SUPREME COURT OF FLORIDA

Case No. SC01-323

VERIZON FLORIDA INC.,

Appellant,

v.

E. LEON JACOBS, JR., et al.

Appellees.

INITIAL BRIEF OF VERIZON FLORIDA INC.

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PREFACE

Petitioner, Verizon Florida Inc. (formerly known as GTE Florida Incorporated), is referred to as "Verizon" herein. Verizon Directories Corp. is referred to as "Directories." Respondent, the Florida Public Service Commission, is referred to as "the Commission."

This matter is before the Court on review of the Commission's Declaratory Statement, Order number PSC-01-0097-DS-TL, issued on January 11, 2001 (hereinafter referred to as "Declaratory Statement"). The Declaratory Statement determined Verizon's Petition for Declaratory Statement (hereinafter, "Petition"), filed on October 13, 2000.

All references to the transcript of the January 2, 2001 agenda conference at which the Commission ruled on Verizon's Petition are designated by "T," followed by the page number within the transcript.

STATEMENT OF THE CASE

Verizon appeals the Commission's Declaratory Statement that pursuant to section 364.336 of the Florida Statutes and Rule 25-4.0161 of the Florida Administrative Code, Verizon must pay regulatory assessment fees not only on "its gross operating revenues derived from intrastate business," but also on the directory advertising revenues of Directories, a separate corporation that is not a telecommunications company and is not subject to Commission jurisdiction. Verizon contends the Declaratory Statement is erroneous because there is no lawful basis for requiring it to pay a regulatory assessment fee based upon the revenue of a corporate affiliate that is not regulated by the Commission.

STATEMENT OF FACTS

Verizon is a local exchange telecommunications company, as that term is defined in section 364.02(6) of the Florida Statutes. The Commission has licensed, or "certificated," Verizon to provide telecommunications services in certain areas of Florida.

As a local exchange telecommunications company, Verizon is required to distribute a white pages directory listing its customers' telephone numbers. Fla. Admin. Code Rule 25-4.040. It has no obligation, however,

to publish a yellow pages directory containing classified advertising. (T. 29, 31-32).

To satisfy its white pages directory obligation, Verizon has entered into a contract with its corporate affiliate, Directories. Directories is not a telecommunications company and is not regulated by the Commission. Instead, it is a structurally separate corporation that sells yellow pages directory advertising and publishes directories that include both yellow pages advertising and white pages directory listings for affiliated and non-affiliated companies. (T. 11, 13; Petition at 2).

Under the contract between Verizon and Directories, Verizon performs certain services for Directories, such as billing and collecting for yellow pages advertising, by including the charges in its telephone bills. (Petition at 1). Directories pays Verizon for these services, and these payments are included in Verizon's regulated revenues. Verizon, however, does not include in its regulated revenues the money it bills and collects for Directories or any other company for which it provides billing and collections service. (Petition at 1-2; T. 5-6, 8, 11).

Prior to 1996, Verizon's prices were set pursuant to "rate of return" regulation. (See Petition at 3, 7). Under rate of return regulation, the Commission was permitted to include yellow pages advertising directory

revenues when setting rates for telecommunications services. Fla. Stat. § 364.037.

Effective January 1, 1996, Verizon elected to operate under "price cap" regulation, rather than rate of return regulation, as permitted by Florida Statute section 364.051. (Petition at 3; T. 7). Price cap companies are exempt from the directory advertising revenue imputation prescribed by section 364.037. Fla. Stat. § 364.051(1)(c).

The Commission is authorized to require the telecommunications companies it regulates to pay a regulatory assessment fee pursuant to section 364.336 of the Florida Statutes. That provision provides, in pertinent part, that:

> each telecommunications company licensed or operating under this chapter ... shall pay to the commission ... a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business.

On October 13, 2000, Verizon filed a petition with the Commission requesting a declaratory statement, pursuant to Florida Statute section 120.565 and Rule 28-105 of the Florida Administrative Code, that it is not required to pay a regulatory assessment fee on Directories' yellow pages directory advertising revenue. Verizon's petition was based upon the fact

that this revenue is not "its gross operating revenue derived from intrastate business" as required by section 364.336(emphasis added).

In its Declaratory Statement issued January 11, 2001, the Commission, by a vote of 4-1, concluded "that the directory advertising revenues from the directories for areas within Verizon's certificated territory that are billed and collected by Verizon, but which are booked by Verizon's affiliate, should continue to be imputed to Verizon and Verizon is required to pay regulatory assessment fees on those revenues." (Declaratory Statement at 9). Commissioner Baez dissented from the Commission's decision because "[n]othing in [Section 364.336] gives the Commission the authority to impute directory advertising revenue gained by Verizon's affiliate to Verizon for the purpose of calculating" regulatory assessment fees. (Declaratory Statement at 14).

As a result of the Commission's decision, Verizon was required to pay $285,000 in regulatory assessment fees on Directories' revenues for the year 2000 alone. (Declaratory Statement at 2).

STANDARD OF REVIEW

The standard of review in this case is whether the Commission's interpretation of the law is clearly erroneous. See, e.g., Regal Kitchens, Inc. v. Fla. Dept. of Revenue, 641 So. 2d 158, 162 (Fla. 1st DCA 1994); Sans Souci v. Div. of Fla. Land Sales and Condominiums, 421 So. 2d 623, 626 (Fla. 1st DCA 1982); Southeastern Utils. Svc. Co. v. Redding, 131 So. 2d 1, 4-5 (Fla. 1961).

SUMMARY OF ARGUMENT

Section 364.336 of the Florida Statutes requires "each telecommunications company" under the Commission's jurisdiction to pay regulatory assessment fees on "its gross operating revenues derived from intrastate business." Fla. Stat. § 364.336. The Commission has interpreted this statute to require Verizon to pay regulatory assessment fees not just on its own revenues, but on those of its directory publishing affiliate, a separate corporation that is not a telecommunications company subject to Commission jurisdiction.

The Commission's interpretation of section 364.336 is clearly erroneous because it is contrary to the statute's plain language. Likewise, it ignores the Legislature's stated purpose for establishing the regulatory assessment fee, which is to help defray the Commission's costs of regulating

companies under its jurisdiction. Fla. Stat. § 350.113. Because the Commission does not regulate Directories, there is no need for it to collect a fee on its revenues.

Instead of focusing on the language and explicit legislative purpose of section 364.336, the Commission speculates about legislative intent. This exercise is entirely improper where, as here, the statute is unambiguous. Even if statutory construction were proper, which it is not, all of the Commission's attempted justifications must be rejected.

The Commission's discussion of imputation precedent confirms that imputation is a concept rooted in rate of return regulation, which no longer applies to Verizon, a price cap regulated carrier. The only statutory authority for imputation of directories revenues appears in section 364.037, which requires consideration of such revenues for rate of return regulation. Although the Commission admits this statute does not apply to Verizon, it fails to link its directory advertising imputation policy to any other statutory language. It defies logic to believe that the Legislature would have removed the only statutory imputation authority for regulatory purposes, but retained it, without saying so, for purposes of calculating the regulatory assessment fee.

Furthermore, if the Commission were right about the scope of its authority under section 364.336, it would have unbridled discretion to choose which regulated companies must pay regulatory assessment fees on their affiliates' revenues and to decree the amount of affiliate revenues to be imputed. It is unreasonable to believe that the Legislature granted the Commission such extraordinary discretion without expression in the language of the statute itself. If the Legislature had done so, the attempted delegation would be impermissible for failure to specify any standards for the exercise of the Commission's discretion.

Verizon asks this Court to reverse the Commission's Declaratory Statement; clarify that the Commission may no longer require Verizon to impute Directories' revenues for purposes of calculating Verizon's regulatory assessment fees; and direct the Commission to permit Verizon to deduct from its next regulatory assessment fee payment the amounts it paid on Directories' revenues since at least July of 2000, when Verizon first notified the Commission that these amounts were paid under protest. (Attachment to Petition).

ARGUMENT

The Commission's interpretation of section 364.336 is clearly erroneous because it does not follow the basic rules of statutory

construction. The Commission ignored the unequivocal language of the statute, as well as the Legislature's stated purpose for establishing the regulatory assessment fee, and instead engaged in impermissible speculation about what the Legislature must have intended.

A. The Commission Was Required to Recognize the Plain Language of the Statute.

An agency's interpretation of a statute must be reversed if it is clearly erroneous. Regal Kitchens, 641 So. 2d at 162; Sans Souci, 421 So. 2d at 626; Southeastern Utils., 131 So. 2d at 4. "There can be no doubt that an administrative ruling or policy which is contrary to the plain and unequivocal language of a legislative act is clearly erroneous....If the terms and provisions of a statute are plain there is no room for judicial or administrative interpretation." Southeastern Utils., 131 So. 2d at 4-5. "Rules of statutory construction should be used only in case of doubt and should never be used to create doubt, only remove it." Englewood Water Dist. v. Tate, 334 So. 2d 626, 628 (Fla. 2d DCA 1976). See also Starr Tyme, Inc. v. Cohen, 659 So. 2d 1064 (Fla. 1995); Tatzel v. State, 356 So. 2d 787, 788 (Fla. 1978); Florida Real Estate Comm'n v. McGregor, 268 So. 2d 529, 530-31 (Fla. 1972); Tropical Coach Line, Inc. v. Carter, 121 So. 2d 779, 782 (Fla. 1960) ("In making a judicial effort to ascertain the legislative intent implicit in a statute, the courts are bound by the plain and definite

language of the statute and are not authorized to engage in semantic niceties or speculations.").

If a statute is ambiguous, such that construction is appropriate, the legislative purpose behind its enactment is of paramount importance in its interpretation. "Every Act of the Legislature should be construed with reference to the purpose intended to be effectuated." State ex. rel. Knott v. Lee, 197 So. 681, 682 (Fla. 1940); see also Whidden v. State, 32 So. 2d 577, 578 (Fla. 1947) ("We must gather the legislative intent from the language used and the purpose to be accomplished"). "[T]he terms of the statute cannot by construction be extended beyond the fair import of the language used considered in view of the object sought to be attained." Escambia County v. Blount Construction Co., 62 So. 650, 651 (Fla. 1913).

Courts also will reject statutory interpretations that lead to absurd or unreasonable results. "Where legislative language is susceptible to more than one interpretation, the interpretation which avoids an unreasonable result should be preferred." Agrico Chemical Co. v. Florida Dept. of Environmental Reg., 365 So. 2d 759, 766 (Fla. 1st DCA 1978); see also Wakulla County v. Davis, 395 So. 2d 540, 543 (Fla. 1981); State ex rel. Fla. Industrial Comm'n. v. Willis, 124 So. 2d 48, 51 (Fla. 1st DCA 1960) ("a statute should not be construed to bring about an unreasonable or absurd

result and...should be construed to effectuate the intention of the legislature in enacting the statute").

B. The Commission Ignored the Plain Language of Section 364.336

Florida Statute section 364.336 requires "each telecommunications company" under the Commission's jurisdiction to pay regulatory assessment fees on "its gross operating revenues derived from intrastate business." Fla. Admin. Code Rule 25-4.0161 ("Regulatory Assessment Fees; Telecommunications Companies"), by its terms, implements section 364.336, as well as section 350.113 ("Florida Public Service Regulatory Trust Fund; moneys to be deposited therein"), which originally established the regulatory assessment fee obligation. The Rule sets the regulatory assessment fee amount at 0.0015 percent of a telecommunications company's "gross operating revenues derived from intrastate business."

The Commission interprets 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, a separate corporation that is not a telecommunications company subject to the Commission's jurisdiction. In other words, the Commission construes the "gross operating revenues" of a "telecommunications company" (see Fla. Stat. § 364.336) to mean its gross

operating revenues, and, at the Commission's discretion, the gross operating revenues of any affiliated, unregulated, non-telecommunications company.

There is no basis in the statute for this reading of section 364.336, which requires *only* a telecommunications company to pay regulatory assessment fees, and *only* on its own revenues. The Commission has failed to give effect to the plain language of section 364.336, which provides no basis to include revenues of unregulated, non-telecommunications companies in a regulated company's assessment fee. Indeed, the Declaratory Statement offers no explanation whatsoever as to how the Commission's application of the statute might be squared with its plain language. The Commission does not interpret the statute so much as ignore it, substituting its own view of appropriate policy for that of the Legislature.

As Commissioner Baez aptly observed in his dissent, "'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.'" Baez Dissent, Declaratory Statement at 10, quoting Starr Tyme, Inc., 659 So. 2d at 1064 (1995). The Commission is "not free to add words to steer it to a meaning...which its plain wording does not supply." James Talcott, Inc. v. Bank of Miami Beach, 143 So. 2d 657, 659 (Fla. 3d DCA 1962). Because

this is exactly what the Commission has done here, its decision must be reversed.

C. The Commission Ignored the Stated Purpose of the Regulatory Assessment Fee

The Commission's interpretation of section 364.336 ignores not just the language of the statute itself, but the Legislature's stated purpose for establishing the regulatory assessment fee set forth in section 350.113. Section 350.113 requires "[e]ach regulated company under the jurisdiction of the commission" (including "each telephone company") to pay regulatory assessment fees. These fees shall "be related to the cost of regulating such type of regulated company." Fla. Stat. § 350.113(3). They are to be deposited into the Florida Public Service Regulatory Trust Fund, which was established for the Commission's use "in the performance of the various functions and duties required of it by law." Fla. Stat. § 350.113(1) & (7).

The regulatory assessment fee thus is expressly designed to defray the Commission's costs of regulating companies under its jurisdiction. Because the Commission does not regulate Directories, there is no reason for it to collect a fee on Directories' revenues. This money is an unauthorized windfall for the Commission.

In this case, not only has the Commission failed to establish a legislative grant of authority for its imputation policy, it has maintained that

policy in violation of the explicit legislative purpose for enacting the regulatory assessment fee. "[T]he Commission derives its power solely from the legislature.....If there is a reasonable doubt as to the lawful existence of a particular power that is being exercised, the further exercise of the power should be arrested." United Telephone Co. of Florida v. Public Service Comm'n., 496 So. 2d 116, 118 (Fla. 1986); see also City of Cape Coral v. GAC Utils., Inc. of Florida, 281 So. 2d 493, 496 (Fla. 1973). The Declaratory Statement therefore must be reversed.

D. The Commission's Reasons for Imputing Directory Advertising Revenues Provide No Basis for Ignoring the Plain Language of the Statute

Rather than relying on the language of section 364.336 to rule on Verizon's Petition, the Commission offers several justifications for its imputation policy. None of these justifications, however, provide a basis for expanding the plain language of the statute.

First, the Commission refers to three cases from the era of rate of return regulation, a United Telephone case from 1989 (Declaratory Statement at 3-4), a Southern Bell Telephone case from 1981 (Declaratory Statement at 5), and a universal service case from 1995. (Declaratory Statement at 6). All of those cases, however, were decided when rate of

return regulation prevailed, and revenues from yellow pages advertising were included in the rate setting process.

By contrast, under price cap regulation the Commission is expressly prohibited from including yellow pages advertising revenue, Fla. Stat. § 364.051(1)(c), as the Commission concedes. (Declaratory Statement at 4).

Thus, even if the plain language of the statute could be interpreted to permit the imputation of yellow pages advertising revenue for regulatory assessment purposes, which it cannot, the only basis for imputing those revenues was eliminated by the Legislature for price cap regulated companies like Verizon. As Commissioner Baez explained in his dissent:

> In fact, imputation goes against the Legislature's intent to exempt price cap regulated companies from the procedural treatment governing rate of return companies. To hold that the Legislature intended to abrogate the inclusion of affiliate revenues from directory advertising, an otherwise unregulated service, in the rate regulation process, yet preserved inclusion of those revenues for purposes of calculating RAFs, implies an authority over unregulated services for which this Commission has no basis in statute.

(Declaratory Statement at 14).

The only authority the Legislature has given the Commission to require directory advertising imputation appears in section 364.037. In the

absence of that authority, there is no other statutory basis for the Commission to order imputation for any purpose for Verizon.

Second, the Commission suggests that if the Legislature intended to exempt yellow pages advertising revenues from the provisions of the regulatory assessment fee statute, it would have amended the statute to do so at the same time that it prohibited these revenues from being considered under price cap regulation. (Declaratory Statement at 8). The Legislature, however, did not have to amend the regulatory assessment fee statute because its terms already did not include yellow pages advertising revenue. Such revenue was previously included only under rate of return regulation, when it was included in the rate setting process. Once price cap regulation was authorized and yellow pages advertising revenue was expressly excluded from regulation, no basis existed for applying regulatory assessment fees to that revenue, and no additional change to the statute was necessary.

Third, the Commission claims that it can impute Directories' yellow pages advertising revenues because Directories "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)." (Declaratory

Statement at 4). While Verizon may have an obligation to provide a white pages directory, neither it nor Directories receives any revenue for doing so. (T. 30-31). Instead, the revenue at issue is from yellow pages advertising, which neither Verizon nor Directories has any obligation to provide. Verizon contracts with Directories to satisfy its legal obligation to provide white page directory listings. The fact that Directories may sometimes combine those white page directory listings with yellow page advertising does not bring the revenue from yellow page advertising within the plain language of the regulatory assessment fee statute.

Fourth, the Commission asserts that the fact that the directory advertising revenue belongs to an affiliate which is not a telecommunications company, rather than Verizon, is not dispositive. According to the Commission, Verizon "may not simply redirect services and revenues to affiliates, and thereby circumvent regulation of its services or the regulatory assessment fee statute." (Declaratory Statement at 4). This asserted justification, however, is contrary to the express language of the statute which limits Verizon's regulatory assessment fee to "**its** gross operating revenues," not its and its affiliates' revenues.

Finally, the Commission concludes that imputation of Directories' revenues to Verizon is appropriate because it believes that Directories has no

meaningful competition in the directory advertising market; Verizon has no meaningful competition in the exchange market; Directories has a competitive advantage because it is affiliated with Verizon; and this competitive advantage warrants the fiction that 100% of Directories' revenues really belong to Verizon. (Declaratory Statement at 7-8). Even if the Commission had an evidentiary basis for its beliefs, which it did not, they still provide no legal foundation for imputing Directories' revenues to Verizon. Nothing in the plain language of the statute suggests that these beliefs, even if true, provide a basis for the imputation required by the Commission.

E. The Commission's Reading of Section 364.336 Grants It Unreasonably Broad Discretion

Even if section 364.336 were deemed ambiguous, which it is not, the rules of statutory construction would require rejection of the Commission's interpretation because its effect is unreasonable. If the Commission is correct about the scope of its authority under section 364.336, it has the discretion to: (1) choose to impose the imputation burden only on certain regulated companies; (2) choose which affiliates' revenues will be imputed; (3) decide what portion of an affiliate's revenues will be imputed; and (4) make all these determinations without any evidentiary basis and without affording any opportunity for hearing. Commission Staff admitted there is no

language in the statute providing any guidance as to how the imputation policy is to be applied. (T. 34). The Commission's expansive reading of section 364.336 is so utterly devoid of any legislative direction or procedural due process safeguards as to be patently unreasonable and, therefore, must be avoided.

Indeed, if the Legislature *had* intended section 364.336 to mean what the Commission says it does, the attempted delegation would be unconstitutional for failure to specify any standards for determining when imputation should apply, to which companies, and to what extent. See, e.g., Florida Home Builders Ass'n. v. Div. of Labor, 367 So. 2d 219, 220 (Fla. 1979) (discretionary authority "must be limited and guided by an appropriately detailed legislative statement of the standards and policies to be followed"); Lewis v. Bank of Pasco County, 346 So. 2d 53 (Fla. 1976).

CONCLUSION

The Commission has no authority to force Verizon to pay regulatory assessment fees on Directories' revenues. The Commission's Declaratory Statement violates the plain language of section 364.336, as well as the legislative purpose for the fees stated in section 350.113. The Commission's attempted justifications for its imputation policy are no substitute for the

requisite statutory authority. Verizon thus asks this 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 its future regulatory assessment fee payments the amounts it paid on Directories' revenues since at least July of 2000, when Verizon first notified the Commission that these amounts were paid under protest.

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CERTIFICATE OF SERVICE

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

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CERTIFICATE OF COMPLIANCE

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

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