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July 25, 2005

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0870

RE: Docket No. 050374-TL, Petition for approval of storm cost recovery surcharge,
and stipulation with Office of Public Counsel, by Sprint-Florida, Incorporated.

Dear Ms. Bayó:

Enclosed for filing in the above-referenced docket are the original and fifteen (15) copies of the Office of Public Counsel's Brief for filing in the above referenced docket.

Also enclosed is a 3.5 inch diskette containing Office of Public Counsel's Brief in Microsoft Word format. Please indicate the time and date of receipt on the enclosed duplicate of this letter and return it to our office.

Sincerely,

A handwritten signature in black ink, appearing to read "Patricia A. Christensen".

Patricia A. Christensen
Associate Public Counsel

PAC/pd
Enclosures

DOCUMENT NUMBER-DATE

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FPSC-COMMISSION CLERK

BEFORE THE FLORIDA 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
Filed: July 25, 2005

OFFICE OF PUBLIC COUNSEL'S REPLY BRIEF

Pursuant to Rule 28-106.215, Florida Administrative Code, the Citizens of the State of Florida, by and through undersigned counsel, Office of Public Counsel, hereby filed their Reply Brief and Statement of Issues and Positions.

INTRODUCTION

On July 8, 2005, Citizens and Sprint-Florida, Incorporated (Sprint) filed their initial Briefs regarding Sprint's Petition for approval of storm cost recovery surcharge. These Briefs addressed whether Sprint was entitled to recovery of any costs related to the four hurricanes that struck Florida. Additionally, the Citizens and Sprint addressed how those costs, if any, would be recovered.

As noted in the Stipulation of the parties, there is no dispute that in 2004, four hurricanes struck Florida, Hurricanes Charley, Frances, Ivan, and Jeanne. Nor is there disagreement that Sprint incurred costs related to these hurricanes. Based on the Parties stipulation, the maximum potential amount for storm cost recovery was determined to be approximately \$30 million.

However, a dispute remains whether Sprint is entitled to recover for 2004 storm costs from its customers through an increase in base rates via a surcharge as a price-cap regulated company. This Reply Brief will address the main arguments raised in Sprint's

initial Brief in support of its claim. However, all arguments set forth in Citizen initial Brief are incorporated herein.

SUMMARY OF ARGUMENT

Sprint is not entitled to recover any of the \$30 million through a cost recovery surcharge to customer's basic access lines. None of the arguments raised in Sprint's initial Brief supports a compelling showing of a substantial change in circumstances to justify any increase in the rates for its basic local telecommunications services as required by Section 364.51(4), Florida Statutes. Based on the stipulated facts and law, Sprint has failed to demonstrate that it has suffered a substantial change in circumstances.

ISSUES AND POSITIONS

ISSUE 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 s. 364.051(4), Florida Statutes?

OPC: *No. The arguments raised in Sprint's initial Brief fail to demonstrate that Sprint has met the criteria necessary to show a compelling showing of substantial change in circumstance required by Section 364.051(4), Florida Statutes.*

ARGUMENT

As noted previously, it is undisputed that four hurricanes struck Florida in 2004. Nor is it disputed that Sprint incurred costs related to these four hurricanes. As agreed to in the Stipulation, the maximum potential costs that Sprint could recover is approximately \$30 million.

Given that there is no factual dispute, there remains the legal issue whether the costs incurred by Sprint as a result of the 2004 hurricanes constitute a compelling

showing of a substantial change in circumstances pursuant Section 364.051(4), Florida Statutes.

Citizens disagree with Sprint's conclusion in its Brief that it has met its burden in demonstrating a compelling showing of a substantial change in circumstances. We believe that the legislative history and cases cited by Sprint support Citizens' analysis of the statute and how it should be applied. Further, Citizens believe that Sprint's application and analysis of the facts and law in this case miss that mark. Sprint's bare assertion that because the 2004 hurricane season was extraordinary and the hurricanes cost it money not contemplated in the price-cap rates is insufficient to justify the requested increase. There are potentially many scenarios where an event could cost Sprint money and the costs were not contemplated in price-cap rates. These circumstances alone do not justify an increase in base rates pursuant to the Section 364.051(4), Florida Statutes, safety net.

a. Statutory Analysis/Legislative History

Section 364.051(4), Florida Statutes, states that:

. . . any local exchange telecommunications company that believes circumstances have changed substantially to justify any increase in 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.

Citizens agree that this is a case of first impression since the Commission has yet to interpret this Section. In the Orders cited by Sprint's Brief, where the Commission

references Section 364.051(4), Florida Statutes, the Commission notes that Section 364.051(4), Florida Statutes, is available to companies, but no detailed analysis or interpretation of that Section is given. See, Order No. 96-0811-FOF-TP, issued June 24, 1996, in Docket No. 950984-TP; Order No. PSC-97-0230-FOF-TP, issued February 26, 1997, in Docket No. 961173-TP; Order No. PSC-98-1169-FOF-TL, issued August 28, 1998, in Docket No. 970808-TL. In these Orders, the Commission notes that Section 364.051(4), Florida Statutes, could be used by a company suffering “revenue losses” if it could demonstrate a compelling showing of changed circumstances. What can be gleaned from the references in the Orders to “revenue losses” is that the Commission anticipated a financial component in any analysis. Thus, there is recognition that an essential component of any analysis of substantial change in circumstances must include a demonstration by the company that there has been financial harm.

In its Brief, Sprint also addresses the legislative history of Section 364.051(4), Florida Statutes. As with the Commission’s interpretation of this Section, there is little information regarding the Legislatures’ intent. Sprint argues that the language was intended to “. . . act as a “safety valve” for the caps imposed on rates in existence at the time a LEC elected price regulation.” Sprint BR at p. 11. Citizens would agree that the language of the statute creates a “safety valve” or “safety net” financially for the companies.

However, even Sprint acknowledges in its Brief, Section 364.051(4), Florida Statutes, provides a safety net which is to be used in extremely rare instances. Sprint Brief at p. 1. The fact that no company before Sprint has petitioned for relief under this Section speaks to this very point. In addition, it shows that the companies have been able

to cope with all kinds of unforeseen, unexpected events under the current pricing scheme without coming to the Commission for relief under Section 364.051(4), Florida Statutes. Citizens believe that it is important that the Commission not make Section 364.051(4), Florida Statutes, easily available for every financial down-turn a company may suffer.

Included in the Legislative history cited by Sprint was the Legislative Bill Analysis from the Executive Office of the Governor Office of Planning and Budgeting. Sprint noted that the legislative bill analysis stated it was unclear what “substantially changed circumstances” could include. Sprint also notes that the legislative bill analysis included an alternative definition provided by the Commission at the time which would define “substantially changed circumstances” as **extreme** inflation or an **onerous** and **unforeseen** increase in operational or personnel costs.

Sprint argues that the 2004 hurricanes meets this definition because they increased operation and personnel cost which were unforeseen by Sprint and not encompassed in the costs that form the basis of its price-capped rates. However, Sprint’s analysis is missing a critical component of this alternative definition. The Commission recognized that the definition of “substantially changed circumstances” necessarily includes two essential components – that there is extreme or onerous financial harm and that it is unforeseen. The alternative definition is consistent with the criteria set out by the Citizens in the initial Brief. This criteria is that in order to demonstrate a “compelling change in circumstances” a company must show that: (1) the substantial change has caused financial harm to the company; (2) the substantial change is of a duration and magnitude that without a change in the basic service rates it cannot be remedied under the current pricing scheme; and (3) the substantial changed is beyond the company’s control.

Sprint in its Brief has failed to show how the costs of the storm are an **extreme** or **onerous** increase in operational or personnel costs that have caused the Company financial harm. They have only shown that the hurricanes caused a temporary increase in operational and personnel costs. Nor has the Company demonstrated how the temporary increases in operational and personnel costs cannot be met under the current price-cap scheme.

b. Price-Cap Argument

Part of Sprint's position that it is entitled to recovery under the statute relies on its argument that the costs associated with the hurricanes were not considered in the rates established for Sprint prior to its going to price-cap regulation. This premise assumes that whether or not costs were included as part of its base rates on which the price-caps were set is relevant to this discussion. It is not. There are many events which increase operational or personnel costs and were not included in the original base rates on which the price-caps were established such as new technologies, mergers, and/or competition.

As noted in Citizens' initial Brief, Section 364.051, Florida Statutes, is structured so that the companies have greater flexibility to run their businesses as they determine is best. They have many options to meet a temporary or permanent increase in costs such as eliminating other costs or increasing prices for services as allowed under the statute. In fact, before a company seeks relief under Section 364.051(4), Florida Statutes, the company needs to show that it cannot meet the increased costs through the flexible regulatory treatment already available pursuant to Section 364.051, Florida Statutes.

Moreover, under the current statutory scheme, there is no reasonableness or prudence evaluation of costs required before a company is permitted to increase its rates.

In other words, it is inappropriate to argue for a base rate protection (i.e. whether a cost is covered by base rates) in a price-cap regulatory scheme. The move toward greater self-determination by the company within the statute strictly limits the regulators' involvement in determining the appropriate costs and profits for a company. With this flexible regulatory treatment comes a significantly restricted ability to intervene by the regulators to protect the company against losses.

Sprint implies that it should be entitled to the same regulatory treatment as a rate-of-return regulated electric company, because it would have been entitled to those costs if it was still rate-of-return regulated. It justifies this position by saying that it would still be well within a reasonable rate of return. But as Confidential Exhibit C shows, Sprint's ROE from 2003 to 2004 shows that Sprint experienced an improvement in its ROE in 2004 despite the hurricanes. As noted in Footnote 2 to the Confidential Exhibit C, the net operating income for 2004 includes the hurricane-related costs that are the subject of its Petition, but not the requested revenue recovery. It is appropriate in both price-cap and rate-of-return regulation to look at the Company's ROE, the measure of its profitability, to determine if its revenues are sufficient to cover its costs and allow the company to make a profit. Clearly, the facts in this case demonstrate that Sprint has been able to make a profit despite the temporary increase in personnel and operational costs.

d. Conclusion

Sprint has failed to raise any arguments that would demonstrate that Sprint has met the criteria necessary to show a compelling showing of substantial change in circumstance required by Section 364.051(4), Florida Statutes. Citizens believe that in order to demonstrate a "compelling change in circumstances" a company must show that:

(1) the substantial change has caused financial harm to the company; (2) the substantial change is of a duration and magnitude that without a change in the basic service rates it cannot be remedied under the current pricing scheme; and (3) the substantial change is beyond the company's control. Based on these criteria, Sprint has failed to demonstrate a compelling showing of substantial change in circumstances.

ISSUE 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 services customers?

OPC: *Nothing in Sprint's arguments demonstrate that it is entitled to any recovery since it failed to demonstrate a compelling showing of a substantial change in circumstance. *

ARGUMENT

As part of the Stipulation, Citizens and Sprint agreed to a maximum potential amount for recovery of approximately \$30 million. The maximum potential \$30 million figure was based on a set of accounting principles developed through the electric storm dockets. By Order PSC-05-0250-PAA-EI, issued March 4, 2005, in Docket No. 050093-EI, consummating order PSC-05-0341-CO-EI, issued March 29, 2005, the Commission approved these principles as part of the Gulf Settlement.

As noted in Issue 1, Citizens do not believe that Sprint has set forth any arguments that met the standard of demonstrating a compelling showing of substantial changed circumstances that justify an increase in the rates for basic telecommunications services. Sprint's profits improved based on Sprint's ROE in 2004 which argues against the idea that Sprint is unable to recover its loss through the current pricing scheme or

suffered any financial harm that would require an increase in the basic telecommunications rate. Therefore, Sprint is not entitled to any additional recovery, even if the hurricanes could be considered a “substantial change in circumstance.”

ISSUE 2(b): If any costs are determined to be recoverable, how should these costs be recovered?

OPC: *Since Sprint’s arguments do not support that it is not entitled any surcharge recovery, Sprint may implement any mechanism appropriate under the current pricing scheme.*

ARGUMENT

Citizens believe that since Sprint’s arguments do not support that it is not entitled to any recovery through an increase to basic rates, Sprint may recover its storm costs through any mechanism that is appropriate under the current pricing scheme. Sprint can implement the price increase allowed under the statutes or forego raising its rates.

ISSUE 3: Should this docket be closed?

OPC: *This docket should be closed if Sprint’s Petition for recovery is denied. *

ARGUMENT

This docket should be closed if Sprint’s Petition for recovery is denied consistent with the Citizens’ position in this matter.

Respectfully submitted,

Harold McLean
Public Counsel

A handwritten signature in black ink, appearing to read 'Patricia A. Christensen', written over a horizontal line.

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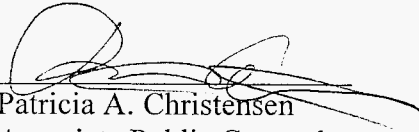
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Office of Public Counsel has been furnished by U. S. Mail and Electronic mail to the following parties on this 25th day of July, 2005, to the following:

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