

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

December 28, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

FPSC, CLK - CORRESPONDENCE
✓ Administrative Parties Consumer
DOCUMENT NO. 14 284-03
DISTRIBUTION: _____

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, et al. (Docket No. 010650-TX)**

Dear Mr. Hall:

The record in the above-referenced case, consisting of one binder is forwarded for filing in the Court. A copy of the index is attached for your use.

Please initial and date the copy of this letter to indicate receipt. Call me at 413-6744 if you have any questions concerning this record.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay Flynn".

Kay Flynn, Chief
Bureau of Records and Hearing Services

Enclosure

cc: Kenneth A. Hoffman, Esquire
Martha C. Brown, Esquire

RECEIVED-FPSC

MEMORANDUM

01 SEP 13 PM 3:04

September 12, 2001

COMMISSION
CLERK

TO: MARTHA BROWN, DIVISION OF APPEALS
FROM: DAVID E. SMITH, DIRECTOR OF APPEALS *DES*
RE: LEVEL 3 COMMUNICATIONS, LLC v. FLORIDA PUBLIC
SERVICE COMMISSION (DOCKET NO. 010650-TX);
FLORIDA SUPREME COURT CASE NO.

The above appeal has been assigned to you. The Notice of Administrative Appeal was filed on September 12, 2001. The case schedule is as follows:

<u>Date</u>	<u>Item</u>
From day of filing:	
<u>10/18/01</u>	Draft of Index of Record from CCA to Appeals attorney.
<u>11/01/01</u>	Index of Record served on parties.
<u>11/11/01</u>	Copy of Record to Appeals.
<u>11/21/01</u>	Appellant's Initial Brief Due.
<u>12/06/01</u>	Draft Commission Answer Brief Due.
<u>12/11/01</u>	Commission's Answer Brief Due.
<u>12/31/01</u>	Appellant's Reply Brief Due.

cc: **Kay Flynn**
Noreen Davis
Mary Diskerud
Wanda Terrell

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770 (CLERK)
(850) 413-6330 (ADMIN)

Public Service Commission

September 12, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

**Re: Level 3 Communications, LLC vs. Florida Public Service Commission
(Docket No. 010650-TX)**

Dear Mr. Hall:

Enclosed is a certified copy of a Notice of Appeal, filed in this office on behalf of the Level 3 Communications, LLC on September 12, 2001. Also enclosed, as an exhibit to the notice, is a copy of Order PSC-01-1662-DS-TX, the order on appeal.

It is our understanding that the index of record is due to be served on the parties to this proceeding on or before November 1, 2001.

Sincerely,

A handwritten signature in cursive script that reads "Kay Flynn".

Kay Flynn, Chief
Bureau of Records and Hearing Services

MHL:mhl
Enclosure

cc: Kenneth A. Hoffman, Esquire
David Smith, Esquire

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770 (CLERK)
(850) 413-6330 (ADMIN)

Public Service Commission

November 1, 2001

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, Jr., et al. (Docket No. 010650-TX)

Dear Mr. Hoffman:

Enclosed is an index to the above-referenced docket on appeal. Please look the index over and let me know if you have any questions concerning the contents of the record. The record will be filed in the Court on or before December 28, 2001.

Please do not hesitate to call if you have any questions.

Sincerely,

A handwritten signature in cursive script that reads "Kay Flynn".

Kay Flynn, Chief
Bureau of Records and Hearing Services

mhl
cc: Martha C. Brown, Esquire

I N D E X

Level 3 Communications, LLC
vs.
Florida Public Service Commission
PSC Docket No. 010650-TX
Supreme Court Case No. SC01-2050

VOLUME 1

Progress Docket 1

Level 3 Communications, LLC's petition for declaratory statement, filed May 1, 2001 3

Letter dated May 8, 2001 to Carroll Webb, Joint Administrative Procedures Committee, from Martha Carter Brown, Public Service Commission, with attached petition for declaratory statement, filed May 8, 2001 9

Notice for publication in May 18, 2001 Florida Administrative Weekly, filed May 9, 2001 ... 16

Memorandum from Commission's Divisions of Appeals, Competitive Services, and Regulatory Oversight, filed July 12, 2001 17

Commission vote sheet from July 24, 2001 conference, filed July 24, 2001 37

Transcript of discussion of Item 4 from July 24, 2001, Commission conference, filed July 30, 2001 39

Order PSC-01-1662-DS-TX on declaratory statement, issued August 14, 2001 117

Notice for publication in August 24, 2001 Florida Administrative Weekly, filed August 15, 2001 126

Notice of Appeal, filed September 12, 2001, on behalf of Level 3 Communications, LLC ... 127

Directions to Clerk, filed September 21, 2001, on behalf of Level 3 Communications, LLC . 138

Acknowledgment of new case from Supreme Court of Florida, filed October 9, 2001 141

Revised directions to Clerk, filed October 19, 2001, on behalf of Level 3 Communications, LLC 143

Certificate of Director, Division of the Commission Clerk and Administrative Services 146

STATE OF FLORIDA

Commissioners:
J. TERRY DEASON, CHAIRMAN
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

November 1, 2001

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
vs. E. Leon Jacobs, Jr., et al. (Docket No. 010650-TX)**

Dear Mr. Hoffman:

I have enclosed an invoice reflecting charges for preparation of the above-referenced record. Please forward a check in the amount indicated, made payable to the Florida Public Service Commission, at your earliest convenience.

Do not hesitate to call if you have any questions concerning this matter.

Sincerely,

A handwritten signature in cursive script that reads "Kay Flynn".

Kay Flynn, Chief
Bureau of Records and Hearing Services

mhl
Enclosure

FLORIDA PUBLIC SERVICE COMMISSION

2540 Shumard Oak Blvd. ♦ Tallahassee, Florida 32399-0850

Date: November 1, 2001

8249

To:

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell
& Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

Date Paid _____

Amount Paid _____

Check # _____

Check Cash

PSC Signature _____

↑ ↑
This number must appear on
all checks or correspondence
regarding this invoice.

Please make checks payable to: FLORIDA PUBLIC SERVICE COMMISSION

QUANTITY	DESCRIPTION	PRICE	AMOUNT
148 pgs	Copying and preparation of Docket 010650-TX on appeal to Supreme Court, Case No. SC01-2050	.05¢ per page	\$ 7.40
1	Certificate of Director	\$4.00 each	4.00
TOTAL			\$11.40

PSC/RAR-8 Rev. 11/94



STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

December 28, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, et al. (Docket No. [REDACTED])**

Dear Mr. Hall:

The record in the above-referenced case, consisting of one binder is forwarded for filing in the Court. A copy of the index is attached for your use.

Please initial and date the copy of this letter to indicate receipt. Call me at 413-6744 if you have any questions concerning this record.

Sincerely,

Kay Flynn, Chief
Bureau of Records and Hearing Services

Enclosure

cc: Kenneth A. Hoffman, Esquire
Martha C. Brown, Esquire

FILED
THOMAS D. HALL
DEC 28 2001

RECEIVED BY _____ CLERK, SUPREME COURT BY [Signature] DATE _____

Case Assignment and Scheduling Record

Section 1 - Division of Records and Report (RAR) Completes

Docket No. 010650-TX Date Docketed: 05/01/2001 Title: Petition for declaratory statement by Level 3 Communications, LLC, that collocation revenues reported by Level 3 should not be included as "gross operating revenues derived from intrastate business" as contemplated by Rule 25-4.0161, F.A.C., and Sections 350.113(3)(b) and 364.336, F.S., for purposes of calculating regulatory assessment fee for calendar year 1999.

Company: Level 3 Communications, LLC

Official Filing Date: _____ Expiration: _____
 Last Day to Suspend: _____

Referred to: ADM AFA (APP) CAF CMP CMU EAG ECR GCL LEG PAI RAR RGO SER WAW
 ("()") indicates OPR _____ X _____ X _____ _____ _____ _____ X _____

Section 2 - OPR Completes and returns to RAR in 10 workdays. Time Schedule

Program/Module	A12(a)
<u>Staff Assignments</u>	
<u>OPR Staff</u>	M Brown
_____	_____
_____	_____
<u>Staff Counsel</u>	M Brown
<u>OCRs (CMP)</u>	C Bulecza-Banks, S Cater
_____	_____
(RGO)	D Vandiver
_____	_____
()	_____
_____	_____
()	_____
_____	_____
()	_____
_____	_____

**WARNING: THIS SCHEDULE IS AN INTERNAL PLANNING DOCUMENT.
 IT IS TENTATIVE AND SUBJECT TO REVISION.
 FOR UPDATES CONTACT THE RECORDS SECTION: (850) 413-6770
 Current CASR revision level**

0

	Due Dates	
	Previous	Current
1. FAW Notice Published	NONE	05/18/2001
2. Staff Recommendation	NONE	06/28/2001
3. Agenda	NONE	07/10/2001
4. Standard Order	NONE	07/30/2001
5. _____		
6. _____		
7. _____		
8. _____		
9. _____		
10. _____		
11. _____		
12. _____		
13. _____		
14. _____		
15. _____		
16. _____		
17. _____		
18. _____		
19. _____		
20. _____		
21. _____		
22. _____		
23. _____		
24. _____		
25. _____		
26. _____		
27. _____		
28. _____		
29. _____		
30. _____		
31. _____		
32. _____		
33. _____		
34. _____		
35. _____		
36. _____		
37. _____		
38. _____		
39. _____		
40. _____		

Recommended assignments for hearing and/or deciding this case:
 Full Commission Commission Panel _____
 Hearing Examiner _____ Staff _____

Date filed with RAR: 05/15/2001

Initials: OPR _____
 Staff Counsel _____

Section 3 - Chairman Completes

Assignments are as follows:

- Hearing Officer(s)

Commissioners						Hrg. Exam.	Staff
ALL	JC	DS	JB	BZ	PL		
X							

- Prehearing Officer

Commissioners					ADM
JC	DS	JB	BZ	PL	
					X

Where panels are assigned the senior Commissioner is Panel Chairman; the identical panel decides the case.
 Where one Commissioner, a Hearing Examiner or a Staff Member is assigned the full Commission decides the case.

Approved: L. / sm
 Date: 05/15/2001

c

STATE OF FLORIDA

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



DIVISION OF RECORDS & REPORTING
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

May 3, 2001

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Bos 551
Tallahassee, Florida 32302-0551

Docket No. 010650-TX

Dear Mr. Hoffman:

This will acknowledge receipt of a petition for declaratory statement by Level 3 Communications, LLC, which was filed in this office on May 1, 2001 and assigned the above-referenced docket number. Appropriate staff members will be advised.

Mediation may be available to resolve any dispute in this docket. If mediation is conducted, it does not affect a substantially interested person's right to an administrative hearing. For more information, contact the Office of General Counsel at (850) 413-6248 or FAX (850) 413-7180.

Division of Records and Reporting
Florida Public Service Commission





Public Service Commission

State of Florida

-M-E-M-O-R-A-N-D-U-M-

DATE: July 30, 2001
TO: Blanca Bayó, Director, Commission Clerk and Administrative Services
FROM: Jane Faurot, Chief, Office of Hearing Reporter Services
RE: DOCKET NO. 010650-TX, #4 of July 24th Agenda Conference.

RE: PETITION FOR DECLARATORY STATEMENT BY LEVEL 3 COMMUNICATIONS LLC, THAT COLLOCATION REVENUES REPORTED BY LEVEL 3 SHOULD NOT BE INCLUDED AS "GROSS OPERATING REVENUES DERIVED FROM INTRASTATE BUSINESS" AS CONTEMPLATED BY RULE 25-4.0161, F.A.C., AND SECTIONS 350.113(3)(B) AND 364.336, F.S., FOR PURPOSES OF CALCULATING REGULATORY ASSESSMENT FEE FOR CALENDAR YEAR 1999.

DOCUMENT NO. 09208, 7-30-01

The transcript for the above proceedings has been completed and is forwarded for placement in the docket file, including attachments.

Please note that Staff distribution of this transcript was made to:

LEGAL, RGO, CMP

Acknowledged BY:

 _____

JF/pc

PSC/RAR 28 (Rev1/00)

CCA Official Filing:

8/14/01***11:22 AM*****Matilda Sanders*****1**

Matilda Sanders

11662-DS

From: Mary Diskerud
Sent: Tuesday, August 14, 2001 10:34 AM
To: CCA - Orders / Notices
Subject: Order / Notice Submitted

Date and Time: 8/14/01 10:33:00 AM
Docket Number: 010650-TX
Filename / Path: dc010650.mcb

9

Order has been copied to gcorders

2/0

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770 (CLERK)
(850) 413-6330 (ADMIN)

Public Service Commission

September 12, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

**Re: Level 3 Communications, LLC vs. Florida Public Service Commission
(Docket No. 010650-TX)**

Dear Mr. Hall:

Enclosed is a certified copy of a Notice of Appeal, filed in this office on behalf of the Level 3 Communications, LLC on September 12, 2001. Also enclosed, as an exhibit to the notice, is a copy of Order PSC-01-1662-DS-TX, the order on appeal.

It is our understanding that the index of record is due to be served on the parties to this proceeding on or before November 1, 2001.

Sincerely,

A handwritten signature in cursive script that reads "Kay Flynn".

Kay Flynn, Chief
Bureau of Records and Hearing Services

MHL:mhl
Enclosure

cc: Kenneth A. Hoffman, Esquire
David Smith, Esquire

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Level 3 Communications, LLC's)
Petition for Declaratory Statement)
_____)

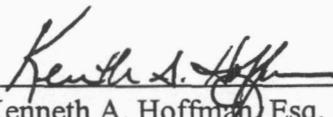
Docket No. 010650-TX

Filed: September 12, 2001

NOTICE OF APPEAL

Notice is given that Level 3 Communications, LLC ("Level 3") appeals to the Florida Supreme Court the Declaratory Statement of this Commission, Order No. PSC-01-1662-DS-TX, rendered on August 14, 2001. A conformed copy of said Declaratory Statement is attached hereto. The Declaratory Statement is a final order determining that Level 3 is required to pay regulatory assessment fees on collocation revenues generated by Level 3.

Respectfully submitted,



Kenneth A. Hoffman Esq.
Florida Bar No. 307718
Martin P. McDonnell, Esq.
Florida Bar No. 301728
Rutledge, Ecenia, Purnell & Hoffman, P.A.
P. O. Box 551
Tallahassee, FL 32301
(850) 681-6788 (telephone)
(850) 681-6515 (telecopier)

Attorneys for Level 3 Communications, LLC

DOCUMENT NUMBER-DATE

11352 SEP 12 01

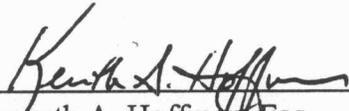
FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Notice of Appeal was furnished by U. S. Mail this 12th day of September, 2001, to the following:

Harold McLean, Esq.
General Counsel
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room G-301
Tallahassee, Florida 32399-0850

Martha Carter Brown, Esq.
Florida Public Service Commission
2540 Shumard Oak Boulevard
Room 370
Tallahassee, Florida 32399-0850



Kenneth A. Hoffman, Esq.

Level3\nnoticeofappeal

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement by Level 3 Communications, LLC, that collocation revenues reported by Level 3 should not be included as "gross operating revenues derived from intrastate business" as contemplated by Rule 25-4.0161, F.A.C., and Sections 350.113(3)(b) and 364.336, F.S., for purposes of calculating regulatory assessment fee for calendar year 1999.

DOCKET NO. 010650-TX
ORDER NO. PSC-01-1662-DS-TX
ISSUED: August 14, 2001

The following Commissioners participated in the disposition of this matter:

E. LEON JACOBS, JR., Chairman
J. TERRY DEASON
LILA A. JABER
BRAULIO L. BAEZ
MICHAEL A. PALECKI

DECLARATORY STATEMENT

Level 3 Communications, LLC (Level 3) is a certificated Alternative Local Exchange (ALEC) and Interexchange (IXC) telecommunications service provider in Florida. On May 1, 2001, Level 3 filed a Petition for Declaratory Statement pursuant to section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code. In its petition, Level 3 states that its request for a declaratory statement arises from an audit of its 1999 Alternative Local Exchange Company regulatory assessment fee filing, in which the Commission staff took exception to Level 3's exclusion of \$381,342.00 in collocation revenues from its assessment fee calculation.¹ Level 3 asks the Commission to

¹ At the current assessment fee rate of 0.0015, the amount in dispute is \$572.01.

DOCUMENT NUMBER-DATE

09909 AUG 14 2001

FPSC-COMMISSION CLERK

declare that the revenue an ALEC generates from collocation should be excluded from the fee calculation. For the reasons explained below we find to the contrary. Level 3 is required to include revenues derived from collocation in its regulatory assessment fee calculation.

LEVEL 3'S PETITION

The facts of this case, gleaned from Level 3's petition, its May 30, 2001, letter to our staff, and marketing information that it publishes on its website, indicate that Level 3 leases space in its Florida "Gateways" telecommunications facilities to other communications providers for the collocation of their communications equipment. Level 3 describes its Gateways facilities as "sophisticated technology centers where customers can physically locate their equipment in order to connect directly to Level 3's and other service providers' networks." As Level 3 explains on its website, collocation in Level 3's Gateways centers provides "direct access to Level 3's Network services," "an open facility - many other carriers are able to deliver service to customers directly within the Level 3 facility, enabling diverse routing and easy communications supplier choice and support service,"² and a variety of other services, like air conditioning, power supplies, and the like.

Level 3 states that a collocation space typically houses customer equipment that is used for the provision of telecommunications and/or information services. Level 3 also states that a lease of collocation space does not necessarily mean that Level 3 is supplying that entity with network facilities. "It is possible to use Level 3's collocation space as a place to locate equipment that is connected to other carriers' networks and thus is not necessarily solely associated with using Level 3's backbone network." Level 3 also explains that its collocation customers may provide interstate services, and most of the equipment that is placed in Level 3's Gateways is used for the provision of Internet-related services. Level 3 states that it cannot easily determine whether its customers are using collocation to ultimately provide regulated or unregulated services.

² www.level3.com.

Level 3 asserts that it does not owe assessment fees on its collocation revenues, because they are not "gross operating revenues derived from intrastate business" contemplated by sections 350.113(3)(b) and 364.336, Florida Statutes. Level 3 contends that since its collocation revenues are generated from a service that it is not required to provide, those revenues should be excluded from the fee calculation. For this proposition Level 3 relies upon this Commission's recent declaratory statement that Verizon is required to pay regulatory assessment fees on the directory advertising revenues of its affiliate. Docket No. 001556-TL, Order No. PSC-01-0097-DS-TL, issued January 11, 2001. Although the Commission found that Verizon was required to pay assessment fees on directory publishing revenues, Level 3 argues that it did so because Verizon's directory affiliate was providing a service Verizon is required to provide as a certificated local telecommunications company. "The final order in the Verizon Declaratory Statement proceeding makes it clear that Sections 350.113(b) and 364.336, Florida Statutes, were never intended to impose a regulatory assessment fee on the revenues of a regulated telecommunications company that are not derived from a required component of the telecommunications company's communications service."

Contending that its collocation revenues "represent nothing more than lease payments for occupying space in Level 3's facilities," Level 3 characterizes collocation as a "simple real property transaction" that does not involve the provision of telecommunications services by Level 3. Level 3 argues that because collocation is neither a telecommunications service, nor a service required in conjunction with the provision of telecommunications service, collocation revenues should be excluded from its gross operating revenues for regulatory fee calculations.

DECISION

Threshold Declaratory Statement Requirements

Section 120.565, Florida Statutes, governs the issuance of a declaratory statement by an agency. In pertinent part it provides:

- (1) Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of a statutory provision, or of any rule or order of the agency, as it applies to the petitioner's particular set of circumstances.

(2) The petition seeking a declaratory statement shall state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that the petitioner believes may apply to the set of circumstances.

Level 3's petition meets the statutory requirements for a declaratory statement. Level 3 does not believe that the regulatory assessment fee statute applies to its collocation revenues, but it will be required to pay the additional fee under our staff's interpretation. Level 3's substantial interests are affected by this disagreement, and therefore we will issue a declaratory statement to resolve it.

Analysis

The regulatory assessment fee statutes at issue here do not contemplate the exclusion of Level 3's collocation revenues from its regulatory assessment fee calculation. In fact, the introductory language of section 364.336, Florida Statutes, militates against any construction of that statute or related statutes that would exclude revenues not expressly excluded by the statute itself. Section 364.336, Florida Statutes, 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. . . (emphasis supplied.)

The statute further provides that 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.³

Section 350.113(3), Florida Statutes, also requires each regulated company under the jurisdiction of this Commission to pay a fee based upon its gross operating revenues. Section 350.113(3) also provides that the fees collected shall to the extent

³ Under that provision, any certificated telecommunications company leasing collocation space or other network facilities from Level 3 would be entitled to exclude amounts paid to Level 3 from their regulatory fee calculation.

practicable, be related to the "cost of regulating such type of regulated company."

Thus there are only two specific statutory limitations on the inclusion of a telecommunications company's gross operating revenues for regulatory assessment fee purposes in Florida. The revenues must be intrastate revenues, and they may exclude any amounts paid to another telecommunications company for the use of its facilities. The statutes make no other provision for the deduction or exclusion of operating revenues from the fee calculation. The statutes do not limit the regulatory fee calculation to revenue acquired either from telecommunications services or services "derived from a required component of the telecommunications company's communications service.", as Level 3 has suggested.⁴

In fact, the regulatory assessment fee statutes do not tie the fees to services of any particular kind at all, but to a regulated company's "intrastate business," a term that is clearly more inclusive than what Level 3 proposes. That is because the Commission regulates the telecommunications company and the business it conducts, not only the specific services that it provides. 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.

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

⁴ Level 3's reliance upon the Verizon declaratory statement is misplaced. In that case the Commission was addressing the imputation of advertising revenues generated by Verizon's affiliate publishing company to Verizon for regulatory assessment fee purposes, given the consideration that Verizon's affiliate was not a telecommunications company. Here there is no question that Level 3 is a telecommunications company and the collocation revenues are its own revenues.

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."

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. Level 3 acknowledges that Incumbent Local Exchange Telecommunications companies (ILECs) are required to provide collocation to competitive telecommunications carriers under the local competition provisions of the Telecommunications Act of 1996, as implemented by this Commission and the FCC. Under the Uniform System of Accounts, ILECs record that collocation revenue along with other rent revenue from the lease of facilities in account 5240, and they include it in their regulatory assessment fee calculation. According to Level 3's argument, ILECs would pay assessment fees on the revenues they collect from collocation, because they are required to provide collocation, but Alternative Local Exchange companies (ALECs) would not, because they are not required to provide collocation. Level 3 contends that this dissimilar treatment of the same revenues for regulatory assessment fee calculation is permissible because it encourages the development of competition pursuant to the directives of section 364.01, Florida Statutes. The assessment fee statutes, however, do not provide for dissimilar treatment of these revenues, and without specific statutory direction we do not have the discretion to treat them that way.

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. Furthermore, Level 3's proposed interpretation would not limit the amount of regulatory assessment fees the Commission would collect. It would limit the base of revenue upon which the Commission could assess the fees, placing a greater burden on other telecommunications providers and their customers. For these reasons, we find that Level 3's collocation revenues should be included in its regulatory assessment fee calculation.

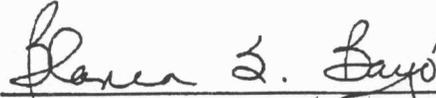
Now, therefore, it is

ORDERED by the Florida public Service Commission that the Petition for a Declaratory Statement is granted. It is further

ORDERED that the substance of the Declaratory Statement is as set forth in the body of this Order. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 14th day of August, 2001.



BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(S E A L)

MCB

Commissioner Jaber dissents from the majority opinion as follows:

The issue before us in this request for a declaratory statement is simply whether Level 3 is required to pay regulatory assessment fees on the revenues it receives from unregulated, unrequired collocation services it provides in its Florida "Gateway" facilities. Level 3 has not sought to address some larger, policy question or the applicability of regulatory assessment fees on any other company or for any other service.

Section 364.336, Florida Statutes, requires each telecommunications company licensed or operating in Florida to pay a regulatory assessment fee based on "its gross operating revenues derived from intrastate business". This section was enacted in 1990, pursuant to Chapter 90-244, Section 33, Laws of Florida. In 1995, the Florida Legislature enacted comprehensive legislation with the clear intent of opening up local exchange services to competition. The Legislature's intent in connection with this legislation to promote competition and to allow for a "transitional period in which new entrants are subject to a lesser level of regulatory oversight than local exchange telecommunications companies" is expressly set forth in Sections 364.01(3) and (4),

Florida Statutes. In 1996, the Federal Telecommunications Act was also changed to require and encourage competition in local markets. Level 3 is a relatively new competitive local exchange company and an example of the companies the Federal and State Telecommunications Acts encourage us to promote by lesser regulation.

Regulatory assessment fees fund regulation. The purpose of regulatory assessment fees is to compensate the agency for the costs of its regulatory activities. It is clear that the Commission conducts no regulatory oversight of the collocation service provided by Level 3. Level 3 is a competitive provider. As such, Level 3 is not required to file its collocation agreements. Our staff does not review these agreements and they are not subject to arbitration matters. Further, it was established that if Level 3 was to create a separate corporation that provided only collocation services, the new corporation would not have to pay the regulatory assessment fees. This application of the regulatory assessment fee statute in this manner defies logic. So, to me, the question is whether, given these facts, does the statute direct us to collect regulatory assessment fees on Level 3's revenue from unregulated, unrequired competitive collocation service.

In making my decision in this matter, I looked to all of Chapter 364 for direction. By analogy, courts look to the provisions of the whole law rather than various statutory subsections in isolation from one another and out of context. Klonis v. State Department of Revenue, 766 So.2d 1186 (Fla. 1st DCA 2000). Legislative provisions must be construed to operate in harmony with each other, City of Jacksonville v. Cook, 765 So.2d 289 (Fla. 1st DCA 2000). As to the notion that the Legislature did not amend Section 364.336 to provide for a lesser or different treatment of regulatory assessment fees for new entrants into the telecommunications area in 1995 when it could have, I do not believe it is reasonable to expect that the Legislature could have contemplated every situation before the PSC when changing statutory provisions. Here, the PSC is the body created by the Legislature to effectuate the policy that the Legislature could not have been expected to flesh out with great detail. In a time of telecommunications deregulation, it does not seem logical to me to collect regulatory assessment fees from a company for an unregulated service it began offering in the new competitive environment. This is a slippery slope. In an extreme situation, this decision has the potential of inhibiting innovation and creative competitive services. This seems contrary to the direction of the Legislature in Section 364.01(4)(f) to "(e)liminate any rules and/or regulations which will delay or impair the transition to competition." Our staff acknowledged that

the majority's decision will require our staff to audit revenues to ensure that the accurate amount of regulatory assessment fees have been submitted. This constitutes regulation.

In conclusion, I do not believe that Section 364.336, when taken together with Sections 364.01(3) and (4), requires the Commission to impose regulatory assessment fees on the collocation revenues of an alternative local exchange company (ALEC) such as Level 3. On the contrary, the most recently enacted statutory provisions direct us to encourage competition through lesser oversight of new entrants free of regulatory impediments. Further, Section 350.113(3), Florida Statutes, provides that the fees collected shall to the extent practicable, be related to the cost of regulation. Since the Commission performs no regulatory oversight of collocation services provided by ALECs, there is no cost of regulation associated with this service for which the PSC needs to be compensated.

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.

OK + Duke

STATE OF FLORIDA

Commissioners:
J. TERRY DEASON, CHAIRMAN
E. LEON JACOBS, JR.
LILA A. JABER
BRAULIO L. BAEZ



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

November 1, 2001

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
vs. E. Leon Jacobs, Jr., et al. (Docket No. 010650-TX)**

Dear Mr. Hoffman:

I have enclosed an invoice reflecting charges for preparation of the above-referenced record. Please forward a check in the amount indicated, made payable to the Florida Public Service Commission, at your earliest convenience.

Do not hesitate to call if you have any questions concerning this matter.

Sincerely,

Kay Flynn, Chief
Bureau of Records and Hearing Services

mhl
Enclosure

FLORIDA PUBLIC SERVICE COMMISSION

2540 Shumard Oak Blvd. ♦ Tallahassee, Florida 32399-0850

Date: November 1, 2001

8249

↑ ↑
This number must appear on
all checks or correspondence
regarding this invoice.

To:

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell
& Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

Date Paid _____

Amount Paid _____

Check # _____

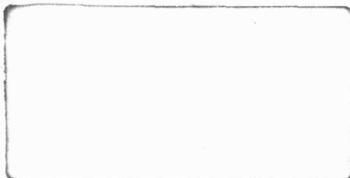
Check Cash

PSC Signature _____

Please make checks payable to: FLORIDA PUBLIC SERVICE COMMISSION

QUANTITY	DESCRIPTION	PRICE	AMOUNT
148 pgs	Copying and preparation of Docket 010650-TX on appeal to Supreme Court, Case No. SC01-2050	.05¢ per page	\$ 7.40
1	Certificate of Director	\$4.00 each	4.00
TOTAL			\$11.40

PSC/RAR-8 Rev. 11/94



dkf file

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK &
ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770 (CLERK)
(850) 413-6330 (ADMIN)

Public Service Commission

November 1, 2001

Kenneth A. Hoffman, Esquire
Rutledge, Ecenia, Purnell & Hoffman, P.A.
Post Office Box 551
Tallahassee, Florida 32301

Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, Jr., et al. (Docket No. 010650-TX)

Dear Mr. Hoffman:

Enclosed is an index to the above-referenced docket on appeal. Please look the index over and let me know if you have any questions concerning the contents of the record. The record will be filed in the Court on or before December 28, 2001.

Please do not hesitate to call if you have any questions.

Sincerely,

Kay Flynn, Chief
Bureau of Records and Hearing Services

mhl
cc: Martha C. Brown, Esquire

I N D E X

Level 3 Communications, LLC
vs.
Florida Public Service Commission
PSC Docket No. 010650-TX
Supreme Court Case No. SC01-2050

VOLUME 1

Progress Docket 1

Level 3 Communications, LLC’s petition for declaratory statement, filed May 1, 2001 3

Letter dated May 8, 2001 to Carroll Webb, Joint Administrative Procedures Committee, from Martha Carter Brown, Public Service Commission, with attached petition for declaratory statement, filed May 8, 2001 9

Notice for publication in May 18, 2001 Florida Administrative Weekly, filed May 9, 2001 ... 16

Memorandum from Commission’s Divisions of Appeals, Competitive Services, and Regulatory Oversight, filed July 12, 2001 17

Commission vote sheet from July 24, 2001 conference, filed July 24, 2001 37

Transcript of discussion of Item 4 from July 24, 2001, Commission conference, filed July 30, 2001 39

Order PSC-01-1662-DS-TX on declaratory statement, issued August 14, 2001 117

Notice for publication in August 24, 2001 Florida Administrative Weekly, filed August 15, 2001 126

Notice of Appeal, filed September 12, 2001, on behalf of Level 3 Communications, LLC ... 127

Directions to Clerk, filed September 21, 2001, on behalf of Level 3 Communications, LLC . 138

Acknowledgment of new case from Supreme Court of Florida, filed October 9, 2001 141

Revised directions to Clerk, filed October 19, 2001, on behalf of Level 3 Communications, LLC 143

Certificate of Director, Division of the Commission Clerk and Administrative Services 146

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

December 28, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, et al. (Docket No. 010650-TX)**

Dear Mr. Hall:

The record in the above-referenced case, consisting of one binder is forwarded for filing in the Court. A copy of the index is attached for your use.

Please initial and date the copy of this letter to indicate receipt. Call me at 413-6744 if you have any questions concerning this record.

Sincerely,

Kay Flynn, Chief
Bureau of Records and Hearing Services

Enclosure

cc: Kenneth A. Hoffman, Esquire
Martha C. Brown, Esquire

FILED
THOMAS D. HALL
DEC 28 2001

RECEIVED BY _____ CLERK, SUPREME COURT _____ DATE _____
BY

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD • TALLAHASSEE, FL 32399-0850

An Affirmative Action/Equal Opportunity Employer

PSC Website: <http://www.floridapsc.com>

Internet E-mail: contact@psc.state.fl.us

dkf fibe

STATE OF FLORIDA

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



DIVISION OF THE COMMISSION CLERK
AND ADMINISTRATIVE SERVICES
BLANCA S. BAYÓ
DIRECTOR
(850) 413-6770

Public Service Commission

December 28, 2001

Thomas D. Hall, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32301

**Re: Supreme Court Case No. SC01-2050 - Level 3 Communications, LLC vs.
E. Leon Jacobs, et al. (Docket No. 010650-TX)**

Dear Mr. Hall:

The record in the above-referenced case, consisting of one binder is forwarded for filing in the Court. A copy of the index is attached for your use.

Please initial and date the copy of this letter to indicate receipt. Call me at 413-6744 if you have any questions concerning this record.

Sincerely,

Kay Flynn, Chief
Bureau of Records and Hearing Services

Enclosure

cc: Kenneth A. Hoffman, Esquire
Martha C. Brown, Esquire

I N D E X

Level 3 Communications, LLC
vs.
Florida Public Service Commission
PSC Docket No. 010650-TX
Supreme Court Case No. SC01-2050

VOLUME 1

Progress Docket 1

Level 3 Communications, LLC’s petition for declaratory statement, filed May 1, 2001 3

Letter dated May 8, 2001 to Carroll Webb, Joint Administrative Procedures Committee, from Martha Carter Brown, Public Service Commission, with attached petition for declaratory statement, filed May 8, 2001 9

Notice for publication in May 18, 2001 Florida Administrative Weekly, filed May 9, 2001 ... 16

Memorandum from Commission’s Divisions of Appeals, Competitive Services, and Regulatory Oversight, filed July 12, 2001 17

Commission vote sheet from July 24, 2001 conference, filed July 24, 2001 37

Transcript of discussion of Item 4 from July 24, 2001, Commission conference, filed July 30, 2001 39

Order PSC-01-1662-DS-TX on declaratory statement, issued August 14, 2001 117

Notice for publication in August 24, 2001 Florida Administrative Weekly, filed August 15, 2001 126

Notice of Appeal, filed September 12, 2001, on behalf of Level 3 Communications, LLC ... 127

Directions to Clerk, filed September 21, 2001, on behalf of Level 3 Communications, LLC . 138

Acknowledgment of new case from Supreme Court of Florida, filed October 9, 2001 141

Revised directions to Clerk, filed October 19, 2001, on behalf of Level 3 Communications, LLC 143

Certificate of Director, Division of the Commission Clerk and Administrative Services 146



Public Service Commission
-M-E-M-O-R-A-N-D-U-M-

OFFICIAL FILE COPY

BIP

DATE: March 11, 2003
 TO: LILA A. JABER, CHAIRMAN
 J. TERRY DEASON, COMMISSIONER
 BRAULIO L. BAEZ, COMMISSIONER
 RUDOLPH "RUDY" BRADLEY, COMMISSIONER
 CHARLES M. DAVIDSON, COMMISSIONER
 HAROLD MCLEAN, GENERAL COUNSEL
 MARY BANE, EXECUTIVE DIRECTOR
 KEVIN NEAL, DEPUTY EXECUTIVE DIRECTOR
 BLANCA BAYO, DIRECTOR OF COMMISSION CLERK AND ADMINISTRATIVE SERVICES
 TIM DEVLIN, DIRECTOR OF ECONOMIC REGULATION
 WALTER D'HAESELEER, DIRECTOR OF COMPETITIVE MARKETS & ENFORCEMENT
 KEVIN BLOOM, DIRECTOR, OFFICE OF PUBLIC INFORMATION
 CHARLES HILL, DIRECTOR OF EXTERNAL AFFAIRS
 FROM: DAVID E. SMITH, ATTORNEY SUPERVISOR
 RE: LEVEL 3 COMMUNICATIONS, LLC V. JACOBS, NO. SC01-2050 (FLORIDA SUPREME COURT, MARCH 6, 2003)

ADM _____
 CLERK Kay
 REP _____
 DATE 3/28/03

3807

COMMISSION CLERK AND ADMINISTRATIVE SERVICES

03 MAR 12 AM 8:17

DES

010650-TX

In May, 2001, Level 3 Communications, LLC, (Level 3), an ALEC, petitioned the Commission for a declaratory statement. It asked the Commission to confirm its theory that it did not have to pay regulatory assessment fees (RAF) on revenues derived from its collocation rentals. The Commission disagreed, finding no RAF exemption for the "intrastate revenues" derived from Level 3's collocation business. Level 3 appealed to the Florida Supreme Court.

On March 6, 2003, the Court affirmed the Commission's declaratory statement. Justice Quince, writing for the Court, concluded first that Level 3's attempt to avoid assessment of RAF based on the type of service provided by the collocation customer, i. e., interstate or unregulated vs. intrastate, made no difference. She pointed out that 350.113(3)(b) and 364.336, Florida Statutes, were only concerned with the with whether the telecommunications company being assessed derived its revenues from its interstate business transactions, not what the customer's business might be. The rental of collocation space being an intrastate transaction, Level 3 could not avoid RAF on this theory.

Level 3 also argued that it shouldn't have to pay RAF because its collocation business was not the provision of "basic local telecommunications service." Justice Quince concluded that there was nothing in 350.113(3)(b) that recognized a RAF exemption based on the type of telecommunications service the company provided. Level 3's corollary argument that it should not have to pay RAF on revenues derived from a non-regulated business was likewise dismissed by the Court. Nothing in 350.113(3) required the Commission to tie its collection of RAF to the regulation of a specific service, and the breadth of the Commission's powers to regulate a variety of telecommunications providers under chapter 364 supported the theory that RAF is assessed to cover

the entire spectrum of Commission regulation.

Finally, the Court dismissed Level 3's equal protection claims, i. e., that as an ALEC providing collocation it had to pay RAF, while other non-ALEC companies that only provided collocation services did not have to pay. Equal protection applies to similarly situated persons, Justice Quince said, and ALECs like Level 3 are not similarly situated to unregulated, non-telecommunications companies.

Martha Brown handled the appeal and oral argument. A copy of the opinion is attached.

cc: Attorneys

Supreme Court of Florida

No. SC01-2050

LEVEL 3 COMMUNICATIONS, LLC,

Appellant,

vs.

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

Appellees.

[March 6, 2003]

QUINCE, J.

We have on appeal a decision of the Florida Public Service Commission concerning regulatory assessment fees on the gross operating revenues of Level 3 Communications, LLC. We have jurisdiction. See art. V, § 3(b)(2), Fla. Const. We affirm the decision of the Public Service Commission for the reasons expressed below.

BACKGROUND

On May 1, 2001, Level 3 Communications, LLC (Level 3),¹ pursuant to section 120.565, Florida Statutes (2001), and rule 28-105.002, Florida Administrative Code, filed a petition for declaratory statement requesting a determination from the Florida Public Service Commission (PSC) concerning items to be included in gross operating revenues from intrastate commerce. Level 3 maintained that its collocation² revenues should not be included as “gross operating

1. Level 3 is a certified alternative local exchange and interexchange telecommunications service provider in Florida. An alternative local exchange telecommunications company (ALEC) is defined as any company certified by the Public Service Commission to provide local exchange telecommunications in Florida on or after July 1, 1995. See § 364.02(1), Fla. Stat. (2001). The federal Telecommunications Act of 1996 required incumbent local exchange carriers (ILECs) to allow ALECs to interconnect their networks with the networks of the new ALECs who sought entry into a particular market. See 47 U.S.C. § 251(c)(2)(2000). ILEC is defined by Florida law as a company certified by the PSC to provide local exchange service on or before June 30, 1995, see section 364.02(6), Florida Statutes (2001), and by federal law as a local exchange carrier that provided telephone exchange service in a particular area on February 8, 1996. See 47 U.S.C. § 251(h).

2. As part of an ILEC’s interconnection duties, the companies are required to allow ALECs to physically collocate their equipment on the ILEC’s premises. The federal statute describes the collocation duty as follows: “The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical

revenues derived from intrastate business” as contemplated by rule 25-4.0161, Florida Administrative Code, and sections 350.113(3)(b) and 364.336, Florida Statutes (2001), for purposes of calculating the regulatory assessment fee for calendar year 1999. Level 3 filed its petition for a declaratory statement after the PSC audited Level 3's 1999 regulatory assessment filing fee and concluded that the company should include revenues from collocation in 1999 in the amount of \$381,342, as part of its gross operating revenues derived from intrastate business to calculate the regulatory assessment fee due. Level 3 asked the PSC to declare that the revenue an ALEC generates from collocation should be excluded from the fee calculation.

In its petition, Level 3 argued that collocation revenues were lease payments made by new ALECs for occupying space in Level 3's “gateway” facilities,³ so collocation should be considered as a “simple real property transaction.” Level 3 further argued that because collocation does not involve the provision of telecommunication services, it should not be included as part of the company's

collocation is not practical for technical reasons or because of space limitations.” 47 U.S.C. § 251(c) (6).

3. Level 3's gateway facilities provide locations where customers can physically collocate their equipment in order to connect directly to Level 3's and other service providers' networks.

gross operating revenues. In support of its position, Level 3 cited to the declaratory statement issued by the PSC in order no. PSC-01-0097-DS-TL (Verizon order). There, the PSC determined that Verizon was required to pay regulatory assessment fees on directory publishing revenues. Level 3 contended that the Verizon order “makes it clear that Sections 350.1113(3)(b) and 364.336, Florida Statutes, were never intended to impose a regulatory assessment fee on the revenues of a regulated telecommunications company that are not derived from a required component of that telecommunications company’s communications service.” According to Level 3, the PSC’s position would subject optional, nontelecommunications services and revenues such as collocation or the sale of customer premises equipment to the regulatory assessment fee. Level 3 argued that because collocation is neither a telecommunications service nor a service required in conjunction with the provision of a telecommunications service, its collocation revenues should be excluded from its gross operating revenues for regulatory fee calculations.

The PSC disagreed, finding that Level 3 was required to include revenues derived from collocation in its regulatory assessment fee calculation. The PSC found that Level 3’s collocation revenues were gross operating revenues derived from intrastate commerce, and the regulatory fee statutes did not contemplate the

exclusion of those revenues from the fee calculation. The PSC reasoned that the statutes only permitted two specific exclusions from gross operating revenues for regulatory assessment fee purposes: (1) interstate revenues, and (2) a deduction for amounts paid to other telecommunications companies for the use of the facilities. The PSC noted that the regulatory statutes “do not tie the fees to services of any particular kind at all, but to a regulated company’s ‘intrastate business,’ a term that is clearly more inclusive than what Level 3 proposes.” Since Level 3’s collocation revenues did not fall under the specific exclusions, the PSC found that the revenues should be included

ANALYSIS

An agency’s interpretation of the statute that it is charged with enforcing is entitled to great deference. See BellSouth Communications, Inc. v. Johnson, 708 So. 2d 594, 596 (Fla. 1998). This Court will not depart from the contemporaneous construction of a statute by a state agency charged with its enforcement unless the construction is “clearly unauthorized or erroneous.” See P.W. Ventures, Inc. v. Nichols, 533 So. 2d 281, 283 (Fla. 1988). The party seeking to challenge the PSC’s order has the burden of overcoming these presumptions “by showing departure from the essential requirements of law.” Florida Interexchange Carriers Ass’n. v. Clark, 678 So. 2d 1267, 1270 (Fla. 1996). However, this Court will not

give deference to an agency's determination when the agency exceeds its authority. See Tampa Elec. Co. v. Garcia, 767 So. 2d 428, 433 (Fla. 2000). Thus, unless this Court finds that the PSC acted outside the scope of its powers and jurisdiction by imposing regulatory assessment fees on Level 3's collocation revenues or its decision was "clearly unauthorized or erroneous," the PSC's decision will be afforded deference.

At issue is whether the PSC has the authority to collect regulatory assessment fees on the collocation revenues of Level 3. The PSC has exclusive jurisdiction to regulate telecommunications of Florida. See § 364.01, Fla. Stat. (2001); Florida Interexchange Carriers Ass'n v. Beard, 624 So. 2d 248, 251 (Fla. 1993). Sections 350.113 and 364.336, Florida Statutes (2001), establish the formula by which the PSC calculates its costs and collects fees needed to cover those costs from telecommunications companies. Section 350.113 creates the Florida Public Service Regulatory Trust Fund and provides the formula for the calculation of the PSC's regulatory costs and the maximum fee rate that the PSC can assess. The statute provides in relevant part:

(1) There is hereby created in the State Treasury a special fund to be designated as the "Florida Public Service Regulatory Trust Fund" which shall be used in the operation of the commission in the performance of the various functions and duties required of it by law.

(3) Each regulated company under the jurisdiction of the commission, which company was in operation for the preceding 6-month period, shall pay to the commission within 30 days following the end of each 6-month period, commencing June 30, 1977, a fee based upon the gross operating revenues for such period subject to the limitations of this subsection. The fees shall, to the extent practicable, be related to the cost of regulating such type of regulated company and shall in no event be greater than:

.....
(b) For each telephone company licensed or operating under chapter 364, one-eighth of 1 percent of its gross operating revenues derived from intrastate business.

.....
Differences, if any, between the amount paid in any 6-month period and the amount actually determined by the commission to be due shall, upon notification by the commission, be immediately paid or refunded. Each regulated company which is subject to the jurisdiction of the commission, but which did not operate under the commission's jurisdiction during the entire preceding 6-month period, shall, within 30 days after the close of the first 6-month period during which it commenced operations under, or became subject to, the jurisdiction of the commission, pay to the commission the prescribed fee based upon its gross operating revenues derived from intrastate business during those months or parts of months in which the regulated company did operate during such 6-month period. In no event shall payments under this section be less than \$25 annually.

§ 350.113 (1), (3), Fla. Stat. (2001).

Section 364.336 provides the fee rate for telecommunications companies.

This section 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 revenue for purposes of computing the fee due.

§ 364.336, Fla. Stat. (2001).

Level 3 advances several arguments in support of its assertion that its collocation activities are not intrastate business. First, Level 3 argues that its collocation product is predominantly interstate, as opposed to intrastate.⁴ It asserts that its collocation product is akin to a real property transaction. Level 3 claims that most of the equipment placed in its gateway facilities are used for the provision

4. The term “intrastate business” is not defined in chapter 364, Florida Statutes (2001). Under Florida’s rules of statutory construction, the term “intrastate business” must be given its plain and ordinary meaning. See Rollins v. Pizzarelli, 761 So. 2d 294, 298 (Fla. 2000). The Court has noted: “When necessary, the plain and ordinary meaning ‘can be ascertained by reference to a dictionary.’ Further, it is a well-settled rule of statutory construction that in the absence of a statutory definition, courts can resort to definitions of the same term found in case law.” Id. (citation omitted). Section 207.002, which deals with taxation on the operation of motor vehicles, defines intrastate as follows: “‘Intrastate’ means vehicle movement from one point within a state to another point within the same state.” § 207.002(14), Fla. Stat. (2001). Black’s Law Dictionary does not define intrastate business, but gives the following definition for intrastate commerce: “Commerce that begins and ends entirely within the borders of a single state.” Blacks Law Dictionary 262 (7th ed. 1999). Webster’s defines intrastate as “existing or occurring within a state.” Merriam-Webster’s Dictionary 614 (10th ed. 1998). Thus, it appears that intrastate business is defined as business occurring within the state of Florida.

of internet-related service; however, Level 3 concedes that it does not know if all the space that it is leasing is used for internet purposes. In its petition for declaratory statement, Level 3 notes, "It would be extremely difficult to determine whether the collocation space that is leased is ultimately being used to provide regulated or unregulated services." Because Level 3 believes that most of the revenues generated by its collocation agreements result from providing support for internet services, the company argues that its revenues are "inherently interstate in nature."

However, Level 3's argument ignores the fact that sections 350.113(3)(b) and 364.336 impose regulatory assessment fees on the gross operating revenue of its intrastate business, not the intrastate or interstate business of its customers. Recently, this Court struck down an order of the PSC which assessed regulatory fees on the revenues of a telecommunication company's affiliate. See Verizon Florida, Inc. v. Jacobs, 810 So. 2d 906 (Fla. 2002). We found that the PSC did not have authority under section 364.336 to impute the affiliate company's revenues to Verizon. Id. at 909. This Court reasoned:

The pertinent language of section 364.336 is plain when it states that telecommunications companies, operating under chapter 364, are only required to pay regulatory assessment fees based on a percentage of their own gross operating revenues derived from intrastate business. In its order, the Commission imputes Directories' revenues to Verizon

for purposes of regulatory assessment fee calculation. Yet, nothing in the plain language of section 364.336 serves as a basis for allowing the Commission to impute revenues to Verizon in the regulatory assessment fee calculus.

Id. at 908-09. Thus, even if Level 3's facilities are used by other companies for internet services, the PSC has the authority to assess Level 3's revenues from the rental of collocation space, because the rental involves an intrastate transaction. In the order, the PSC states:

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."

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.

This Court is not at liberty to disregard the PSC's findings if they are supported by competent, substantial evidence. See DeGroot v. Sheffield, 95 So. 2d 912, 916 (Fla. 1957).

Second, Level 3 argues that collocation is not subject to regulation by the PSC because it does not involve the provision of basic local telecommunications

service. Essentially, Level 3 has interpreted the assessment fee statutes as imposing an assessment on a telecommunications company based upon the type of intrastate business the company is providing. Section 350.113(3)(b) reads: "For each telephone company licensed or operating under chapter 364, one-eighth of 1 percent of its gross operating revenues derived from intrastate business." Section 364.336, Florida Statutes, states in pertinent part: "Notwithstanding any provisions of the law to the contrary, 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." (Emphasis added.) Nothing in the plain language of section 364.336 exempts a telecommunications company from paying regulatory assessment fees on collocation revenues derived from intrastate business. The statute on its face does not limit the assessment based upon the type of service that telecommunications business is providing.

Alternatively, Level 3 contends that its collocation revenues are not subject to assessment fees due to Level 3's status as an ALEC. Level 3 argues that because the collocation agreements of ALECs are not required and unregulated by the PSC, the revenues from their collocation agreements are not subject to assessment fees. Level 3 opines that because regulatory fees are required to be directly related to

actual costs of the regulatory process, the PSC cannot justify its assessment against Level 3's collocation revenues.

Level 3 cites section 364.337 for support of its argument. This statute, which pertains to ALECs, provides in pertinent part:

(2) Rules adopted by the commission governing the provision of alternative local exchange telecommunications service shall be consistent with s. 364.01

.
(5) The commission shall have continuing regulatory oversight over the provision of basic local exchange telecommunications service provided by a certificated alternative local exchange telecommunications company or a certificated alternative access vendor 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.

§ 364.337, Fla. Stat. (2001). Level 3 argues that subsection (5) details the entire scope of the PSC's authority over ALECs, and because subsection (5) does not mention collocation, the PSC has no right to assess fees on an unregulated service that is not required. Level 3 further argues that ALECs are free to engage in any lawful unregulated intrastate or interstate business free from regulatory oversight.

A similar type of argument was advanced in General Telephone Co. of Florida v. Marks, 500 So. 2d 142 (Fla. 1986). In Marks the petitioner argued that the PSC was prohibited from including certain expenses in calculating the

company's profits because the statute did not specially authorize the PSC to include the expenses in calculating the gross profit. This Court disagreed:

The legislature cannot be expected to foresee and make provision for every possible type of expense that might be associated with the gross profit of a particular type of operation. Some discretion must be given to regulatory bodies to promulgate the detailed rules that expand upon and implement legislative directives. In this case the legislature provided that the commission shall calculate gross profits. Unless there is something else directly contrary in the statute itself, we must assume the legislature intended to grant to the commission the discretion to determine what factors should be used in calculating gross profits

Id. at 145. Since nothing in the statute expressly prohibited the inclusion of white page expenses in the calculating of gross profits, the Court affirmed the PSC's order. We agree with this reasoning. In the instant case, nothing in sections 350.113 or 364.336 prohibits the PSC from including Level 3's collocation revenue for purposes of calculating gross profits.

Section 350.113(3) gives the PSC the authority to assess a fee "upon the gross operating revenues The fees shall, to the extent practicable, be related to the cost of regulating such type of regulated company" The language in the statute does not appear to tie the assessment of regulatory fees to a specific service. Level 3's argument that the PSC has limited authority over ALECs ignores the numerous statutes which give the PSC authority over a variety of activities of all

local telecommunications providers. For example, section 364.01 (4) gives the PSC broad regulatory powers over the telecommunications industry. See § 364.01(4), Fla. Stat. (2001). Section 364.12 gives the PSC authority over the interconnection duties of both ILECs and ALECs. See § 364.12 (2)-(5), Fla. Stat. (2001). The breadth of the PSC's authority supports the argument that the assessment fee is assessed to cover the entire spectrum of its regulatory activities.

Finally, Level 3 argues that the PSC's decision violates equal protection because it forces Level 3 to pay regulatory assessment fees on revenues generated in the same manner as those of its competitors that do not have to pay an assessment fee. The constitutional right to equal protection mandates that similarly situated persons be treated alike. See Duncan v. Moore, 754 So. 2d 708, 712 (Fla. 2000). Equal protection is not violated simply because persons are treated differently. When considering a statute that abridges a fundamental right, courts are required to apply the strict scrutiny standard to determine whether the statute denies equal protection. See Lite v. State, 617 So. 2d 1058, 1061 n.2 (Fla. 1993). However, where a fundamental right is not at stake, the courts apply the rational basis test. "Under the rational basis standard, the party challenging the statute bears the burden of showing that the statutory classification does not bear a rational relationship to a legitimate state purpose." Id.

Level 3 argues that the extension of the PSC's authority to cover the company's nonregulated revenues unduly discriminates against collocation companies that are ALECs. However, Level 3 is not similarly situated to companies that solely engage in the rental of collocation facilities. Under section 364.02(12)(a)-(f), a company that only provides facilities to other telecommunications providers is not considered a telecommunications company. Since Level 3 is not in the same class as those companies, because it provides facilities and telecommunications services, it has failed to show that it has been denied equal protection.

Accordingly, we affirm the PSC's order determining that Level 3's collocation revenues are subject to regulatory assessment fees.

It is so ordered.

ANSTEAD, C.J., WELLS and PARIENTE, JJ., and SHAW and HARDING,
Senior Justices, concur.
LEWIS, J., concurs in result only.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION, AND
IF FILED, DETERMINED.

An Appeal from the Florida Public Service Commission

Kenneth A. Hoffman and Martin P. McDonnell of Rutledge, Ecenia, Purnell &
Hoffman, P.A., Tallahassee, Florida; and Michael R. Romano and Greg L. Rogers

of Level 3 Communications, LLC, Broomfield, Colorado,

for Appellant

Harold McLean, General Counsel and Martha Carter Brown, Associate General
Counsel of the Florida Public Service Commission, Tallahassee, Florida,

for Appellee