitted. You're
6 going to have to engage in this sort of
7 ratemaking analysis every six months to see if
8 you think all these affiliates have arm's-length
9 transactions with the ILEC. That's the logical
10 conclusion of the staff's argument. You're
11 going to have to do these mini rate cases over
12 and over and over.

13 COMMISSIONER BAEZ: Mr. Chairman, I have
14 another question for staff. Ms. Moore, I'm
15 reading .051(c), where it says that a price
16 regulated company is exempt from 364.037.
17 That's the directory advertising revenue
18 statute. By being exempt from that, what's the
19 functional effect of that exemption?

20 MS. MOORE: Simply that the revenues are no
21 longer considered for rate regulating purposes.

22 COMMISSIONER BAEZ: And how -- well, to me
23 it seems that they're not part of a definition
24 any more. I mean, is that fair to say?

25 MS. MOORE: Not part of --

1 COMMISSIONER BAEZ: The directory -- the
2 revenues from directory advertising are no
3 longer part of the definition of something, part
4 of a basis for something.

5 MS. MOORE: For determining rates, yes, and
6 any of the obligations imposed by .037 --

7 COMMISSIONER BAEZ: And that's the only
8 thing that it's exempt from, from --

9 MS. MOORE: Yes. They're not exempt from
10 the regulatory assessment fee statute, .336 or
11 350.113.

12 COMMISSIONER BAEZ: Well, but if -- okay.
13 If now in clear terms, a statute that said, you
14 know, revenues with a capital R consist of A, B,
15 C, and D -- do you follow me? Let's take this
16 statute. Now all of a sudden a company is
17 exempt from what this revenues with a big R is
18 defined as, or a statute says, okay, D no longer
19 applies. would you still define revenues with a
20 big R as A, B, C, and D? Do you follow what --

21 MS. MOORE: If the statute says revenues
22 are now defined as this and they don't include
23 yellow page advertising --

24 COMMISSIONER BAEZ: Right.

25 MS. MOORE: And that statute was not just

1 -- that definition wasn't just tied to the rate
2 regulation, for instance, if it was much
3 broader, so that the regulatory assessment fee
4 statute said the fee is paid on the revenues,
5 then I would say, no, they wouldn't have to --

6 COMMISSIONER BAEZ: So you're just going on
7 the fact that there isn't an explicit exemption
8 from the regulatory assessment fees, from the
9 counting of directory revenues when you're
10 calculating regulatory assessment fees, that
11 they're two different things, ratemaking and
12 calculating the fees, that they're two different
13 bases?

14 MS. MOORE: Yes, yes.

15 COMMISSIONER BAEZ: Was there ever a time
16 when they coincided, I mean, when the bases are
17 the same, what you calculate your RAFs and what
18 you -- what were under your jurisdiction for
19 ratemaking purposes?

20 MS. MOORE: Yes, I believe that's the
21 case. Maybe Mr. Mailhot can add to that, but I
22 think typically regulated revenues were
23 regulated revenues for, you know, all purposes.

24 COMMISSIONER BAEZ: For everything, for all
25 purposes.

1 MS. MOORE: I believe so.

2 COMMISSIONER BAEZ: And wouldn't it make
3 sense to say when it's taken out of regulated
4 revenues for one purpose, it's taken out for
5 all?

6 MS. MOORE: No, because we still regulate
7 the service. And if you only based it on what
8 revenues were subject to rate regulation --

9 COMMISSIONER BAEZ: And you said something
10 interesting there, because I'm having trouble
11 understanding. Exactly what is the service that
12 we regulate? Based on our requirement that the
13 company puts out directory listings?

14 MS. MOORE: That's correct, and furnishes
15 directories.

16 COMMISSIONER BAEZ: Not yellow pages.

17 MS. MOORE: Right.

18 COMMISSIONER BAEZ: Just the directory
19 listings. And I'm having -- I'm not
20 understanding where the revenue part of it comes
21 in from them performing this particular
22 requirement.

23 MS. MOORE: We don't regulate -- you're
24 right. We don't regulate the rates or anything
25 having to do with the yellow page advertising.

1 Now, I know the business rate entitles a
2 business customer -- the business rate that they
3 pay for service entitles them to a yellow page
4 listing. So if that was an error, I think we
5 could --

6 COMMISSIONER BAEZ: would there be a way
7 for a company to live up to its requirement, to
8 comply with the requirement to provide directory
9 listings and not make any revenue at all, that
10 it was just a straight, you know, complying with
11 this requirement, and then, oh, here's this
12 other thing that we make business on. I mean,
13 can --

14 MS. MOORE: Could they separate --

15 COMMISSIONER BAEZ: -- you conceive of the
16 two being separate, the two functions or the two
17 services being separate?

18 MS. MOORE: Separating the white page
19 directory from the yellow page and --

20 COMMISSIONER BAEZ: well, separating the
21 statutory requirements, separating the
22 Commission's requirement from anything over and
23 above that that the company would decide to do
24 on a business basis, as a business decision,
25 that they would actually make revenue on.

1 I mean, the fact is that what we're
2 requiring the company to do doesn't produce any
3 revenues for them. Or is that not --

4 MS. MOORE: To the extent they don't sell
5 the white page directory?

6 COMMISSIONER BAEZ: Well, I don't think --

7 MS. MOORE: I would say your observation is
8 probably true.

9 COMMISSIONER BAEZ: I think, you know, if
10 you're requiring me to put out directories and I
11 did that, I would make no -- you know,
12 conceivably I wouldn't make any revenue for it,
13 and I would be complying with the requirement
14 that this Commission has placed that I provide
15 all my customers with a directory listing and a
16 directory for free and make no revenue out of
17 it. And I can just as well turn around tomorrow
18 and say, "You know what? I'm going to put out
19 this book that has advertising in it." We
20 couldn't touch that. We're not requiring it.
21 It's not within our jurisdiction to require them
22 to provide it, and it's certainly not within our
23 jurisdiction to attach to those revenues; is
24 that right?

25 MS. MOORE: I would say yes.

1 COMMISSIONER BAEZ: Because that's
2 unregulated. That's not required, and that's
3 not --

4 MS. MOORE: Right.

5 COMMISSIONER BAEZ: What is it about this
6 scenario as it exists now that's any different?

7 MS. MOORE: I think that the revenues from
8 the advertising, I think the Commission has
9 said, and I agree, that the basis for those
10 revenues and those great profits are because of
11 its position as the local exchange company, and
12 it's the Commission's requirement that they do
13 publish a directory, or the statute requires
14 furnishing a directory and a white page
15 listing. So it is integrally related, and the
16 ratepayers benefit from that, not solely --

17 COMMISSIONER BAEZ: Related --

18 MS. MOORE: -- the shareholders.

19 COMMISSIONER BAEZ: I'm sorry. Related in
20 what way? Their branding, their positioning?

21 MS. MOORE: They can assure the advertisers
22 that the directory will be distributed to every
23 telecommunications customer, every person
24 receiving service in that --

25 COMMISSIONER BAEZ: For a fee.

1 MS. MOORE: Right.

2 COMMISSIONER BAEZ: which that fee is part
3 of jurisdictional revenues.

4 MS. MOORE: Yes.

5 COMMISSIONER BAEZ: All right.

6 MS. MOORE: And they maintain that
7 dominance because of the requirement that they
8 furnish that directory, the white page part of
9 it.

10 COMMISSIONER PALECKI: I would like to ask
11 staff to address the Company's argument with
12 regard to Section .336. Their argument is that
13 it specifically applies to certificated
14 telecommunications companies and not non-utility
15 affiliates. How do you address that argument?

16 MS. MOORE: I think it depends on whether
17 the business of the affiliate is integral -- is
18 directly related to their regulated service.
19 There are no facts in the petition, no
20 circumstances specifying the different services
21 that they allege ALECs may provide that are
22 provided by affiliates and whether those would
23 be considered.

24 staff's opinion is that if they were doing
25 directory publication and revenues were related

1 to that, then they should be attributed to the
2 company itself. I think it depends on the
3 nature of the business that the affiliate is
4 doing.

5 COMMISSIONER JABER: Where do you get that
6 language from, Chris? What can you point to
7 that gives you that guidance that it depends on
8 whether the nature of the service is directly
9 related to their regulated service?

10 MS. MOORE: There is not language in the
11 statute. It does say telecommunications
12 service; that's correct. The Commission has
13 interpreted that in the past to include the
14 revenues that are related to the provision of
15 telecommunications service, regardless of the
16 corporate structure.

17 COMMISSIONER JABER: And that
18 interpretation was in the United order?

19 MS. MOORE: United, and I think in various
20 rate cases also, in the Southern Bell rate case
21 that's cited.

22 COMMISSIONER JABER: And then those
23 decisions came before the implementation of the
24 '96 act; correct?

25 MS. MOORE: Yes. But I don't think it's

1 dependent on whether the Commission can regulate
2 the rates. I think the principle is the same.

3 COMMISSIONER PALECKI: Now, under Section
4 364.336, if the utility took a clearly utility
5 function and they went ahead and contracted with
6 a completely independent subcontractor in no way
7 related to the company, not an affiliate,
8 clearly, there would be some profit made, but
9 the profit would not be in any way associated
10 with the telecommunications company.

11 I guess what you're saying is that because
12 revenue is being derived, whether it's for a
13 telecommunications or a non-regulated function,
14 it stays with the company rather than going
15 outside? Is that the rationale?

16 MR. MAILHOT: Yes. If you look a number of
17 the small ILECs, they have contracts with an
18 independent publisher, and in those cases, 100%
19 of the revenue from the directory advertising is
20 recorded on the ILEC's books. And then what
21 they do is, they pay the publisher a commission.
22 Say, 30%, 40% of the gross revenue may end up as
23 a commission to the publisher. But 100% of the
24 revenue ends up on their books, and they end up
25 paying directory -- paying a regulatory

1 assessment fee on all of that directory revenue.

2 CHAIRMAN JACOBS: How about expenses? What
3 kind of expenses are they incurring to do this?

4 MR. MAILHOT: Most of their expenses
5 involve the commission that they pay to the
6 directory publisher, which is, like I say,
7 around 30 to 40% of the gross revenue. And
8 that's recorded as an expense, so it's not even
9 a reduction to the revenue. I mean, they record
10 100% of the revenue on their books.

11 And if you go back, you know, maybe 20
12 years ago, that was the same situation for most
13 of the companies, most of the ILECs. They
14 recorded all of the revenue on their own books,
15 and they paid a regulatory assessment fee on all
16 of that revenue.

17 And what has happened over time is, several
18 of the -- especially the large ILECs have set up
19 affiliates to do this, you know, to do the
20 directory publishing. And based on their
21 contracts, they've essentially said, well, most
22 of the revenue belongs to the affiliate, and the
23 affiliate will simply pay the ILEC some
24 percentage, you know, for doing work. And that
25 can range from anywhere from only 10% of the

1 gross revenue to maybe 40 or 50% of the gross
2 revenue. It varies considerably. But they've
3 simply set up affiliates and recorded the
4 revenue on the affiliate's books instead of on
5 their own books.

6 And that's -- I mean, our position really
7 has nothing to do with the ratemaking
8 treatment. It's really just the regulatory
9 assessment fee issue.

10 CHAIRMAN JACOBS: And that's an important
11 point. And, of course, we're arguing that while
12 the statute -- the exemption may apply for
13 ratemaking purposes, we're saying that it
14 doesn't apply for purposes of calculating the
15 regulatory assessment fee.

16 The counterargument is that it all speaks
17 to gross operating revenue, and that's all we're
18 talking about. How do you address that?

19 MR. MAILHOT: Well, what we have is a
20 situation where they've signed contracts which
21 simply, in effect, transfer a significant amount
22 of gross revenue to the affiliate. They're
23 quite willing to do this because it's not an
24 arm's-length transaction. It's an affiliate.
25 In the cases where you still have companies that

1 have signed contracts with independent
2 publishers, there you'll see that 100% of the
3 revenue is still recorded on the ILEC's books.

4 CHAIRMAN JACOBS: In the case of Donnelley
5 -- I think that's the name of one of the outfits
6 that does these; right? Have we -- it occurs to
7 me that if I wanted to look at this and
8 determine to what extent the ILEC affiliate is
9 in a really independent position, I would look
10 at someone like Donnelley and determine to what
11 extent their expenses correlate to the expenses
12 of this affiliate and the extent to which their
13 market value -- I'm sorry, their name
14 recognition value has garnered them a certain
15 advertising rate as opposed to the name value of
16 Verizon has garnered this affiliate a particular
17 advertising rate. Have you ever done something
18 of this sort, looked at this in those terms?

19 MR. MAILHOT: No. I mean, years ago there
20 was, you know, some effort to do that, and
21 that's when you get back into the ratemaking
22 statute, because then you get into the relative
23 amount of gross profit, which is the revenues
24 minus the expenses.

25 CHAIRMAN JACOBS: Right.

1 MR. MAILHOT: This issue here is simply the
2 revenues, because we're not in a ratemaking
3 issue here. So, I mean, we're not really
4 concerned about the value or the expenses
5 involved.

6 CHAIRMAN JACOBS: well, from the regulated
7 companies' standpoint, I can agree. My interest
8 here is, if that argument wins, if the Company's
9 argument wins, that gross revenues no longer
10 includes these revenues from advertising, then
11 I'm at a point where I want to understand, okay,
12 how is it that we ensure that the revenue
13 they're getting from their affiliate equates to
14 proper value, because I want to make sure that
15 that ILEC is getting proper value.

16 If it's truly a reasonable contract, then
17 that affiliate ought to be giving back value
18 that represents that contract to the ILEC, and
19 then that will be where the imputation occurs.
20 The imputation will occur to make sure that if
21 it does not represent value coming back from the
22 affiliate, then we want to impute what that
23 value would be as revenue to the ILEC. You
24 understand?

25 And my concern here is, we don't even have

1 a measurement to go on with that, it doesn't
2 sound like. we wouldn't know what the proper
3 value should be for a contract between an ILEC
4 with a non-affiliated company to do its
5 publishing business, its directory publishing
6 business, do we?

7 MR. MAILHOT: well, we do if you look at
8 the contracts with the independents. The
9 publisher in those cases essentially retains
10 somewhere around 35 to maybe 40% of the revenue
11 for their services, so actually the other 60 to
12 65% belongs to the ILEC.

13 CHAIRMAN JACOBS: So the argument --

14 MR. MAILHOT: That's an arm's-length
15 transaction.

16 CHAIRMAN JACOBS: And the argument being
17 that the value that should have been exchanged
18 was somewhere on the order of 35% to that
19 affiliate; is that correct? It's not the whole
20 100%.

21 MR. MAILHOT: Correct.

22 CHAIRMAN JACOBS: And this is where the
23 tricky part comes, because to expand on that
24 argument, what we have to say is that the
25 affiliate gained its market status, its market

1 position and the level of revenues because of
2 the relationship it has with that parent. I
3 mean, if that affiliate were to go out and set
4 up shop to do business as simply XYZ Directory
5 Distribution Company, would they be able to
6 garner the level of advertising rates that they
7 do, would they be able to get the level of
8 distribution that they do, and would they be
9 able to attract that level of revenue that
10 they're able to attract now?

11 And in my mind, that sounds like some kind
12 of a scrutiny that you would want to put on
13 that, on whether or not there's value, true
14 value being exchanged between those two
15 companies. Is that a reasonable approach?

16 MR. MAILHOT: It could be. As I say, in
17 the past we've just looked at 100% of the gross
18 revenue as belonging to the ILEC.

19 CHAIRMAN JACOBS: Here's my point.

20 MR. MAILHOT: Because that's the way it is
21 in the contracts, even with the independents.
22 You know, the revenue belongs to the ILEC, and
23 then the ILEC also has an expense.

24 CHAIRMAN JACOBS: Here's the point. The
25 Company raises I think an interesting point by

1 raising the enactment of this statute after that
2 decision, although I think there's a
3 double-edged sword there, because if indeed that
4 statute was enacted after this decision, and
5 indeed that decision was on the books, you could
6 argue that there should have been an express
7 exemption in the statute to deal with this
8 imputation issue. So there not being some
9 express exemption in the statute, we now have to
10 go to interpreting what gross operating revenues
11 is. And you could argue that the Legislature
12 wouldn't have left that up -- that important an
13 issue up in the air.

14 But let's buy that argument for a moment
15 that by enacting a statute having to do with
16 price regulation, the Legislature intended to
17 affect what ties the company's gross operating
18 revenue. Okay? In my mind, then don't we have
19 to figure out how to distinguish this from gross
20 operating revenue into some other kind of
21 revenue? Do you follow my point?

22 MR. MAILHOT: I'm not sure. I mean, in our
23 view, the change in the statute in 1995 really
24 had nothing to do with the regulatory assessment
25 fee.

1 CHAIRMAN JACOBS: That's your story, and
2 you're sticking to it?

3 MR. MAILHOT: Yes. I mean, basically, it
4 really didn't have anything to do with it.

5 COMMISSIONER JABER: Can I ask Mr. McLean a
6 question to give me just a little bit of
7 guidance?

8 Mr. McLean, I see the regulatory assessment
9 issue separate from the traditional ratemaking
10 concepts. I'm looking at 364.336, and I'm
11 concentrating on this language for several
12 things. One is the point that Chairman Jacobs
13 just made with respect to there is no specific
14 exemption for the collection of directory
15 revenues. But second, I'm looking at the words,
16 "each telecommunications company," and then
17 "intrastate business."

18 Ms. Caswell makes the point that the
19 affiliate is not a telecommunications company,
20 or the argument at least, and that even if you
21 look at the nature of the service, it doesn't
22 constitute an intrastate business. Can you give
23 me some guidance on all of those things?

24 MR. MCLEAN: Maybe I can help. First of
25 all, I think the Chairman put his finger

1 directly on a point which has not been mentioned
2 thus far, and that is, that was not timid
3 legislation that came out in those years, 1995,
4 1996. The Legislature must be presumed to know
5 that you were taxing this entity, and it would
6 have been a very simple stroke of the pen to
7 throw that section in as well. The Legislature
8 may have also been aware that you regulate many
9 other aspects of this enterprise, not just the
10 rate base, and not just the rate of return and
11 so forth, and perhaps they wanted to collect
12 money to compensate the government for
13 performing that function.

14 with respect to your question about the
15 statute, I can't help but notice what that
16 statute says to begin with. It says,
17 "Notwithstanding any provision of law to the
18 contrary," which seems to me to suggest to you
19 that you ought to resolve doubt in favor of the
20 taxing authority.

21 And let me go just a little bit more into
22 that. You all are cast into the unfamiliar and
23 perhaps unwelcome role of tax collector here. I
24 don't think these traditional notions that
25 you've discussed a lot this morning about

1 regulatory ratemaking and so on are going to
2 help you a whole lot. I think that you ought to
3 be looking at more tradition notions of taxing
4 authority and how that taxing authority is
5 construed in the State of Florida.

6 And to the extent that your questions
7 regarding regulatory concepts have addressed the
8 notion of the nexus between this affiliate and
9 the company in general, they're very relevant to
10 the issue of whether they should be taxed. But
11 let me point this out. You've taxed them for
12 years. The Legislature has known you've taxed
13 them for years, and they have not relieved you
14 of the responsibility in that legislation that
15 came out in 1995 and 1996.

16 There is a potential -- I think that I'm
17 persuaded by Ms. Caswell's argument that says,
18 if I can paraphrase it, "well, if you tax our
19 yellow page revenues, what will you tax next?"
20 There's a flip side to that, of course, and that
21 is that if we don't tax this affiliate, what
22 affiliate will you reform next?

23 There is a general notion in tax law I
24 think that says the taxing authority must look
25 to substance as opposed to form. We look to --

1 the taxing authority looks to the actual
2 substance of the transaction and relationship as
3 opposed to its form.

4 Nonetheless, and to the extent that I
5 oppose delay -- I generally don't think it's a
6 good idea -- I think it would be very wise of
7 the Commission to accept legal briefs on this
8 issue, because I think the parties ought to take
9 you into the area of taxing law as opposed to so
10 much regulatory law; and particularly to the
11 notion that whether and to what extent perhaps
12 the nexus between the affiliate and the
13 traditionally taxed corporation is important to
14 the issue of whether you should continue the
15 tax; and what happens when the Legislature has
16 permitted, if not ordered you to tax for years,
17 and there is some cloud cast upon that
18 authority. I believe that you're entitled to a
19 legal brief on the issue. As much as I hate to
20 see the delay, that's what I would recommend.

21 Failing in that, let me say my inclination
22 would be to advise you that you have taxed it
23 for years, that the Legislature had a golden
24 opportunity to relieve you of that
25 responsibility, if it is a responsibility, and

1 it didn't do it, and they must be presumed to
2 know that you are levying that tax at their
3 order. They must be presumed to know that.
4 They had an opportunity to relieve you of that
5 obligation, and to my eye, they did not do it.

6 I don't think that an analysis of whether
7 and to what extent they are regulated helps you
8 very much at all except to address the rather
9 narrow question of the nexus between the
10 affiliate and the taxing authority.

11 COMMISSIONER DEASON: Mr. Chairman, let me
12 make one point. I have reviewed the various
13 sections of the Florida Statutes in Chapter 364
14 in which companies are exempt when they choose
15 to become price cap regulated. And, of course,
16 364.037 is the only one that deals with the
17 question of directory advertising and that sort
18 of thing. The others are more general areas
19 which refer to the basis of setting rates, and
20 interim rate procedure, and things of that
21 nature, which, if a company is no longer subject
22 to rate base regulation, surely they should be
23 exempted from.

24 The problem I'm having is, we have a very
25 clear statute that tells us to collect

1 regulatory assessment fees on gross operating
2 revenues derived from intrastate business. It
3 doesn't say "as the Commission defines in a rate
4 proceeding" or anything like that. It just says
5 if it's gross operating revenue and it's from
6 intrastate business, you calculate the
7 regulatory assessment fee. I don't see how the
8 exemption changes that definition.

9 And I agree with Mr. McLean. If it was the
10 intent of the Legislature to have this agency
11 cease to collect regulatory assessment fees on
12 revenues derived from yellow page advertising,
13 it would have been a simple matter to have
14 defined it as such, but they did not.

15 I just don't see where the exemption
16 changes the definition of gross operating
17 revenues derived from intrastate business. An
18 extreme interpretation would be that this
19 company no longer has any revenue derived from
20 intrastate business, because we're no longer in
21 the business of defining the revenue for
22 purposes of setting rates. And that's the
23 argument that I hear Ms. Caswell saying, is
24 because they're exempt from the requirement to
25 impute yellow page advertising in their rates,

1 they're exempt from calculating regulatory
2 assessment fees.

3 well, it would be just as logical to say
4 that since you don't set our rates at all, you
5 don't consider any revenue we derive in
6 determining rates, and we're exempt from that;
7 therefore, we owe you zero regulatory assessment
8 fees. And I don't think that's logical.

9 I'm not against the recommendation that we
10 receive legal briefs on the question, but my
11 point of view is that it's really not required.

12 COMMISSIONER PALECKI: Chairman Deason, I
13 agree with you completely that the exemption
14 really has nothing to do with the regulatory
15 assessment fee. What I'm more troubled with is
16 the argument regarding Section 364.336, in that
17 these are not revenues of the licensed or
18 operating telecommunications company. I think
19 if you look at a strict reading of that chapter,
20 the affiliate, and it's very arguable, does not
21 fall under that definition.

22 I guess I'm even more troubled, because I
23 think under the statute it would be arguable
24 that if a utility function had been subbed out
25 to the affiliate, that you could still make that

1 argument that even though it's a utility
2 function, that it's not actually the
3 telecommunications company's revenues. And I'm
4 troubled that that would allow any
5 telecommunications company to completely avoid
6 any regulatory assessment fee.

7 I'm leaning towards wanting to have the
8 legal briefs on this issue, but I would like to
9 at least ask the company that if you take your
10 argument to its logical conclusion, wouldn't you
11 be able to avoid regulatory assessment fees
12 completely just by subbing or contracting out
13 even your utility functions to your affiliate?

14 MS. CASWELL: No, because then that company
15 will pay regulatory assessment fees.

16 COMMISSIONER PALECKI: well, not under the
17 statute if they're not a licensed
18 telecommunications company.

19 MS. CASWELL: If it's performing -- you're
20 saying utility function. If it's performing --
21 if it's performing a function like that, I'm
22 assuming it's going to be a telecommunications
23 function.

24 COMMISSIONER PALECKI: well, under a
25 contract, you could take, I would think,

1 regulated functions and subcontract them out to
2 either an affiliate or an independent company
3 who would be working for the licensed
4 telecommunications company. I would think you
5 probably sub out many functions that are
6 telecommunications related.

7 CHAIRMAN JACOBS: I think, Ms. Caswell, if
8 I'm not mistaken, you're saying that even if
9 that were to occur that that subcontractor would
10 have to then come and get a certificate; is that
11 correct?

12 MS. CASWELL: I believe so, if it were
13 performing these, quote, utility services. And
14 depending on the nature of the subcontract, you
15 would have to look at whose books the revenues
16 would hit, I guess. But you're not going to be
17 deriving revenues from telecommunications
18 services, because only telecommunications
19 companies can provide those, and you get the
20 regulatory assessment fee on those services
21 provided by telecommunications companies.

22 So we can't get around by that simply, you
23 know, creating affiliates all over the place to
24 avoid the fee. You know, even if we were so
25 inclined, I don't think that would work.

1 COMMISSIONER PALECKI: well, if you're
2 making a profit on some function and you went
3 ahead and subbed it out to a completely
4 non-related subcontractor, obviously, you would
5 not make a profit. There would be no revenues
6 from that function anymore, and the
7 non-regulated subcontractor or non-affiliated in
8 any manner would just do the work for the
9 licensed utility.

10 Now, arguably, it seems that you could do
11 the same thing with an affiliate. And let's
12 talk about it being an arm's-length transaction,
13 and you have a fair contract. Under your
14 argument, it would take those revenues which
15 still would be derived by the larger company.
16 The profits would be earned by the affiliate,
17 and it would mean you could avoid the regulatory
18 assessment fee, I think, taking your argument to
19 its logical conclusion.

20 MS. CASWELL: If you have an affiliate
21 that's performing non-telecommunications
22 services, just like the directories affiliate
23 is --

24 COMMISSIONER PALECKI: I want to talk about
25 telecommunications services. You're subbing out

1 a function.

2 MS. CASWELL: Oh, yes. If you're talking
3 about that, I don't see a way that you can avoid
4 the fees, because you're going to have to be
5 certificated as a telecommunications company.

6 COMMISSIONER PALECKI: You're saying that
7 all of the subs that you use to perform any
8 functions related to the telecommunications
9 company needs to be another certificated
10 subcontractor? I don't think so.

11 MS. CASWELL: No, what I'm saying is, if
12 they're providing telecommunications services,
13 they need to be a certificated company.

14 COMMISSIONER PALECKI: No, I'm talking a
15 function related to you providing
16 telecommunications services. See, your argument
17 has --

18 MS. CASWELL: I guess maybe I'm not
19 understanding because I don't see any sort of
20 concrete example.

21 COMMISSIONER BAEZ: Commissioner, if I can
22 stick my foot in this for a second, it seems to
23 me -- and I have the same concerns, that you
24 open the door, and now out of a sudden
25 everything falls through.

1 A company providing telecommunications
2 services, whether it's an affiliate or not, is
3 going to be one of two things: They're either
4 going to have to come in and get certificated,
5 or they're providing that service as a sub
6 exclusively to the company, which is then making
7 revenue off it, and then they wouldn't have to
8 be certificated.

9 But it doesn't seem to me, I think in the
10 example that we're all trying to get our hands
11 around, where the company would have to -- would
12 be able to say, "well, we're not getting any
13 revenue. The revenue is going directly -- you
14 know, we're not booking the revenue for
15 providing that service." In the case where
16 there's a subcontractor providing this utility
17 function to the company, I don't see how they
18 avoid that. I don't see how they avoid getting
19 those revenues imputed to them.

20 COMMISSIONER PALECKI: I agree.

21 COMMISSIONER BAEZ: And if somebody wants
22 to jump in and say how it can, you know,
23 please. Maybe I'm just missing something here.

24 COMMISSIONER PALECKI: Commissioner, I
25 guess what I'm troubled by is the clear language

1 of 364.336 that talks about a licensed
2 telecommunications company. And I think the
3 argument is that we're dealing with an affiliate
4 that is not a licensed telecommunications
5 company, and that in reading the language of the
6 statute, we have no regulatory assessment fee
7 because the affiliate is simply not a licensed
8 telecommunications company.

9 COMMISSIONER BAEZ: And here is where my
10 whole difficulty in understanding this comes
11 in. To me, directory -- publishing a directory,
12 to call that a telecommunications service, you
13 can't define it as one, strictly speaking.
14 Because the company has a statutory
15 responsibility to provide a directory, and now
16 all of a sudden that's lumped into everything
17 else and it's a telecommunications service, to
18 me that's a fiction. Now, it's a useful
19 fiction, and it's a practical fiction, but it is
20 a fiction nonetheless. You cannot look at it
21 standing alone and say, "This is a
22 telecommunications service. This is like
23 providing dial tone. This is like providing
24 anything else that would fall within the
25 definition."

1 So where I break off is this: If now all
2 of a sudden this fiction that was created as a
3 telecommunications service is no longer subject
4 to regulation -- and to me, that's what the
5 exemption did. It frees it from regulation,
6 because it's no longer lumped into this
7 telecommunications revenue definition for
8 telecommunications service so that we can
9 calculate rates and so that we can set rates,
10 and furthermore, so that we can get our RAFs, so
11 we can calculate the assessment fees. If all a
12 sudden that fiction doesn't exist anymore, then
13 how can we continue to hang onto it?

14 And I think Mr. McLean's comments are well
15 taken, but it just doesn't -- it doesn't fit in
16 my mind how the Legislature could have said,
17 "All right. This situation doesn't exist
18 anymore, oh, except for the Commission so that
19 you can get your -- you know, so that you can
20 wet your beak." That doesn't compute.

21 So I don't see -- well, I do see the
22 opportunity or the possibility that the door is
23 open wide, and now all of a sudden because --
24 you know, because it's an affiliate involved and
25 not the company, that there would be some issues

1 as to whether revenues for telecommunications
2 services are imputed. I'm not that concerned
3 over that, because I think there's two ways that
4 you can go. You're either providing it for the
5 company and they're deriving it, they're
6 creating the revenues, or a company itself is
7 providing that service to the public for hire,
8 which makes it a telecommunications company, and
9 somebody is going to owe an assessment fee.

10 Directory publishing to me was a fictional
11 service that existed or that was created one day
12 because of the nexus to the company, and because
13 it was something that we were requiring to some
14 extent. But that condition doesn't exist
15 anymore, not in my mind.

16 COMMISSIONER JABER: Let me take a stab at
17 a motion. I don't know if it will satisfy you,
18 Commissioner Baez, or you, Commissioner Palecki,
19 but just in an effort to change the discussion a
20 little bit to a motion.

21 I keep focusing on 364.336 and what it says
22 literally about regulatory assessment fees, and
23 what Mr. McLean has confirmed for me that it
24 doesn't -- what it doesn't say, for example, the
25 specific exemption that would deal with the

1 situation.

2 You know, we implement the law that has
3 been created for us, and we are supposed to look
4 at the plain meaning of the statute, and we're
5 not supposed to read into the statute. The
6 exemption found under the price regulation
7 statute could have included an exemption for
8 .336, and they do not. The regulatory
9 assessment fee statute could have been changed,
10 and it wasn't. That was a critical point, and I
11 needed to hear that from Mr. McLean.

12 And with that, I've got a comfort level
13 that I can move staff's recommendation for those
14 reasons, that the statute I think is clear with
15 respect to collecting revenues associated with
16 all functions by GTE, or in this case its
17 affiliate, because the statute does not contain
18 an exemption to address the directory revenues.

19 COMMISSIONER PALECKI: Second.

20 CHAIRMAN JACOBS: Moved and second to
21 approve staff. All in favor say "aye."

22 COMMISSIONER PALECKI: Aye.

23 CHAIRMAN JACOBS: All opposed?

24 COMMISSIONER BAEZ: Nay.

25 CHAIRMAN JACOBS: Show a four-to-one vote.

1 I did not vote. I should say "aye." Show it
2 approved by a four-to-one vote.

3 That takes care of Item 3, and I believe
4 also the agenda.

5 (Conclusion of consideration of Item 3.)
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CERTIFICATE OF TRANSCRIBER


STATE OF FLORIDA:

COUNTY OF LEON:

I, MARY ALLEN NEEL, do hereby certify that the foregoing was transcribed by me from an audiotape, and that the foregoing pages numbered 1 through 59 are a true and correct transcription of the aforesaid proceedings to the best of my ability.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing matter.

DATED THIS 10th day of January, 2001.


MARY ALLEN NEEL, RPR
100 Salem Court
Tallahassee, Florida 32301
(850) 878-2221