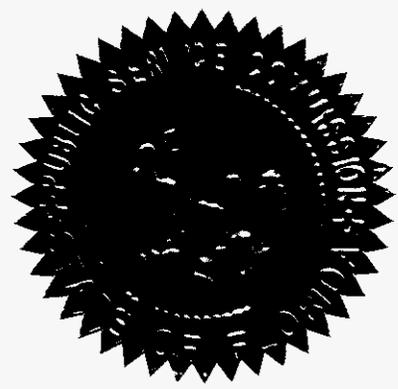


BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:

DOCKET NO. 110092-EI

PETITION FOR APPROVAL OF AMENDED
STANDARD OFFER CONTRACT, BY
PROGRESS ENERGY FLORIDA, INC.



PROCEEDINGS: COMMISSION CONFERENCE AGENDA
ITEM NO. 5

COMMISSIONERS
PARTICIPATING: CHAIRMAN ART GRAHAM
COMMISSIONER LISA POLAK EDGAR
COMMISSIONER RONALD A. BRISÉ
COMMISSIONER EDUARDO E. BALBIS
COMMISSIONER JULIE I. BROWN

DATE: Tuesday, June 14, 2011

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

REPORTED BY: JANE FAUROT, RPR
Official FPSC Reporter
(850) 413-6732

DOCUMENT NUMBER: 04164 JUN17

04164 JUN17

FPSC-COMMISSION CLERK

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

CHAIRMAN GRAHAM: Item Number 3.

MS. TAN: Good morning, Commissioners. Lee Eng Tan on behalf of Commission staff.

Item Number 3 concerns Express Phone's notice of adoption of an interconnection agreement and complaint against AT&T for termination of service and dispute regarding promotional credits.

Staff's recommendation addresses Express Phone's motion for summary final order and notice of adoption. Express Phone has requested oral argument for Issue 2. Staff recommends granting the oral argument with each side allowed no more than ten minutes.

Vicki Kaufman, representing Express Phone, and Tracy Hatch, representing AT&T, are here today. Mr. Armstrong, owner of Express Phone, is also here today. Staff is available for any questions.

CHAIRMAN GRAHAM: All right. I guess it's Issue Number 1, and I don't have a problem with granting the oral argument and staff is recommending ten minutes.

Can we get a motion?

COMMISSIONER EDGAR: I move the staff recommendation on Issue 1 for oral argument, ten

1 minutes per side.

2 **CHAIRMAN GRAHAM:** Moved and seconded.

3 Commissioner Brisé, do you have something?

4 Okay. All in favor say aye.

5 (Vote taken.)

6 **CHAIRMAN GRAHAM:** Any opposed?

7 We are granting oral argument.

8 Staff, who is going first?

9 **MS. TAN:** Vicki Kaufman for Express Phone.

10 **CHAIRMAN GRAHAM:** Vicki, you're up.

11 **MS. KAUFMAN:** Thank you, Mr. Chairman. Good
12 morning, Commissioners. I am Vicki Gordon Kaufman; I'm
13 with the law firm of Keefe Anchor Gordon and Moyle here
14 in Tallahassee, and I am here on behalf of Express
15 Phone. And with me is Mr. Tom Armstrong, who is
16 President of Express Phone.

17 Express Phone is a CLEC that has been doing
18 business in Florida for many years, primarily providing
19 service to Lifeline customers. By way of background, I
20 just wanted to note that there are two dockets included
21 in this recommendation. One deals with the adoption of
22 an interconnection agreement pursuant to clear federal
23 law, while the other relates to a billing dispute
24 between AT&T and Express Phone. I suggest to you that
25 these are totally different issues and totally separate

1 dockets. However, in the recommendation on the
2 adoption, it appears to us that staff and AT&T have
3 mixed these two issues together. We think that that is
4 inappropriate, and it's contrary to federal law, as I
5 am going to discuss in a moment.

6 In addition, I'm sure that you will hear AT&T
7 say that Express Phone is trying to escape its payment
8 obligations under its interconnection agreement.
9 Commissioners, that is not the case. You will hear in
10 another docket, and it's 110071, the dispute between
11 the parties. You will decide in that docket who owes
12 who what, if that makes sense. You will decide if
13 Express Phone owes AT&T, or you will decide if AT&T
14 owes Express Phone, as your staff suggests, subject of
15 an evidentiary hearing to develop those facts.

16 And I want you to know as a practical matter,
17 AT&T has cut off service to Express Phone, and no
18 doubt, though I can't say for certain, many of those
19 customers went to AT&T. Since AT&T has already cut off
20 service, what we would ask you to do in this case is to
21 find that Express Phone can adopt the image access
22 agreement and direct AT&T to allow ordering under that
23 agreement.

24 I'm going to address primarily the adoption
25 issue which we think is clearly a matter of law.

1 Express Phone sent AT&T not one, but two notices of
2 adoption pursuant to federal law. And so AT&T ignored
3 those adoption notices, and did write back to Express
4 Phone relating concerns that have nothing to do with
5 the federal law or the principles of adoption.

6 We filed a motion for final summary order.
7 There are no facts in dispute that relate to the
8 adoption. We agree with the standard your staff has
9 set out on Page 7 in regard to what you need to find to
10 enter a final summary order. We disagree with their
11 conclusion, and we think those standards have been met.

12 Let me talk a moment about the federal law
13 and rules that relate to adoption. You probably know
14 that awhile ago the FCC changed its adoption rule from
15 allowing a carrier to pick and choose certain
16 provisions and incorporate those into the rule they now
17 have, which is called the all or nothing rule, meaning
18 that a carrier has to adopt an entire agreement, they
19 can't just pick out pertinent provisions.

20 When the FCC went through that rulemaking,
21 here is what they said the reason for that change was.
22 And this is the FCC. They said we conclude that under
23 an all-or-nothing rule, requesting carriers will be
24 protected from discrimination as intended by Section
25 252(i), which is the federal adoption law.

1 Specifically, an incumbent will not be able to reach a
2 discriminatory agreement for interconnection services
3 or network elements with a particular carrier without
4 making that same agreement in its entirety available to
5 other carriers.

6 This is the overriding purpose of the rule,
7 to prevent the incumbent from discriminating among
8 carriers. That's just what has occurred in this case.
9 Express Phone has tried to adopt in its entirety an
10 interconnection agreement of another company that has
11 more favorable terms. There's nothing wrong with that.
12 That's exactly what the law intends to happen.

13 Now, your job, and the reason I say this is a
14 matter of law, is to determine if the criteria for
15 adoption have been met. And if you look at the
16 implementing FCC rule on adoption that implements
17 Section 252(i), there are two exceptions to adoption,
18 two. One is the costs are greater of providing service
19 to the adopting carrier than they were to the original
20 party to the contract, and the second is that the
21 provision of service is not technically feasible.

22 Neither of those exceptions have been raised
23 by AT&T. Neither of those exceptions is a fact in
24 dispute. So in our view, we have met the requirement
25 for adoption. We have complied with the letter of the

1 law. So you are asking yourselves, well, why are we
2 here, why are we having this dispute? Now, your staff
3 and AT&T have provided some reasons outside the
4 parameters of the federal law which states they would
5 prevent the adoption. The first thing they say is
6 there is a question as to whether a carrier can adopt a
7 new agreement during the term of the current agreement.
8 Of course they can. And, again, this goes back to the
9 discrimination provision, and let me just give you a
10 hypothetical. These numbers have no reality in law.
11 Let's say that Express Phone is paying AT&T \$20 for
12 each resold line. Another carrier is paying AT&T \$10
13 for each resold line. Of course, Express Phone
14 pursuant to the law and the reason behind the law is
15 permitted to adopt a more favorable agreement. That is
16 what is happening here.

17 And I would also point out to you that in the
18 current agreement between Express Phone and AT&T, there
19 is a section in the general terms and conditions, and I
20 want to quote this to you because I think it's
21 important, this is in the contract between the parties.
22 It says pursuant to 47 U.S.C. Section 252(i) and 47
23 C.F.R. 51.809, BellSouth shall make available to
24 Express Phone any entire resale agreement filed and
25 approved pursuant to 47 U.S.C. 252. That's in the

1 contract.

2 Now, your staff does cite that provision in
3 the recommendation as one of our positions, but they
4 don't tell you why that provision should be ignored.
5 The provision in the contract is totally consistent
6 with the federal law as I have described it to you.

7 The second reason that staff and AT&T suggest
8 that the adoption shouldn't be permitted is because
9 these parties have a dispute in the billing docket. It
10 involves whether promotional credits have been
11 appropriately credited to Express Phone. You are not
12 here to decide that today. I will tell you that it is
13 our position that AT&T owes us money, not the other way
14 around. It doesn't effect whether or not there has
15 been a valid adoption.

16 The third reason that staff and AT&T suggest
17 you shouldn't permit the adoption is for reasons that
18 they call public policy reasons. With all due respect,
19 I think 252(i) and the FCC rule, as I have already
20 said, give you two exceptions and only two. However,
21 if you want, if you are inclined to consider public
22 policy, the public policy you should consider is the
23 one that is to prevent discrimination among carriers,
24 and we would also have you consider the fact that AT&T
25 has cut off service to 3,000 Express Phone customers,

1 most of whom were receiving Lifeline who now have fewer
2 choices in the competitive marketplace.

3 AT&T does cite some, I would call them
4 general public interest cases, none of them are on
5 point, and I would ask you to think about what is the
6 public interest here. Is it the interest of the AT&T
7 shareholders, which is the only public interest I have
8 been able to come up with to support that argument, or
9 is it to prevent discrimination and to provide choice
10 in the marketplace.

11 Lastly, there has been an issue raised that
12 says the adoption date, the date we adopted the
13 agreement isn't clear. It is perfectly clear; and it
14 is a matter of settled law in Florida. It is not in
15 dispute. Adoption of an ICA is presumptively valid
16 when the -- when AT&T, when the incumbent receives the
17 notice of adoption. This very Commission entered that
18 order in the Sprint-Nextel adoption case that some you
19 may be familiar with. AT&T didn't like that result,
20 and they took it over to the Northern District and
21 appealed it, and the Northern District said the very
22 same thing.

23 So adoptions, contrary and with all due
24 respect to your staff, it is not when they get filed
25 with the Commission, it is when the incumbent receives

1 notice. That's what you said, and that's what the
2 court said. And further I would say to you that it is
3 not Express Phone's obligation to file the notice, it
4 is the incumbent's obligation to file the notice.

5 Lastly, staff, as well as AT&T, attribute
6 some highly nefarious motives to Express Phone on Page
7 14 of the recommendation. As I emphasized, we're not
8 trying to escape any payment obligation. That will be
9 sorted out by you. But it doesn't really matter what
10 our motive is, we have complied with the law, and the
11 law is clear, and we are entitled to adopt the
12 agreement.

13 Now, as I said earlier, we have already been
14 shut off. So, in this case, I think the appropriate
15 thing to do would be to find the adoption valid and to
16 direct AT&T to provide service ordering under the new
17 agreement.

18 And, Chairman, I don't know where I am in my
19 time, but I would like the opportunity for a minute or
20 two of rebuttal, if that's appropriate. Thank you.

21 **CHAIRMAN GRAHAM:** AT&T.

22 **MR. HATCH:** Thank you, Commissioners,
23 Tracy Hatch on behalf of AT&T, Florida.

24 First off, we think the staff -- we support
25 the staff recommendation. We think staff's analysis is

1 correct. But to go further and address some of the
2 points that Ms. Kaufman raised, one of the things that
3 she relies on is -- the core of this case really
4 surrounds the adoption process, and whether she is
5 allowed to opt-in to the New Image contract. And the
6 question arises, that is not -- and the case law
7 supports it, that is not a completely unlimited
8 unfettered opportunity to opt-in at any time for any
9 reason.

10 The case law in construing that provision has
11 clearly suggested there are practical limits on it.
12 For example, the Global NAPS case, which both sides
13 have talked about and cited. Which basically in the
14 Global NAPS case, they arbitrated before a state
15 commission. They didn't like the result of that
16 arbitration, so they thought that they could then
17 escape that decision by opting into another agreement.
18 And that agreement -- and basically the Commission said
19 no and the First Circuit ultimately said no. So the
20 answer is it is not an unfettered opportunity to opt-in
21 whenever you want to and for whatever reason. So it is
22 clear there are practical limits.

23 And as Ms. Kaufman noted, there are a
24 substantial line of cases that essentially put onto, as
25 interpreting that provision, a lot of public interest

1 standards. This Commission itself has incorporated a
2 public interest standard in addressing the opt-in
3 question.

4 As to -- the basic question of an opt-in is
5 are you eligible to opt-in in the first instance. If
6 you are eligible to opt-in, then, yes, you can opt-in
7 to any agreement that is otherwise available. But when
8 they sent us a letter asking to opt-in in, I think, the
9 first one was in October, ultimately in November, they
10 were not then eligible to opt-in.

11 Now, Ms. Kaufman recited to you the provision
12 in the contract that says we'll make available any
13 contract. What she didn't cite to you is another
14 provision in the same agreement that is the termination
15 of the term of the contract and the termination
16 provisions of the contract.

17 In the term provisions of the contract it
18 says you cannot opt in or you cannot open negotiations
19 for a new agreement, you don't become eligible for a
20 new agreement until -- I think it's 270 days prior to
21 the expiration of your agreement. Essentially that 270
22 days is the nine-month clock under the federal
23 arbitration negotiation standards. And so when your
24 contract is coming up for renewal or termination, you
25 can then begin the arbitration process, and opt-in is

1 in lieu of an arbitration process. It doesn't
2 completely -- it isn't and doesn't trump everything
3 else. And so you have to read both of those provisions
4 in para materia in order to reach the right result.

5 Ms. Kaufman's suggested result would write
6 that provision completely out the contract. It just
7 doesn't make any sense. Now, her contrary argument
8 would be, well, that provision, you know, the term
9 provision trumps, it essentially writes the opt-in
10 provision out. And my suggestion to you is it does
11 not; you have to read them together. Once you have an
12 eligible window for negotiation for arbitration, that
13 window is also applicable to opt-in, and then you can
14 opt-in. But what they want to do is go a step further.
15 When they are in the eligible window, and they opt-in.
16 They want to then take that, retroactively go back and
17 eviscerate the obligations under the old agreement, and
18 that is the net result here. That is what they are
19 trying to accomplish.

20 Under their existing agreement or their prior
21 agreement, assuming that the opt-in had not happened,
22 their existing agreement says if you dispute a charge
23 you still have to pay it. You can still dispute it.
24 They have failed to pay. They are in actual material
25 breach of their contract. They don't deny that. They

1 owe AT&T money under their existing contract.

2 Now, they have a complaint pending to
3 determine the legitimacy of their disputes. Ultimately
4 that will be resolved, but that does not in any way
5 essentially prevent AT&T from enforcing the terms of
6 its contract and it has done so. It terminated them
7 for that breach.

8 Now, what they want to do is essentially make
9 that all go away with an opt-in that opts back to when
10 they sent us a letter, in which case they were not
11 eligible for the opt-in. And, moreover, they cannot
12 use the new provisions to eviscerate the provisions of
13 the old provisions.

14 And then the next step you have to get to is
15 assuming the legitimacy of the debt, do we have to
16 enter into a contract with a new carrier that owes us
17 money? I think the answer to that is no, and that is
18 why I think your staff has got its policy
19 considerations lined up exactly. It makes no sense to
20 suggest a policy that says I just opt-out of my
21 existing agreement whenever I want and leave all of my
22 debts behind and start fresh. How many times can I do
23 that? I will run up another tally, opt into a new
24 agreement, run up another tally, opt into a new
25 agreement. We will never get to the end of this. And

1 so I think the staff's recommendation is correct in
2 this case.

3 **CHAIRMAN GRAHAM:** Ms. Kaufman.

4 **MS. KAUFMAN:** Thank you, Mr. Chairman.

5 I just have a few points that I want to make.
6 I'll try to start backwards, and I just want to
7 emphasize to you despite my colleague, Mr. Hatch's
8 comments, we are not trying to escape from any debt.
9 Adoption of the agreement is not going to allow us to
10 escape from any debt, nor is it going to allow AT&T, if
11 that is how the hearing ultimately turns out, to escape
12 from any debt. That, the question of what is owed and
13 who owes what is going to be determined in that other
14 case, and it is not -- the amount owed either way is
15 not going to be affected by the adoption.

16 As to the Global NAPS case, I just want to
17 read you what the Commission -- it happens to be the
18 Massachusetts Commission said in that case in regard to
19 what they did and what they did not decide about
20 adoption. And they said the Massachusetts -- actually,
21 this is the district court. The Massachusetts
22 Commission did not, contrary to Global NAPS' assertion,
23 hold that a party to an arbitrated agreement can never
24 exercise rights under 252(i). It also does not,
25 contrary to Verizon's assertion, hold that a party

1 subject to valid arbitration could never under 250(i)
2 (sic) take advantage of terms in a previously available
3 agreement.

4 That Global NAPS case is entirely different,
5 and I think the court made it clear that they weren't
6 issuing a blanket ruling that no adoption can ever be
7 permitted. As to Mr. Hatch's claim that we need to
8 look to the termination provision and ignore the
9 provision regarding adoption, that 270-day window of
10 negotiation is in the Federal Telecommunications Act.
11 That is when parties can begin to renegotiate, if they
12 so desire. It does not in any way change or do away
13 with a party's right to adopt.

14 So I think that what you need to look at is
15 we have met the adoption criteria, the billing dispute
16 will be taken care of in another place, and you should
17 find that we can adopt and that we can receive service
18 under that agreement. Thank you.

19 **CHAIRMAN GRAHAM:** Ms. Kaufman, does the
20 contract say, as Mr. Hatch has said, does it say that
21 if there is a billing dispute you are still responsible
22 to pay the bill and then it will be settled afterwards?

23 **MS. KAUFMAN:** The contract does say that
24 disputed amounts shall be paid. However, it is our
25 view -- we have several issues, and one is --

1 **CHAIRMAN GRAHAM:** That's all right. I just
2 want to know what the contract says.

3 **MS. KAUFMAN:** Okay. It does say that, but we
4 are not -- do not believe that we are in breach of that
5 agreement.

6 **CHAIRMAN GRAHAM:** Okay. Commissioner.

7 **COMMISSIONER BROWN:** Thank you, Mr. Chairman.

8 I think it is pretty clear that there are a
9 lot of outstanding factual items here, and the burden
10 here for the motion for summary final order would not
11 be met. It appears that there are several disputes
12 from factual matters of the status of the ICA, the
13 effective date of the adoption, and I would support
14 staff's recommendation on this issue.

15 **CHAIRMAN GRAHAM:** On Issue 2?

16 **COMMISSIONER BROWN:** Uh-huh, yes, sir.

17 **CHAIRMAN GRAHAM:** Was that a motion and a
18 second? Any further discussion on Issue 2? All in
19 favor say aye.

20 (Vote taken.)

21 **CHAIRMAN GRAHAM:** Any opposed? Let's go to
22 Issue 3.

23 Commissioner Balbis.

24 **COMMISSIONER BALBIS:** Thank you, Mr.
25 Chairman.

1 And I think just a general question, just to
2 clarify for me. And this question is for AT&T. If
3 Express Phone did pay the disputed amount, would
4 service be restored?

5 **MR. HATCH:** I think the answer to that is
6 yes, but it depends on the existing ICA or under the
7 new opt-in ICA. If they met the conditions in the
8 list, we have made that offer up to them. One of the
9 conditions being that they become current with all
10 their past debts, and then we would allow the opt-in.
11 And so on a going-forward basis, assuming they cured,
12 then they would otherwise be allowed to opt-in, in
13 which case then they would have the Image Access
14 contract and then they could engage in the practice of
15 disputing (inaudible).

16 **COMMISSIONER BALBIS:** Okay. And, again,
17 whether or not the payment for the disputed amount,
18 whether it goes back to Express or back to AT&T, that
19 will fall out during the hearing process, which I agree
20 with Mr. Kaufman on that, as well. And it just seems
21 like it's pretty clear in the contract if there is a
22 provision dealing with disputed amounts that the easy
23 solution would be for Express to pay the disputed
24 amount, and we would work everything out during a
25 hearing, and then go from there. But, again, just a

1 general comment, and we can go through issue-by-issue
2 after that.

3 **CHAIRMAN GRAHAM:** Commissioner Brisé.

4 **COMMISSIONER BRISÉ:** With respect to the
5 relationship between the two companies, is traffic one
6 way or is the traffic two ways?

7 **MR. HATCH:** I believe traffic is two-way.
8 They are a CLEC, so they originate and terminate
9 traffic. That traffic could come from us or it could
10 come from other carriers.

11 **COMMISSIONER BRISÉ:** Okay. So there is the
12 possibility, as Express contends, that there may be
13 some outstanding financial responsibilities from AT&T's
14 side, as well.

15 **MR. HATCH:** Financial, the issues here are
16 the charges that we believe Express Phone owes AT&T for
17 the provision of the service to them as a reseller.
18 They are reselling our local service, essentially. And
19 so our contention is they have not paid us, pursuant to
20 their interconnection agreement, for the local service
21 that we wholesale to them that they in turn provide to
22 their end users.

23 **MS. KAUFMAN:** Commissioner, if I might
24 comment on that.

25 **CHAIRMAN GRAHAM:** Sure.

1 **MS. KAUFMAN:** Our position on this is that we
2 are entitled to the application of promotional credits,
3 which we have submitted, and which AT&T refuses to
4 honor. So that's really the issue for the billing
5 case. And if our position is the one that is
6 ultimately found to be the correct one, AT&T will owe
7 money to us, we will not owe money to them.

8 **CHAIRMAN GRAHAM:** Any further discussion on
9 Issue Number 3? Do I get a motion? Does somebody want
10 the gavel?

11 Commissioner Brisé.

12 **COMMISSIONER BRISÉ:** Thank you, Mr. Chairman.
13 I think at this time I'm prepared to move staff's
14 recommendation on Issue 3.

15 **CHAIRMAN GRAHAM:** It has been moved and
16 seconded, staff recommendation on Issue 3.

17 Any further discussion on Issue 3? Seeing
18 none, all in favor say aye.

19 (Vote taken.)

20 **CHAIRMAN GRAHAM:** Any opposed? By your
21 action you have approved Issue 3.

22 Issue 4. Commissioner Edgar.

23 **COMMISSIONER EDGAR:** Thank you, Mr. Chairman.
24 I have a quick question for staff, and then
25 maybe I'm able to make a motion. If the remainder of

1 the staff recommendation were to be adopted, what then
2 would be the status of the 087 docket?

3 **MS. TAN:** On the 087 docket, Issue 2 would be
4 a final order, and then Issue 3 would be a proposed
5 agency action in which Express Phone has the ability to
6 protest, if they wish.

7 **COMMISSIONER EDGAR:** Okay. And we are on
8 Issue 4, is that correct, Mr. Chairman?

9 **CHAIRMAN GRAHAM:** That's correct.

10 **COMMISSIONER EDGAR:** Then I'm prepared to
11 move the staff recommendation on Issues 4 and 5.

12 **CHAIRMAN GRAHAM:** It has been moved and
13 seconded, staff recommendation on Issues 4 and 5. Any
14 discussion on those last two issues? Seeing none, all
15 in favor say aye.

16 (Vote taken.)

17 **CHAIRMAN GRAHAM:** Any opposed?

18 By your action, you have approved staff
19 recommendation on Issues 4 and 5, which concludes Item
20 Number 3.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF FLORIDA)

: CERTIFICATE OF REPORTER

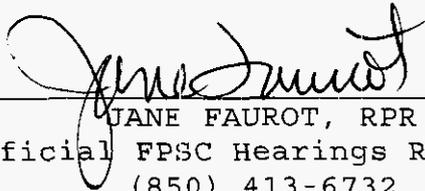
COUNTY OF LEON)

I, JANE FAUROT, RPR, Chief, Hearing Reporter Services Section, FPSC Division of Commission Clerk, 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 16th day of June, 2011.



JANE FAUROT, RPR
Official FPSC Hearings Reporter
(850) 413-6732