

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition for approval of storm cost recovery surcharge, and stipulation with Office of Public Counsel, by Sprint-Florida, Incorporated.

DOCKET NO. 050374-TL
ORDER NO. PSC-05-0946-FOF-TL
ISSUED: October 3, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
LISA POLAK EDGAR

ORDER APPROVING STORM COST RECOVERY SURCHARGE

BY THE COMMISSION:

I. Case Background

Between mid-August and late September of 2004, Hurricanes Charley, Frances, Jeanne, and Ivan struck Sprint-Florida, Incorporated's (Sprint) service territory causing damage to Sprint's telecommunications systems. On May 25, 2005, Sprint-Florida, Incorporated filed a Petition for Approval of Storm Cost Recovery Surcharge and Stipulation (Stipulation). The Stipulation involved a factual agreement between Sprint and the Office of the Public Counsel (OPC) concerning the extent of storm damage sustained by Sprint, the number of customers affected, and the amount of costs subject to recovery in order for this Commission to determine whether Sprint's Petition meets the criteria set forth in Section 364.051(4), Florida Statutes. The Stipulation also included the parties' agreement that an abbreviated procedure consistent with Section 120.57(2), Florida Statutes, would be appropriate in this proceeding.

By PAA Order No. PSC-05-0735-PAA-TL, issued July 8, 2005, we approved the substantive portion of Sprint and OPC's stipulation, ordered that an average 30-day commercial paper rate shall be applied for the purposes of calculating the carrying costs attributable to the period August 2005, through July 2007, and approved Sprint's proposed true-up of its access line forecast contingent upon a later determination that any recovery was appropriate. By Order No. PSC-05-0757-PCO-TL, the procedural portion of the parties' stipulation was approved. Pursuant to the parties' stipulation, parties filed initial briefs on July 8, 2005, and reply briefs on July 25, 2005. The parties' briefs addressed the following agreed upon issues:

1. Do the costs incurred by Sprint as a result of the 2004 hurricanes constitute a compelling showing of a substantial change in circumstances pursuant to Section 364.051(4), Florida Statutes?

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- 2(a). If Issue 1 is answered in the affirmative, how much, if any, of the costs set forth in the stipulation may be recovered from Sprint's basic local service customers?
- 2(b). If any costs are determined to be recoverable, how should these costs be recovered?

We have jurisdiction over this matter pursuant to Sections 364.01, 364.051(4), 364.051(5), Florida Statutes.

II. Analysis

Section 364.051, Florida Statutes, allows a price-regulated ILEC to request an increase in its basic local service rates if the ILEC makes a compelling showing of a substantial change in circumstance. This safety valve provision of the historic 1995 revisions to our ratemaking authority has essentially lain dormant for 10 years. The Legislature's obvious intent was for the provision to be used sparingly, and as such, this is a case of first impression.

The combination of four major storms in one season was unparalleled in the history of Florida. Prior to the four storms hitting Florida in 2004, the last time comparable multiple storm impacts were felt in a single season in a single state was in Texas in 1886. While there have been other active hurricane seasons in the United States during the twentieth century, arguably, none compare to the 2004 season in terms of the impact on a single state.

Sprint does not base its claims of a "substantial change in circumstance" upon any one of these hurricanes alone. Rather, it is the cumulative impact of the successive storms hitting Sprint's territory within a six week period that Sprint believes constitute a single continuous, unprecedented and unforeseen event. Because the hurricanes hit some Sprint areas more than once, network elements made operational after being damaged in one storm were again damaged or disabled in another storm. Cumulatively, these four storms rendered 691,000 Sprint customers out of service and 1,878 (or 67%) of Sprint's major network elements out of service. These unprecedented and unforeseen costs are arguably the type of costs Section 364.051(4), Florida Statutes, was intended to address. However, Sprint's assertion that the 2004 hurricane season was extraordinary and the hurricanes cost it money not contemplated in the price-cap rates is insufficient alone to justify the requested increase. There are an endless number of scenarios where an event could cost Sprint money and the costs were not contemplated in price-cap rates. There does exist, however, ample legislative history that, when examined, provides evidence that it was the Legislature's intent that damages such as those caused by the 2004 Hurricane season should be interpreted to constitute a compelling showing of changed circumstances.

Statutory Construction

Section 364.051, Florida Statutes, states:

Notwithstanding the provisions of subsection (2), any local exchange telecommunications company that believes circumstances have changed

substantially to justify any increase in the rates for basic local telecommunications services may petition the commission for a rate increase, but the commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances. The costs and expenses of any government program or project required in part II shall not be recovered under this subsection unless such costs and expenses are incurred in the absence of a bid and subject to carrier of last resort obligations as provided for in part II. The commission shall act on any such petition in 120 days.

Section 364.051, Florida Statutes, does not define specifically what constitutes a “substantial change in circumstance” which would allow a price-regulated LEC to seek relief. However, the rules of statutory construction, as well as guidance from the Florida Legislature’s 2005 revisions of Chapter 364, support an interpretation that the provision would contemplate that Sprint’s 2004 hurricane costs amount to a “substantial change in circumstances.”

Section 364.051, Florida Statutes, refers to pricing regulation by which a company derives its earnings and thus its profits. The purpose of switching from rate base regulation to a price cap scheme was to allow financial flexibility to transition to a competitive market. Within the current price cap scheme, the company has flexibility to increase its prices within limits based on market conditions and the company’s financial interest. Thus, the company is free to make as much profit as it can by reducing its costs or increasing its prices within the statutory scheme. It is however, still constrained by the statutory limitations on increases; in other words, Sprint is neither fully regulated nor a deregulated open market participant. As such, we do not believe the statute would contemplate recovery to the extent that it might significantly skew the competitive market, since in most instances a competitive business would be unable to request or impose such a surcharge, except to the extent that the market would bear.

As a matter of law, the plain language of Section 364.051(4), Florida Statutes, only excludes one category of costs, thereby making all other categories of costs caused by substantially changed circumstances eligible for recovery. Section 364.051(4) only excludes as a substantial change in circumstances expenditures required under part II of Ch. 364, Florida Statutes, related to support for educational access to advanced telecommunications services, except under certain circumstances.

It is a well-recognized rule of statutory construction that the mention of one thing implies the exclusion of another¹. Because the Legislature specifically excluded the specified expenses, which might otherwise be deemed to constitute changed circumstances, it is apparent that they intended the statute to capture any other expenditures not contemplated in the original establishment of a company’s rates, except those expenditures that were specifically identified and excluded.

¹ See, e.g., *Mosher* at 816 (Fla. 2002); *Moonlit Waters Apartments, Inc.* at 900

Public Counsel's interpretation of Section 364.051(4), Florida Statutes, fails to consider the requirement that all parts of a statute be read together to achieve a consistent whole.² 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 364.051(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.

Legislative Guidance

In the recent 2005 legislative session, the Legislature substantially revised Chapter 364, Florida Statutes. Of specific note are revisions made to Section 364.051 related to the "substantial change in circumstances" provision.

Section 364.051(b), Florida Statute, the new legislation, states:

For purposes of this section, evidence of damage occurring to lines, plants, or facilities of a local exchange telecommunications company that is subject to the carrier-of-last-resort obligation, which damage is the result of a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances.

As set forth in the revised language itself, the new legislation is to be applied to hurricanes after June 1, 2005. The revised statute clarifies both the legislative intent of Section 364.051, and provides us with guidance in determining what constitutes a "substantial change in circumstances."

III. Decision

Sprint serves a geographically diverse territory throughout Florida, and consequently, it was significantly impacted by all four storms. The costs Sprint incurred to restore service to its customers as a result of the 2004 hurricanes were unprecedented. These costs were not anticipated when Sprint's price-capped rates were originally set, nor are they recoverable

² See *T.R. v. State*, 677 So. 2d 270 (Fla. 1996).

through the normal course of the yearly indexed price increases. Additionally compelling, are the provisions of the 2005 legislation deeming damages caused by tropical systems named by the National Hurricane Center, as constituting a compelling showing of changed circumstances, at least on a going-forward basis from the effective date of the legislation. Therefore, we hereby find that Sprint's hurricane-related costs meet the criteria set forth in Section 364.051, Florida Statutes.

Furthermore, we hereby find that Sprint shall be able to recover the full stipulated amount of costs attributable to its basic services access lines, that is, \$30,319,521, from its basic services customers. Based on the stipulated facts, this amount appears most appropriate. The costs shall be recovered through an \$.85 surcharge calculated based on Sprint's average number of access lines. The 30-day commercial paper rate shall apply to the recovery period and it shall be subject to a true-up that will ensure that Sprint customers do not pay any more than the approved recovery amount.

This docket shall remain open for a period of time consistent with the approved methodology of recovery in order to monitor Sprint's compliance with this order.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Sprint-Florida, Incorporated's hurricane-related costs meet the criteria set forth in Section 364.051, Florida Statutes, and constitute a compelling showing of changed circumstances. It is further

ORDERED that Sprint-Florida, Incorporated shall be able to recover the stipulated amount of costs attributable to its basic services access lines, that is, \$30,319,521, from its basic services customers. The costs shall be recovered through an \$.85 surcharge calculated based on Sprint's average number of access lines. It is further

ORDERED that the 30-day commercial paper rate shall apply to the recovery period and it shall be subject to a true-up that will ensure that Sprint-Florida, Incorporated's customers do not pay any more than the approved recovery amount. It is further

ORDERED that this docket shall remain open for a period of time consistent with the approved methodology of recovery in order to monitor Sprint-Florida, Incorporated's compliance with this order.

By ORDER of the Florida Public Service Commission this 3rd day of October, 2005.

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

By: Kay Flynn
Kay Flynn, Chief
Bureau of Records

(S E A L)

AJT/JPR

DISSENT

Commissioner Lisa Polak Edgar dissents from the Commission's decision on Issues 2(a) and 2(b) with the following opinion:

Sprint's petition for approval of a storm cost recovery surcharge was filed May 25, 2005, pursuant to section 364.051, Florida Statutes. As applicable to this petition, section 364.051(4), Florida Statutes, gives any local exchange telecommunications company that believes circumstances have changed substantially to justify an increase in the rates for basic local telecommunications services the right to petition the Commission for a rate increase. This section further provides that the Commission shall grant such petition only after an opportunity for a hearing and a compelling showing of changed circumstances.

The stipulation entered into by Sprint and OPC established that \$30 million would be the maximum amount for consideration for Sprint to receive through a rate increase approved under this provision. At the agenda conference on July 5, 2005, when the Commission approved the proposed stipulation, Sprint represented that the \$30 million was a cap and that a party could craft a legal and policy argument during the next phase of the proceeding for consideration of a lesser total amount.

Section 364.051(4), Florida Statutes, does not provide guidance as to what constitutes justification of changed circumstances necessary for an increase in basic telecommunications rates. Arguments were presented as to whether amendments to this section enacted by the 2005 Legislature may or may not provide guidance in this instance. Our action today on this petition does not require a finding on this point. I do note, however, that if one chose to look to the 2005 amendments in their entirety for guidance as to legislative intent, it would be difficult to evaluate whether any "adverse affects" resulted; i.e., there is no way to know the amount of storm costs recovery the Commission would have approved "but for" the stipulation.

As indicated by my vote on Issue 1, I concur that the damage to Sprint's system resulting from four hurricanes in 2004 demonstrates substantially changed circumstances. I do not believe, however, that by finding the existence of changed circumstances, this Commission is then obligated to approve a rate increase for recovery of the maximum amount allowed under the stipulation or, lacking a stipulation, an entire amount requested by petition.

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.