Sprint

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July 25, 2005

Ms. Blanca S. Bayó, Director
Division of the Commission Clerk
& Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 050374-TL

Dear Ms. Bayó:

Enclosed for filing on behalf of Sprint-Florida, Incorporated is Sprint's Reply Brief.

Copies are being served on the parties in this docket pursuant to the attached certificate of service.

If you have any questions, please do not hesitate to call me at 850/599-1560.

Sincerely,

Susan S. Masterton

Susan S. Masterton

Enclosure

CERTIFICATE OF SERVICE
DOCKET NO. 050374-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by U.S. and electronic mail this 25th day of July, 2005 to the following:

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Office of Public Counsel
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Susan S. Masterton

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Sprint-Florida, Incorporated's Petition for approval of storm cost recovery surcharge for extraordinary expenditures related to Hurricanes Charley, Frances, Jeanne and Ivan	)	Docket No. 050374-TL
	)	Filed: July 25, 2005

SPRINT-FLORIDA, INCORPORATED'S REPLY BRIEF

Pursuant to Order No. PSC-05-0757-PCO-TP, Sprint-Florida, Incorporated (hereinafter "Sprint") hereby submits its Brief in response to the initial Brief of the Office of the Public Counsel (hereinafter "OPC").

INTRODUCTION

By its Petition, Sprint seeks to recover approximately $30 million of extraordinary 2004 storm related costs through a time-limited increase in its basic rates pursuant to Section 364.051(4), Florida Statutes, i.e., the "changed circumstances" provision of the price regulation statute. This amount represents only about 20% of the total storm-related costs incurred by Sprint due to the four hurricanes that struck Florida in 2004. OPC does not dispute that the 2004 hurricane season was unprecedented and imposed extraordinary costs on Sprint. As shown below, the legal arguments in OPC's initial brief are without merit. Sprint's arguments set forth in its Initial Brief demonstrate that, pursuant to section 364.051(4), Florida Statutes, Sprint is entitled to recover these extraordinary costs. Accordingly, the Commission should enter an order granting Sprint's Petition.

ARGUMENT

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 to Section 364.051(4), Florida Statutes?

Sprint's Position: **Sprint has made a compelling showing that the costs Sprint incurred as a result of the 2004 hurricane season constitute a substantial change in circumstance pursuant to section 364.051(4), Florida Statutes. Therefore, the Commission should grant Sprint's Petition to recover $30,319,521 of these costs from Sprint's basic service customers.**

OPC does not dispute that the 2004 hurricane season was unprecedented and that Sprint incurred extraordinary costs

OPC recognizes that "the 2004 hurricane season was extraordinary and unprecedented, in that, four hurricanes hit a single state in one season causing extraordinary financial damage." (OPC's Brief at page 10. See, also, OPC's Brief at pages 3 and 9.) OPC also recognizes that "there is no dispute that Sprint suffered damage in its territory as a result of the four hurricanes" or that "this damage caused Sprint to incur financial costs to restore service to its customers." (OPC's Brief at page 6.) In addition, OPC recognizes that the costs Sprint incurred were extraordinary costs and were "beyond the control of the Company." (OPC's Brief at page 10.) OPC's recognition of the extraordinary and unprecedented character of the 2004 hurricane season and the resulting costs supports Sprint's position that the storms and the costs they imposed on Sprint constitute a substantial change in circumstances pursuant to section 364.051(4), Florida Statutes. The fact that Sprint is statutorily obligated to provide basic local telecommunications service as a carrier of last resort pursuant to section 364.025(1), Florida Statutes, is not in dispute.

OPC Erroneously Asserts that section 364.051, Florida Statutes, includes an earnings test

While OPC admits that the hurricane season and the resulting costs were extraordinary, OPC argues that they do not constitute a "substantial change in circumstances" within the meaning of section 364.051(4), Florida Statutes, because it claims Sprint has not demonstrated that the costs harmed Sprint financially. (OPC's Briefs at pages 8 and 10.) This argument has no merit. First, OPC's argument improperly reads an earnings test into section 364.051(4), Florida Statutes. An earnings test is neither express nor implied in the text of section 364.051(4), Florida Statutes. Second, Sprint was financially harmed by any objective measure.

OPC's position that the statute includes an earnings test violates a number of fundamental tenets of statutory construction. The general rule of statutory construction is that courts (or in this case the Commission) may not, in the process of construing a statute, insert words or phrases into the statute, or supply an omission that was not in the minds of the legislators when the statute was enacted. See, *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1137 (Fla. 1990); *Devin v. Hollywood*, 351 So. 2d 1022, 1025 n.6 (Fla. 4th D.C.A. 1976). Even if the legislative intent is unclear, any doubt should be resolved against the power of the court to supply missing words. See, *Armstrong v. Edgewater*, 157 So. 2d 422, 425 (Fla. 1963); *Pichowski v. Florida Gas Transmission Company*, 857 So. 2d 219, 221 (Fla. 2d D.C.A. 2003). Section 364.051(4), Florida Statutes, contains no reference to an earnings test, nor does it instruct the Commission to consider the status of a company's earnings in determining whether a substantial change in circumstances has occurred. These principles of statutory construction do not allow the Commission to evaluate, as the OPC has

suggested, any alleged year to year improvements in ROE as a basis for finding the absence of a change in circumstances.[1]

OPC's interpretation of section 364.051(4), Florida Statutes, also ignores the basic framework of price regulation and violates the requirement that all parts of a statute be read together to achieve a consistent whole. See *T.R. v. State*, 677 So. 2d 270 (Fla. 1996). Subsection (3) of section 364.051, Florida Statutes, allows a local exchange company to increase certain of its retail prices without Commission action 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 an incentive for ILECs to become increasingly efficient, but generally allows the recovery of these normal and foreseeable inflationary costs through indexed retail price increases. Unforeseeable, catastrophic costs such as the costs for which Sprint seeks recovery in this case are not part of normal inflation and cannot be offset by improved productivity. 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 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.[2]

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[1] In any event, the Commission need not reach the question of whether section 364.051(4), Florida Statutes, contains an implied earnings test, because the facts of this case do not show an unreasonable achieved rate of return.

[2] The OPC also argues that Sprint's recovery of its storm-related costs is inappropriate in a competitive environment. (OPC's Brief at page 5); however, there is no record evidence to support this assertion. OPC's unsupported assumption that competitive companies are precluded from recovering extraordinary costs, such as those incurred as a result of the 2004 storms, is erroneous. Because wireless and cable rates are not regulated in the same way as ILEC rates, these competitors have a variety of avenues open to them

Even assuming *arguendo* that section 364.051(4), Florida Statutes, contains an implied earning test, OPC's analysis of Sprint's ROE in 2003 and 2004 misses the mark. Sprint *was* financially harmed by the 2004 hurricane event. The ROE information to which the OPC stipulated shows that Sprint clearly has not earned an excessive ROE in any of the years shown and that recovery of $30 million of storm-related costs over two years will not result in extraordinary earnings and certainly not an earnings windfall to Sprint.

Moreover, contrary to OPC's assertion that Sprint suffered no financial harm, the stipulated facts alone demonstrate that Sprint has incurred substantial financial harm: $148 million of unanticipated costs is financial harm per se. Sprint is not seeking recovery of its total hurricane-related costs. Nor is the company seeking cost recovery of make-up work or other displacement costs. Sprint straightforwardly approached the OPC with a proposal to recover only its incremental costs and the OPC rightfully accepted this proposal, as evidenced by the Stipulation approved by the Commission. By definition, these incremental costs are the most harmful of the total hurricane-related costs of $148 million. The total costs are a staggering impact on ROE of well over 750 basis points.[3] Likewise, the incremental request of $44 million (intrastate basic allocation of $30.3 million) has a very large and material impact of well over 200 basis points on Sprint's intrastate ROE. Having forgone any chance to recover over $100 million in storm-related costs, other than absorbing them through earnings and normal operations, Sprint is here seeking the recovery of only the most financially harmful of the costs.

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to recover unanticipated and extraordinary costs, such as general rate increases or the deferral or cancellation of planned rate decreases.

[3] The ROE impact can be calculated by dividing the dollar amount per 100 basis points shown in Confidential Petition Exhibit C into the storm impact dollars. That result times 100 yields the ROE impact.

One-time extraordinary costs may constitute a substantial change in circumstances

OPC's argument that the Commission must measure both the "duration and magnitude" of a change in circumstance to determine if the change is substantial (OPC's Brief at page 9) has no merit and is not supported by the plain language of the statute. Sprint does not disagree that the magnitude of the submitted change in circumstances is relevant to whether a company is entitled to relief under section 364.051(4), Florida Statutes. This concept is endorsed in the amendment to the section adopted by the Legislature in 2005 and codified in chapter 2005-132, Laws of Florida, which requires a company of Sprint's size to demonstrate that it has incurred more than $1.5 million in storm-related costs before it may seek recovery using the mechanism established in the law. In the case of the 2004 storms, Sprint incurred intrastate, incremental costs 24 times the threshold recognized by the Legislature as substantial. The total costs incurred are 99 times greater! There is abundant evidence in the record that the costs incurred by Sprint as a result of the 2004 storm season were of a magnitude not contemplated in Sprint's cost of service when its base rates were last set by the Commission justifying relief under section 364.051(4), Florida Statutes. (Sprint's Initial Brief at pages 6-8.)

Sprint disagrees with OPC's implicit argument that a one-time occurrence, no matter how significant or extraordinary, does not meet the statutory criteria. (OPC's Brief at page 9.) The issue is not whether the event qualifying as a "changed circumstance" occurs once or twice or three times, but rather, whether the kind of event (and resulting costs) qualifying as a "changed circumstance" occurred and was reflected in similar scale in Sprint's cost of service when the base rates inherent in the Company's price-indexed rates were established. In order for the "changed circumstance" provision to have real

meaning, the Commission must compare the submitted "changed circumstance" (here, an unprecedented event of four hurricanes in a six-week period) against circumstances at some reference point in time, which under this statute, are the circumstances that were, or could have been, recognized in Sprint's rates at the time the price regulation statute was adopted in 1995. It is undisputed on the record of this case that four major hurricanes over a six-week period was not a condition that had ever occurred in Florida prior to 1995 and, therefore, the associated costs of those storms could not be, and were not, contemplated in the Company's cost of service at that time.[4] Recent Commission decisions in the electric company cases (*Gulf Power, Florida Power & Light and Progress Energy*) confirm this. Since the unprecedented event of four hurricanes was not inherent in Sprint's cost of service in 1995 when the price regulation statute was adopted, the occurrence of the four storms thereafter in 2004 qualifies as a changed circumstance.

Although some may speculate that a price-capped company might embrace Public Counsel's notion that only permanent rate changes can be approved under section 364.051(4), Florida Statutes, and therefore, request a permanent rate increase to create a storm damage reserve, there is no reason to reach and decide that question in this case. Rather, Sprint asserts that there is nothing in section 364.051(4), Florida Statutes, which precludes the Commission from approving a time-constrained increase or temporary surcharge when there has been a showing of a substantial change in circumstances.

The fact that the Legislature contemplated a time-limited increase in basic rates or surcharge is clear from the legislative activity in this area. In the 2005 amendment to section 364.051(4), Florida Statutes, the Legislature recognized a time-limited surcharge

[4] As noted in Sprint's Initial Brief, Sprint's average, foreseeable experience for storm costs – of all types, including tornadoes – was $600,000 annually and this cost was excluded from Sprint's request.

as an acceptable mechanism for addressing a rate increase due to a substantial change in circumstances. Likewise, Sprint's interpretation of the statute is consistent with the Commission's rulings in the various electric company storm cost recovery dockets and is based on a more logical and customer beneficial interpretation that a significant and unprecedented one-time increase in costs, which has not been factored into the base upon which rates have been established, is sufficient to justify an increase in base rates in the form of a time-limited surcharge.[5] In any event, the passage of 365 days is a convenient ratemaking tool, but it is not a limiting factor. Merely because an event is confined to a particular calendar year does not mean that it should not be recognized in a company's rates or that its extraordinary costs cannot be recovered from the customers. The test under section 364.051(4), Florida Statutes, is whether the event was extraordinary and not foreseeable such that it was not contemplated for recovery in Sprint's normal operations. The Commission has already recognized this for Gulf Power, Florida Power & Light and Progress Energy. Sprint's incremental costs of the 2004 Hurricane season are no different and meet this test. Furthermore, the two-year recovery period is consistent with the recent decisions of the commission related to the 2004 event and better restricts recovery to the generation of customers who benefited from a speedy restoral of their basic service.

[5] See, Docket No. 041291-EI, in which on July 19, 2005, the Commission approved for Florida Power and Light the recovery of $441,990,525 in storm-related costs through an estimated surcharge amount of $1.68 per average customer; Order No. PSC-05-0748-FOF-EI, issued 7-14-05, in which the Commission approved for Progress Energy the recovery of $231,839,389 in storm-related costs through an estimated surcharge amount of at least $3.81 for the first year and $3.59 for the second year per average customer; and Order No. PSC-05-0250-PAA-EI, issued March 29, 2005, in which the Commission approved for Gulf Power the recovery of $51,384,816 in storm-related costs through an estimated surcharge of $2.78 per average customer.

The 2005 amendment supports Sprint's interpretation of s. 364.051(4), Florida Statutes

OPC correctly asserts that amendments to section 364.051(4), Florida Statutes, enacted by the 2005 Legislature generally are not applicable to a petition filed prior to the effective date of the legislation.[6] (OPC's Brief at page 11.) However, while not strictly applicable, the 2005 amendment provides clear insight into the Legislature's view of the scope of section 364.051(4), Florida Statutes, prior to the 2005 changes. By including a "savings clause" that ensures that nothing in the 2005 legislation will adversely affect a previously filed petition, the Legislature makes it clear that section 364.051(4), Florida Statutes, contemplates the filing of a petition to recover extraordinary costs incurred as a result of cataclysmic events such as the 2004 hurricane season. Simply put, if the Legislature had not contemplated that the 2004 storms could constitute a changed circumstance meriting recovery, there would have been no reason to include a "savings clause" in the 2005 amendment to preserve a company's right to recover extraordinary costs. In fact, the Senate sponsor of the amendment specifically noted in Senate floor debate on this specific provision that the existing statute authorizes companies to file a petition to recover 2004 storm costs without limiting the amount or duration of any recovery.[7] Not only does this confirm the fundamental basis of Sprint's Petition, but it is

[6] Section 28 of chapter 2005-132, Laws of Florida, states, "This paragraph is not intended to adversely affect the commission's consideration of any petition for an increase in basic rates to recover costs related to storm damage which was filed before the effective date of this act.

[7] Remarks of Senator Lee Constantine in debate on Amendment 5 to SB 2232 on the Senate Floor on May 4, 2005 transcribed from official audio records of the Florida Senate. The floor debate included the following exchange between Senator Constantine and Senator Fasano:

Sen. Constantine: ....This gives the PSC the ability to look at the cost of the losses from the storm infrastructure recovery for the telecom industry, which by the way ladies and gentlemen, today under change of circumstance without any regulation, without any limit of one year, without any limit 50 cents, without any limit of specifically what they could ask they could ask for it to the PSC today.

evidence that the Legislature was aware that a telecommunications company petition was imminent for 2004 storm costs. Had there been a desire to limit the consideration of such a petition to only 50 cents per month over 12 months, the Legislature could have done so at that time. Instead, well aware of the magnitude of the 2004 hurricane event, they instead inserted a savings clause to preserve the right to file this very petition.

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 service customers?

Sprint's Position: **Sprint should 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.**

OPC offers various alternative theories for why Sprint should not be able to recover the full amount of the stipulated costs attributable to its basic service access lines from Sprint's basic services customers even if the Commission finds that the storms and resulting costs constitute substantially changed circumstances. All of OPC's alternative suggestions should be rejected. First, OPC suggests that Sprint should subtract any increases realized from its annual price cap filing from the recovery amount. (OPC's Brief at page 14.) This argument ignores both the purpose of the allowable annual price cap increases and the purpose of section 364.051(4), Florida Statutes. As discussed above, in order to recognize the effects of inflation on prices taking into account productivity factors that might offset inflation, section 364.051(3), Florida Statutes,

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Sen. Fasano: **You say they can ask for it today**, then why are we needing this language that would allow them to increase the consumer's rate by 60-70 million dollars. Why don't they just go to the public service commission and put in for it. Why are they needing this language then?

Sen. Constantine: Again, this is not on this amendment but I will answer it. **We are understanding that they can** and we understand that one telephone company is actually contemplating doing that right now. In fact, I do not know if they have actually filed but they are planning to file already under the change of circumstance provision in the bill, not this bill but in bills [sic] that are in statute today. (emphasis added)

allows a company to annually increase its price-capped basic service rates by inflation minus 1%. This increase is not intended to accommodate extraordinary circumstances, but rather is intended to capture the ordinary price increases that would be expected due to a general increase in the prices of consumer good and services. This intent is evidenced by the statute's tying of the inflation increase to the Gross Domestic Products Fixed 1987 Weights Price Index, or successor fixed weight price index.

Even more to the point, section 364.051(4), Florida Statutes, was specifically intended to capture changes not otherwise captured by the general provisions of the price cap statute. (See, Sprint Initial Brief at pages 9-10.). OPC seeks to have the Commission read into the statute a netting process that was not stated by the Legislature and therefore must be presumed not to have been intended. See, *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1137 (Fla. 1990) and Armstrong *v. Edgewater*, 157 So. 2d 422, 425 (Fla. 1963) The same argument applies to OPC's suggestion that any increase should be netted against Sprint's allegedly improved ROE. (OPC's Brief at page 14.) The Legislature did not expressly include a consideration of a company's earnings in section 364.051(4), Florida Statutes, much less express an intent to take a company's ROE trending into account in establishing the costs that may be recovered once a compelling showing of changed circumstances is made.

Finally, OPC suggests that the Commission should limit Sprint's recovery in the manner provided in 2005-132, Laws of Florida, even though, as OPC admits, the legislation specifically provides that it is not intended to *adversely* affect any petition for recovery pending on the effective date of the Legislation. (OPC's Brief at pages 11 and

15.) This suggestion by OPC not only reads a requirement that does not exist into the law, but actually contravenes the unambiguously stated intent of the law. To the extent that the Commission would attempt to write back in the pre-July 1, 2005 law a limitation on recovery of legitimate and undisputed costs, it would expressly violate the statutory admonition that the petition cannot be adversely affected by the 2005 Act. The Commission would be acting outside the scope of the authority delegated to it by the Legislature if it were to take this approach.

As discussed in Sprint's Initial Brief, it makes sense for Sprint to recover its storm costs from its basic service customers in proportion to the number of basic service access lines. (Sprint's Initial Brief at page 16.) Sprint's proposal to recover the stipulated costs attributable to its basic service access lines from its basic service customers is reasonable and should be approved by the Commission.

Issue 2(b) If any costs are determined to be recoverable, how should those costs be recovered.

Sprint's Position: **The costs should be recovered through a surcharge calculated based on Sprint's average number of access lines for a period not to exceed 24 months. The 30-day commercial paper rate should apply to the recovery period. Sprint agrees that reecovery should be subject to a true-up that will to ensure that Sprint customers do not pay any more than the approved recovery amount.**

Other than OPC's proposal that the Commission ignore the clear language of chapter 2005-132, Laws of Florida, and apply the post-2005 mechanism to Sprint's 2004 costs, there does not appear to be a material disagreement between the parties concerning the appropriate mechanism for Sprint to recover any storm costs determined to be recoverable by the Commission. Both OPC and Sprint agree that these costs should be recovered through a surcharge based on the average access line total. (OPC's Brief at

page 16, Sprint's Initial Brief at page 17.) Both OPC and Sprint agree that the recovery period should not exceed 2 years (or 24 months) and that there should be a true-up before the end of the recovery period to ensure that Sprint does not recover more than the authorized amount. (OPC's Brief at page 16, Sprint's Initial Brief at page 17.) In addition, pursuant to Order No. PSC-05-0735-PAA-TL, the 30-day commercial paper rate should be applied to the recovery amount during the 24-month recovery period. The Commission should adopt the recovery mechanism as proposed by Sprint and generally concurred in by OPC.

CONCLUSION

Sprint has made a compelling showing that it incurred millions of dollars of extraordinary costs as a result of the unprecedented 2004 hurricane season, that these costs constitute a substantial change in circumstances under section 364.051(4), Florida Statutes and that Sprint is entitled to recover the stipulated $30,319,521 of these costs through an increase in its basic rates. The opposing arguments put forth by the OPC are without merit and provide no basis for the Commission to deny Sprint's Petition. The Commission should approve Sprint's Petition to recover its costs through a surcharge calculated based on its average access lines for a period not to exceed 24 months, subject to a true-up to ensure that Sprint recovers no more than the approved amount.

RESPECTFULLY submitted this 25th day of July 2005.

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