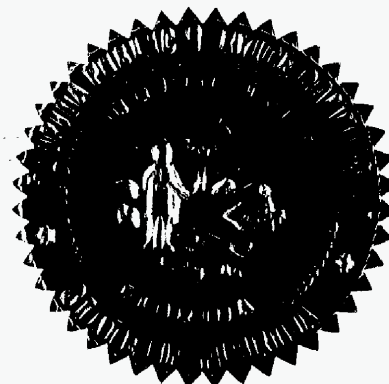


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

DOCKET NO. 040343-TP

In the Matter of

PETITION BY VOLO COMMUNICATIONS
OF FLORIDA, INC. d/b/a VOLO
COMMUNICATIONS GROUP OF FLORIDA,
INC. FOR ADOPTION OF EXISTING
INTERCONNECTION AGREEMENT BETWEEN
ALLTEL FLORIDA, INC. AND LEVEL 3
COMMUNICATIONS, LLC.



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PROCEEDINGS: AGENDA CONFERENCE
ITEM NO. 5

BEFORE: CHAIRMAN BRAULIO L. BAEZ
COMMISSIONER J. TERRY DEASON
COMMISSIONER RUDOLPH "RUDY" BRADLEY
COMMISSIONER CHARLES M. DAVIDSON

DATE: Tuesday, October 19, 2004

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

REPORTED BY: JANE FAUROT, RPR
Chief, Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
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1 PARTICIPATING:

2 JEFF WAHLEN, ESQUIRE, and JAMES WHITE,
3 representing ALLTEL Florida, Inc.

4 FLOYD SELF, ESQUIRE, representing Volo
5 Communications Group of Florida, Inc.

6 BETH KEATING, ESQUIRE, representing the Florida
7 Public Service Commission Staff.

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CHAIRMAN BAEZ: We are on Item 5 now.

MS. KEATING: Commissioners, Item 5 is staff's recommendation on ALLTEL's motion to dismiss Volo Communication's notice of adoption of the ALLTEL Level 3 agreement. Staff is recommending that ALLTEL's motion to dismiss be denied, that this matter be held in abeyance to allow the parties to continue to negotiate for a period of 60 days. And, thereafter, if negotiations are still unsuccessful, that this matter be set for a hearing. And parties are here to address the Commission.

CHAIRMAN BAEZ: The parties are here. And forgive the ignorance at this point, Ms. Keating, but the fact that the parties are here, does that mean we are going to argue the motion, or maybe I should ask them.

MS. KEATING: There is a motion --

CHAIRMAN BAEZ: Yes, there is a motion up. Since we usually take up whether we want to hear oral argument or not, maybe I'm getting ahead of myself.

MS. KEATING: This is a decision prior to hearing, and typically --

CHAIRMAN BAEZ: Very well. Who has got the motion. Mr. Wahlen.

MR. WAHLEN: Good morning, Commissioners. I'm Jeff Wahlen of the Ausley and McMullen law firm. Here with me is

1 James White of ALLTEL.

2 We filed a motion to dismiss Volo's petition to
3 opt-in to the interconnection agreement between Level 3 and
4 ALLTEL. That petition was filed with the Commission on April
5 19th. By its terms, the agreement expires on June 30th. There
6 is an FCC regulation which says that companies can opt-in to an
7 agreement, but that an ILEC need only make available an
8 interconnection agreement for opt-in for a reasonable period of
9 time after the approved agreement is available for inspection.

10 ALLTEL's position in this case is that it is not
11 reasonable to opt-in to an agreement about two or three months
12 before it is scheduled to expire. The Virginia Commission has
13 looked at this question in a case involving GNAPs. I believe
14 the opt-in at that case was about 11 months before it was going
15 to expire. The Virginia Commission decided that was not a
16 reasonable time. The Maryland Commission considered this
17 issue, the request to opt-in was six months before the
18 agreement was set to expire, and the Commission there decided
19 that that was not a reasonable time.

20 The Georgia Commission involving a case with the very
21 same agreement between ALLTEL and Level 3 and an opt-in request
22 that was filed two days after the Commission, or the petition
23 was filed in this case, considered the very same agreement with
24 the very same parties, and the Georgia Commission decided that
25 it was not reasonable for Volo to attempt to opt-in to the

1 Level 3 agreement, you know, about two months before it was set
2 to expire. The Georgia Commission established a standard that
3 said you could opt-in at least six months before it is set to
4 expire. But they considered the same petition, the same
5 agreement, and in May of this year denied Volo's request to
6 opt-in on grounds that the request was not made within a
7 reasonable time.

8 So our position is that the petition should be
9 dismissed because the request to opt-in was not made within a
10 reasonable time. Of course, if the Commission thinks that the
11 issue of a reasonable time involves factual questions, which I
12 think the staff suggests it does, ALLTEL would agree to have a
13 hearing on this, if that is the will of the Commission.

14 Thank you.

15 CHAIRMAN BAEZ: Questions of Mr. Wahlen,
16 Commissioners?

17 Thank you, Mr. Wahlen.

18 Mr. Self.

19 MR. SELF: Thank you, Commissioners. I'm Floyd Self
20 appearing on behalf of Volo Communications.

21 It's very clear under the federal act that CLECs have
22 an absolute right to adopt, in full, existing interconnection
23 agreements. ALLTEL has made a point of saying that under the
24 FCC rule that you can adopt for a reasonable period of time
25 that the adoption that Volo has undertaken here, that it is not

1 reasonable because it is -- I'm not sure what the standard is
2 that they are attempting to apply, and I think that is
3 important. The FCC has not defined what a reasonable period of
4 time is. This Commission has not adopted what a reasonable
5 period of time is.

6 Volo took the interconnection agreement on the exact
7 and complete same terms and conditions as the underlying ALLTEL
8 Level 3 agreement. We recognized at the time of adoption that
9 the interconnection agreement was set to expire on June 30th.
10 It is now October, whatever today's date is, 19th, and the
11 underlying ALLTEL Level 3 agreement is still in effect because
12 there has not been a successor interconnection agreement. And
13 unless something has been filed by ALLTEL or Level 3 cancelling
14 or terminating that agreement, which I could not find on the
15 Commission's website this morning, that agreement is still in
16 effect. That is way more than six months now, since we first
17 noticed this adoption. The other thing is ALLTEL has permitted
18 other carriers, specifically Sprint, from adopting this
19 agreement when there was less than six months left on the terms
20 of the original term of the agreement.

21 So given the fact that we were willing to take the
22 interconnection agreement exactly as is, on the same terms and
23 conditions, and given the fact that under the FCC rule, ALLTEL
24 has not said, pursuant to the FCC rule, that there was a cost
25 issue, or anything that Volo was seeking was not technically

1 feasible, I think given the absence of a definition of what a
2 reasonable period of time is, the Commission has no choice but
3 to adopt the staff recommendation and deny the motion to
4 dismiss.

5 Thank you.

6 CHAIRMAN BAEZ: Thank you, Mr. Self.

7 Questions? Commissioner Deason.

8 COMMISSIONER DEASON: Mr. Wahlen, what is the harm in
9 letting this entity adopt this agreement, if the agreement is
10 still in existence?

11 MR. WAHLEN: Well, the harm is that as soon as the
12 agreement is adopted, then ALLTEL begins the process of telling
13 them the agreement is going to be terminated, and they begin to
14 establish a business relationship that at any time can be
15 severed as soon as the underlying agreement between Level 3 and
16 ALLTEL is extinguished. And so at that point --

17 COMMISSIONER DEASON: Let me interrupt just a second.

18 MR. WAHLEN: Sure.

19 COMMISSIONER DEASON: It seems like the risk is on
20 the person seeking the agreement to be in a position where
21 there is no longer an agreement, and they either have to adopt
22 a different one or enter into negotiations for their own
23 agreement.

24 MR. WAHLEN: Well, I would suggest that the risk is
25 on both sides. Because entering into and beginning to do

1 business under these agreements requires work on both sides,
2 both from the incumbent and from the CLEC. And ALLTEL doesn't
3 think it is reasonable to begin the process of setting up a
4 business relationship based on an agreement that can expire at
5 any minute, and then have to begin the process all over again.

6 ALLTEL thinks that in a situation like this the
7 parties should just begin negotiating an interconnection
8 agreement, and go through the process of negotiating an
9 interconnection agreement.

10 COMMISSIONER DEASON: When is the new Level 3
11 agreement going to be finalized.

12 MR. WAHLEN: I don't know the answer to that.

13 COMMISSIONER DEASON: So sit could be six months or a
14 year from now?

15 MR. WAHLEN: It could be. There is also a provision
16 under this Level 3 agreement, if I'm reading it correctly, in
17 Paragraph 4.3 that says, "After completion of the initial term,
18 this agreement may be terminated by either party for any reason
19 not prohibited by law upon 90-days written notice to the other
20 party." So I'm not sure exactly what that means, but it sounds
21 to me as though this agreement could be terminated by ALLTEL if
22 it wanted to on 90-days notice. Now, whether ALLTEL would do
23 that, I don't know.

24 But the whole point is that what Volo is trying to do
25 is opt-in to an agreement that is very tenuous at best. And we

1 think the more orderly and efficient process for both ALLTEL
2 and Volo is just negotiate an interconnection agreement and go
3 through the process so that they can have an agreement that
4 they both want. That's the result that the Georgia Commission
5 reached, that's the result the Virginia Commission reached,
6 that's the result the Maryland Commission reached. We think
7 that is a reasonable result here.

8 Now, if the Commission thinks this question of
9 reasonable time is appropriate, and Mr. Self has pointed out
10 something about Sprint that, of course, there is no evidence or
11 testimony about, if this is something that needs to go to
12 hearing, we can go to hearing and we can flesh that all out.
13 And at the end of the day the Commission will have a standard
14 that the parties and everybody in the industry will know what
15 the standard is.

16 COMMISSIONER DEASON: I have a follow-up for Mr.
17 Self. Mr. Self, why do you want -- in Mr. Wahlen's terms, why
18 do you want to adopt a tenuous agreement?

19 MR. SELF: Well, Commissioner, the reality of the
20 situation is, in terms of what is really efficient, is that, as
21 Mr. Wahlen said, the companies need to begin a business
22 relationship. There are things that you can't do unless you
23 have an adopted interconnection agreement between the parties.
24 When there is a successor agreement of some kind, whether it is
25 arbitrated, negotiated, or simply you adopt someone else's

1 agreement, there is no gap. It is not like this agreement
2 expires on June 30th, hypothetically, and for the next three,
3 or six, or nine months nothing happens, and then a new
4 agreement takes effects. The business relationship continues.

5 The reality is it is more efficient for Volo at this
6 point, given where their business plan is, to simply allow
7 other parties, in this case Level 3 and ALLTEL, to negotiate an
8 agreement, and for Volo to adopt that agreement. This is a
9 little different than BellSouth, or Verizon, or Sprint where
10 maybe there is, you know, tens if not hundreds of agreements
11 out there. ALLTEL has a very, very, very few effective
12 interconnection agreements in its service territory.

13 COMMISSIONER DEASON: Are there any other with a
14 longer life than the Level 3?

15 MR. SELF: I haven't been able to find anything else.

16 COMMISSIONER DEASON: Is it your client's intent that
17 if ALLTEL and Level 3 reach a new agreement that it is your
18 client's intent to adopt a new agreement on a going-forward
19 basis?

20 MR. SELF: They would certainly have to read it. But
21 it is their intent, at this time, that if that agreement is
22 satisfactory, to adopt it. I have experienced, on behalf of
23 other clients, situations where even if it is not fully
24 everything that they want, given the lack of alternatives they
25 may well adopt that agreement immediately and then pursue their

1 own negotiations either for amendments or for a totally
2 different agreement. But when Volo was looking to get into the
3 market, get into business, they researched the issue and said
4 this agreement meets our needs, we don't need to have another
5 negotiation with them.

6 COMMISSIONER DEASON: Have there been any ongoing
7 negotiations at this point? I know staff is recommending 60
8 days. What is your position on that?

9 MR. SELF: I know there have been some discussions,
10 but I don't know what the exact status is recently. **The**
11 Company is based in Orlando. I know the recent storms have
12 kind of put them a little behind schedule. But I believe their
13 current intent is to wait for that successor agreement between
14 ALLTEL and Level 3, and then adopt that.

15 COMMISSIONER DEASON: But your difficulty is you
16 don't know when that new agreement is going to be reached?

17 MR. SELF: That's correct. And it seems highly
18 unlikely that ALLTEL or Level 3 are going to terminate the
19 existing agreement pursuant to the provision that Mr. Wahlen
20 quoted to you because they would be without an agreement. And
21 the business reality is you keep the business relationship
22 going. It may change a little bit, or various terms may change
23 under the successor agreement, but the ongoing business
24 relationship doesn't change. How ALLTEL processes order
25 requests, for example, isn't going to change or certainly isn't

1 going to materially change under a successor interconnection
2 agreement, for example.

3 COMMISSIONER DEASON: Mr. Wahlen, is 60 days adequate
4 time to carry on further negotiations, or it is your position
5 it is not going to be fruitful?

6 MR. WAHLEN: Well, ALLTEL has been ready, willing,
7 and able to negotiate from the beginning. And we would
8 continue to be ready, willing and able to do that. And I
9 think, you know, 60 days is worth a shot.

10 CHAIRMAN BAEZ: Commissioners, any other questions?

11 I have a question of staff. There was some reference
12 made to ALLTEL's relatively few existing interconnection
13 agreements, and I understand that this is probably a case of
14 first impression before the Commission, but in your and staff's
15 experience are there any examples, you know, real world
16 examples of how other incumbents deal with it, these interim
17 situations. I'm sure some of them must have come up, although
18 they haven't gotten to the Commission. Do you have any
19 knowledge of that?

20 MS. KEATING: I know we have had a few instances
21 where incumbents have objected to somebody trying to adopt an
22 interconnection agreement. But most of those instances were
23 resolved before we had to bring the matter before the
24 Commission. And I'm not quite sure on what basis they were
25 resolved. They were negotiated business resolutions between

1 the companies. As far as how different incumbents handle what
2 they believe is a timely amount of time to adopt an
3 interconnection agreement, as far as I know we have not seen
4 that issue.

5 CHAIRMAN BAEZ: Not even in its preliminary form, you
6 know, even before --

7 MS. KEATING: That's correct. The instances that I
8 remember, it was more of an issue of terms that were in the
9 interconnection agreement itself as opposed to the timeliness
10 of it.

11 CHAIRMAN BAEZ: Okay. And then another question. I
12 want to understand a little better the effect of staff's
13 recommendation in terms of the process by -- if you are
14 recommending denial of the motion to dismiss, is that the same
15 thing or something less than accepting or taking whatever
16 notice of adoption, whatever the residual process is left?
17 What do we do when companies adopt agreements, we take notice
18 of them, is that pretty much it?

19 MS. KEATING: Yes, sir, we typically do. But what
20 staff is actually recommending in this instance, that the
21 matter be held in abeyance for 60 days so that the adoption not
22 necessarily be approved, but that it be held in abeyance for 60
23 days. Thereafter, if the situation doesn't resolve itself,
24 that we go ahead and set it for a hearing.

25 CHAIRMAN BAEZ: Now, as a functional matter, I guess

1 the question to Mr. Wahlen, because it would be held in
2 abeyance, there is no obligation, there is no business being
3 done. I guess you all have talked about business
4 relationships. There is, in fact, no business relationship
5 until those 60 days, or for those 60 days that staff is
6 suggesting?

7 MR. WAHLEN: Well, I think there could be a business
8 relationship created as soon as the parties would get together
9 and negotiate one. And ALLTEL continues to be willing to
10 negotiate either a new agreement, or to talk about modifying
11 this to opt-in to it, or whatever, for 60 days.

12 CHAIRMAN BAEZ: Alternatively, and for argument sake,
13 if the notice of adoption were given significance, I guess
14 physically, real world, what would happen?

15 MR. WAHLEN: I'm not sure I understand the question.

16 CHAIRMAN BAEZ: Well, let's say -- this seems to be
17 some intermediate resolution of the issue. And I don't see
18 anything particularly offensive by it, but I want to
19 understand. You have, on the one end, the motion to dismiss is
20 granted, there is no business relationship established or
21 encouraged, and it will just take its normal course. And,
22 therefore, Volo doesn't get the benefit of being able to
23 provide service, arguably anyway, at least not purchasing
24 service from ALLTEL.

25 On the other end, if all things being equal, the

1 notice would take effect, the notice of adoption would take
2 effect, there would be a business relationship existed, and
3 then there would be some brief period of time after which, you
4 know, the provision of service would begin taking place and the
5 CLEC would then start offering service.

6 I don't know how much time that is. I don't know how
7 much time takes place. But I guess I'm trying to understand,
8 if that is true, that's not going to happen in the 60 days,
9 within the 60 days that staff is suggesting holding this in
10 abeyance.

11 MR. WAHLEN: It would not happen automatically in
12 that 60 days, but it would happen if the parties could reach
13 agreement on a business arrangement. And I think all of these
14 factual questions about how long does it take to establish
15 service and what are the implications of that is why the staff
16 is recommending a hearing to take evidence on the question of
17 reasonable time, if the parties can't agree.

18 CHAIRMAN BAEZ: But I see those things -- that is an
19 academic exercise. I mean, in terms of the real-world effect,
20 if we go through a hearing, if we go through even normal
21 negotiation times, absent some adoption, then the practical
22 effect is that someone is not providing, someone doesn't have
23 access to the products. I mean, that much is clear to
24 everyone. No judgment good or bad, that's a fact.

25 MR. WAHLEN: That's right.

1 CHAIRMAN BAEZ: And I guess my questions are more
2 trying to get at the, what the practical effect of all of this
3 process is going to be in terms of a competitive alternative,
4 or a company that is willing and able to provide service
5 getting to do that within the law and on reasonable, you know,
6 according to whatever process, formal/informal, we have sort of
7 provided here. And going to hearing doesn't necessarily do
8 that. Because as long as we are in a hearing mode, there is
9 not going to be any, there is not going to be any business
10 relationship, there is not going to be any provision of service
11 for whatever length of time that is, in order that we can
12 answer what is, essentially, an academic question of what is a
13 reasonable time for someone to opt-in to an agreement.

14 MR. WAHLEN: It may be an academic question but --

15 CHAIRMAN BAEZ: Not an unimportant question, I
16 understand.

17 MR. WAHLEN: You know, what the Georgia Commission
18 did was look at this and say the request to opt-in was filed
19 less than six months before it was going to expire. And they
20 acknowledged in their order that it could continue on. It
21 denied the petition to opt-in, and then it said we are going to
22 establish a bright line test of six months, that way the entire
23 industry is on notice what the standard is in the state of
24 Georgia. And I think that is the direction that staff is
25 pointing the Commission, if the parties are unable to negotiate

1 an agreement. All of your points about, you know, the business
2 relationship are correct.

3 ALLTEL's view is that they should have, we should
4 have done a better job negotiating an interconnection agreement
5 without respect to the opt-in. And if that process had worked,
6 they could be in business now. But Volo decided they wanted to
7 opt-in and, you know, we are about to start going around the
8 track again on some of these arguments. But that's where we
9 think we are.

10 MR. SELF: Mr. Chairman, if I can just clarify
11 something. If, hypothetically, there was a bright line test,
12 whatever it is, let's just say six months, if Volo had adopted
13 this agreement December 15th, which would have been more than
14 six months before the expiration date, it's possible that Volo
15 might never in the next six and a half months talked to ALLTEL
16 about establishing service. And the reason for that is as a
17 start-up enterprise trying to get into the business, there are
18 things that the company has to do to get its proverbial ducks
19 in a row in order to ultimately offer service.

20 And one of those things that's required, whether it
21 is lending institutions, NeuStar to get numbers, those various
22 others things, is you have to have an interconnection
23 agreement. It is a process. And the process takes time. You
24 don't just arrive on the scene on January 1st and say, we're
25 here, and adopt an interconnection agreement and start

1 providing service to customers two weeks later. There are
2 systems things that the CLEC and ALLTEL have to work out in
3 terms of how you process orders, all of those kinds of things.

4 But there are things unrelated to the relationship
5 between the CLEC and the ILEC that also impact the company's
6 ability to provide service. Things that, you know, occur
7 behind the curtain. And so the adoption of an interconnection
8 agreement doesn't necessarily mean that we are here ready to
9 start conducting business with you next week, next month, even
10 six months from now.

11 And there are different business things that change
12 and influence. I know when we started this process with Volo
13 they were very interested in getting rolling right away. The
14 weather has had an influence, the business climate has had an
15 influence on these things. But it doesn't change the fact that
16 from a start-up enterprise standpoint, if you don't have an
17 interconnection agreement then there is simply -- you can't
18 really get started. And that is why I said if we had adopted
19 this back in December, and there was, indeed, a six-month rule,
20 the two companies may never have talked, because they are
21 trying to accomplish all of these other things.

22 CHAIRMAN BAEZ: Mr. Wahlen, one final question. You
23 also alluded to the possibility that there would be some notice
24 of termination almost immediately after some determination was
25 made as to whether there existed an opt-in or not. Would that

1 have any more or less effect than what you are continuing
2 negotiations are now, besides the statutory --

3 MR. WAHLEN: I'm not sure, operationally, how that
4 would work. But I think what ALLTEL has been concerned about
5 all along is making it look like we have an agreement, having
6 an agreement that is about to expire, and then having to go
7 through the potential disruption of, you know, where are we
8 with Volo based on where we are with Level 3.

9 And I guess the only other point I would make is that
10 ALLTEL is a little bit different than Sprint, and Verizon, and
11 BellSouth. They have been through rounds and rounds of
12 interconnection agreements. They have refined their
13 interconnection agreements. They have been through
14 arbitrations, lots and lots of issues have been decided for
15 them. There are things -- this is just my perception -- in the
16 margin on their agreements that are always being negotiated.
17 But they are a lot further along the curve than ALLTEL is.

18 So the likelihood that there could be, you know,
19 whatever you would call a major change in the relationship
20 between ALLTEL and Level 3 to me is greater than the likelihood
21 that there would be a big change in one of the, you know,
22 well-worked interconnection agreements with the big companies,
23 and that is one of the concerns that we have.

24 CHAIRMAN BAEZ: Thank you, Mr. Wahlen.

25 Commissioners, questions or motion?

1 COMMISSIONER DAVIDSON: I'm prepared to move staff.
2 I mean, it just strikes me that what Volo is attempting to do
3 is a bit unreasonable. But, I mean, it is probably for us to
4 decide. Opting-in to an agreement that basically expired June
5 30th but is continuing between the parties while they negotiate
6 seems to a stretch, but I think there is nothing wrong with
7 allowing the parties some time to negotiate and try and work
8 this out. So I'm prepared to move staff.

9 CHAIRMAN BAEZ: There is a motion. Is there a
10 second?

11 COMMISSIONER DEASON: I'm going to second it. Before
12 we take a vote, it just seems to me -- I agree with what
13 Commissioner Davidson just said, but it also seems to me that
14 I'm missing something here. It seems to me that if there is an
15 entity that wants to do business, and I think both of these
16 entities want to do business, serve customers, abide by the law
17 as the law is constituted, and it just seems to me that they
18 could have sat down and said, well, we want to adopt an
19 agreement, but we know it's about to expire. Let's take that
20 as a framework, let's kind of tweak that, and let's get our own
21 agreement that is going to last for two years, three years, or
22 whatever, and get down and provide service to customers. That
23 is what I would like to see. And I just don't know why we're
24 not there, why this has to be brought to the Commission.

25 MR. WAHLEN: Well, I think --

1 COMMISSIONER DEASON: That's not a question, Mr.
2 Wahlen.

3 MR. WAHLEN: We'll take that back to ALLTEL. I'm
4 sure Mr. Self will take that back to --

5 COMMISSIONER DEASON: I second the motion.

6 CHAIRMAN BAEZ: There is a motion and a second,
7 Commissioners, all those in favor say aye.

8 (Simultaneous affirmative vote.)

9 CHAIRMAN BAEZ: Thank you all.

10 MR. WAHLEN: Thank you, Commissioners.

11 MR. SELF: Thank you, Commissioners.

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STATE OF FLORIDA)

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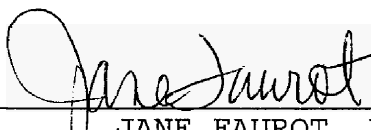
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Office of Hearing Reporter Services, FPSC Division of Commission Clerk and Administrative Services, do hereby certify that the foregoing proceeding was heard at the time and place herein stated.

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 my notes 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 26th day of October, 2004.



JANE FAUROT, RPR
Chief, Office of Hearing Reporter Services
FPSC Division of Commission Clerk and
Administrative Services
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