

**SUPREME COURT OF FLORIDA**

LEVEL 3 COMMUNICATIONS, LLC )  
 )  
 Appellant, ) CASE NO. SC01-2050  
 )  
 v. )  
 )  
 E. LEON JACOBS, JR., et al. )  
 )  
 Appellees. )  
 \_\_\_\_\_ )

APPEAL FROM THE  
FLORIDA PUBLIC SERVICE COMMISSION

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AMENDED ANSWER BRIEF OF THE  
FLORIDA PUBLIC SERVICE COMMISSION

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FLORIDA PUBLIC SERVICE COMMISSION ORDERS

In re: Petition by Verizon Florida, Inc. for Declaratory Statement on Applicability of Sections 364.336, F.S. and Rule 25-4.0161, F.A.C., Regulatory Assessment Fees, Docket No. 001556-TL, Order No. PSC-01-0097-DS-TL, issued January 11, 2001, Appeal pending, S. CT. Case No. SC01-323 . . . . . 20,21

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## **SYMBOLS AND DESIGNATION OF THE PARTIES**

Appellee, the Florida Public Service Commission will be referred to in this brief as the “Commission.”

Appellant, Level 3 Communications, LLC, will be referred to as “Appellant” or “Level 3.”

The Commission’s Declaratory Statement, Order No. PSC-01-1662-DS-TX, issued August 14, 2001, will be referred to as the “Order.” (APP-1).

References to the Record on Appeal are designated (R-\_\_\_).

References to the appendix to this brief are designated (APP-\_\_\_).

All references to the Florida Statutes are to Florida Statutes (2000), unless otherwise noted.

## STATEMENT OF THE CASE AND FACTS

Appellant's statement of the case and facts contains extensive legal argument. The Commission, therefore, offers its own statement of the case and facts.

Level 3 Communications, LLC, holds certificates from the Commission to provide Alternative Local Exchange (ALEC) and Interexchange (IXC) telecommunications service in Florida. (R-4, 117) Level 3 provides service in Florida through the use of communications network facilities that it owns and maintains, including what it calls its "Gateway" facilities. (R-5, 29, 48) Level 3's Gateway facilities provide an array of communications-related services and a location for other telecommunications and information service providers to interconnect their communications equipment with the facilities of Level 3 and other providers. (R-5, 29, 33, 118, 130) Level 3 describes its Gateway facilities as "sophisticated technology centers where customers can physically locate their equipment in order to connect directly to Level 3's and other service provider's networks." (R-29, 130)

Level 3's business in Florida includes both the provision of intrastate telecommunications services to its own customers and the provision of collocation facilities to other communications providers. (R-4-5, 29-30) Level 3 leases collocation space that typically houses customer equipment used for the provision of local and long distance telecommunications services and information services, including the provision of Internet service. (R-5, 118) Level 3 cannot easily determine what particular services its collocation customers provide to their customers. (R-5, 30) Level 3 asserts that many of its collocation customers provide Internet service or

interstate telecommunications, while some also provide local telecommunications services. (R-30, 118)

On May 1, 2001, Level 3 filed a Petition for Declaratory Statement with the Commission to resolve a dispute with the Commission's auditing staff over Level 3's exclusion of \$381,342.00 in collocation revenues from the calculation of Level 3's regulatory assessment fees (RAFs) for 1999. (R-4) At the current assessment rate of 0.0015, the amount in dispute was \$572.01. (R-117) Level 3 asked the Commission to decide whether the Commission's regulatory assessment fee rule and statutes included revenues an ALEC generates from collocation for the purpose of calculating the annual regulatory assessment fee. (R-4)

Section 350.113, Florida Statutes, establishes the Florida Public Service Regulatory Trust Fund to be used by the Commission in the performance of its regulatory responsibilities, and section 350.113(3) generally provides that each regulated company under the jurisdiction of the Commission shall pay a semi-annual regulatory assessment fee to the Commission to be deposited in the fund. The fee assessed is to be "based upon the gross operating revenues for such period," and "shall, to the extent practicable, be related to the cost of regulating such type of regulated company."

Section 364.336, Florida Statutes, specifically describes the method for calculating regulatory assessment fees for telecommunications companies. It provides:

Notwithstanding any provisions of law to the contrary, each telecommunications company licensed or operating under this chapter, for any part of the preceding 6-month period, shall pay to the

commission, within 30 days following the end of each 6-month period, a fee that may not exceed 0.25 percent annually of its gross operating revenues derived from intrastate business, except, for purposes of this section and the fee specified in s.350.113(3), any amount paid to another telecommunications company for the use of any telecommunications network shall be deducted from the gross operating revenues for purposes of computing the fee due. . .

The most recent amendments to section 364.336 occurred in 1995 and 1998. In 1995, the year the Legislature made sweeping changes to Chapter 364 to provide for the development of local telecommunications competition, the Legislature amended section 364.336 to permit the Commission to collect regulatory assessment fees annually rather than semi-annually. The Legislature made no other changes to the regulatory assessment fee statutes at that time. Ch. 95-403, Laws of Fla. In 1998, the Legislature added the exception for amounts paid to other telecommunications companies for the use of any telecommunications network. Ch. 98-277, Laws of Fla. The Legislature made no other changes to the fee statutes at that time.

In its Declaratory Statement Petition, Level 3 stated that; “[t]he primary issue raised in this Petition is whether revenues realized from the provision of collocation space should be considered ‘gross operating revenues derived from intrastate business’ under the aforementioned rule and statutes for purposes of calculating the RAF.” (R-5) Level 3 asserted that the Commission’s regulatory assessment fee statutes should not be interpreted to include collocation revenues as gross operating revenues derived from intrastate business, because collocation was a simple real property transaction, not a regulated telecommunications service as the term is defined in federal law, and Level 3 was not required to provide it. (R-6)

The Commission published notice of the declaratory statement petition in the May 18, 2001, Florida Administrative Weekly (R-16), and considered the merits of Level 3's petition at its July 24, 2001, Agenda Conference. After lengthy consideration of Level 3's arguments, (R-39-116) the Commission decided to issue a declaratory statement that its regulatory assessment fee statutes did require the inclusion of Level 3's collocation revenues in the calculation of fees owed. (R-21, 37, 114, 115)

The Commission issued its Declaratory Statement Order memorializing its decision on August 14, 2001. (R-117, APP-1) The Commission found that Level 3's collocation revenues were “gross operating revenues derived from intrastate business,” and it held that its regulatory fee statutes did not contemplate the exclusion of those revenues from the fee calculation. The Commission reasoned that the statutes permitted only two specific exclusions from gross operating revenues for regulatory assessment fee purposes; interstate revenues, and a deduction for amounts paid to other telecommunications companies for use of their facilities. Since Level 3's collocation revenues did not fit those specific exclusions the revenues should be included. The Commission explained:

There are limits to the scope of the regulatory assessment fee statutes, but they are prescribed by the statutes themselves. They do not apply to a company's interstate business, and they do not include amounts paid to other companies for the use of their facilities. The revenues in question in this case do not fall within the statutory limitations. They derive from collocation, which is, despite Level 3's assertions to the contrary, directly related to its intrastate business and the use of telecommunications facilities. But for the access to communications networks and facilities, providers would not collocate in Level 3's Gateways facilities, and Level 3 would not receive revenue from the lease of those facilities. Section 364.02(13), Florida Statutes,

provides that a telecommunications facility “includes real estate, easements, apparatus, property, and routes used and operated to provide two-way telecommunications service to the public for hire within this state.”

. . . .

Level 3's interpretation would require us to read exceptions and exclusions into the regulatory assessment fee statutes that are simply not there. The statutes plainly provide that regulatory assessment fees shall be paid by all telecommunications companies based on their ‘gross operating revenues derived from intrastate business,’ and the revenues in question here are gross operating revenues derived from intrastate business. The introductory language of section 364.336 clearly indicates that no other exclusions should be implied by reference to other statutes.

Order, p. 5-6. (APP-1)

The Commission also found that Level 3's collocation revenues were derived from the lease of space in a telecommunications facility that was essentially no different than the revenues telecommunications companies collect for lease of space on telephone poles or in telecommunications vaults and conduits.

Collocation revenue is rent revenue from the lease of telecommunications facilities, like revenue from the lease of space on telephone poles and in telecommunications vaults and conduits. Rent revenue has traditionally been included in telephone company assessment fee calculations, and the statutes do not provide for any different treatment here.

Order, p. 5 (APP-1)

The Commission issued its Declaratory Statement Order on August 14, 2001, and Level 3 filed its Notice of Appeal on September 12, 2001.

## SUMMARY OF THE ARGUMENT

In the Declaratory statement proceeding below, Level 3 asked the Commission to declare that its revenues from collocation were not subject to regulatory assessment fees, because they were not “gross operating revenues derived from intrastate business” under sections 350.113(3)(b) and 364.336, Florida Statutes. The Commission held otherwise. It determined that the collocation revenues were revenues derived from intrastate business, and they did not fall within the specific exceptions and exclusions explicitly defined in the statute’s language. Reading the statutory language as written, the Commission declined to infer that “intrastate business” actually meant “intrastate telecommunications business”, or “business derived from a regulated service.” The Commission’s declaratory statement Order is entitled to great weight and should be affirmed absent a showing that it was clearly erroneous.

The Commission’s decision interpreting its regulatory assessment fee statutes was reasonable and within its authority to make. The Commission did not exceed its statutory authority by interpreting its own statute. It correctly decided that section 350.113, Florida Statutes, applies to the Commission’s total cost to regulate, not the particular costs of regulating a specific service, and section 364.336 applies to the total business revenues of a telecommunications company, not to the particular revenues derived from a specific service. It also correctly determined that the scope of the fee statutes was not limited to so-called “regulated services, but covered “intrastate business”, a term that is more inclusive than Level 3's narrow interpretation.

The Commission correctly considered Chapter 364's statutory framework when

it interpreted its fee statutes. That framework encompasses broad regulatory responsibilities and powers with regard to the telecommunications industry. In the exercise of that power and responsibility, the Commission incurs costs of regulation that cannot be directly and specifically attributable either to a specific company or specific services that companies provide. Recognizing this fact, and the impracticality of attempting such an assessment fee regime, the regulatory fee statutes wisely do not require that effort.

The lynch-pin of Level 3's argument is the categorical assertion that its collocation service is not a telecommunications service and not a regulated service. Aside from the fact that the clear language of the statute states that fees attach to all gross revenues from intrastate business, the Commission correctly questioned Level 3's argument that collocation was not telecommunications service. Collocation is a means and method of interconnection, and interconnection is a fundamental duty of all telecommunications providers. In Florida “service is to be construed in its broadest and most inclusive sense. And although Level 3 was not required to provide collocation, when it chose to do so, its revenues were subject to regulatory assessment fees.

The Verizon declaratory statement Order is distinguishable on its facts and is not relevant to this case, and the Commission’s decision was constitutionally sound.

## ARGUMENT

**I. Standard of Review. The Court should give great weight to the Commission's interpretation of its regulatory assessment fee statutes and should uphold the Declaratory Statement Order absent a showing that the interpretation was clearly erroneous.**

In the declaratory statement proceeding below, Level 3 asked the Commission to interpret its regulatory assessment fee statutes to exclude an ALEC's collocation revenues from the assessment fee calculation on the grounds that collocation was neither a "telecommunications" service under federal law, a "regulated" service, nor a service Level 3 was "required" to provide. Level 3 argued that the two statutes at issue were never intended to capture collocation revenues in calculating regulatory assessment fees, and therefore were not "gross operating revenues derived from intrastate business" under Sections 350.113(3)(b) and 364.336, Florida Statutes. The Commission reviewed its statutes in light of the question and the facts that Level 3 presented, and determined that the statutes did include collocation revenues as gross operating revenues derived from intrastate business.

The case below was a statutory interpretation case, and it remains so in this appeal. The question is not whether the Commission exceeded its statutory authority. The Commission had the authority to issue its declaratory statement. Section 120.565, Florida Statutes. The Commission had the authority to interpret its regulatory statutes. PW Ventures v. Nichols, 533 So.2d 281 (Fla. 1988). The question is whether the interpretation it made was correct, and the appropriate standard of review of that interpretation is the clearly erroneous standard.

Commission orders come to this Court clothed with the presumption of validity. Florida Interexchange Carriers Association v. Clark, 678 So.2d 1267, GTC, Inc. v. Garcia, 791 So.2d 452 (Fla. 2001). The Commission's interpretation of a statute it is charged with enforcing is entitled to great deference. United Telephone Co. v. Public Service Commission, 496 So.2d 116,118 (Fla. 1986) (" . . . and will be approved by this Court if it is not clearly erroneous.) See also, Florida Cable Television v. Deason, 635 So.2d 14,15 (Fla. 1994); Floridians for Responsible Utility Growth v. Beard, 621 So. 2d 410 (Fla. 1993). The party challenging the Commission's order has the burden of overcoming these presumptions by showing a departure from the essential requirements of law, City of Tallahassee v. Mann, 411 So. 2d 162, 164 (Fla. 1981), and in a statutory interpretation case it is not sufficient to demonstrate that another interpretation of the statute is possible, or even preferable, to the Commission's. Level 3 must show that the Commission's interpretation is clearly erroneous. D.A.B. Constructors, Inc. v. Dept. of Transportation, 656 So.2d 940 (Fla. 1<sup>st</sup> DCA 1995) Level 3 cannot avoid its burden, the deference due the Commission's interpretation, or the clearly erroneous standard of review, simply by claiming now that the Commission exceeded its statutory authority in making the interpretation that it did. Initial Brief, p. 16.

**II. The Commission's decision interpreting its regulatory assessment fee statutes to include Level 3's collocation revenues was reasonable and well within its authority to make.**

Sections 350.113, and 364.336, Florida Statutes, prescribe the formula by which the Commission calculates its costs and collects fees needed to cover those costs

from telecommunications companies. The statutes in effect create an equation for the fair calculation and collection of regulatory fees. Section 350.113 establishes the Commission's side of the equation - the creation of the Commission's regulatory trust fund, the calculation of the Commission's regulatory costs, and the maximum fee rate that the Commission can assess. Section 350.113(3) applies generally to all regulated companies subject to the Commission's jurisdiction, and it requires that the calculation of the Commission's costs "shall, to the extent practicable, be related to the cost of regulating such type of regulated company." Subsections (3)(a)-(e) identify the types of companies subject to the fees and establish a maximum rate that the Commission can assess against each type.<sup>1</sup>

The regulated companies' side of the equation - the calculation of the companies' revenues against which the Commission may assess its fees - is prescribed in the statutes for each regulated industry and is tailored to that industry. For telecommunications companies the relevant statute is section 364.336, Florida Statutes.<sup>2</sup> Section 364.336 sets the maximum rate at which the Commission can assess a regulatory fee to 0.025 percent, provides for a deduction of amounts paid to

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<sup>1</sup> Section 350.113(3)(b), Florida Statutes. Subsection 3(a) establishes the maximum rate for railroads, subsection 3(c) establishes the rate for electric and gas "public utilities" as defined in section 366.02, Florida Statutes, subsection 3(d) establishes the rate for municipal electric utilities and rural electric cooperatives, and subsection 3(e) establishes the rate for water and wastewater companies regulated under chapter 367, Florida Statutes.

<sup>2</sup> See section 366.14, Florida Statutes, governing regulatory assessment fees for electric and gas utilities, municipal electric utilities and rural electric cooperatives. See section 367.145 governing fees for water and wastewater utilities, and section 368.109 governing fees for intrastate natural gas pipelines.

other telecommunications providers for use of their facilities from the amount subject to assessment, and permits the Commission the discretion to collect fees on an annual rather than a semi-annual basis. It provides that all regulated telecommunications companies will pay an assessment fee based on their “gross operating revenues derived from intrastate business.”<sup>3</sup>

Both statutes are integral to the fair calculation of regulatory assessment fees. Each side of the equation is necessary, but they are not interchangeable, and the requirements of one are not necessarily relevant or applicable to the other. One of the problems with Level 3's arguments in this appeal is that it blurs the distinction between the standard in section 350.113 applicable to the Commission's calculation of its regulatory costs (“shall, to the extent practicable, be based on the cost of regulating such type of regulated company”) and the standard in section 364.336 applicable to the regulated companies' calculation of their regulatory fees (“gross operating revenues derived from intrastate business”) The standard in section 350.113 applies to the Commission's total costs to regulate all telecommunications companies, not the particular costs of regulating individual telecommunications companies, nor the costs of regulating a specific telecommunications service. The standard in section 364.336

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<sup>3</sup> For purposes of calculating regulatory assessment fees for telecommunications companies, section 364.336 is the more specific statute, not section 350.113. Level 3 is simply incorrect when it argues otherwise. Initial Brief, page 21. Furthermore, in case of a conflict with section 350.113 or any other regulatory statute, section 364.336 states clearly that its provisions would control, “[n]otwithstanding any provisions of law to the contrary.”

applies to the total intrastate business revenues of a telecommunications company, not to the particular revenues derived from a specific service offering.

The regulatory assessment fee equation that the Legislature established in section 350.113 and 364.336 recognizes that the Commission's regulatory expenses can vary considerably from year to year, and it spreads the costs of regulation equally among all telecommunications companies. Under the current regulatory scheme, if the Commission's costs rise all telecommunications companies share the increased cost burden through an increase in the assessment rate. If the Commission incurs limited or no costs of regulating a particular company in a particular year, if the Commission practices less regulatory oversight of competitive providers, or incurs few or no costs related to a particular service, all telecommunications companies benefit. The reduced costs are ultimately reflected in a lower assessment fee rate for all companies.

- A. Neither section 350.113(3), nor section 364.336, Florida Statutes, limit the imposition of regulatory assessment fees to revenues derived from so-called "regulated" services.**

In its petition and in its Initial Brief, Level 3 asserts that the collocation service it provides in its Gateway facilities to other communications providers is neither a telecommunications service nor a service it is required to provide as a regulated telecommunications company. (R-4) Initial Brief, page 28. Level 3 then argues that the term "gross operating revenues" excludes revenues derived from services that are not telecommunications services or regulated services. Even if it could fairly be argued that collocation services provided by a telecommunications company are not

telecommunications services, which the Commission found questionable<sup>4</sup>, the assessment fee statutes make no distinctions based on the type of service a telecommunications company provides.

Level 3 claims that the Commission somehow ignored the requirements of section 350.113 because it did not interpret the phrase "gross operating revenues derived from intrastate business" to really mean "gross operating revenues derived from intrastate telecommunications or regulated services." (Initial Brief, pages 20-22) The Commission did not ignore section 350.113. It simply did not interpret that statute or section 364.336 as Level 3 wanted. The Commission concentrated on section 364.336, because that is the statute applicable to the question Level 3 asked: are collocation revenues gross revenues derived from intrastate business for purposes

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<sup>4</sup> Commissioner Palecki:

I think it would still be arguable if they rented space to a telecom company that was just using it for general office purposes. But when they're renting the space to a telecom company that uses it to interconnect with Level 3's system, perhaps it becomes more clear that this is a telecom purpose that should be subject to a regulatory assessment fee. (R-58)

Twice Commissioner Baez addressed the categoric assumption that collocation was not a telecommunications service.

. . . [T]he question of the petition carries with it some implication that collocation isn't a telecommunications service. Now I would like that - I mean, are we answering that question? I would like to know. I have that question. (R-86)

. . . .  
That's my concern, and I'm not sure that I'm comfortable with agreeing with the basis for Level 3's assertion that collocation is not a telecommunications service under every circumstance. (R-89)

of calculating a telecommunications company's regulatory assessment fees? The Commission considered section 350.113 at its Agenda Conference and in its Order, to the extent that it was relevant to the question before it.

Reading the statutes as written, the Commission correctly concluded that the assessment fee statutes do not tie the calculation of regulatory fees to services of any particular kind, but to “intrastate business,” a term that is more inclusive than the interpretation Level 3 propounds. “The language of the statute accounts for the fact that the Commission’s regulation encompasses much activity that cannot be tied to any specific services that a regulated company may offer.” Order, page 5. (App-1) At the Agenda Conference, in response to Commissioner Palecki’s concern about the lack of information in the proceeding about the costs of regulation under section 350.113, Commissioner Deason correctly described the effect of the statute this way;

That particular section of the statute, I’ve always interpreted that that was to try to bring some parity or equity between the various industries that we regulate, not necessarily companies within an industry and that’s why we have different regulatory assessment fees . . . .

Now I would agree in a perfect world, a cost causer would pay what he or she causes for the system. And if we go down that road a long distance we may end up, for example, when we send an auditor to a company to audit their books, we would send them a bill for the number of hours that the auditor was there. I don’t think we want to get to that. I mean, what we have here is a surrogate for what the company is causing in terms of costs. . . .

It’s not a per service thing. It’s revenue for a company. If a company is certificated to do business in Florida, they’re regulated, and we have - as a surrogate of the cost they impose, we just say we’re going to impose a percentage to your intrastate business revenues. (R-92, 93, 94, 97)



**B. The Commission appropriately considered the statutory scheme in its interpretation of its assessment fee statutes.**

In Point I of its brief, to support its argument that the Commission's decision in this case is not entitled to deference, Level 3 argues that the Court need only look to the plain meaning of the regulatory assessment fee statutes to decide this appeal. Initial Brief, pages 16-17. In Point II of its brief, however, Level 3 argues that the language in section 350.113, Florida Statutes, is plain and clear, but the language in section 364.336 contains "the ambiguous language 'gross revenues derived from intrastate business.'" Level 3 proposes that this inconsistency be resolved by interpreting the statutes to require "a finding, prior to assessing regulatory assessment fees, that the revenues of a telecommunications company are both: (1) derived from intrastate business; and (2) related to the cost of regulation performed by the Commission." Initial Brief, page 22. Level 3 complains that because the Commission did not make these inferences when it analyzed the language of its regulatory assessment fee statutes it failed to consider the broader statutory scheme of which the fee statutes are a part. This is not so.

Aside from the fact that the same language, "gross operating revenues derived from intrastate business", appears in both statutes, and it is unreasonable to propose that it is plain for purposes of the Court's standard of review but not for purposes of statutory construction, the Commission did consider the broader statutory scheme in its decision. Commission appropriately found that the statutes did not tie the collection of regulatory assessment fees to particular services. The complex nature

of the Commission's broad regulatory activities and the costs incurred could not be so particularly defined. Furthermore, Level 3's revenues from collocation are comparable to other rent revenues from the lease of telecommunications facilities. The Commission was correct in determining that Level 3's collocation services were integrally related to Level 3's telecommunications business and the use of telecommunications facilities. The regulatory statutes provide no clear basis for treating ALEC collocation revenues any differently than ILEC collocation revenues. Order, pages 5-6.

**C. The Commission retains authority over a wide variety of activities of all local telecommunications providers in Florida, including the interconnection duties of ILECs (incumbent local exchange companies) and ALECs and the means and manner of interconnection.**

Level 3's argument that the Commission has very limited authority over ALEC business in Florida is overstated. Even with the Legislature's extensive revisions to Chapter 364 in 1995 to encourage the development of local telecommunications competition in Florida, ch. 95-403, Laws of Fla., it is clear that the Commission still has broad regulatory responsibilities and powers with regard to the telecommunications industry. GTC, Inc. v. Garcia, 791, So.2d 452, 458 (Fla. 2001) Section 364.01(2), Florida Statutes, gives the Commission exclusive jurisdiction in all matters set forth in chapter 364 to regulate telecommunications companies. Section 364.01(4), Florida Statutes, gives the Commission the power to protect the public health safety and welfare, promote competition, and ensure fair treatment of all telecommunications providers by preventing anticompetitive behavior. Section 364.025 vests the

Commission with authority to oversee the development and protection of universal service. Sections 364.0251 and 364.0252 require the Commission to implement consumer information programs and assist consumers in resolving any billing and service disputes with telecommunications companies. The Commission enforces the provisions of sections 364.08, 364.09 and 364.10, which prohibit free service, discriminatory rates or charges, or undue preference in the provision of telecommunications service.

Section 364.33 requires that all companies receive a certificate from the Commission to provide telecommunications service in Florida. Section 364.337 directs the Commission's oversight of ALEC's basic local telecommunications service "for purposes of establishing reasonable service quality criteria, assuring resolution of service complaints, and ensuring the fair treatment of all telecommunications providers in the telecommunications marketplace." Section 364.3381(3) provides that "[t]he Commission shall have continuing oversight jurisdiction over cross-subsidization, predatory pricing, or other similar anti-competitive behavior and may investigate, upon complaint or on its own motion, allegations of such practices." Sections 364.601, 364.603 and 364.604 give the Commission authority to regulate telecommunications companies' billing practices. All of the statutes described above apply to ALECs like Level 3. All but section 364.337 apply to incumbent local exchange telecommunications companies in Florida, and many apply to interexchange telecommunications companies as well.

These statutes cover a broad range of regulatory responsibilities for the

Commission, which generate varying degrees of regulatory costs. Those costs cannot be tied to a particular telecommunications service a company may provide. As a practical matter, no simple or straightforward boundary lines exist so that the costs of regulation can be readily segregated or allocated. It would greatly increase the cost to attempt to pinpoint, track and allocate costs to every discrete service or activity of every company. Nor is it practicable to tie regulatory assessment fees to the cost of regulating each particular company or each type of service. The amount of regulatory activity a company may generate is not necessarily or even reasonably related to the amount of revenue it generates. Wisely, neither fee statute requires that effort.

As described above, the Commission retains authority over a wide variety of activities of all local telecommunications providers in Florida, including the interconnection duties of both ILECs and ALECs and the means and manner of interconnection. Interconnection is a fundamental duty of all local telecommunications providers in both Florida law and Federal Law. Section 364.16(2), Florida Statutes states:

Each alternative local exchange telecommunications company shall provide access to, and interconnection with, its telecommunications services to any other provider of local exchange telecommunications services requesting such access and interconnection at nondiscriminatory prices, terms, and conditions. If the parties are unable to negotiate mutually acceptable prices terms and conditions after 60 days, either party may petition the commission and the commission shall have 120 days to make a determination after proceeding as required by s. 364.162(2) pertaining to interconnection services.

Section 364.16(3) imposes the same obligation on ILECs, and subsection (5) requires all telecommunications companies to provide access to any “poles, conduits, rights-

of-way- and like facilities that they own or control to other local telecommunications companies. While section 364.161, titled “Unbundling and resale”, imposes additional obligations on ILECs, the former monopoly local telecommunications providers, to unbundle their local networks for lease by competitors, section 364.16 applies to all local providers.

In the Telecommunications Act of 1996, Congress imposed a similar obligation on all telecommunications providers. 47 U.S.C. § 251 entitled “Interconnection”, imposes a duty to interconnect on all providers. Subsection (a) states:

General Duty of telecommunications carriers - each telecommunications carrier has the duty -

(1) to interconnect directly with the facilities and equipment of other telecommunications carriers

Like section 364.16(5), Florida Statutes, 47 U.S.C. § 251(b)(4), requires all local exchange companies to provide access to poles, ducts, conduits and rights-of-way to other telecommunications providers. The federal law imposes additional obligations on incumbent companies to lease elements of their networks to competing companies, as Florida law does, and 47 U.S.C. § 251(c)(6) specifically requires ILECs to permit its competitors to physically collocate their equipment on the ILECs’ premises for interconnection and access to the elements of the ILECs’ network.

The point that is missing from Level 3's discussion about collocation is the fact that collocation is a means - perhaps the most efficient means - to fulfill the obligation to provide interconnection. Collocation is the means by which a telecommunications company can fulfill its obligation to interconnect with other telecommunications

companies for the seamless completion of telecommunications calls.

It is true that collocation is not the call itself. See Initial Brief, page 28. Collocation is the act of locating the telecommunications equipment in a telecommunications facility for the purpose of providing telecommunications. Under Florida's law, found in section 364.02(11), Florida Statutes, "service is to be construed in its broadest and most inclusive sense," and it stretches credibility to contend that collocation is a simple real estate transaction, not integrally related to the provision of telecommunications service.

It is also true that Level 3 is not required under Florida or federal law to provide collocation. Nevertheless, it is required to provide interconnection to its network, and if it chooses to fulfill that responsibility by offering physical collocation services to other communications providers, the Commission correctly held that its revenues were "intrastate revenues derived from intrastate business."

**D. Level 3's interpretation of the Commission's Verizon decision is incorrect and that decision is not relevant to the facts of this case.**

In its Order, at footnote 4, page 5, the Commission dismissed Level 3's argument that its recent declaratory statement in the Verizon case, In re: Petition by Verizon Florida, Inc. for Declaratory Statement on Applicability of Sections 364.336, F.S. and Rule 25-4.0161, F.A.C., Regulatory Assessment Fees, Docket No. 001556-TL, Order No. PSC-01-0097-DS-TL, issued January 11, 2001, Appeal pending, S. CT. Case No. SC01-323, required the exclusion of Level 3's collocation revenues from the regulatory assessment fee calculation. The Commission stated that Level 3's

reliance on Verizon was misplaced. The Commission explained that in Verizon it had addressed the imputation of yellow pages advertising revenues generated by Verizon's affiliate to Verizon for regulatory assessment fee purposes, given the fact that Verizon's affiliate was not a telecommunications company. That is not the question in this case, and the decision in Verizon is inapplicable and irrelevant. There is no question here that Level 3 is a telecommunications company, and the collocation revenues are its own revenues. That being said, the Verizon opinion actually supports the Commission's decision here. Contrary to Level 3's reading of that case, Verizon was not required to provide yellow pages advertising. It was only required to provide white pages advertising. Where Verizon chose to provide advertising along with its white pages, the revenues were subject to regulatory assessment fees. Similarly here, Level 3 is not required to provide physical collocation to interconnect communications providers to its network and other providers, but where it has chosen to do so, the revenues are subject to assessment fees.

### **III. The Commission's Declaratory Statement interpreting its regulatory assessment fee statute is Constitutionally sound.**

The Commission would like to point out that Level 3 did not raise any equal protection issues in the proceeding below and the Commission did not have the opportunity to consider them in its decision interpreting its regulatory assessment fees statutes. Regardless, Level 3's equal protection claims are without merit. Level 3 makes no argument that as an ALEC it has been subject to different treatment than other ALECs. It simply argues that collocation providers who are not

telecommunications companies enjoy unregulated status and do not pay assessment fees. Level 3 has not been denied equal protection because it occupies the same status as other certificated alternative local exchange companies in Florida, all of whom are subject to the same regulatory assessment fee requirements. Storey v. Mayo, 217 So. 2d 304 (Fla. 1968).

As the Court stated in Florida Department of Business and Professional Regulation v. Investment Corp., of Palm Beach, 747 So. 2d 374, 382 (Fla. 1999), legislative intent is the primary principle of statutory interpretation in Florida, which is determined first and foremost from the plain meaning of the statute's language. Accord, Florida Department of Revenue v. Florida Municipal Power Agency, 2001 Fla. LEXIS 1254 (Fla. 2001) ("Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity." Quoting Forsythe v. Longboat Key Beach Erosion Control Dist., 604 So. 2d 452, 454 (Fla. 1992))

In its Order the Commission correctly declined to read additional limitations or exclusions into the language of the regulatory assessment fee statutes. The Commission correctly found that Level 3's collocation revenues were intrastate revenues derived from Level 3's business and thus subject to the assessment fee statutes. The Commission made that finding because the language of the statutes was clear and because Level 3's assertion that its collocation revenues were unrelated to its intrastate business and the use of telecommunications facilities was not credible.

However the Court views the clarity of the regulatory assessment fee statutes, the Commission's interpretation was reasonable and should be upheld.

## CONCLUSION

Level 3 has not met its burden to overcome the presumption of validity that attaches to Commission orders. It has not shown that the Commission's decision is clearly erroneous or that it departs from the essential requirements of law. The Commission's interpretation of its regulatory assessment fee statutes was reasonable, correct, and is entitled to great weight. The Court should affirm the Commission's Order.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing has been furnished by United States mail this 27<sup>th</sup> day of December 2001, to the following:

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## **CERTIFICATE OF COMPLIANCE**

In compliance with the Court's Administrative Order dated July 13, 1998, the font size used in this Brief is Times New Roman, size 14.