Timolyn Henry

From: MAHARAJ-LUCAS.ASHA [MAHARAJLUCAS.ASHA@leg.state.fl.us]
Sent: Friday, June 23, 2006 4:07 PM
To: Filings@psc.state.fl.us
Cc: Charles Beck; ROBERTS.BRENDA
Subject: 060300-prehearing Memorandum
Attachments: 060300.doc

Electronic Filing

a. Person responsible for this electronic filing:

Charlie J. Beck, Deputy Public Counsel
Office of Public Counsel
c/o The Florida Legislature
111 West Madison Street, Room 812
Tallahassee, FL 32399-1400
(850) 488-9330
beck.charles@leg.state.fl.us

b. Docket No. 060300

In re: Petition for Recovery of Intrastate Costs and Expenses Relating to Repair, Restoration and Replacement of Facilities Damaged by Hurricane Dennis by GTC, Inc. d/b/a GT Com

c. Document being filed on behalf of Office of Public Counsel

d. There are a total of 11 pages.

e. The document attached for electronic filing is OPC Pre-hearing memorandum of Law.

(See attached file: 060300.doc)

CMP ____
COM 5
CTR ____
ECR ____
GCL ____
OPC ____
RCA ____
SCR ____
SGA ____
SEC 1
OTH kimp

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition for Recovery of Intrastate Costs and Expenses Relating to Repair, Restoration and Replacement of Facilities Damaged by Hurricane Dennis by GTC, Inc. d/b/a GT Com	)	Docket No. 060300-TL
	)	Filed: June 23, 2006

CITIZENS' PREHEARING MEMORANDUM OF LAW

The Citizens of Florida, through Harold McLean, Public Counsel, file this Prehearing Memorandum of Law.

The core legal issue facing the Commission with respect to GTCom's petition is whether section 364.051(4)(b)3, Florida Statutes, allows the Commission to use an incremental cost approach, including an adjustment to remove normal capital costs, as an appropriate methodology to determine which costs related to Hurricane Dennis are reasonable under the circumstances. OPC does not take the position that the incremental cost approach is mandated by the statute; rather, in providing the Commission the responsibility for determining which storm costs are "reasonable under the circumstances," the legislature provided the Commission broad discretion and responsibility to determine which costs should be included in storm surcharges. Once the Commission determines that it has this authority, it follows quickly that the Commission should use the incremental cost approach to determine storm costs because (1) this methodology prevents customers from being charged twice for the same costs, and (2) this is the approach that has been used consistently by the Commission

in all of the recent electric utility cases and in a Commission approved stipulation between Sprint and the Office of Public Counsel.

The term "reasonable" is used as the legal standard for storm cost recovery in both chapter 366, Florida Statutes, for electric companies, and chapter 364, Florida Statutes, for local telecommunications companies. The Commission has made it abundantly clear that reasonable storm costs to be recovered from customers by electric utilities are incremental storm costs, including an adjustment for normal capital costs.

The most recent line of cases began with the case brought by Florida Power & Light Company to recover storm expenses incurred during 2004. FPL filed a petition on November 4, 2004, seeking to define "reasonable" storm costs in much the same way that GT Com has done here. FPL attempted to charge all possible costs, whether or not incremental to the company's normal cost of operations, to its storm reserve. The Commission refused to accept FPL's proposed methodology. Instead, the Commission decided that costs determined using a "modified incremental cost approach" that addressed both capital items and income statement items on an incremental basis were reasonable and prudent expenditures appropriate for recovery through a surcharge. *See* Florida Public Service Commission order no. PSC-05-0937-FOF-EI issued September 21, 2005, at 3, 8 ("FPL 2004 Storm Cost Order").

Some of the specific infirmities with FPL's requested approach are relevant to GTCom's petition in this proceeding. The Commission, for example, found that moving all O&M expenses associated with the storm repair to the

storm reserve, without taking into account the normal level of expenditures funded by base rates that customers pay, requires customers to pay twice for the same costs. *FPL 2004 Storm Cost Order* at 9. The Commission therefore removed the normal level of O&M expenses from the surcharge, but allowed the company to include in the surcharge the amount in excess of the normal level of these expenses. In addition, the Commission found that charges to FPL's storm reserve should be adjusted to remove items normally related to base rates. Consistent with that approach, the Commission removed $58 million of capital costs associated with FPL's storm recovery efforts and required FPL to book those expenditures to rate base as plant in service. *FPL 2004 Storm Cost Order* at 19. Capital amounts in excess of the normal levels were allowed in the amount included in the surcharge.

The FPL 2004 Storm Cost Order did not discuss the specific statutory provisions underlying the decision to allow Florida Power & Light Company to surcharge customers for the costs associated with the 2004 storms in excess of the storm reserve, other than to cite sections 366.04, 366.05, and 366.06, Florida Statutes, as providing the Commission jurisdiction over the matter brought by FPL. *FPL 2004 Storm Cost Order* at 3.

Section 366.04, Florida Statutes, prescribes the Commission's jurisdiction over public utilities, including "jurisdiction to regulate and supervise each public utility with respect to its rates and service." Section 366.05, Florida Statutes, provides the Commission the power " to prescribe fair and reasonable rates and charges, classifications, standards of quality and measurements, and service

rules and regulations to be observed by each public utility..." "Fair and reasonable rates" is the statutory underpinning for storm cost recovery in section 366.05. In a similar fashion, section 366.06, Florida Statutes, provides the Commission the authority "to determine and fix fair, just, and reasonable rates that may be requested, demanded, charged, or collected by any public utility for its service." "Fair, just, and reasonable rates" is the statutory underpinning in this section. The Commission's decision to use an incremental cost approach for storm costs with a normal capital adjustment, instead of FPL's proposal to include every conceivable cost, came from the statutory directive in sections 366.05 and 366.06, Florida Statutes, to set fair and reasonable rates.

The statute before the Commission in this case, section 364.051(4)(b)3, Florida Statutes, is no different, because this statute, like the electric utility statutes, provides the Commission authority and responsibility to determine which storm costs are "reasonable."

Every electric utility case dealing with the 2004 and 2005 storm seasons has followed the incremental cost methodology with a normal capital cost adjustment. These include dockets addressing Florida Power & Light company storm cost recovery for the 2004 and 2005 storm seasons (docket Nos. 041291-EI and 060038-EI), Progress Energy 2004 storm recovery costs in docket no. 041272-EI, and settlements with Gulf Power Company's for the 2004 and 2005 storm season cost recovery (docket nos. 050093-EI and 060154-EI).

The only other local exchange telecommunications company case dealing with the 2004 or 2005 storm costs followed this methodology as well. Sprint filed

a case on May 25, 2005, well after the legislature had passed the statute under which GTCom is proceeding in this case. However, Sprint's case addressed 2004 storm costs, and section 264.051(4)(b) applies only to named tropical storms occurring after June 1, 2005. Sprint therefore proceeded under the provisions of the new statute which stated that "this paragraph is not intended to adversely affect the commission's consideration of any petition for an increase in basic rates to recover costs related to storm damage which was filed before the effective date of this act." §364.051(4)(b), Fla. Stat.

The provisions of section 364.051(4)(b)(3), which applies to GTCom in this case, requires recoverable costs to be " reasonable under the circumstances for the named tropical system." This provision did not specifically apply to Sprint's petition to recover costs from the 2004 storm season, but the agreement between Sprint and OPC provided that "the parties acknowledge and accept that their agreement to exclude certain charges is reasonable under the circumstances." Stipulation between Sprint and OPC dated May 25, 2005, at paragraph 20. This provision in the stipulation tracked the statutory language contained in section 364.051(4)(b)(3) that the costs be "reasonable under the circumstances."

The agreement between Sprint and OPC used the same methodology of incremental costs with a normal capital adjustment that has been used by the Commission in all of the electric utility cases dealing with 2004 or 2005 storm costs. Unlike GTCom, Sprint agreed to exclude normal capital project costs; regular time labor (salary and hourly); budgeted overtime labor; contractor

budget levels; capitalized material; capitalized building repairs, generators, fuel, line card repair and return, and the normal cost of removal expense applicable to retired assets. In addition, unlike GTCom, Sprint included only extraordinary capital reconstruction costs, so that the recovery amount included only capital costs to the extent the cost of reconstruction exceeded the normal material and labor cost of construction and the costs attributable to extraordinary contractor premium rates. Stipulation between Sprint and OPC dated May 25, 2005, at paragraph 19.

Even though Sprint agreed that the use of incremental costs was "reasonable under the circumstances" to determine storm recovery costs, and Sprint is a local telecommunications company subject to price caps just like GTCom, GTCom may nonetheless claim that the rationale for using incremental costs should not apply to a price cap company.

The Commission's order determining the amount of the surcharge in the Sprint case gives insight into the interrelationship between storm costs and price caps. In its discussion about the provisions of section 364.051(3) which allow price cap companies to increase basic rates each year by an inflation factor minus one percent, the Commission stated:

> "Subsection (3) of Section 364.051, Florida Statutes, allows a local exchange company to increase certain aspects of its retail prices, without petitioning this Commission, once a year in an amount not to exceed inflation minus a productivity offset of one percent. This portion of the statute recognizes that the prices of goods and services used by an ILEC to provide service are expected to increase and provides a reason for ILECs to become progressively more efficient, while still allowing limited recovery of normal

> and foreseeable inflationary costs through indexed retail price increases. Unforeseeable, and arguably, catastrophic costs such as those for which Sprint seeks recovery in this case are not part of normal inflation and cannot be offset by improved productivity or the indexed price increases. Thus, reading subsections 364.05l(3) and (4), Florida Statutes, together, as the statutory construction rules require, compels the conclusion that "normal" cost increases were intended to be recovered, less a productivity offset, via the annual indexed retail price increases, while substantial, unforeseen and extraordinary costs, such as the hurricane costs at issue here, can be recovered via the sparingly-used "changed circumstances" provision of the statute." Order no. PSC-05-0946-FOF-TL issued October 3, 2005, at 4.

While this discussion contained in the Commission's order specifically addressed the relationship between inflationary costs to the adjustment of price cap levels, it reflects a recognition that price caps are designed to allow a company to recover costs. Any company must recover costs to remain in business, and price cap local exchange telecommunications companies like GTCom are no different than any other company in this regard. Their existing prices recover their normal costs, as they do for rate-of-return regulated companies. "Reasonable" costs for recovery through an additional surcharge should only recover costs in excess of normal cost levels. This is consistent with the statutory premise that the surcharge be based on changed circumstances. A *changed* circumstance would include only the increment above normal costs; it should not duplicate normal costs already reflected in existing rates.

Just as the Commission has found that that "reasonable" storm costs for electric utilities are determined by using incremental costs with a normal capital

adjustment, the Commission should interpret the term "reasonable" in the same way for local exchange telecommunications companies. Sprint agreed that the use of incremental costs were "reasonable under the circumstances," and the Commission approved a stipulation containing that agreement. There is no reason to interpret the term differently in this case. The Legislature specifically entrusted the Public Service Commission to use its expertise to determine "reasonable" costs both for electric utilities and local telecommunications companies. The Commission should determine that reasonable storm costs means the same thing for both electric and local telephone companies.

An agency's interpretation of a statute it is charged with enforcing is entitled to great deference and will be upheld if based on competent substantial evidence and not clearly erroneous. *Florida Cable Television Ass'n v. Deason*, 635 So.2d 14 (Fla. 1994). In *Florida Cable Television Ass'n v. Deason* the FCTA had argued that the Commission erred by not adopting a "plain meaning" approach that would give separate and distinct meanings to the terms "competitive," "subject to effective competition," and "effectively competitive" in section 364.338. The Commission found that a literal reading of section 364.338 would render parts of the statute incomprehensible and, thus, contrary to its purpose. The Florida Supreme Court upheld the Commission. The FCTA had further argued that the Commission's order departed from essential requirements of law by overlooking the legislative purpose of chapter 364, which it said was to foster telecommunications competition in the public interest. The Court stated:

> "The FCTA's narrow reading of legislative intent fails to see the forest for the trees. Although fostering

> telecommunications competition in the public interest is one purpose of chapter 364, the Commission has a broader, overall duty to regulate. *See§ 364.01(3)(a)-(f), Fla.Stat. (1991).* The Commission's order gives effect to these purposes." *Florida Cable Television Ass'n* at 16.

A similar rationale applies in this case. The legislature directs the Commission to determine reasonable costs, and the Commission has repeatedly responded by granting the companies only those costs which are incremental to the costs the company already recovers in rates. GTCom, by seeking to recover costs it recovers elsewhere in rates, fails to see the forest for the trees.

Florida Interexchange Carriers Association v. Clark, 678 So.2d 1267 (Fla. 1996) provides the following analysis similar to the one provided by the Court in *Florida Cable Telephone Ass'n*:

> "Commission orders come to this Court "clothed with a presumption of validity." *City of Tallahassee v. Mann*, 411 So.2d 162, 164 (Fla. 1981). Moreover, an agency's interpretation of a statute it is charged with enforcing is entitled to great deference and will be approved by this Court if it is not clearly erroneous. *Florida Cable Telephone Ass'n v. Deason*, 635 So.2d 14, 15 (Fla. 1994); *Floridians for Responsible Util. Growth v. Beard*, 621 So.2d 410, 412 (Fla. 1993). The party challenging the Commission's order bears the burden of overcoming those presumptions by showing a departure from the essential requirements of law. *City of Tallahassee v. Mann*, 411 So.2d at 164; *Shevin v. Yarborough*, 274 So.2d 505, 508 (Fla. 1973)." *Florida Interexchange Carriers Association* at 1270.

See also AmeriSteel Corp. v. Clark, 691 So.2d 473 (Fla. 1997); *BellSouth Telecommunications, Inc., v. Johnson*, 708 So.2d 594 (Fla. 1998); and *Level 3 Communications, LLC v. Jacobs*, 841 So.2d 447 (Fla. 2003).

It will be no departure from the essential requirements of law for the Commission to interpret "reasonable" in the same manner for the recovery of storm costs by electric and local exchange telecommunications companies. The reasonable costs and expenses of GTCom relating to repairing, restoring, or replacing the lines, plants, or facilities damaged by Hurricane Dennis are those which are incremental to normal costs and not recovered by the company's other rates. The Commission should follow the precedent of the electric cases and the Sprint settlement by using incremental costs with a normal capital adjustment to determine storm costs included in a surcharge to existing rates.

Respectfully submitted,

HAROLD MCLEAN
PUBLIC COUNSEL

s/ Charles J. Beck
Charles J. Beck
Deputy Public Counsel
Fla. Bar No. 217281

Office of Public Counsel
c/o The Florida Legislature
111 W. Madison Street
Room 812
Tallahassee, FL 32399-1400

(850) 488-9330

Attorneys for Florida's Citizens

DOCKET NOS. 060300-TL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to the following parties on this 23rd day of June, 2006.

s/ Charles J. Beck
Charles J. Beck

Adam Teitzman
Legal Department
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

Kenneth A. Hoffman, Esquire
Marsha E. Rule, Esquire
Rutledge, Ecenia, Purnell &
Hoffman, P.A.
215 South Monroe St., Suite 420
Tallahassee, FL 32301