BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to recover 2005 tropical system related costs and expenses, by Embarq Florida, Inc.	DOCKET NO. 060644-TL ORDER NO. PSC-07-0126-FOF-TL ISSUED: February 12, 2007

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
MATTHEW M. CARTER II
KATRINA J. TEW

ORDER ON EMBARQ STORM COST RECOVERY

BY THE COMMISSION:

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I. Abbreviations and Acronyms

Act	Telecommunications Act of 1996
BRI	Basic Rate Interface
CFR	Code of Federal Regulations
CLEC	Competitive Local Exchange Carrier
COLR	Carrier of Last Resort
DS0	Digital Signal, level Zero. DS0 is 64,000 bits per second.
DS1	Digital Signal, level One. A 1.544 million bits per second digital signal carried on a T-1 transmission facility.
DS3	Digital Signal Level 3
DSL	Digital Subscriber Line
EEL	Enhanced Extended Link
FAC	Florida Administrative Code
FCC	Federal Communications Commission
FPSC	Florida Public Service Commission
ILEC	Incumbent Local Exchange Carrier
ISDN	Integrated Service Digital Network
LEC	Local Exchange Carrier
PRI	Primary Rate Interface
TELRIC	Total Element Long-Run Incremental Cost
TRRO	Triennial Review Remand Order, FCC 04-290
UNE	Unbundled Network Element

II. Case Background

On September 26, 2006, Embarq Florida, Inc. (Embarq) filed a Petition to Recover 2005 Tropical System Related Costs and Expenses (Petition) sustained as a result of three named tropical storm systems. Pursuant to § 364.051(4), Florida Statutes, Embarq seeks cost recovery for the damage caused by the following 2005 Tropical Storm Systems:

- Hurricane Dennis made landfall at Santa Rosa Island, between Pensacola and Navarre Beach on July 10, 2005. The Hurricane was a Category three storm with winds of 115 to 120 miles per hour. Embarq states that two of its eight districts, Ft. Walton Beach and Tallahassee, were impacted by Hurricane Dennis. According to the company, 11,644 customers and 87 network elements[1] went out of service as a direct result of the storm. The company states that the storm inflicted damage to buildings and a variety of outside plant network equipment, including but not limited to cable, terminals, drops and poles.

- Hurricane Katrina crossed southern Florida on August 25, 2005, as a Category one storm before strengthening in the Gulf of Mexico. On the morning of August 29, 2005, the storm made a second and third landfall along the Florida panhandle at Category four and three intensities, with wind speeds of up to 125 miles per hour. The hurricane impacted Embarq's service territories in Ft. Walton Beach and Tallahassee resulting in 368 customers and one network element [going] out of service. The storm also caused minor building damage, such as roof leaks, as well as damage to cables, terminals, drops, poles and network equipment.

- On October 24, 2005, Hurricane Wilma made landfall in Embarq's territory as a Category three hurricane with sustained wind speeds of up to 120 miles per hour on the southwest coast of Florida. The storm crossed Embarq's entire Southern area, cutting a diagonal path across the southern portion of the Florida peninsula, and exited after the eye wall crossed south and central Palm Beach County. Embarq states that the Naples metropolitan area received the brunt of Hurricane Wilma and the communities around landfall suffered extreme damage. According to Embarq, the company had 146,788 of its customers and 398 network elements out of service as a direct result of Hurricane Wilma impacting the Avon Park, Ft. Myers and Naples Districts. Embarq states its network suffered damage to a variety of outside plant network equipment, including but not limited to cables, terminals, drops, poles and pair gain devices, and several buildings sustained damage.

Section 364.051(4)(b), Florida Statutes (F.S.) provides that evidence of damage occurring to the lines, plant, or facilities of a local exchange telecommunications company that is subject to carrier-of-last-resort obligations, 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. Section 364.051(4)(b), F.S., provides that:

1. A company may file a petition to recover its intrastate costs and expenses relating to repairing, restoring, or replacing the lines, plant, or facilities damaged by a named tropical system.

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[1] "Network Element (NE): Processor controlled entities (A group of lines served by common originating equipment. Newton's Telecom Dictionary p. 252) of the telecommunications network that primarily provide switching and transport network functions and contain network operations functions." Newton's Telecom Dictionary p. 472

2. The commission shall verify the intrastate costs and expenses submitted by the company in support of its petition.

3. The company must show and the commission shall determine whether the intrastate costs and expenses are reasonable under the circumstances for the named tropical system.

4. A company having a storm reserve fund may recover tropical-system-related costs and expenses from its customers only in excess of any amount available in the storm-reserve fund.

5. The commission may determine the amount of any increase that the company may charge its customers, but the charge per line-item may not exceed $0.50 per month per customer line for a period of not more than 12 months.

6. The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the commission shall verify that the collected amount did not exceed the amount authorized by the order. If collections exceed the ordered amount, the commission shall order the company to refund the excess.

7. In order to qualify for filing a petition under this paragraph, a company with 1 million or more access lines, but fewer than 3 million access lines, must have tropical-system-related costs and expenses exceeding $1.5 million, and a company with 3 million or more access lines must have tropical-system-related costs and expenses of $5 million or more. A company with fewer than 1 million access lines is not required to meet a minimum damage threshold in order to qualify to file a petition under this paragraph.

8. A company may file only one petition for storm recovery in any 12-month period for the previous storm season, but the application may cover damages from more than one named tropical system.

Embarq has more than 1.6 million access lines and provides telecommunications services in eight districts throughout Florida. These districts include the major cities of Naples, Ft. Myers, Ocala, Tallahassee and Ft. Walton Beach.

Embarq asserts that the intrastate costs and expenses it incurred as a result of the impact of the three named hurricanes in 2005, constitute a "compelling showing of changed circumstances," and it is therefore entitled to seek recovery of these costs.

According to Embarq, the total storm-related expenses for repairing, restoring, or replacing its lines, plant, and facilities damaged by the 2005 storms was approximately $59.94

million. Of the approximately $59.94 million amount, Embarq states its total extraordinary expenses for the 2005 storms were $19.95 million, and the intrastate portion of the total extraordinary expenses was $15.47 million. Embarq determined the incremental intrastate portion by taking the total extraordinary expenses incurred and applying an intrastate jurisdictional factor of 74.429553% and adding amounts for interest during recovery, uncollectible accounts and the Florida regulatory assessment fee.

Embarq has not previously filed a petition for storm recovery for the 2005 storm season. It states it did not have any insurance coverage which provided reimbursement for any of its intrastate hurricane costs and expenses and it does not have a storm reserve fund.

Embarq proposes to recover its intrastate, incremental expenses via a charge not to exceed $0.50 per month per line for a period of not more than 12 months in accordance with § 364.051(4) F.S. Thus, the total amount Embarq is seeking to recover due to the 2005 storms is approximately $10 million. Embarq proposes that the line-item charge be recovered on a per line basis from retail basic and non-basic local exchange lines, wholesale unbundled loop element customers, resale customers, and commercial agreement customers.

By Order No. PSC-06-0912-PCO-TL, issued November 2, 2006, we acknowledged intervention by the Citizens of the State of Florida. By Order PSC-06-0942-PCO-TL, issued November 13, 2006, we granted intervention to Competitive Carriers of the South, Inc. On December 14, 2006, by Order No. PSC-06-1034-PCO-TL, we granted permission to intervene to Florida Digital Network. During the hearing on January 4, 2007, we granted intervention to Joanna Southerland, the Sugarmill Woods Civic Association, Inc., and AARP.

We conducted two public hearings to permit Embarq customers to be heard on any and all issues in this case. The dates and places of the public hearings are listed below:

- 11/16/06 Ft. Myers – Adams Public Education Center
- 12/13/06 Ft. Walton Beach – Ft. Walton Beach City Hall

On January 4, 2007, we held an administrative hearing on the case. The purpose of the hearing was to permit parties to present testimony and exhibits relative to this proceeding. Before the hearing on the technical issues, the parties were able to reach a stipulation on Issue One. The stipulation language for this issue and any related discussion can be found below, under the "Stipulated Issue" heading, and also in the hearing transcript.

We have jurisdiction over this matter pursuant to § 364.051(4) F.S.

III. Stipulated Issue

The stipulated language for Issue One appears below. We approved the stipulation as a preliminary matter at the hearing which took place on January 4, 2007.

Issue 1: What is the appropriate amount of intrastate costs and expenses related to damage caused during the 2005 tropical system season, if any, that should be recovered by Embarq, pursuant to Section 364.051(4), Florida Statutes?

Stipulated Language: For the sole purpose of this case, and without any party conceding its position on any other disputed issue in this docket, the maximum amount of intrastate costs and expenses related to the damage caused during the 2005 tropical storm season that Embarq incurred and is entitled to recover is $13 million.

IV. Retail Access Lines

Section 364.051(4)(b), Florida Statutes, provides a telecommunications company the right to request approval to recover certain storm-related costs from the Commission. Specifically, § 364.051(4)(b) 5 and 6, Florida Statutes, state that:

> 5. The commission may determine the amount of any increase that the company may charge its customers, but the charge per line-item may not exceed 50 cents per month per customer line for a period of not more than 12 months.
>
> 6. The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers, its retail nonbasic telecommunications service customers, and, to the extent the commission determines appropriate, its wholesale loop unbundled network element customers. At the end of the collection period, the commission shall verify that the collected amount does not exceed the amount authorized by the order. If collections exceed the ordered amount, the commission shall order the company to refund the excess.

In the BellSouth Storm Recovery Order, the Commission found that, for purposes of assessing a line-item storm recovery charge, a customer or access line should be defined as the number of activated channels.[2] In this proceeding, Embarq proposes to count certain types of access lines differently from the BellSouth Storm Recovery Order, thus assessing the line-item storm recovery charge differently from BellSouth.

A. Parties' Arguments

In its petition to recover 2005 storm related costs, Embarq proposes to assess a line-item storm recovery charge to retail access lines and to access lines resold under § 251 of the Telecommunications Act of 1996. For retail lines, Embarq proposes to apply the charge to retail

[2] Order No. PSC-07-0036-FOF-TL, issued January 10, 2007, in Docket No. 060598-TL, In Re: Petition to recover 2005 tropical system related costs and expenses, by BellSouth Telecommunications, Inc., p. 11 (BellSouth Storm Recovery Order)

basic and nonbasic access lines. Embarq utilized a forecast of access lines in its proposal; however, Embarq will bill actual lines in service. Included in the retail category are:

- Residential and business lines, payphone lines, key system lines, Centrex lines, and ISDN BRI lines (one charge per line);
- PBX trunk lines (two charges per line); and
- ISDN PRI lines and DS1 lines (five charges per line).[3]

Embarq proposes to:

- Not apply the charge to Lifeline customers; and
- Assess the charge on the voice component of DSL lines (Embarq does not have customers who purchase DSL but do not purchase voice).

For higher capacity services, such as ISDN PRI and DS1, Embarq argues that a charge strictly based on voice grade equivalents could place a greater share of the storm recovery cost on high-capacity services "than is appropriate when considering the underlying facilities used to provide such services." Embarq asserts that its proposed treatment of high-capacity lines reflects a balancing of the relationship of the services being provided to the underlying facilities used to provide the service.

Embarq witness Dickerson asserts that the cost to repair a DS1 is higher than the cost to repair a DS0. DS1 circuits also have additional, more complex equipment than do DS0 circuits. He explains that most DS0 repairs are done on an aggregate basis unlike DS1 repairs, which are completed more on an individual basis.

Embarq did not propose a line-item storm recovery charge on special access lines. While Embarq believes that it would be appropriate to include special access, it believes that the statute does not appear to expressly authorize it. CompSouth agrees that special access should not be included because there is no statutory basis to include special access, which is a tariffed service, not an unbundled network element.

Embarq was the only party to provide testimony on this issue. In discovery, our staff asked CompSouth to identify any adjustments that it believes should be made to Embarq's retail access lines. CompSouth responded that it does not have a position on Embarq's methodology for counting retail access lines, other than to note that CLEC customers whose service is provided through resale are not Embarq retail customers.

We note that Embarq previously filed a petition for storm cost recovery under § 364.051(4), Florida Statutes, for the 2004 storms. Embarq states that its proposed application of the charge to retail and resold access lines in this proceeding "is exactly the same" as was approved in Docket No. 050374-TL – Petition for approval of storm cost recovery surcharge, and stipulation with Office of Public Counsel, by Sprint-Florida, Incorporated.

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[3] Embarq does not have any retail DS3 lines.

B. Analysis

Types of Access Lines and Methodology Used to Count Access Lines

In the BellSouth Storm Recovery Order, we defined a customer or access line as the number of activated channels for purposes of assessing a line-item storm recovery charge. Embarq interprets the term "channel" and "voice grade equivalent" to have the same meaning as the term "access line," used in Rule 25-4.003(1), FAC.

For residential, business, payphone, and key system lines, Embarq's proposal appears to be consistent with the BellSouth Storm Recovery Order on activated channels and there is no evidence from other parties that Embarq's proposal for these lines is flawed. However, there are other types of lines where Embarq's proposal differs from the BellSouth decision:

- For Centrex, Embarq proposes to assess one charge to each individual Centrex station line compared to BellSouth, which is assessing each Network Access Register (NAR). A NAR is a point of access to the network; there are more Centrex lines than NARs. Embarq asserts that a Centrex line provides a single voice grade service and is equal to one access line.

- For each PBX trunk line, Embarq proposes to assess two charges rather than the one which BellSouth is assessing. A PBX trunk line is a DS0; however, it supports multiple end users. Although a single charge could be considered appropriate because a PBX trunk is a DS0, Embarq proposes two charges because this recognizes that the service supports more end users than a single residential or business access line. Additionally, Embarq argues that the imposition of two charges "equitably balances" the relationship between the number of multiple end users a PBX trunk line can support and the facility used to provide the service. At the same time, Embarq asserts that the application of two charges does not unfairly place a larger share of the cost recovery on a PBX trunk line when considered in conjunction with the underlying facility.

- For ISDN BRI, Embarq proposes to assess one charge, which differs from the BellSouth Storm Recovery Order where the number of activated channels will be assessed. According to Embarq, an ISDN BRI line is a service that provides integrated voice and data services over a single exchange access line. Embarq argues that assessing one charge is consistent with the application of the Federal subscriber line charge (SLC) and "equitably" balances the cost recovery with the facility used to provide the service.

- For ISDN PRI, Embarq proposes to assess five charges, which differs from the BellSouth Storm Recovery Order where the number of activated channels will be assessed. Embarq defines ISDN PRI as a DS1-based access link to the public switched telephone network (PSTN) that provides multiple voice and data channels on the same line. According to Embarq, assessing five charges is consistent with the number of SLCs applied to an ISDN PRI. Additionally, five charges provide a "price-to-

surcharge relationship that's pretty consistent with the DS0s." Embarq's position is that while an ISDN PRI line can provide up to 23 activated channels, it is provided over a single facility, not 23 separate lines. Embarq argues that applying the charge on activated channels would place a "disproportionate share of cost recovery" on this customer group than is "justified" when considering the facilities that are used to provide service.

- For DS1, Embarq proposes that a DS1 be assessed five charges, which also differs from the BellSouth Storm Recovery Order where the number of activated channels will be assessed. According to Embarq, five charges for a DS1 achieves consistency with the five charges applied to an ISDN PRI line.[4]

The BellSouth Storm Recovery Order provides useful guidance in determining the type of access line and the methodology of applying charges. Embarq's proposal to assess residential, business, payphone, and key system lines one charge per access line appears to be consistent with the BellSouth Storm Recovery Order on activated channels and is without any opposing evidence. Therefore, we find that for the purpose of assessing a line-item storm recovery charge, each residential line (excluding Lifeline), business line, payphone line, and key system line shall be assessed one line-item storm recovery charge.

Embarq's proposals for Centrex lines, PBX trunk lines, ISDN BRI, ISDN PRI, and DS1 retail lines differ from the BellSouth Storm Recovery Order; therefore, these proposals need to be addressed separately. Embarq is, of course, a different company from BellSouth with a different market and territory in Florida. Presumably, Embarq based its proposal on its own business, including its assessment of the competitive market in which it operates, as BellSouth most probably did. This factor allows us to address each petition based on the record evidence while keeping in mind our prior decision for BellSouth.

Embarq witness Dickerson described an access line's ability to serve a customer as a "continuum." The continuum begins with DS0 service that can technically serve one customer (for example, a single residential, business, or Centrex line) to a DS0 that can serve more than one customer or end user (for example, a PBX) to an ISDN PRI or DS1 line that can serve up to 24 end users. In Embarq's proposal, the number of potential customers (or end users) that can be served by each underlying facility is more relevant than how many end user channels are activated. An access line that serves one end user is assessed one line-item storm recovery charge, and as the potential number of end users served per access line (or facility) increases, so does the number of charges. Embarq apparently disagrees with the BellSouth Storm Recovery Order that the number of activated channels is the appropriate basis for assessing charges (where more than one end user can be served by a facility) because it believes that applying a charge "based strictly on voice grade equivalents" could place a greater share of the storm cost recovery on high-capacity services than is "appropriate" when the underlying facilities are considered.

[4] Embarq does not have any retail DS3 service.

Embarq's proposal is not based on how many channels a customer has activated, so it is not based on actual market data for high-capacity lines. Rather, the underlying premise of Embarq's proposal appears to be that an access line's value increases as the number of potential end users served by that line increases. Thus, it is appropriate to assess additional line-item storm recovery charges to access lines that have a greater potential to serve end users. Embarq's proposal takes the maximum number of Federal subscriber line charges for ISDN PRI, five, and applies that number as the number of charges for ISDN PRI or DS1 lines. Embarq's proposal likely will assess fewer charges for ISDN BRI, ISDN PRI, and DS1 lines than the BellSouth Storm Recovery Order. At the same time, its Centrex proposal will assess more charges to Centrex customers than the BellSouth Storm Recovery Order. Embarq's PBX trunk proposal doubles the number of charges – from one to two – compared to the BellSouth Storm Recovery Order.

The relevant part of § 364.051(4)(b)6, Florida Statutes, states that, "The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers . . . ." Embarq's proposal assesses the same number of charges to the same types of access lines. This does not appear to conflict with the statutory statement of "equal line-item charge per access line" because the same number of charges would be applied to each different type of access line. Therefore, we find that, as the BellSouth Storm Recovery Order was consistent with the applicable statute, Embarq's proposal is also consistent with the statute. Embarq's proposal appears to be equitable in that large business customers and high-capacity users are not advantaged at the expense of residential and small business customers. Although the number of activated channels is the basis for assessing the storm recovery charge in the BellSouth Storm Recovery Order, we are persuaded by the record evidence that Embarq's proposal is appropriate for the purpose of this proceeding.

Count of Access Lines and Number of Charges

Embarq states that the number of retail access lines to be assessed is included on lines 11 and 12 of Exhibit KWD-5. Exhibit KWD-5 does not break out resold lines separately from retail lines, and furthermore is a monthly forecast of lines. Therefore, we will not use EXH 19 to determine the count of access lines or the number of charges. Witness Dickerson's Late-filed Deposition Exhibit 2 provides the June 2006 actuals and a monthly average forecast for February 2007 to January 2008 for both access lines and the number of charges. However, the public version of this exhibit does not provide any method to determine even an approximate number of retail access lines, so we will use the number of charges in the following discussion. Embarq forecasts that the total number of line-item storm recovery charges for retail (including resold) will decline from approximately 1.801 million in June 2006 to an average monthly forecast of 1.649 million. Although Embarq has requested confidentiality for the number of resold lines and charges for both time periods, in a public discovery response, Embarq reported that the total number of its average monthly forecast of resold lines is 28,400. Therefore, the number of retail-only charges using Embarq's average monthly forecast is approximately 1.620 million.

C. Conclusion

For the purpose of assessing a line-item storm recovery charge to Embarq's access lines, each retail residential (excluding Lifeline), business, payphone, key system, Centrex, and ISDN BRI line shall be assessed one line-item storm recovery charge. Each PBX trunk line shall be assessed two line-item storm recovery charges and each ISDN PRI and DS1 shall be assessed five line-item storm recovery charges.

V. Wholesale UNE Loops

This issue consists of both a legal and technical part. The legal analysis addresses whether assessing a line-item storm charge on wholesale unbundled network loops (UNE loops), resold lines, and wholesale local service "platform"[5] offerings provided under commercial agreements is appropriate or violates Federal or state law. The technical analysis addresses the types of lines/loops that should be assessed the storm charge and how to assess the charge.

A. Parties' Arguments (Legal Authority)

Embarq contends that, consistent with our determination in the BellSouth Storm Recovery Order, this Commission should, as a matter of law, allow Embarq to assess the storm recovery charge on its wholesale customers. Embarq argues that the legal analysis and conclusion adopted by this Commission in the BellSouth docket are equally applicable in this case and supported by Embarq witness Dickerson who testified that extraordinary storm events such as the 2005 storm season were not contemplated in setting UNE rates. Embarq also cites to provisions of its interconnection agreements which authorizes the pass-through of authorized taxes and fees.

Next, Embarq states that our analysis and conclusions are consistent with the FCC's reasoning and conclusions regarding the local number portability surcharge which was not subject to TELRIC pricing principles. Finally, Embarq cites to the principle of *stare decisis* to require this Commission to reach the same legal conclusion regarding the appropriateness of assessing the charge under Florida and Federal law in this case as it did in the BellSouth case. *See Gessler v. Department of Bus. And Prof. Reg.*, 627 So. 2d 501, 504 (Fla. 4th DCA 1993)

CompSouth argues that the surcharge sought by Embarq amounts to an increase in UNE rates which is preempted by Federal law which mandates TELRIC pricing for UNEs. CompSouth explains that the rates incumbents may charge competitors must be based on cost and that the FCC chose the TELRIC pricing methodology to determine those costs. Moreover, the TELRIC pricing methodology specifically excludes "costs that incumbent LECs incurred in the past and are recorded in the incumbent LEC's books of accounts." CompSouth maintains that the proposed price increase would allow Embarq to recover historic book costs in addition to

[5] Referred to as UNE-P prior to the FCC's TRRO decision, this combination of switching, loop, and transport is now offered only under commercial agreements.

those included in the calculation of forward-looking costs when this Commission set UNE rates. CompSouth also points out that "[j]ust as Embarq does not lower UNE rates in a year when a certain cost may decline (for example, 2006 hurricane costs), it may not raise them when a cost increases." Finally, CompSouth discusses the various cases where deviation from TELRIC pricing was found to be inappropriate and concludes that imposition of any charge, in addition to Commission approved TELRIC rates would be inappropriate under state law and violate Federal TELRIC pricing principles.

Embarq also seeks to impose the charge on wholesale customers who purchase services pursuant to commercial agreements and resold access lines. Embarq states that the loops sold under commercial agreements had their origin as unbundled network elements, and thus should be treated like unbundled network element loops for application of the storm cost recovery charge. Embarq states that while Federal law recognizes a distinction between loops sold under commercial agreements and loops sold under § 251 interconnection agreements, § 364.051(4)(b), Florida Statutes, makes no such distinction. Embarq states that the loops at issue are functionally equivalent, with the only distinction in commercial agreements being that the loops are packaged with Embarq-provided switching services. Embarq contends that because both involve the purchase by a wholesale customer of Embarq's network elements, the charge should also apply to loops provided under commercial agreements.

Embarq states that resold lines are included because "resold services are directly tied to Embarq's retail services and are included in Embarq's price regulation filings completed under the provisions of [] 364.051." Embarq contends that application of the charge to resold lines is also supported by FCC Rule 51.603, which requires ILECs to offer retail telecommunications services at resale in the same manner they provide those services to retail customers.

CompSouth did not testify on whether it is appropriate to include resold lines, but did respond to staff discovery by stating that it would be inappropriate to include resold lines; because a CLEC that resells Embarq's service does not purchase an unbundled loop network element, a surcharge on resold services cannot be collected. CompSouth asserts that CLEC's customers served through resale are not retail customers of Embarq and resold services are not unbundled network elements; thus, there is no provision in the statute to permit Embarq to assess a storm recovery surcharge on resold services.

B. Analysis (Legal Authority)

Section 364.051(4)(a), Florida Statutes, states in pertinent part;

> Notwithstanding 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 the petition only after an opportunity for a hearing and a compelling showing of changed circumstances.

Pursuant to this statute, if Embarq believes its circumstances have changed substantially, it may petition this Commission for a rate increase. Section 364.051(4)(b), Florida Statutes,

proceeds to clarify that a tropical system occurring after June 1, 2005, and named by the National Hurricane Center, constitutes a compelling showing of changed circumstances. Consequently, we find storm cost recovery through the $0.50 charge is a rate increase as contemplated by § 364.051(4)(a), Florida Statutes. However, as will be discussed below, it is not a price increase within the meaning of TELRIC.

CompSouth argues that this rate increase is contrary to the TELRIC pricing methodology, and is thus preempted; we disagree. We find that recovery for these catastrophic events was not contemplated by TELRIC and is therefore not preempted by the Federal pricing methodology. We find that TELRIC is inapplicable to this rate increase because the TELRIC framework assumes that future costs are "normal" over the long run, while the costs being addressed here are not "normal" but rather catastrophic. In other words, the TELRIC framework, in excluding embedded costs, assumes hypothetically that the COLR's system, as on ongoing concern, will not be devastated by widespread catastrophic damage in the long run.

> First, TELRIC measures costs in the long run, a time frame lengthy enough to allow all of an incumbent's costs to become variable and, thus, to allow all embedded costs to drop out. Second, TELRIC is based not on an incumbent local exchange carrier's (ILEC) actual network but instead on a hypothetical network that uses the least cost technology and most efficient design currently available, given the existing location of the ILECs' wire centers. Despite these technical features, however, TELRIC is not a specific, mathematical formula but rather a framework of methodological principles that states retain flexibility to use in conjunction with local technological, environmental, regulatory, and economic conditions in order to arrive at forward-looking rates that are both just and reasonable.[6]

TELRIC thus assumes (1) a hypothetical and perfect system that (2) operates over a time frame lengthy enough (3) to allow just and reasonable forward-looking rates. Some disasters, whether the work of nature or man, can impose restoration costs so enormous that they cannot be handled in the TELRIC framework without rendering the "hypothetical network" arbitrary and capricious and forward-looking rates both unjust and unreasonable.

This view of the limitations of the TELRIC pricing methodology is consistent with witness Dickerson's statements that when Embarq's UNE rates were established there was no extraordinary storm cost included in the establishment of those rates. He also testified Embarq is only seeking those extraordinary costs reduced by an amount reflecting the normalized level of historic storm damage and costs.

For example, if an ILEC's system incurred restoration costs so great that one could reasonably project them to occur once every century, how could those costs be reflected in a time frame of 30 years or less without untoward consequences? Moreover, disasters of such enormity

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[6] Verizon Pa., Inc. v. Pa. PUC, 380 F. Supp. 2d 627, 632 (Eastern Dist. PA 2005)

are essentially unforeseeable, except in some vague way not useful for rate setting. Thus the assumptions and purpose of TELRIC preclude that framework from being used to address widespread catastrophic damage in forward-looking rates. Widespread catastrophic damage to an ILEC's system must be handled on an ad hoc basis, and in this context, state authority remains primary.

In sum, the catastrophic events at issue here are unpredictable and have diverse economic effects. Were TELRIC to account for such economically diverse and unpredictable events, the resulting TELRIC rates would be unjust not only because of their amount in relation to historical averages, but also because of the disparity in the amount of recovery between retail and wholesale customers. Moreover, the resulting rates would be anti-competitive because they would be so high.

Therefore, we find that because these costs are not included in the TELRIC methodology, we have authority to allow recovery of these costs in compliance with both Federal and Florida law. Moreover, by allowing short-term partial storm cost recovery, we can maintain the integrity of the existing TELRIC rates as reflecting the forward-looking cost based on the most efficient telecommunications technology. Therefore, we find it appropriate, under § 364.051(4)(b), Florida Statutes, to allow recovery from wholesale UNE loop customers, to avoid unequal treatment of the retail customers and wholesale customers.

Other Wholesale Customers

As stated above, § 364.051(4)(b), Florida Statutes, only authorizes a line-item charge be assessed per access line on retail basic and nonbasic customers, and where appropriate, wholesale loop unbundled network element customers. A plain reading of the statute would seem to preclude application of the line-item charge on customers other than those enumerated in the statute, as Embarq has argued in its treatment of special access service. Embarq asserts that inclusion of resold lines is reasonable because resold lines are "directly tied" to Embarq's retail services and are included in Embarq price regulation filings under § 364.051, Florida Statutes. However, we note that FCC Rule 61.603 requires LECs, like Embarq, to make its telecommunications services available for resale at *wholesale rates*. Therefore, we find that resold lines are wholesale services rather than retail services as argued by Embarq. Moreover, because resold lines are not "wholesale unbundled network element" customers, Embarq is not authorized under § 364.051, Florida Statutes, to assess the charge to these customers.

While Embarq seeks to assess the charge to commercial agreement customers, we note that commercial agreements are negotiated at arm's length between Embarq and its wholesale customers. The local service platform offered in a commercial agreement is not a UNE loop as defined by § 251 of the Act and FCC rules. Consequently, whether this charge applies would be governed by the agreement's language. However, to the extent the commercial agreement provides that charges such as for storm cost recovery are allowable under the terms of the agreement, any amounts collected shall be counted towards the maximum allowed intrastate amount approved in Issue 1 for true-up purposes.

C. Conclusion

We find it appropriate for Embarq to impose a line-item charge on wholesale UNE loop customers. A line-item charge on resale lines is not authorized under § 364.051, Florida Statutes. Whether a charge should be imposed on commercial agreement customers is solely governed by the agreement's language. If agreements exist that provide for storm cost recovery from resale or local platform services, the amounts generated shall be counted toward the total amount of approved storm cost recovery for true-up purposes.

D. Parties' Arguments (Technical)

Embarq witness Dickerson testifies that in accordance with § 364.051(4), Florida Statutes, Embarq proposes to apply the storm cost recovery charge to all wholesale unbundled network element (UNE) loops. This includes two- and four-wire unbundled loops, DS1 loops, DS3 loops, and enhanced extended loops (EELs),[7] and local service platform offerings sold under commercial agreement. Witness Dickerson asserts that it is appropriate for us to approve the application of the charge to all wholesale loops since the storm damage affected facilities serving both retail and wholesale unbundled loop customers. The witness explains that Embarq utilized a forecast of access lines in its proposal; however, Embarq will bill actual lines in service.

Embarq interprets the term "access line" in the statute as a voice grade equivalent channel, e.g., 24 for DS1 and 672 for DS3. Witness Dickerson believes this interpretation is consistent with Rule 25-4.003(1), Florida Administrative Code, where the term is defined to mean "The circuit or channel between the demarcation point at the customer's premise and the service end or class 5 central office."

As his initial proposal outlined in direct testimony, Embarq witness Dickerson proposed to apply the storm charge to the capacity, or all potential channels, of loops, even though Embarq does not know how many channels a CLEC has activated. For example, a DS1 loop is capable of providing 24 channels, so 24 charges would be assessed whether or not all channels were activated. Similarly, a DS3 loop is capable of providing 672 channels, so there would be 672 charges assessed whether or not all channels were activated. Embarq utilized a forecast of the wholesale unbundled loops it expects to be in service during the anticipated recovery period of February 2007 through January 2008.

CompSouth witness Wood disputes the way in which Embarq proposes to define the term "access line" and to apply the line-item storm charge. Witness Wood argues that Embarq is actually proposing to (1) impose a charge on a per-DS0 basis rather than on a per access line or per-customer line basis thereby imposing a charge much greater than $0.50/line/month permitted by the statute; (2) apply the charge in a way that is not competitively neutral by assessing

[7] An EEL is an unbundled loop-transport combination.

wholesale lines and retail lines on a different basis, and (3) apply a charge to wholesale UNE loops that is not permitted by Federal law and FCC pricing rules.

Witness Wood believes that certain aspects of § 364.051(4), Florida Statutes, are particularly important in this proceeding:

1. The application of a storm charge to wholesale lines is explicitly limited to "wholesale loop unbundled network element" lines. The statute does not provide the opportunity to impose a charge on any other types of wholesale access lines purchased pursuant to tariff (such as special access).

2. The statute limits the charge to $0.50 per access line each month for one year. Such a constraint, asserts witness Wood, causes Embarq to have little incentive or reason to justify costs in excess of the limit, and to be motivated to seek to apply the charge to as many access lines as possible (and highly motivated to seek to define and count access lines to yield the highest number possible).

CompSouth witness Wood asserts that Embarq's proposal to assess the storm charge on a per-DS0 equivalent basis should be rejected. Witness Wood contends that the phrase "DS0 equivalent" does not appear in the pertinent section of the statute; only the phrase "access line" appears, and it is used in the same way when referring either to retail telecommunications service customers or wholesale loop unbundled network element customers. Witness Wood asserts that Embarq's proposal attempts to broaden the statute's language by equating "access line" with a single customer for retail services, but with capacity or bandwidth for wholesale UNE loops. This interpretation, asserts witness Wood, increases the size of the charge applied to wholesale lines[8] and is at odds with the plain reading of the statute.

CompSouth witness Wood asserts that Embarq's proposal is also at odds with the way in which costs are incurred. The witness contends that costs to restore facilities damaged by storms are not incurred on a per DS0 basis. The restoration of a DS1 loop is unlikely to cost anything different than restoring a DS0 loop, for example. The witness states that Embarq has not demonstrated that it costs 24 times as much to restore a DS1 loop than a DS0 loop, or 672 times as much to restore a DS3 loops as a DS0 loop, but only offers that DS1 and DS3 UNE loops provide greater capacities. Witness Wood argues that the statute contains no such value-of-service pricing provision and Embarq witness Dickerson offers no explanation for the decision to impose a capacity-based charge on UNE loops, but not on retail DS1 and DS3 services. Such a proposal, asserts the witness, artificially expands the number of access lines upon which to impose the storm charge and competitively disadvantages CLECs.

In response to CompSouth's allegations, Embarq explains that restoring DS1 and DS3 loops requires additional circuit assignment, engineering and testing work above and beyond that required for DS0 loops. Embarq Witness Dickerson also explains that most DS0 repairs are done

[8] Embarq would impose $12/month for a DS1 line (24 voice channels X $0.50/month = $12/month), and $336/month for a DS3 line (672 channels x $0.50/month = $336/month).

on an aggregate basis unlike DS1 and DS3 repairs, which are completed more on an individual basis. For this reason, it is logical to assess DS1 and DS3 loops differently from DS0 loops. However, Embarq acknowledges that, under its original proposal, retail high-capacity loops and wholesale high-capacity loops are treated differently and a charge strictly based on voice grade equivalents could place a greater share of the storm recovery cost on wholesale high-capacity services "than is appropriate when considering the underlying facilities used to provide such services." To achieve consistency in applying the charge to retail and wholesale services, Embarq witness Dickerson proposes to assess one charge on all DS0 level retail and wholesale services, five charges for DS1 level retail and wholesale services (ISDN-PRI retail and DS1 wholesale), and 30 charges for DS3 wholesale services.[9] Witness Dickerson explains that assessing UNE DS3 loops 30 charges recognizes the approximate 6 to 1 cost/price relationship between UNE DS3 and UNE DS1 loops. In this manner, both retail and wholesale customers are being treated in a competitively neutral manner and there is a balancing of the relationship of the services being provided to the underlying facilities used to provide the service.

E. Analysis (Technical)

Types of Access Lines and Methodology Used to Count Access Lines

In the BellSouth Storm Recovery Order we defined a customer or access line based on the number of activated channels for purposes of assessing a line-item storm recovery charge. (BellSouth Storm Recovery Order, p. 11) However, for wholesale unbundled loops, because BellSouth did not know how many channels a CLEC activated, we approved a 47% utilization factor to apply to wholesale loop equivalents to determine the number of line-item charges to be applied. The utilization factor was developed by taking the number of activated channels as of June 2006 for retail customers and dividing that number by total channel capacity. This approach resulted in a DS1 being assessed 11 charges (47% X 24) and a DS3 being assessed 315 charges (47% X 672). We directed BellSouth to recalculate the 47% factor each month during the 12-month cost recovery period using the most recently available data. (BellSouth Storm Recovery Order, p. 23) In this instant proceeding, Embarq proposes to count retail and wholesale high-capacity lines on a different basis, thus assessing the storm recovery charge differently.

While the BellSouth Storm Recovery Order provides guidance in determining loop types and the methodology of applying charges in subsequent storm petitions, Embarq is a different company with a different market and territory in Florida. Presumably, Embarq based its proposal on its own business, including its assessment of the competitive market in which it operates, as BellSouth most probably did. This factor allows us to address each petition based on the record evidence while keeping in mind our prior decision for BellSouth.

The record indicates that Embarq, like BellSouth, does not know how many channels of a wholesale unbundled loop a CLEC has activated. Similarly, Embarq's original proposal, like BellSouth's, assessed wholesale loops based on their total capacity. In BellSouth's case, retail

[9] Embarq has no retail DS3 level local services.

high-capacity lines were assessed charges based on activated channels, while in this proceeding, Embarq proposes to assess its retail ISDN-PRI and DS1 services five charges.[10]

To achieve consistency in applying the storm charge to retail and wholesale services, Embarq proposes, in surrebuttal testimony, assessing one charge on all DS0-level retail and wholesale services, five charges for DS1-level retail and wholesale services (ISDN-PRI retail and DS1 wholesale), and 30 charges for UNE DS3-level wholesale services.[11] Even though a UNE DS1 line is not an exact equivalent to an ISDN-PRI line,[12] Embarq explains that both services utilize a DS1-level capacity. For this reason, Embarq believes it is appropriate to use the same methodology in assessing the storm charge. For DS3 wholesale services, Embarq proposes to assess 30 charges, based on the 6 to 1 cost/price relationship between a DS3 and DS1 loop. In this manner, both retail and wholesale customers are being treated in a competitively neutral manner. We note that while CompSouth disputes that it is appropriate to assess UNE loops, witness Wood states that Embarq's alternative proposal is preferable to a methodology based on activated channels.

Embarq's proposal is not based on activated channels, so it is not based on actual market data for high-capacity loops. Rather, the underlying premise of Embarq's proposal appears to be that an access line's value increases as the number of potential end-users served by that line increases. Therefore, it is appropriate to assess additional charges to access lines that have a greater potential to serve end-users. We observe that Embarq's proposal has the potential to assess fewer charges for each wholesale DS1 and DS3 loop than does the BellSouth decision.[13]

The relevant part of § 364.051(4)(b)6, Florida Statutes, states that, "The commission may order the company to add an equal line-item charge per access line to the billing statement of the company's retail basic local telecommunications service customers . . . ." Embarq's proposal assesses the same number of charges to the same types of access lines. This does not appear to conflict with the statutory statement of "equal line-item charge per access line" because the same number of charges would be applied to each different type of loop. Therefore, we find that, as the BellSouth decision was consistent with the applicable statute, Embarq's proposal is also consistent with the statute. Embarq's proposal appears to be equitable in that users of retail high-capacity services are not disadvantaged relative to wholesale users of high-capacity services and balances the relationship of the retail and wholesale high-capacity services to the underling provisioning facilities. Although we defined the number of activated channels as the basis for

[10] Assessing five charges is consistent with the number of subscriber line charges (SLCs) applied to an ISDN-PRI. Additionally, five surcharges provide a "price-to-surcharge relationship that is reasonably consistent with the DS0s."

[11] Embarq has no retail DS3-level services.

[12] An ISDN-PRI line provides more functionality (e.g. switching services) than a UNE DS1 loop.

[13] Embarq's proposal results in five charges for a DS1 and 30 charges for a DS3. The BellSouth decision assesses 11 charges for a DS1 and 315 for DS3.

the assessing the storm recovery charge in the BellSouth decision, we find by the record evidence that Embarq's proposal is appropriate for the purpose of this proceeding.

Count of Access Lines and Number of Charges

Embarq's position is that the number of wholesale unbundled network element loops to be assessed are included in line 13 of Exhibit KWD-5. We note that line 13 is confidential. However, in the public version of Embarq witness Dickerson's Late-filed Deposition Exhibit 2, June 2006 actuals and a monthly average forecast for February 2007 to January 2008 for both access lines and the number of charges is shown. Certain information on this exhibit is confidential but the relevant line count and number of charges for wholesale UNE loops by loop type is shown as not confidential. Embarq forecasts that the monthly average number of UNE loops is 16,646.

F. Conclusion

A line-item storm recovery charge shall be applied to each of the following UNE loop types:

- DS0 Unbundled Digital Loop
- DS1 Unbundled Digital Loop
- DS3 Unbundled Digital Loop
- DS1 and DS3 loops in EEL Combinations

DS0 loops shall be assessed one charge, DS1 loops shall be assessed five charges, and DS3 loops shall be assessed 30 charges.

VI. Line Item Charge Per Access Line

A. Parties Arguments

Embarq's total costs exceed the maximum amount that can be recovered per Florida Statute, § 364.051(4)(b)5, which states:

> The commission may determine the amount of any increase that the company may charge its customers, but the charge per line-item may not exceed 50 cents per month per customer line for a period of not more than 12 months.

Therefore, Embarq, under the statutory cap, asserts that the $0.50 per line per month for 12 months should be the amount charged.

CompSouth believes that there should be no line-item charge assessed on wholesale UNE loop customers.

B. Analysis

This issue is a fall-out calculation based on our decisions. To calculate the appropriate monthly line-item charge per access line, we divided the appropriate amount of intrastate costs and expenses by the number of access lines, then divided the result by twelve months. § 364.051(4)(b)5, Florida Statutes provides that "The Commission may determine the amount of any increase that the company may charge its customers, but the charge per line-item may not exceed $0.50 per month per customer line for a period of not more than 12 months." In this docket, the line-item charge per access line is the approved storm cost recovery amount, $13 million, divided by the appropriate number of access lines, 1.637 million[14], divided by 12 months. The amount, $0.66, exceeds the statutory limitation of $0.50 per month per customer line as defined in § 364.051(4), Florida Statutes.

C. Conclusion

The appropriate monthly line-item charge per access line is $0.50 per month for 12 months.

VII. Effective Date of Line Item Charge

A. Parties Arguments

Embarq states that § 364.051(4)(b), Florida Statutes does not set any specific time frame for filing a petition and as a result, does not prohibit local exchange companies from filing a petition for recovery any time subsequent to either a single storm or a particular storm season as a whole. Embarq comments that subparagraph (4)(b)8., which limits a company to filing only one petition per storm [season] "in any 12 month period" could be reasonably interpreted as requiring a petition to be filed no later than one calendar year following the year in which the storms occurred.

Embarq states that since the statute restricts local exchange companies from filing more than one storm cost recovery petition per year, but allows multiple storms to be included in a single petition, the statute appears to contemplate that a company would file for cost recovery at the end of a year's storm season (i.e., after November 30). However, Embarq notes that repair and restoration efforts continue for a number of months after incurring damage from a major storm event. According to Embarq, recovery processes take some time to process and document to Commission standards for filing a recovery petition. As a result, a reasonable period to complete this would be the end of the second quarter of the following year. However, Embarq notes that there is nothing in the statute that prohibits a local exchange company from filing a petition sooner if a single storm resulted in costs that would exceed the 50 cent per access line cap.

[14] Cumulative total of the monthly line counts in Issue 2(a) and 2(b).

Witness Dickerson expanded on the concept of filing earlier stating that during the 2005 storms, the company did not incur the level of expenses to make it prudent to file sooner. According to witness Dickerson, it was not until Hurricane Wilma in October 2005 that that cost threshold was crossed. Witness Dickerson states that it would have been imprudent to file before the cap had been reached. Witness Dickerson asserts that had a storm hit earlier, such as in July, with the level of damage caused by Wilma, Embarq would have filed sooner.

In his testimony, witness Dickerson confirmed that Embarq is currently charging customers an authorized surcharge of $0.85 per month for storm costs incurred in 2004, and that the charge will continue through October 2007. Witness Dickerson also acknowledged that any approved cost recovery in this docket would take effect about February 2007, and run concurrently with its cost recovery of $0.85 for the 2004 storms through October 2007.

When asked if Embarq should insulate its customers from "rate shock" by delaying the proposed 50 cent per month recovery charge for the 2005 storms until after the current charge expires, witness Dickerson replied "no." Witness Dickerson explained that Embarq is approaching two years since the costs were incurred and further deferral would deny Embarq the cost recovery that it is entitled to under § 364.051, Florida Statutes, and that further deferral could also set up an even worse situation of stacking storm recovery costs one behind the other in future years.

Embarq points out that there is nothing in § 364.051(4)(b) that precludes the company from charging, concurrently, any approved charge for the 2005 tropical storm season in addition to the previously authorized 2004 storm surcharge. Embarq states that from a statutory construction standpoint, the statute is "crystal clear" in that recovery of storm costs for 2005 forward were not intended to address or affect its then pending 2004 cost recovery petition. Embarq also asserts that if the Legislature had wanted to prohibit concurrent recovery from two completely different storm seasons, based on two different statutes, it could have (and would have) said so.

Embarq also denied that it has sought any double recovery of costs or recovery of unnecessary costs in this docket. The company pointed out that the storm recovery costs applicable to 2004 and 2005 are separate and specific to those years, and do not represent a "double recovery" of costs.

Embarq points to a matter of public policy and claims that to delay recovery of the 2005 storm costs until after the 2004 storm costs are recovered places the recovery of storm costs onto a greater number of customers who were not Embarq customers at the time the costs were incurred. Additionally, Embarq argues that those customers who exercise competitive choice would be allowed to avoid paying their fair share of the storm cost.

CompSouth believes that if the Commission approves any storm charge, it should not be applicable to wholesale UNE customers. If any charge is applied to wholesale customers, which it should not be, such a charge cannot be applied unless and until any applicable interconnection agreements are amended. Finally, any charge must end 12 months after its effective date.

OPC holds that Embarq should defer any storm cost recovery charge approved by the Commission until after the storm cost recovery for 2004 expires in October 2007. OPC disagrees with Embarq's theory that deferral of any 2005 storm cost recovery would have the potential of creating a stacking of recovery charges over successive years.

During witness Dickerson's deposition, OPC maintained that the next opportunity Embarq would have to be able to file for a storm surcharge would occur as a result of storm damage in 2007, and that Embarq would not be able to file for recovery until sometime in 2008 as the result of the administrative processes involved in filing. Witness Dickerson stated he was not certain if the provision in the statute for filing once in a 12 month period was on a calendar year or if it was based on a filed-for basis (which would allow filing sooner) but agreed with OPC as a general matter. At hearing, witness Dickerson further explained that part of Embarq's response to staff's interrogatory 78 was a parenthetical statement that there is nothing in the statute that would prohibit a local exchange company from filing sooner if a single storm resulted in costs that would exceed the 50 cent per access line cap.

Witness Dickerson stated it was a factual likelihood that if a single storm occurred early in the storm season and costs exceeded the 50 cent per access line cap, that Embarq would file for recovery much earlier. Witness Dickerson later modified his characterization of Embarq's response to staff's interrogatory 78, stating he did not agree that the time frames discussed in the response and in his earlier testimony represent a committed response from Embarq that all subsequent filings would be under those time frames, particularly in light of the parenthetical statement in the response.

When asked if it would be unlikely that there would be any stacking of surcharges if Embarq delayed its 2005 recovery until November 2007 (after the 2004 recovery was completed in October 2007), witness Dickerson replied that stacking of costs would likely occur. Witness Dickerson explained that under OPC's scenario, the 2005 recovery would not begin until almost 2008. As a result, 2007 storm cost would have to be deferred over a year before they could begin to be recovered (until November 2008).

When asked if Embarq would have to begin recovery of any hypothetical 2007 storm costs before November 2008 for stacking of surcharges to occur, witness Dickerson replied in the affirmative. Witness Dickerson stated that it was not a foregone conclusion that Embarq would not seek recovery of any hypothetical 2007 storm costs earlier than November 2008.

OPC maintains that Embarq established that a reasonable time frame for compiling the necessary cost information and preparing a petition would be the end of the second quarter of the year following the year in which storm damage occurred. At hearing, OPC argued that it has taken Embarq at least ten months to get any surcharge in effect after the close of a calendar year in which hurricane damage has taken place, noting that the 2004 hurricane damage surcharge did not go into effect until October 2005, with an even longer period for 2005, with its surcharge projected to go into effect in February [2007].

OPC speculated that if there were hurricanes in 2007, the earliest Embarq could file for recovery would be in the second quarter of 2008, around June. OPC opines that if the

Commission were to delay the recovery of any surcharge in this case for collection in the October/November time frame, it would be unlikely that there would be any overlapping of recovery amounts in the future even if there were hurricanes in 2007.

OPC concludes that Embarq is concerned over continuing overlapping of costs recovery in the future if devastating storms should occur early in the [2007] storm season. OPC opines that overlapping of cost recoveries is a "bad thing" to let happen, but is a virtual certainty if Embarq is allowed to begin recovering 2005 storm costs in February 2007, concurrently with the 2004 recovery. OPC concludes that this is a unique case, and based on the statute, over lapping surcharges will not occur in the future.

Ms. Joanna C. Southerland, Sugarmill Woods Civic Association, Inc., and AARP adopted OPC's concerns voiced in opening statements at hearing. Further, Joint Petitioners conceded that the statute is silent as to when collection of surcharges should begin, and that the law could have included such language but did not. Joint Petitioners also conceded that there is nothing in the law that states you have to have concurrent "double-dipping" charges. Joint Petitioners further urge the Commission to consider that there is no need, legally, for imposing concurrent surcharges and instead should impose them consecutively.

B. Analysis

In 2004, Embarq (then Sprint) incurred damage to its system by four named hurricanes which inflicted approximately $30.3 million in damage. In 2005, Embarq entered into a stipulated agreement with the Office of Public Counsel which 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 met the criteria set forth in § 364.051(4), Florida Statutes. By Order No. PSC-05-0946-FOF-TL, issued October 3, 2005, we approved a surcharge of $0.85 per month per access line which began October 6, 2005, and will cease on October 5, 2007.

As mentioned above, the maximum amount of intrastate costs and expenses related to the damage caused during the 2005 tropical storm season that Embarq is entitled to recover is $13 million. § 364.051, Florida Statutes, now limits the maximum line-item recovery at 50 cents per access line per month and limits the recovery period to 12 months. Any cost recovery approved by this Commission is likely to take effect beginning in February 2007, with a potential maximum monthly charge to customers of $0.50 per access line for a period of 12 months.

Applying a Storm Cost Recovery Surcharge Concurrent with the 2004 Surcharge

Any recovery of 2005 storm costs is likely to overlap with the storm cost recovery the company is already charging for the 2004 storm costs. The point of contention is whether Embarq should be allowed to collect these costs concurrently, or wait until the 2004 cost recovery has ended in October 2007 before collecting any 2005 storm costs (collecting the costs consecutively). Embarq's position is that recovery of storm costs in this docket should not be delayed. To defer this recovery would result in diminished recovery for Embarq, based on the

time value of money, and that this delay would diminish Embarq's ability to upgrade its system and provide improved quality of service for its customers.

If approved, the 2005 recovery charge would overlap with Embarq's existing surcharge of $0.85 per access line per month causing the two charges to run concurrently from late February 2007 through early October 2007. At that time, the 85 cent charge would end and the 50 cent charge would continue until it ended in January 2008. For the most basic customer with only one access line, this would be an increase in their storm damage recovery charge from $0.85 to $1.35 per month through October 2007.

At hearing, the Joint Petitioners asked witness Dickerson if a customer having difficulty paying his/her monthly Embarq bill would find it easier to pay only the 85 cent surcharge for the 2004 storm recovery rather than having a combined $1.35 charge that included both the 2004 and 2005 storm charges. Witness Dickerson responded that Embarq customers who would have a difficult time to pay would be equated to those eligible for Lifeline service, and pointed out that customers enrolled in Lifeline were excluded from having to pay storm recovery costs for either 2004 or 2005.

Applying a Storm Cost Recovery Surcharge after the 2004 Surcharge Ends

OPC and the Joint Petitioners have taken the position that recovery in this docket should not commence until the recovery of 2004 storm costs is complete. OPC and the Joint Petitioners base this position on being reasonable to the ratepayers and to avoid "pancaking" storm recovery charges (collecting more than one storm charge at a time).

As mentioned above, Embarq customers are currently being assessed a monthly charge of $0.85 for the cost of storms that occurred in 2004. Embarq anticipates that the 2004 recovery will continue until October of 2007. In this 2004 docket, Sprint, on its own initiative, proposed that recovery be spread over a 24 month period as opposed to a one year recovery period. While the rationale for this proposal was not specifically delineated in the record of that docket, one can reasonably surmise that the intent of this extended recovery period was to mitigate the rate impact on consumers and to maintain affordable rates for Sprint customers. When asked at the 2005 storm cost recovery hearing if one of the reasons to ask for a two-year recovery for the 2004 storm costs was to mitigate the monthly impact on customers, witness Dickerson replied "yes" and he added "And you know, that's a mile apart from the facts in this case."

In the case at issue today, Embarq has requested that recovery of the statutory maximum of $0.50 per month for 12 months for the 2005 storm damage, begin in February of 2007. Based on this proposal, for the period of February 2007 through October 2007, Embarq customers would be assessed two storm cost recovery surcharges, one of $0.85 per month for the 2004 storm season and another of $0.50 per month for the 2005 storm season. Embarq disagrees with OPC and the Joint Petitioners and believes the Commission should not require a delay in collecting the 2005 charge until the 2004 collection is complete.

However, there are other issues that we must consider. First is the affordability of service.[15] While Embarq's witness Dickerson downplayed the importance of a 50 cent increase, it is incumbent upon this Commission to ensure that phone service is available to all consumers in the state at reasonable and affordable prices.[16] By smoothing out the impact of these charges, we could help to maintain the affordability of service. Second, we have a responsibility to ensure universal service.[17] While it is laudable that Embarq has proposed that Lifeline customers will not be assessed for 2005 storm costs, there are other phone customers who, while not qualifying for Lifeline, still struggle to pay their bills. By disallowing the "piggyback" recovery of 2004 and 2005 storm charges, we could further our goal that universal telephone service be made available to all Floridians at an affordable rate.

C. Conclusion

We agree with the Petitioners that § 364.051(4)(b) Florida Statutes, is silent on when any approved service charge should begin. The statute does not prevent us from approving a 2005 storm cost recovery surcharge to be applied concurrent with the 2004 storm surcharge or consecutively after the 2004 surcharge ends. Consequently, we find it appropriate to delay the change to minimize the impacts of these changes and maintain affordable service.

The charge may be assessed no earlier than 30 days from the expiration of the current storm cost recovery charge. The charge shall be effective for 12 consecutive months. Embarq shall provide the wording to be used on its bills regarding the storm charge prior to issuance.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the specific findings set forth in this Order are approved in every respect. It is further

ORDERED that this docket shall remain open for a period of time to allow us to verify the collected amount does not exceed the amount authorized.

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[15] 364.01. Powers of commission, legislative intent. (4) The commission shall exercise its exclusive jurisdiction in order to: (a) Protect the public health, safety, and welfare by ensuring that basic local telecommunications services are available to all consumers in the state at reasonable and affordable prices.

[16] Section 364.01(4)(a), Florida Statutes.

[17] 364.025. Universal service (1) For the purposes of this section, the term "universal service" means "an evolving level of access to telecommunications services that, taking into account advances in technologies, services, and market demand for essential services, the commission determines should be provided at just, reasonable, and affordable rates to customers...."

By ORDER of the Florida Public Service Commission this 12th day of February, 2007.

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

(S E A L)

JKF

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.