

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Complaint by Florida BellSouth customers who paid fees to BellSouth Telecommunications, Inc. related to Miami-Dade County Ordinance Section 21-44 ("Manhole Ordinance") and request that Florida Public Service Commission order BellSouth to comply with Section A.2.4.6 of General Subscriber Service Tariff and refund all fees collected in violation thereof.

DOCKET NO. 050194-TL  
ORDER NO. PSC-06-1007-FOF-TL  
ISSUED: December 6, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman  
J. TERRY DEASON  
ISILIO ARRIAGA  
MATTHEW M. CARTER II  
KATRINA J. TEW

ORDER DENYING PROTEST AND RENDERING  
PROPOSED AGENCY ACTION ORDER NO. PSC-06-0685-PAA-TL  
FINAL AND EFFECTIVE

BY THE COMMISSION:

**I. CASE BACKGROUND**

On March 23, 2005, a Complaint of Florida BellSouth Customers Against BellSouth Telecommunications, Inc. and Request for Relief (Complaint) was filed by Karla Hightshoe, Timothy McCall, and Manuel Garcia, individually, and Best Investment Realty, Inc., a Florida Corporation, as well as on behalf of all other BellSouth customers who have paid the Miami-Dade County Ordinance #83-3 (Manhole Ordinance) fee, (collectively as the Petitioners).<sup>1</sup>

On April 18, 2005, BellSouth filed its Motion to Dismiss the Complaint. By Order No. PSC-05-0762-PCO-TL, issued July 25, 2005, we granted in part and denied in part BellSouth's Motion to Dismiss. We further ordered our staff to investigate the matter and present the results

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<sup>1</sup> Prior to filing the Complaint, the Petitioners served as representatives of a class of BellSouth customers in a class action suit before Judge Henry Harnage in the Eleventh Judicial Circuit for Miami-Dade County, Florida, concerning the same matters brought by the Complaint. See Hightshoe, et al. v. BellSouth Telecommunications, Inc., Case No. 03-26623-CA11. The Court dismissed the Petitioners' Complaint for failure to exhaust administrative remedies and abated the action pending submission of a claim filed with this Commission.

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of its investigation to this Commission at a future Agenda Conference. On July 18, 2006, we addressed our staff's findings at the Agenda Conference. We voted to approve our staff's recommendation with slight modifications.

On August 8, 2006, we issued Proposed Agency Action Order PSC-06-0685-PAA-TL (PAA Order). Pursuant to the PAA Order, BellSouth was required to perform reconciliations for each future six-month period and to apply the overage/underage in collections as an accounting adjustment to determine the appropriate fee. We further determined that a customer credit or refund was impractical, and therefore not required. Furthermore, the Notice of Further Proceedings or Judicial Review contained in the PAA Order required protests to be received by close of business on August 29, 2006.

On August 29, 2006, at 5:04 p.m. the Petitioners' Petition of Protest to Proposed Agency Action (Protest) was received by the Division of the Commission Clerk and Administrative Services (Commission Clerk); therefore, the protest was not officially filed until August 30, 2006. The Petitioners' protest was filed untimely. According to our legal staff, Petitioners' counsel acknowledged that the protest was filed untimely and stated that a motion would be filed requesting consideration of the untimely protest. Shortly thereafter, on September 1, 2006, the Petitioners filed their Motion to Consider Petition of Protest Timely Filed (Motion). In support of their Motion, the Petitioners noted counsel's inability to synchronize clocks across the state with this Commission's clock as the reason for the untimely filing.

On September 8, 2006, BellSouth filed its Response in Opposition to Petitioners' Motion (Response to Motion). BellSouth requests that the Petitioners' Motion be denied because the protest was filed untimely. On September 11, 2006, BellSouth filed its Response in Opposition to Protest (Response to Protest).

## **II. ANALYSIS**

### **A. Parties' Arguments**

#### *i. Petitioners' Protest*

In support of their Protest, the Petitioners state that there is a lack of competent substantial evidence to support any findings of fact or conclusions made in the PAA Order. The Petitioners note that this Commission has indicated in its own PAA Order that certain data is unavailable and as a result it is difficult to reach a conclusion. The Petitioners disagree with several of this Commission's findings:

- First, that there was an over collection pursuant to the Manhole Ordinance tariff but no finding of a violation of the Tariff.
- Second, that no customer credit or refund is required.
- Third, that the cumulative overage in collections, with interest, as of year-end 2005 is set at \$469,176.

- Fourth, that the overage/underage in collections from future accounting reconciliations for each six-month period be applied as an accounting adjustment.

The Petitioners request a full evidentiary hearing, or, in the alternative, that this matter be returned to the 11th Judicial Circuit Court in and for Miami-Dade County, Florida, where it was dismissed and abated pending action by this Commission. If returned, the Petitioners request that this Commission abate this proceeding pending final resolution by the Court. Furthermore, the Petitioners request that any adjustments made by BellSouth pursuant to the PAA Order that began on August 1, 2006, or while the evidentiary proceeding is pending, be readjusted pursuant to any order arising from a hearing.

*ii. Petitioners' Motion*

In support of their Motion, the Petitioners assert that on August 29, 2006, counsel e-filed their Protest approximately five minutes before 4:00 p.m. Central Standard Time, the time zone in which Petitioners' counsel operates. According to the Petitioners, counsel was immediately notified by our Commission Clerk that their filing was after business hours, and the Protest would be considered filed on August 30, 2006.

The Petitioners request that we consider their Protest as timely filed. The Petitioners state that they intended to oppose the PAA Order. Furthermore, the Petitioners assert that their Protest was filed on the 21st day of the protest period and within three to four minutes of the deadline. The Petitioners claim that the untimely filing was not the result of purposeful neglect or delay; rather, it was the logistical impossibility of synchronizing clocks across the state with those of this Commission.

*iii. BellSouth's Response in Opposition to Motion*

BellSouth requests that we deny the Petitioners' Motion. BellSouth supports its position by citing relevant rules and statutes. BellSouth notes that the PAA Order clearly indicates the protest deadline was by close of business on August 29, 2006. BellSouth further notes Rule 28-106.111(2), Florida Administrative Code, which provides

[u]nless otherwise provided by law, persons seeking a hearing on an agency decision which does or may determine their substantial interests shall file a petition for hearing within 21 days of the receipt of written notice of the decision.

Furthermore, Rule 28-106.111(4), Florida Administrative Code, provides that "[a]ny person who receives written notice of any agency decision and who fails to file a written request for a hearing within 21 days waives the right to request a hearing on such matters." BellSouth also cites Section 120.569(2)(c) which states "[a] petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed."

BellSouth points out that the Petitioners acknowledge that they filed the Protest after the deadline and therefore there is no dispute that it is untimely. BellSouth contends that the

Petitioners' reason for considering its Protest is insufficient and does not constitute excusable neglect.<sup>2</sup>

BellSouth further contends that this Commission does not have the discretion to consider an untimely filed protest. In Cann v. Department of Children and Family Services (DCF), 813 So.2d 237 (Fla. 2d DCA 2002), DCF denied the petitioners' request because it was undisputed that the request was untimely. On appeal, the Second District Court of Appeal rejected the availability of the doctrine of excusable neglect to cure an untimely protest of an agency decision. (See also Whiting v. Florida Department of Law Enforcement, 849 So.2d 1149 (Fla. 5th DCA 2003) and In re: Complaint GHF Associates against Southern Bell Telephone and Telegraph Company regarding billing for ESSX service, Docket No. 910486-TL, Commission Order No. 24971, issued August 26, 1991).

In addition, BellSouth contends that the doctrine of equitable tolling is not applicable in this instance because the Petitioners have failed to allege that they have "been misled or lulled into inaction, [have] in some extraordinary way been prevented from asserting [their] rights, or [have] timely asserted [their] rights mistakenly in the wrong forum." Machules v. Department of Administration, 523 So.2d 1132, 1134 (Fla. 1988); see also, Cann, 813 So.2d at 239.

*iv. BellSouth's Response in Opposition to Protest*

According to BellSouth, it filed its Response to the Protest in an abundance of caution and in the event we decide to consider the Petitioners' untimely Protest. BellSouth incorporates the arguments made in its Response to the Petitioners' Motion and contends that this Commission should reject the Protest for the sole reason that it is untimely.

In addition to the Protest being untimely, BellSouth argues that the Petitioners failed to provide an explanation of how their substantial interests will be affected by the proposed agency action. Therefore, BellSouth contends that the Petitioners fail to adequately allege standing for an administrative hearing. BellSouth further contends that we do not have the jurisdiction to entertain class actions. Also, BellSouth argues that the Petitioners' Protest fails to comply with the requirements of Rule 28-106.201(2)(b) and (f), Florida Administrative Code, because the Protest does not include a citation or mention any rule or statute that requires the reversal or modification of the PAA Order. Furthermore, the Protest does not include the addresses and telephone numbers of the Petitioners. BellSouth concludes that the Protest should be dismissed because it fails to substantially comply with the provisions of Rule 28-106.201(2)(b), Florida Administrative Code.

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<sup>2</sup> Excusable neglect is defined as "[a] failure – which the law will excuse – to take some proper step at the proper time [...] not because of the party's own carelessness, inattention, or willful disregard of the court's process, but because of some unexpected or unavoidable hindrance or accident [...]" Black's Law Dictionary, Garner, 7th ed., at p. 1055.

**B. Petitioners' Untimely Protest**

This matter is governed by Section 120.569(2)(c), Florida Statutes, which addresses decisions affecting substantial interests and provides in pertinent part that

[u]pon receipt of a petition or request for hearing, the agency shall carefully review the petition to determine if it contains all the required information. A petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed.

Additionally, the requirements for a written petition are contained in Rule 28-106.201(2), Florida Administrative Code. Subsection (4) of Rule 28-106.201, Florida Administrative Code, reiterates that a petition shall be dismissed if it is not in substantial compliance with the requirements of subsection (2) or if it has been untimely filed. Generally, Rule 28-106.111(4), Florida Administrative Code, states that any person who receives written notice of an agency's decision and fails to seek a hearing within 21 days waives his right to a hearing on the matter.

*i. Doctrine of Equitable Tolling*

The Florida Legislature very recently carved out an exception in Section 120.569(2)(c), Florida Statutes, to make available "equitable tolling as a defense to the untimely filing of a petition."<sup>3</sup> In the instant case, there is no dispute that the Petitioners filed their Protest after the deadline, which was clearly set forth in the PAA Order. The Petitioners acknowledge as much in their Motion in which they request this Commission to consider the Protest despite its late filing. This alone amounts to a waiver of the right to a hearing.

The ultimate issue in this case is whether equitable tolling applies to excuse the late filing. Equitable tolling was traditionally defined as "the doctrine that the statute of limitations will not bar a claim if the plaintiff, despite diligent efforts, did not discover the injury until after the limitations period had expired." Black's Law Dictionary, Garner, 7th ed., at p. 560. In *Machules v. Department of Admin.*, 523 So. 2d 1132 (Fla. 1988), which was cited by BellSouth, the Supreme Court of Florida explained the doctrine as follows:

The doctrine of equitable tolling was developed to permit under certain circumstances the filing of a lawsuit that otherwise would be barred by a limitations period. [...] The tolling doctrine is used in the interests of justice to accommodate both a defendant's right not to be called upon to defend a stale claim and a plaintiff's right to assert a meritorious claim when equitable circumstances have prevented a timely filing. Equitable tolling is a type of equitable modification which "focuses on the plaintiff's excusable ignorance of the limitations period and on [the] lack of prejudice to the defendant." Id. at 1133-34. [citations omitted]

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<sup>3</sup> Section 120.569(2)(c), Florida Statutes, was amended to include this language recognizing equitable tolling as a defense by Chapter 2006-82, Section 6, at 11, Laws of Florida.

A review of this Commission's treatment of late-filed petitions and motions for reconsideration over the past 15 years reflects that this Commission has generally applied the principles of equitable tolling in determining whether to allow them. Thus as a general rule, this Commission typically allows late-filed petitions and motions, where the specific facts of the case satisfy the principles of equitable tolling, i.e., where "equitable circumstances have prevented a timely filing." *Id.*

We have noted in prior cases that "[a]lthough the plain meaning of the pertinent statutes and rules mandate that untimely petitions for hearing should not be considered, we and the courts in some instances allowed equitable tolling to excuse an untimely petition."<sup>4</sup> Additionally, the courts "have consistently held that the late filing of a request for an administrative hearing is not a jurisdictional defect." *Machules* at 238. Nonetheless, in exercising our jurisdiction we shall only accept an untimely protest if a party successfully argues that equitable tolling applies.

ii. Commission Precedent

Before reviewing some earlier equitable tolling cases, it is worth emphasizing that the doctrine of equitable tolling creates an *exception* to the general rule that untimely filings are invalid. To successfully invoke the doctrine, the party must demonstrate persuasively that the circumstances justify the exception and this is not easy to do. Thus, there are few cases allowing late-filed petitions.

However, this Commission has applied the principles of equitable tolling to allow late-filed petitions. For example, in Docket No. 940719-TC, this Commission issued a show cause order against Vocal Motion, Inc. for, *inter alia*, operating as a pay telephone provider without a certificate. On the day its response was due, Vocal Motion faxed its Petition for a Formal Proceeding to this Commission and contacted our staff to ensure that the response was filed. Vocal Motion then learned that the rules did not allow this method of filing.<sup>5</sup> Vocal Motion delivered the curative pleadings to this Commission by overnight mail. This Commission found that under those circumstances it was "fair and appropriate" to allow the filing.<sup>6</sup>

In Docket 040208-EI, this Commission also allowed a late-filed request for hearing. In Order No. PSC-04-0743-PCO-EI, this Commission invoked the doctrine of equitable tolling to

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<sup>4</sup> In re: Application for transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to RealNor Hallandale, Inc., Docket No. 990975-SU, Order No. PSC-00-1276-FOF-SU, issued July 13, 2000, at pp. 6-7 (citation omitted); See also In re: Initiation of show cause proceedings against VOCAL MOTION, INC. for violation of Rule 25-24.510. F.A.C., Certificate of Public Convenience and Necessity Required, and Commission Order No. 24101, Docket No. 940719-TC, issued May 23, 1995, at p. 2. (This Commission ruled that "it may grant a petition for a formal proceeding even if it is untimely. Whether to grant or deny an untimely petition is within our discretion.").

<sup>5</sup> The then existing Commission rules required an original and seven copies to be timely filed. Vocal Motion presented to this Commission a facsimile copy of the original.

<sup>6</sup> Docket No. 940719-TC, Order No. PSC-95-0630-FOF-TP Order Granting Request for a Formal Proceeding, at p. 2.

grant a late-filed request for hearing when the petitioner (a consumer filing *pro se*) attempted to file via facsimile. Upon learning that the protest was late and this Commission did not accept filings by facsimile, the petitioner sent the letter of protest via overnight mail.<sup>7</sup> This Commission identified three factors as satisfying the requirements of the equitable relief:

- (1) the attempted filing was *timely* but through an unauthorized *method*;
- (2) the petitioner's remedial efforts were immediate; and
- (3) the deadline notice did not advise the petitioner that this Commission did not accept filings by fax.

Although not explicitly noted by this Commission, there was an additional factor that appears to have affected this Commission's reasoning: petitioner was a customer appearing *pro se*. Thus, it would have been both contrary to this Commission's mission and unfair to the customer to charge her with the same procedural knowledge an attorney would be expected to have.

In summary, this Commission, in both of these cases, appears to have relied on the petitioners' good faith efforts to file on time (i.e., that the responses were timely presented to this Commission in the wrong form),<sup>8</sup> lack of knowledge as to this Commission's filing policies, (the responses were the petitioners' initial formal filings with this Commission), and overall context in which the equitable relief supported the focused exercise of this Commission's jurisdiction (the certification and regulation of telephone companies and addressing a specific customer complaint).

These cases are distinguishable from the instant case in at least three ways. First, the petitioners did not know that filing by facsimile was an unacceptable means until after the protest deadline had passed. In this case, the Petitioners were aware of the filing requirements prior to the deadline. It is important to note Rule 28-106.104(8), Florida Administrative Code, which provides that

[a]ny party who elects to file any document by electronic transmission shall be responsible for any delay, disruption, or interruption of the electronic signals and accepts the full risk that the document may not be properly filed with the clerk as a result.

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<sup>7</sup> In re: Consumer complaint against Florida Power & Light Company by Leticia Callard, Docket 040208-EI, Order Granting Late-Filed Request for Hearing, issued August 3, 2004, at p. 7.

<sup>8</sup> Compare with Docket No. 060038-EI, In re: Petition for issuance of storm recovery financing order, by Florida Power & Light Company, in which the prehearing officer allowed a motion for reconsideration that was filed electronically one minute beyond the deadline. In that case, FPL contemporaneously filed the motion for reconsideration with a motion for oral argument. The motion for oral argument was timely received. The prehearing officer determined that the motion for oral argument incorporated the motion for reconsideration and held, therefore, that the motion for reconsideration had been timely filed as a matter of fact. Therefore, the decision was not based on the doctrine of equitable tolling.

Hence, pursuant to Commission rules, the Petitioners assumed the risks associated with e-filing. Moreover, their inability to “synchronize their clocks” with this Commission’s is not an extraordinary circumstance worthy of applying the doctrine of equitable tolling.

Second, in the above cases the petitioners did file timely; they just did not file originals and copies as required by the rule. In this case, the attorneys for the customers did not file anything on time.

Third, in the above cases the procedural error was the initial pleading of the petitioners, and in one case the petitioner was a non-attorney customer. The issue here is whether a party can reasonably claim “clean hands” in requesting equitable relief from a clear procedural deadline. Because the above cases involved initial pleadings and involvement with this Commission’s procedural rules about the *method* of filing, this Commission may reasonably infer “excusable ignorance.”

In the instant case, the attorneys cannot claim “clean hands” in the sense that they have not complied with the uniform rules that this Commission is obligated to follow and enforce. Attorneys appearing before this Commission have the duty to know and comply with the uniform rules, as well as the applicable specific rules of this Commission. The attorneys for the Petitioners have not met this duty. For example, not only did they file late, the protest they attempted to file does not substantially comply with Rule 28-106.201(2)(b), Florida Administrative Code. Thus, the Petitioners cannot make a legitimate claim to the defense of equitable tolling.

This view of “clean hands” may appear severe, but it is not gratuitous. Under Section 120.569(2)(c), Florida Statutes, we are required to “carefully review” the petition to determine if it meets the requirements of the uniform rules; moreover, if the petition does not substantially the requirements, this Commission *must* dismiss the petition without prejudice. The problem here is that the attorneys for the Petitioners filed late an ill-pled petition that this Commission would be obligated to dismiss had it been filed timely. These are not circumstances under which this Commission may reasonably infer “excusable ignorance.”

Commission precedent disallowing late-filed petitions does not support the Petitioners’ motion either. For example, in Order No. PSC-00-1276-FOF-SU, this Commission dismissed a protest that was 27 days late, and the explanation offered as to why this Commission did not receive the protest before the protest deadline was that it had been lost in the mail. In that case, the doctrine of equitable tolling was not applied because this Commission found that the petition at issue was facially insufficient “to provide an equitable basis to excuse his untimely filing.” Furthermore, this Commission found that the petitioner had not been “misled or lulled into inaction, or in some extraordinary way been prevented from asserting his rights. Nor does excusable ignorance excuse Mr. Miceli from filing his protest in a timely fashion.”<sup>9</sup>

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<sup>9</sup> Docket No. 990975-SU, Order Dismissing Late-Filed Protest, issued July 13, 2000, at p. 9.



For similar reasons, in Order No. PSC-98-0029-PCO-GU, this Commission denied an untimely protest for failure to show good cause where the petitioner did not provide an explanation as to why the protest was not timely filed.<sup>10</sup>

*iii. Summary*

In summary, the circumstances of the instant case are such that equitable tolling should not apply. We recognize that denying the Petitioners' Protest on the basis that it is untimely may appear harsh; however, the relevant rules and case law support denial.

For example, in Cann the court stated that “[g]enerally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.” Cann citing Machules at 1134. The court concluded that those three circumstances did not exist because the agency’s notice was proper, the petitioners were aware of the correct forum, and two days for the postal delivery of a letter is not “extraordinary.” Cann at 239.

Equitable tolling does not apply in the instant case for the very same reasons. First, the PAA Order’s notice was clear on the deadline for filing protests and that the protests must be received by this Commission’s Clerk by close of business on the date the protest period ends. Second, the Petitioners were aware of the forum in which they should file.<sup>11</sup> Third, their excuse for the untimely filing, i.e. the inability to synchronize clocks across the state with that of this Commission’s, is not an extraordinary circumstance that would prevent them from exercising their right to protest.

There were no circumstances in this case that would have misled or lulled the Petitioners into inaction. Nothing prevented the Petitioners from filing prior to the 21st day or earlier in the day for that matter. Petitioners waited until the last minutes before the deadline to file. Moreover, the Petitioners’ Motion does not allege the defense of equitable tolling to excuse their late-filed Protest. Based upon the pleadings alone, equitable tolling does not apply in this case. Therefore, the Protest shall be denied.<sup>12</sup>

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<sup>10</sup> In re: Application for rate increase by City Gas Company of Florida, Docket No. 960502-GU, Order Denying Protest, issued January 5, 1998, at p. 4.

<sup>11</sup> We note that the same Petitioners’ counsel has practiced before the Commission since March 2005.

<sup>12</sup> The Petitioners’ alternative request, *i.e.*, for this matter to be returned to the 11th Judicial Circuit Court in Miami-Dade County, is implicitly granted. According to the Petitioners, the proceeding before the Court was dismissed and abated pending an outcome by this Commission. This Commission’s findings in Order PSC-06-0685-PAA-TL resolved the issues brought by the initial Complaint. There is no need for this docket to be abated pending any proceeding in the Court. The Petitioners’ administrative remedies have been exhausted; therefore, there is no need for this docket to be abated.

**III. DECISION**

We hereby deny the Petitioners' Protest on the basis that it is untimely. Moreover, the Protest does not substantially comply with Rule 28-106.201(2)(b), Florida Administrative Code. Therefore, this matter shall not be set for an administrative hearing and Proposed Agency Action Order PSC-06-0685-PAA-TL is made final and effective.

Accordingly, there is no further action for this Commission to take. Therefore, this docket shall be closed.

Based upon the foregoing, it is

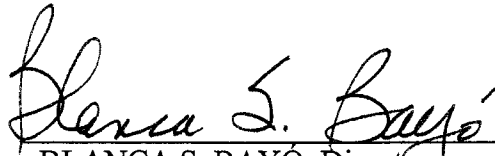
ORDERED by the Florida Public Service Commission that the Petitioners' Protest of Proposed Agency Action Order No. PSC-06-0685-PAA-TL is denied. It is further

ORDERED that this matter shall not be set for an administrative hearing. It is further

ORDERED that Proposed Agency Action Order No. PSC-06-0685-PAA-TL is hereby rendered final and effective. It is further

ORDERED that this docket shall be closed.

By ORDER of the Florida Public Service Commission this 6th day of December, 2006.

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

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, Florida Administrative Code; or 2) judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or the First District Court of Appeal in the case of a water and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.