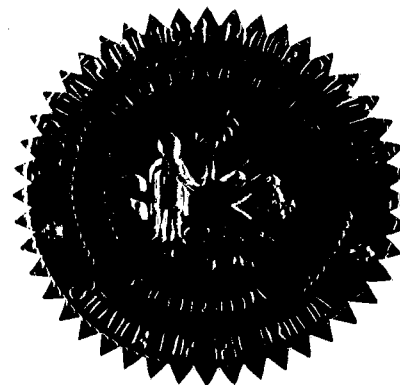


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040130-TP

In the Matter of

JOINT PETITION BY NEWSOUTH
COMMUNICATIONS CORP., NUVOX
COMMUNICATIONS, INC., KMC TELECOM
V, INC., KMC TELECOM III LLC, AND
XSPEDIUS COMMUNICATIONS, LLC, ON
BEHALF OF ITS OPERATING SUBSIDIARIES
XSPEDIUS MANAGEMENT CO. SWITCHED
SERVICES, LLC AND XSPEDIUS MANAGEMENT
CO. OF JACKSONVILLE, LLC, FOR
ARBITRATION OF CERTAIN ISSUES ARISING
IN NEGOTIATION OF INTERCONNECTION
AGREEMENT WITH BELLSOUTH
TELECOMMUNICATIONS, INC.



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PROCEEDINGS: AGENDA CONFERENCE
 ITEM NO. 11

BEFORE: COMMISSIONER RUDOLPH "RUDY" BRADLEY
 COMMISSIONER LISA POLAK EDGAR

DATE: Tuesday, August 30, 2005

PLACE: Betty Easley Conference Center
 Room 148
 4075 Esplanade Way
 Tallahassee, Florida

TRANSCRIBED FROM
TAPE BY: JANE FAUROT, RPR
 Official FPSC Hearings Reporter
 (850) 413-6732

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FLORIDA PUBLIC SERVICE COMMISSION 08753 SEP 16 8

FPSC-COMMISSION CLERK

1 PARTICIPATING:

2 JEREMY SUSAC, ESQUIRE, Anne Marsh, Michael Barrett,
3 Jerry Hallenstein, Kit Kennedy, Doris Moss, Nancy Pruitt, and
4 Paul Vickery, representing the Florida Public Service
5 Commission Staff.

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P R O C E E D I N G S

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2 CHAIRMAN BAEZ: Item 11 is a panel of Bradley and
3 Edgar.

4 COMMISSIONER BRADLEY: Are we ready for Item 11?
5 We're on Item 11. Staff.

6 MS. MARSH: Good morning, Commissioners. I'm Anne
7 Marsh with the Commission Staff. I'm introducing Item 11.
8 This is Docket Number 040130-TP, the joint petition of
9 NewSouth, NuVox, and Xspedius for arbitration of certain issues
10 with regard to their arbitration agreement with BellSouth. KMC
11 has withdrawn from this docket. Before we begin, Mr. Susac has
12 some procedural matters he would like to suggest, so I will
13 turn it over to Mr. Susac.

14 MR. SUSAC: Thank you. Jeremy Susac on behalf of
15 staff.

16 Mr. Chairman, we have two procedural suggestions, and
17 with your permission I will give you those suggestions.

18 COMMISSIONER BRADLEY: You are recognized.

19 MR. SUSAC: The first suggestion, because it is a
20 two-member panel, you can simply, after a motion has been made,
21 if you agree with the motion, you can say without objection and
22 then show the item moved, or you can simply state that you
23 would like to discuss the item, and then we can go into a
24 question.

25 The second is due to the number of issues at hand, it

1 may be appropriate, in some instances, to take up more issues
2 at once. For example, Issues 4, 5, and 7 all deal with
3 liability issues. If that is your pleasure, staff is prepared
4 to do that. If not, we can go issue-by-issue.

5 COMMISSIONER EDGAR: Commissioner Bradley, I think
6 that it makes sense to kind of approach this in chunks, if you
7 will. And so if there are some natural groupings of issues,
8 and I believe that there are on some, I would like to approach
9 it that way if you are comfortable with that. And then if
10 there are those items that we would like to ask more questions
11 or have more discussion, we can jump right into those.

12 COMMISSIONER BRADLEY: I would agree with the
13 Commissioner, we should probably take them in groups. Because
14 there are quite a few of them that are related, and I think the
15 outcome of one will affect the outcome of the others.

16 Let's start with Issues 4, 5, and 7. And I have
17 looked at them, and it is my understanding that these are
18 liability limitations and indemnification items -- issues.

19 MR. SUSAC: That is correct, Mr. Chairman.

20 COMMISSIONER BRADLEY: Why don't we start with those.

21 MR. SUSAC: I'll begin with Issue 4. Issue 4 is what
22 should the limitation of each party's liability in
23 circumstances other than gross negligence or willful
24 misconduct? Staff recommends that a party's liability should
25 be limited to the issues of bill credits in all circumstances

1 other than gross negligence or willful misconduct. Staff
2 arrived at that recommendation by agreeing with the FCC
3 wireline bureau in the Virginia arbitration.

4 Essentially, the FCC wireline said that it is
5 appropriate for an ILEC to treat a CLEC in the same manner as
6 it treats its own retail customers. In this instance,
7 BellSouth treats its retail customers by bill credits, so we
8 feel that it is appropriate that they treat the CLECs with bill
9 credits.

10 COMMISSIONER EDGAR: And that was Issue 4?

11 MR. SUSAC: That was Issue 4.

12 COMMISSIONER EDGAR: Okay. Commissioner Bradley, I
13 would like to go ahead and hear the discussion or presentation
14 on 5 and 7.

15 COMMISSIONER BRADLEY: Okay, and we'll vote on them
16 in block.

17 MR. SUSAC: Okay. Issue 5. Issue 5 states if the
18 CLEC does not have in its contracts with end users and/or
19 tariff standard industry limitations of liability, who should
20 bear the resulting risk.

21 Staff recommends that CLECs have the ability to limit
22 their liability through their customer agreements and/or
23 tariffs. And if a CLEC does not choose to limit its liability
24 through customer agreements or tariffs, then the CLEC should
25 bear the resulting risk. Staff would also note that all

1 parties to this proceeding currently limit their liability via
2 their tariffs, so we don't believe any party would be
3 prejudiced by that recommendation.

4 COMMISSIONER BRADLEY: 7.

5 MR. SUSAC: I believe the next is Issue 7.
6 Essentially Issue 7 is what should the indemnification
7 obligations of the parties be under this agreement. Staff
8 recommends a party should be indemnified, defended, held
9 harmless against claims, losses, or damages to the extent
10 reasonably arising from or in connection with the other party's
11 gross negligence or willful misconduct.

12 Essentially, as we stated in the previous issues,
13 parties have the ability to limit their liability in their
14 tariffs and their agreements. If they don't, they bear the
15 resulting risk. However, that shouldn't apply, in staff's
16 opinion, to, in a sense, bad conduct, willful misconduct or
17 gross negligence.

18 COMMISSIONER BRADLEY: Okay. Any discussion or a
19 motion?

20 COMMISSIONER EDGAR: Based on staff's discussion, I
21 would move staff's recommendation on 4, 5 and 7.

22 COMMISSIONER BRADLEY: Show this item as moved
23 without objection.

24 Item 6, identification of damage terms.

25 MR. SUSAC: Yes, Mr. Chairman. Issue 6, how should

1 indirect, incidental, and consequential damages be defined for
2 purposes of this agreement. Staff recommends that the
3 Commission should not define indirect, incidental, or
4 consequential damages for purposes of the agreement. The
5 decision of whether a particular type of damage is indirect,
6 incidental, or consequential should be made consistent with
7 applicable law if and when a specific damage claim is presented
8 to the Commission or a court of law.

9 COMMISSIONER BRADLEY: Any discussion or a motion?

10 COMMISSIONER EDGAR: I'm comfortable that staff's
11 recommendation is in keeping with previous actions of this
12 Commission, and I can move staff's recommendation.

13 COMMISSIONER BRADLEY: Okay. Show the item as being
14 moved without objection.

15 Item 9, dispute resolution forum.

16 MR. SUSAC: Yes, Mr. Chairman. Issue 9, under what
17 circumstances should a party be allowed to take a dispute
18 concerning the interconnection agreement to a court of law for
19 first resolution? Essentially, staff recommends that the
20 parties should be allowed to seek resolution disputes arising
21 out of an interconnection agreement to the Commission, the FCC,
22 or courts of proper jurisdiction. However, staff believes that
23 the Commission has primary jurisdiction over most disputes
24 arising from interconnection agreements, and that if a petition
25 is filed in an improper forum, it is ultimately subject to

1 being dismissed or held in abeyance while the Commission
2 addresses matters within its own jurisdiction.

3 Staff is available for questions.

4 COMMISSIONER BRADLEY: Questions or discussion?

5 COMMISSIONER EDGAR: A statement, I believe, has been
6 made that there may be another forum that might be more
7 efficient than this Commission in rendering a decision.

8 MR. SUSAC: Staff notes that in most instances we
9 have primary jurisdiction over disputes over the
10 interconnection agreement. However, staff believes that no
11 forum should be foreclosed to any party to this agreement, and
12 one example we give is third-party damages. Third-party
13 damages more than likely fall outside of the Commission's
14 jurisdiction. In that instance, a court of proper jurisdiction
15 may be appropriate in that instance. However, staff notes more
16 often than not this Commission has primary jurisdiction over
17 disputes arising from interconnection agreements.

18 COMMISSIONER EDGAR: And I agree with your last
19 statement that we do have primary jurisdiction, and I can move
20 staff's recommendation.

21 COMMISSIONER BRADLEY: Without objection, show the
22 item as being moved.

23 Issue 12, applicable laws, rules and regulations.

24 MR. SUSAC: Yes, Mr. Chairman, Issue 12.

25 Issue 12, should the agreement explicitly state that

1 all existing state and federal laws, rules, regulations, and
2 decisions apply unless otherwise specifically agreed to by the
3 parties. Staff recommends answering that issue with no. A
4 provision including such a statement could be subject to
5 various interpretations in the context of a dispute.

6 Instead, the contract should be interpreted according
7 to explicit terms, if those terms are clear and unambiguous.
8 In the event the contract language is deemed ambiguous, the
9 terms should be interpreted in accordance with applicable law
10 governing the contract interpretation.

11 COMMISSIONER BRADLEY: Discussion or a motion?

12 COMMISSIONER EDGAR: I'm comfortable that the staff
13 recommendation here and discussion is, again, in keeping with
14 previous actions of this Commission. I can move staff's
15 recommendation.

16 COMMISSIONER BRADLEY: Without objection, show the
17 item as being moved, having been moved.

18 Item 26. Issue 26, I'm sorry.

19 MR. VICKERY: Good morning, Commissioners. My name
20 is Paul Vickery with Commission Staff. Issue 26 is whether or
21 not BellSouth is to be required to commingle UNEs or UNE
22 combinations with any service, network element, or other
23 offering that it is obligated to make available pursuant to
24 Section 271 of the Act. Staff is recommending that BellSouth,
25 upon a CLEC request, be allowed to commingle UNE and UNE

1 combinations with any service network element or other offering
2 that it is obligated to make available pursuant to Section 271.

3 Staff is available for any questions that you may
4 have.

5 COMMISSIONER BRADLEY: Discussion or a motion?
6 Discussion?

7 COMMISSIONER EDGAR: I have read these paragraphs
8 over and over and over and over. And I have also gone back to
9 the errata, and to the definition of errata. And, you know, it
10 is my impression, Commissioner Bradley, that the language at
11 question in this issue can reasonably be interpreted more than
12 one way. So trying to take a step back, perhaps, and look at
13 the bigger picture and where we are today, and where we may be
14 headed, I think that what we have here is similar to an
15 instance of, perhaps, dualing experts. We have dualing
16 interpretations that, again, are reasonable, and that the
17 language can reasonably be interpreted more than one way.

18 But the way I have tried to approach this, again,
19 after reading and rereading and rereading, I do think that an
20 errata is to make a correction, I'll make that statement and
21 throw that out for possible discussion. In the discussion in
22 the item, staff states that Paragraph 584 after the errata
23 could be construed to mean that commingling of network elements
24 unbundled pursuant to Section 271 is no longer required. And
25 staff further states that the errata change to Paragraph 584

1 made the issue unclear and no longer straightforward. I'm not
2 so sure it was clear and straightforward before, but I do agree
3 that it is not completely clear and straightforward as we sit
4 today.

5 So with that, again, I think what we need to do is
6 look at it in the larger context, and that the language at
7 issue should be interpreted within the larger context of FCC
8 decisions and direction, and in keeping with this Commission's
9 recognition of that direction.

10 Recreating UNE-Ps or UNE-P type service provisions, I
11 believe, is in contradiction to the goals of the FCC and the
12 direction that they have laid out in the TRO and as followed
13 through with the errata that came after that. I also don't
14 believe that the CLECs are significantly disadvantaged by
15 removing 271 services from those services that must be
16 commingled with UNEs or with UNE combinations. 271 services
17 will continue to be available from BellSouth through special
18 access tariffs or commercial agreements.

19 And that is kind of the thought process that I have
20 gone through. I can move forward with a motion along those
21 lines, or I'm open to more discussion or questions,
22 Commissioner Bradley, whatever is your pleasure.

23 COMMISSIONER BRADLEY: Well, this is a philosophical
24 issue that I also have given a lot of thought to, and I have
25 always stated that in order to have real competition that all

1 competitors must be facilities-based. And I think the message
2 that we have received, or what I'm hearing as it relates to the
3 direction of seeing -- as it relates to the direction that the
4 FCC is moving in is that that is also their thinking. And I
5 know it's painful, but the only way that we can have true
6 competition is to have facilities-based companies competing.
7 So, therefore, I agree with what you have said.

8 COMMISSIONER EDGAR: I do have a concern, as I
9 stated, that regardless of pricing, that one could argue that
10 commingling 251, those elements, and 271 switching could be
11 representative of UNE-P. And I agree with your statement that
12 that is not the direction that the FCC has given us and that
13 this Commission has been following through on, as well. I can
14 make a motion or we can discuss it further.

15 COMMISSIONER BRADLEY: I'll accept the motion.

16 COMMISSIONER EDGAR: Okay. I would move that the
17 Commission deny staff's recommendation on Issue 26 and find
18 that BellSouth is required, upon a CLEC's request, to commingle
19 or to allow commingling of UNEs or UNE combinations with any
20 service, network element, or other offering that it is
21 obligated to make available. However, this does not include
22 services, network elements, or other offerings made available
23 only under Section 271.

24 COMMISSIONER BRADLEY: That's the motion?

25 COMMISSIONER EDGAR: That's the motion.

1 COMMISSIONER BRADLEY: Well, without objection, show
2 the motion as having been accepted. We are now on Issue -- did
3 you say something?

4 MS. MOSS: Commissioner, I was going to introduce
5 Issues 36A/B, 37, and 38.

6 COMMISSIONER BRADLEY: Okay. We are on Issues 36A/B,
7 37, and 38. And these issues deal with line conditioning.

8 MS. MOSS: Yes. I'm Doris Moss with Commission
9 Staff. These issues are related to line conditioning. 36A
10 deals with the appropriate definition for line conditioning;
11 36B follows with BellSouth's obligations with respect to line
12 conditioning. Issue 37 deals with specific loading provisions.
13 And 38 deals with the rates, terms, and conditions for removal
14 of bridged tap.

15 Staff's recommendation in 36A is to define line
16 conditioning based on the rules. This will encompass the
17 obligation to ensure xDSL capability and also the requirement
18 to provide nondiscriminatory access, which is parity. Based
19 upon this definition, staff believes that BellSouth's
20 obligations in Issue 36B are to provide line conditioning at
21 parity. Therefore, in Issues 37 and 38, to provide --
22 BellSouth's recommendation is for BellSouth to provide loading
23 and bridged tap removal at parity with what BellSouth affords
24 its own customers or other telecommunications carriers.

25 COMMISSIONER BRADLEY: Discussion or a motion?

1 COMMISSIONER EDGAR: Thank you. I do think that it
2 is reasonable to expect that BellSouth should not be required
3 to perform services that are not consistent with what they
4 would perform for their own customers or carriers. I do think
5 that this is carrying forward on the concept of parity that
6 this Commission has moved forward with in the past, and I can
7 move staff recommendation on Item 36A, 36B, 37, and 38.

8 COMMISSIONER BRADLEY: Show Items 36A/B, 37, and 38
9 as having been moved without objection.

10 Item 56 -- I'm sorry, 51B/C, audit issues.

11 MR. KENNEDY: Good morning, Commissioners, Kit
12 Kennedy with Commission Staff. Issues 51B and C are about the
13 auditing of the service eligibility criteria for EELs. Staff
14 believes that identifying the specific circuits and providing
15 documentation in the audit notice would be an impediment to the
16 auditing process and was not the intention of the FCC.

17 In 51C, staff believes that including a list of
18 auditors in the interconnection agreement from which BellSouth
19 can choose is appropriate. In this way the CLEC will still be
20 able to provide input without unreasonably delaying the audit.
21 Staff is available for questions.

22 COMMISSIONER BRADLEY: Discussion or a motion?

23 COMMISSIONER EDGAR: I think the staff recommendation
24 is quite reasonable to me, and I can move it forward on 51B and
25 51C.

1 COMMISSIONER BRADLEY: Show Items 51B and C as having
2 been moved without objection.

3 Item 65.

4 MR. VICKERY: Commissioners, this is Paul Vickery,
5 again.

6 Item 65 deals with the TIC, Tandem Intermediary
7 Charge, and whether BellSouth is going to be allowed to charge
8 it. Staff is recommending that they be allowed to charge the
9 CLEC a TIC for the transport of transit traffic when CLECs are
10 not directly interconnected to third parties. And we are also
11 recommending that unless a different rate is negotiated prior
12 to the parties filing their agreement, the applicable rate in
13 this agreement should be .0015 cents per minute of use.

14 Staff is available for any questions you may have.

15 COMMISSIONER BRADLEY: Discussion or a motion?

16 COMMISSIONER EDGAR: I do have a question.

17 COMMISSIONER BRADLEY: Question.

18 COMMISSIONER EDGAR: Mr. Vickery, my reading of this
19 issue is that it may not be necessary for this Commission to
20 make a finding of the specific amount for the TIC in order to
21 resolve the question that is presented to us.

22 Do you agree with that, or could you give me some
23 background?

24 MR. VICKERY: Yes, ma'am. I don't think we have to
25 set a rate. We are not setting a rate, we are just trying to

1 set a point for negotiations to be continued. But we don't
2 even have to go that far. I just think that the tariff that is
3 in place right now sets the rate at .003 cents a minute, and
4 the negotiations contained the rate of .0015, and they are free
5 to negotiate to whatever rate they want to. So we don't have
6 to set a rate.

7 COMMISSIONER EDGAR: I did also enjoy the discussion
8 in this item, and wherever in here it is categorized, a TIC
9 being categorized as an annoying insect or something. I don't
10 see the exact quote, but it's always nice to see a little
11 lightness in these sorts of things.

12 Commissioner Bradley, I am comfortable with staff's
13 recommendation that BellSouth should be allowed to charge a
14 TIC, a tandem intermediary charge. I do have, I guess, a
15 question as to whether we have enough information in the record
16 from hearing and the briefs before us to set that specific
17 amount. I have a little concern there. Realizing that we
18 don't know the give and take that was going on with
19 negotiations, and recognizing that there is a tariff on the
20 books, I welcome some discussion.

21 COMMISSIONER BRADLEY: Well, I guess what the issue
22 here would be is should the TIC be negotiated or should there
23 be a minimum point at which negotiations start. What would the
24 practical impact be upon this item if we eliminate the language
25 that requires a minimum starting point?

1 MR. VICKERY: Well, they are still going to be
2 allowed to charge a TIC, and the tariff says that they should
3 negotiate a rate if they don't want to apply for the tariffed
4 rate, the .003 cents. So they would just start back to
5 negotiations is the way that I see it.

6 Mr. Susac, do you agree with that?

7 MR. SUSAC: I agree with what Mr. Vickery said. I
8 would just like to note that this rate does not have to be a
9 TELRIC rate, so that there didn't have to be a submission of a
10 cost study into the record for you to formulate a rate that you
11 believe is reasonable. Staff came to the .0015 because that
12 was a tentative agreement between the parties during the course
13 of this proceeding, and we found that fair and reasonable.
14 However, you do not need to set a rate, as Mr. Vickery said.
15 The mere obligation would put the parties in a posture of
16 negotiating a rate.

17 COMMISSIONER EDGAR: Commissioner Bradley.

18 COMMISSIONER BRADLEY: Uh-huh.

19 COMMISSIONER EDGAR: I guess maybe I would like to
20 suggest approaching it this way. As I said a moment ago, I'm
21 comfortable with the portion of the staff recommendation that
22 allows BellSouth to charge a TIC, a Tandem Intermediary Charge,
23 for transport of transit traffic, period. And then would go on
24 to say that we could encourage that the parties continue
25 negotiating at a rate, strongly encouraging that they begin

1 those negotiations at the .0015 per minute of use that was
2 presented to us in that item.

3 COMMISSIONER BRADLEY: Okay. Is that a motion?

4 COMMISSIONER EDGAR: That is a motion.

5 COMMISSIONER BRADLEY: Let the record reflect that
6 without objection the motion is moved as so stated by the
7 Commissioner.

8 We are on Item 86B, customer service records.

9 MR. HALLENSTEIN: Good morning, Commissioners. Jerry
10 Hallenstein with staff. In Issue 86B staff is recommending
11 that disputes over unauthorized access to CSR information
12 should be handled in accordance with the dispute resolution
13 provision in the general terms and conditions of the
14 interconnection agreement. If a CLEC does not dispute the
15 allegations, BellSouth may suspend or terminate service.

16 Staff is available for questions.

17 COMMISSIONER BRADLEY: Discussion or a motion?

18 COMMISSIONER EDGAR: I can move staff recommendation
19 on Item 86B.

20 COMMISSIONER BRADLEY: Without objection, show Item
21 86B as having been moved.

22 Items 88, 97, 100. These items relate to tariffed
23 rates and charges.

24 MR. BARRETT: Good morning, Commissioners, Michael
25 Barrett of staff. I'm introducing those three issues.

1 Issue 88 addresses service expedites. Issue 97
2 addresses the time frame for bill payments. And Issue 100
3 addresses past due amounts and suspension of service.

4 COMMISSIONER BRADLEY: Repeat that again, please, I'm
5 sorry, the three.

6 MR. BARRETT: 88 addresses charges for service
7 expedites; 97 addresses the time frame for bill payments; and
8 100 addresses past due amounts and suspension of service.

9 COMMISSIONER BRADLEY: Okay. Discussion or a motion?

10 COMMISSIONER EDGAR: I can move staff recommendation
11 on those three items, Commissioner Bradley.

12 COMMISSIONER BRADLEY: Let the record reflect that
13 Items 88, 97, and 100 have been moved without objection.

14 Items 101, 102, 103, items that relate to
15 deposits/billing.

16 MS. PRUITT: Good morning, Commissioners. Nancy
17 Pruitt. I will be introducing Issues 101 through 103 which
18 address deposits. Staff recommends a maximum deposit of two
19 months billing with no offset for past due amounts. Staff also
20 recommends that if a CLEC ignores a deposit request, and that
21 they do nothing, that service can be terminated.

22 COMMISSIONER BRADLEY: Discussion or a motion?

23 COMMISSIONER EDGAR: I'm comfortable with the staff
24 recommendation, and I move staff's recommendation on Items 101,
25 102, and 103.

1 COMMISSIONER BRADLEY: Let the record reflect that
2 without objection, Items 101, 102, and 103 have been moved
3 without objection.

4 Is there anything else before us?

5 MR. SUSAC: 115, which is the close-docket issue, we
6 are recommending that it remain open so that the parties can
7 negotiate and come back with an agreement within 30 days of
8 issuance of this Commission order.

9 COMMISSIONER EDGAR: So moved.

10 COMMISSIONER BRADLEY: Let the record reflect that
11 Item 115 has been moved without objection. Anything else?

12 MR. SUSAC: That is all, Mr. Chairman.

13 COMMISSIONER BRADLEY: I think that concludes today's
14 agenda, because that is the last item. Any other business? We
15 are adjourned.

16 MR. SUSAC: Thank you very much.

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STATE OF FLORIDA)
:
COUNTY OF LEON)

CERTIFICATE OF REPORTER

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IT IS FURTHER CERTIFIED that I stenographically reported the said proceedings; that the same has been transcribed under my direct supervision; and that this transcript constitutes a true transcription of said proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor am I a relative or employee of any of the parties' attorney or counsel connected with the action, nor am I financially interested in the action.

DATED THIS 16th day of September, 2005.



JANE FAUROT, RPR
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