

MEMORANDUM

SEPTEMBER 29, 1997

RECEIVED

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FPSC - Records/Reporting

TO: DIVISION OF RECORDS AND REPORTING

FROM: DIVISION OF LEGAL SERVICES (KEATING) *WAC RVE*

RE: DOCKET NO. 970365-GU - COMPLAINT OF MOTHER'S KITCHEN LTD.
AGAINST FLORIDA PUBLIC UTILITIES COMPANY REGARDING
REFUSAL OR DISCONTINUANCE OF SERVICE

PSC-97-1133-FOF-GU

Attached is a NOTICE OF PROPOSED AGENCY ACTION ORDER DENYING COMPLAINT to be issued in the above referenced docket. (Number of pages in order - 12)

WCK/js

Attachment

cc: Division of Consumer Affairs (Durbin, Plescow)

Division of Electric and Gas (Dillmore, Makin, Lowery)

I:970365or.wck

see 2

*forwarded
marked 1*

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of Mother's
Kitchen Ltd. against Florida
Public Utilities Company
regarding refusal or
discontinuance of service.

DOCKET NO. 970365-GU
ORDER NO. PSC-97-1133-FOF-GU
ISSUED: September 29, 1997

The following Commissioners participated in the disposition of
this matter:

JULIA L. JOHNSON, Chairman
J. TERRY DEASON
SUSAN F. CLARK
DIANE K. KIESLING
JOE GARCIA

NOTICE OF PROPOSED AGENCY ACTION
ORDER DENYING COMPLAINT

BY THE COMMISSION:

NOTICE is hereby given by the Florida Public Service
Commission that the action discussed herein is preliminary in
nature and will become final unless a person whose interests are
substantially affected files a petition for a formal proceeding,
pursuant to Rule 25-22.029, Florida Administrative Code.

Case Background

On September 17, 1996, Mr. Anthony Brooks II filed a complaint
with this Commission's Division of Consumer Affairs ("CAF") against
Florida Public Utilities Company ("FPUC" or "Company"). Mr. Brooks
claimed that gas service to his business, Mother's Kitchen
Restaurant ("Mother's Kitchen"), was improperly disconnected by
FPUC. The following correspondence was provided to CAF:

- On September 20, 1996, CAF received a letter from Mr. Brooks
that set forth the allegations of his complaint against FPUC
("initial written complaint").

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FPSC-RECORDS/REPORTING

- By letter dated September 19, 1996, FPUC responded to the complaint ("initial response").
- On November 6, 1996, CAF received by fax a letter from Mother's Kitchen that set forth allegations of specific rules violations by FPUC ("second written complaint").
- By letter dated November 26, 1996, FPUC responded to each specific allegation ("second response").
- By letter dated November 30, 1996, Mother's Kitchen offered rebuttal to FPUC's letter of November 26 ("November 30 letter").

An informal conference concerning the complaint was held February 24, 1997, ("first informal conference") and was attended by representatives from Mother's Kitchen ("Complainants"), FPUC, and CAF. The Complainants stated then that they sought payment from FPUC of \$862.00, which included mostly amounts paid on its account for service received, and sanctions against the Company. The parties did not reach a settlement agreement at the informal conference.

This Commission heard discussion concerning this complaint at our May 6, 1997, agenda conference. We voted to approve our staff's recommendation but later voted to reconsider our decision when we learned that the Complainants had arrived to present their case. At agenda, the Complainants alleged, for the first time in this proceeding, that they had paid FPUC \$500 on July 11, 1996, as a security deposit for a new account for Mother's Kitchen. We deferred a decision on the matter to allow our staff additional time to investigate this new allegation. In addition, we instructed our staff to further investigate the circumstances surrounding FPUC's refusal to reconnect service to Mother's Kitchen on September 13, 1996.

Commission staff from CAF, the Division of Electric and Gas, and the Division of Legal Services conducted an informal meeting with the Complainants and FPUC in Orlando, Florida, on July 7, 1997 ("second informal conference", for the purpose of obtaining additional information and to discuss the possibility of settlement. The parties did not reach a settlement agreement. The Complainants seek payment of \$1,072.72 and sanctions against the Company.

Mother's Kitchen Ltd. ("MKL") is a partnership between Mr. Alfred Byrd, Ms. Daniele M. Dow, Mr. Eddie Hodges, and Mr. Arthur Brooks. Mr. Anthony Brooks II represents the partnership interest of his wife, Daniele M. Dow. The partnership was created for the purpose of operating Mother's Kitchen.

According to its records, FPUC received on March 21, 1996, a deposit of \$200.00 to establish an account for Mother's Kitchen. On March 22, 1996, FPUC commenced service for the account in the name of Alfred Byrd, d/b/a Mother's Kitchen. At no time was the account listed in any other manner.

During the term of Mother's Kitchen's account with FPUC, a dispute arose between Mr. Alfred Byrd and his partners. This dispute concerned, in part, control over the account. The Complainants allege that FPUC improperly established the account in Mr. Byrd's name. (Although Mr. Byrd allegedly did not participate in the day-to-day operations of Mother's Kitchen after July 11, 1996, he remained a partner. The complaining partners -- all of the partners except Mr. Byrd -- are simply referred to as "Complainants" in this Order.)

During the months of June, July, and August, 1996, the Mother's Kitchen account accrued past due balances for gas service. In each of those months, Mother's Kitchen made last minute payments to avoid discontinuance of service.

On September 12, 1996, FPUC discontinued service to Mother's Kitchen due to nonpayment of past due amounts for service received. Payments of \$230.04 for past due amounts and \$31.00 for a reconnect fee were made later that day by the Complainants, and FPUC scheduled reconnection for the following morning. Early the following morning, Mr. Byrd requested that FPUC disconnect service to Mother's Kitchen. The gas service was not reconnected that day. The Complainants allege that FPUC improperly disconnected, or failed to reconnect, gas service to Mother's Kitchen.

Establishment of the Original Account

The Complainants allege that the Mother's Kitchen account was inappropriately established in the name of Alfred Byrd. The Complainants cite Rule 25-7.083(4)(a), which provides that "[e]ach utility having on hand deposits from customers . . . shall keep records to show the name of each customer making the deposit." Throughout its written complaints, the Complainants asserted that

Mr. Anthony Brooks, in the presence of Mr. George Byrd, Mr. Leonard Brooks, and Mr. Alfred Byrd, presented to FPUC a security deposit of \$200 to establish gas service for Mother's Kitchen. The Complainants further asserted that they presented to FPUC, with the deposit, a Department of Revenue license naming Alfred Byrd, Eddie Hodges, and Daniele Dow-Brooks as owners of Mother's Kitchen. The Complainants claimed that Mr. Alfred Byrd was left by the others to obtain a receipt for the deposit, and, at that time, FPUC inappropriately placed his name on the receipt as the customer-of-record. The Complainants seek a full refund of this deposit.

The Complainants later gave statements that contradicted their written complaints. Mr. Anthony Brooks stated at the second informal conference that he and Mr. Harry Johnson accompanied Mr. Byrd to FPUC's office and left Mr. Byrd there with \$200 to use as a security deposit for gas service.

FPUC maintains that on March 21, 1996, a cash deposit was made in person by Mr. Byrd alone. FPUC asserts that it was provided no documentation showing the organization of Mother's Kitchen or the involvement in the business of individuals other than Mr. Byrd at any time before discontinuance of service on September 13, 1996. FPUC provided us copies of the deposit receipt and a work order for connection of service at Mother's Kitchen, signed by Mr. Byrd.

We find that FPUC acted in compliance with all applicable statutes and Commission rules concerning establishment of service and customer deposits. We believe that the deposit receipt on file with FPUC is the best evidence of who established the account. The deposit receipt for this account indicates that the account was established in the name of Alfred Byrd d/b/a Mother's Kitchen. In addition, the work order for connection of service displays the signature of Alfred Byrd.

Further, we find that FPUC should not be required to provide a refund of all or any part of the deposit made on the Mother's Kitchen account. The deposit was properly applied toward an outstanding balance of \$310.75 on September 19, 1996, leaving an unpaid balance of \$110.75. (After a subsequent payment by Mr. Byrd, the current account balance is \$88.00.)

Establishment of a New Account

As previously stated, the Complainants alleged at the May 6, 1997, agenda conference, that they paid FPUC \$500 on July 11, 1996,

as a security deposit for a new account for Mother's Kitchen. The Complainants claimed that they made a \$524 payment on July 11, 1996, \$500 of which was intended as a deposit for a new account and \$24 of which was intended to cover a charge for service to a restaurant appliance. Mr. Anthony Brooks stated that FPUC provided him a receipt for this payment but that the receipt did not indicate it was a deposit receipt. FPUC responded by claiming that they have no record of a \$524 payment made on the Mother's Kitchen account at any time.

We can only conclude that a \$524 payment or \$500 security deposit was not made by the Complainants to FPUC on July 11, 1996. FPUC's records do not indicate any such payment or deposit, and the Complainants have not produced a canceled check or a receipt as proof of this payment. In addition, no evidence exists to indicate that Mother's Kitchen owed \$24 on July 11, 1996, for service to a restaurant appliance.

Since the May 6, 1997, agenda conference, the Complainants have alleged that they paid a \$500 security deposit in August 1996, rather than July. At the second informal conference, Mr. Anthony Brooks insisted that he paid \$521.72 on August 28, 1996, \$500 of which was intended as a deposit for a new account and \$21.72 of which was intended to cover a service charge on the account. Mr. Brooks stated that FPUC provided him a receipt for this payment but that the receipt did not indicate it was a deposit receipt.

FPUC's records show a \$521.72 credit to the account on August 28, 1996. FPUC maintains that this credit consists of a \$231.72 cash payment (to cover a returned check and returned check charge) made on August 28, 1996 and a \$290 cash payment (to pay arrears) made on August 12, 1996. FPUC acknowledges that the \$290 payment should have been credited to the account on August 12, 1996, when it was made. FPUC claims that the payment was received late in the day and was placed in the office manager's petty cash box; the Company then corrected this error by crediting the account at the time the \$231.72 payment was received on August 28, 1996.

Again, we can only conclude that a \$521.72 payment or \$500 security deposit was not made to FPUC on August 28, 1996. The Complainants have not produced a canceled check or a receipt as proof of this payment. Furthermore, at the first informal conference, Mr. Anthony Brooks stated that the Complainants had, at one time, made a cash payment of \$231.72 to FPUC to cover a returned check and returned check charge; this statement clearly

supports and is consistent with FPUC's position. Finally, no evidence exists to indicate that Mother's Kitchen owed a \$21.72 service charge to FPUC on August 28, 1996. Although FPUC admittedly mishandled the \$290 payment made August 12, 1996, it clearly corrected its error before it was reflected in any billing statement or resulted in any threat of discontinuance of service.

Further, we note that the Complainants' previous statements contradict the allegation that they provided a \$500 security deposit to FPUC. In an undated letter to FPUC, Mr. Anthony Brooks, on behalf of the partnership, wrote

[FPUC demanded] that we pay for a bad check Mr. Byrd had wrote (sic) them, pay off Mr. Byrd's bill and then pay \$500.00 additional to have the gas restored. Only after arguments and threats of legal action did they finally except (sic) the fact that they could not make us do both. Accordingly at their request and to prevent further loss of revenue did we pay for Mr. Byrd's bad check and bring the bill current.

In addition, in the initial written complaint, Mr. Anthony Brooks wrote

Diane [FPUC's Sanford Office Manager] stated[,] when we said we would open another account[,] that we would have to pay \$500.00 plus pay Mr. Byrd's bill and pay for a bad check Mr. Byrd had given them. . . . [We] told them we would do one or the other but not both. Diane and Dino [FPUC's Division Manager] then said they would allow service to remain in the company's name as it was if we paid for Mr. Byrd's bad check and paid on his back bill since it was in Mother's Kitchen name.

(Emphasis supplied by original author.) These statements also dispel the notions that the Complainants intended any payment to be applied as a security deposit for a new account or were led to believe that any payment would be so applied.

Based on the foregoing, we find that the Complainants did not make a deposit of \$500 at any time to establish a new account and, therefore, that FPUC acted in compliance with all applicable

statutes and Commission rules concerning establishment of service and customer deposits.

Disconnection and Refusal to Reconnect Service

In its second written complaint, the Complainants cite five subsections of Rule 25-7.089, Florida Administrative Code, that were allegedly violated by FPUC. We find that FPUC acted in compliance with each of the rules cited by the Complainants, as stated below. Accordingly, we find that FPUC should not be required to provide a refund of any amounts paid for service or fees on the Mother's Kitchen account.

1. The Complainants allege that FPUC violated Rule 25-7.089(2)(g), Florida Administrative Code, which provides that a utility may refuse or discontinue service "[f]or nonpayment of bills . . . only after there has been a diligent attempt to have the customer comply, including 5 working days' written notice to the customer, such notice being separate and apart from any bill for service."

In its second response, FPUC states that a disconnect notice for September 10, 1996, in the amount of \$230.04 was mailed to the Complainants at the restaurant's physical address on August 30, 1996. FPUC provided us a copy of that notice. FPUC states that payment was not made on the account, and service was disconnected on September 12, 1996.

We find that FPUC acted in compliance with Rule 25-7.089(2)(g), Florida Administrative Code. The copy of the notice provided by FPUC clearly shows that it was sent in the time frame required by the Rule. The Complainants contend they never received this notice. They assert that the U.S. Postal Service was rerouting mail from FPUC to Mr. Byrd's personal post office box because Mr. Byrd's name appeared on the bill. Even if this assertion is true, FPUC cannot be held responsible for the U.S. postal service's routing of properly addressed mail.

2. The Complainants allege that FPUC violated Rule 25-7.089(3), Florida Administrative Code, which provides that "[s]ervice shall be restored when cause for discontinuance has been satisfactorily adjusted." They allege that FPUC's serviceman intentionally damaged a control knob, thereby creating a leak on the restaurant's stove, in order to avoid reinstating service on the account after payment of past due amounts and a reconnect fee

was made on September 12, 1996. The Complainants allege that they wanted the service reconnected and offered to pay for any repair necessary to reinstate service, but FPUC's serviceman refused.

The FPUC serviceman sent to reconnect service, Mr. Bill McDaniel, provided a signed statement concerning the events that occurred on September 12, 1996. Mr. McDaniel stated that a meter test on the gas line revealed a leak somewhere on the Complainants' side of the meter. Mr. McDaniel further stated that, after inspection, he discovered that the threads of an oven pilot adjustment screw were worn out, allowing gas to leak. Mr. McDaniel stated that Mr. Anthony Brooks refused his offer to attempt to repair the leak, so Mr. McDaniel capped and plugged the gas line to the range. According to Mr. McDaniel, Mr. Brooks refused to sign the Hazardous Condition Report and red tag prepared by Mr. McDaniel. FPUC provided a copy of the Hazardous Condition Report which indicates that the customer refused to sign it. Mr. McDaniel stated that the only other gas appliance did not appear to be leaking gas. When he returned to his truck, Mr. McDaniel was called by the FPUC office and told to turn off the meter and lock it, which he then did.

At the second informal conference, FPUC explained its decision to not reconnect service to Mother's Kitchen on September 13, 1996. Management at FPUC's Sanford office contacted Mr. Darryl Troy, an FPUC vice president, to discuss the situation that morning. After being advised of the circumstances, Mr. Troy ordered that service be disconnected for the following reasons: (1) there was a leak and a dangerous condition; (2) the Complainants refused to sign the Hazardous Condition Report prepared by FPUC's serviceman and refused to authorize repair of the leak; (3) Mr. Byrd had requested early that morning that service on the account be terminated; and (4) the account had been in arrears since the due date of the first payment.

We find that Mr. Troy, based on the information provided to him, made a reasonable management decision to refuse to reconnect service to Mother's Kitchen. First, FPUC's serviceman located a gas leak, which the Complainants refused to acknowledge by refusing to sign a hazardous condition report prepared by the serviceman. Rule 25-7.089(2)(h), Florida Administrative Code, provides that a utility may refuse or discontinue service "[w]ithout notice in the event of a condition known to the utility to be hazardous." Second, the customer-of-record, Mr. Byrd, requested that the account be terminated. We believe that FPUC's decision to follow

the instructions of the customer-of-record was reasonable. FPUC was placed in the middle of a partnership dispute over control of the account; we believe it would be inappropriate to find that FPUC improperly refused to reconnect service under the circumstances.

We note two final points on this subject. First, FPUC's Sanford office manager, Ms. Diane Keitt, telephoned Mr. Anthony Brooks on the morning of September 13, 1996, to inform him that Mr. Byrd had requested disconnection of service. During the conversation, Ms. Keitt advised Mr. Brooks that FPUC would leave the account on for three days to allow Mr. Brooks time to establish a new account. After this conversation, Mr. Troy was notified of the gas leak at Mother's Kitchen and the Complainants' refusal to sign a hazardous condition report. We are unaware whether Ms. Keitt informed Mr. Troy of her offer to Mr. Brooks before Mr. Troy ordered the serviceman not to reconnect service. In any event, we believe that FPUC properly refused to reconnect service immediately due to the presence of a gas leak and the Complainants' failure to acknowledge the hazardous condition.

Second, there is no evidence to indicate that FPUC's serviceman intentionally created a gas leak on an appliance at Mother's Kitchen in order to avoid reconnecting service. Pursuant to Rule 25-7.037, Florida Administrative Code, gas utilities are required to make a general inspection and adjustment of all appliances affected by a change in character of service, including a change in gas pressure or any other condition or characteristic which would impair the safe and efficient use of the gas in the customer's appliances. Such an inspection is required for safety purposes after any outage or disconnection of service. FPUC's serviceman stated that, while performing a safety inspection before reconnecting service at Mother's Kitchen on September 13, 1996, he conducted a meter test which revealed the presence of a leak. Searching for the leak, he removed the side plate of the range, recognized the odor of gas, soaped the valves and fittings, and located the leaking part. We believe that the serviceman was simply performing his job and was not creating leaks.

3. The Customer alleges that FPUC violated Rule 25-7.089(5), Florida Administrative Code, which provides that "[i]n case of refusal to establish service, or whenever service is discontinued, the utility shall notify the applicant or customer in writing of the reason for such refusal or discontinuance."

In its second response, FPUC states that it never refused service to the Complainants. FPUC asserts that Mr. Byrd requested service on the account be terminated on September 13, 1996. FPUC further asserts that the Complainants did not provide the deposit required to establish service under a new account.

We are uncertain as to what exactly the Complainants' allegation relates. If, as FPUC appears to assume, the allegation relates to refusal of service, we find that FPUC acted in compliance with the Rule. After Mr. Byrd requested termination of service on the account on September 13, 1996, the Complainants had the opportunity to establish service under a new account, provided they pay the necessary deposit, but they chose not to do so. If the allegation relates to discontinuance of service for nonpayment, we find that FPUC acted in compliance with the Rule for reasons stated previously. If the allegation relates to discontinuance of service at the request of Mr. Byrd, we find that the Rule is inapplicable. When a customer voluntarily requests discontinuance of service from a utility, the utility is not required to notify that customer of the discontinuance. Rule 25-7.089(5), Florida Administrative Code, is not intended to govern voluntary disconnections.

4. The Complainants allege that FPUC violated Rule 25-7.089(6)(a), Florida Administrative Code. Rule 25-7.089(6) lists grounds which do not constitute sufficient cause for refusal or discontinuance of service to an applicant or customer. Subparagraph (a) of the Rule provides that one of those grounds is "[d]elinquency in payment for service by a previous occupant of the premises unless the current applicant or customer occupied the premises at the time the delinquency occurred and the previous customer continues to occupy the premises and such previous customer will receive benefit from such service."

In its second response, FPUC states that the Complainants were not refused service because of the delinquency of a previous tenant. FPUC notes that the account was not delinquent on September 13, 1996, when Mr. Byrd requested termination. FPUC also notes that Mr. Byrd was the "current tenant" through September 13, 1996.

We find that Rule 25-7.089(6)(a), Florida Administrative Code, is inapplicable to this situation. Mr. Byrd was the customer-of-record and "current occupant" from the inception of the Mother's Kitchen account until he requested disconnection on September 13,

1996. The Complainants never opened an account separate from the original Mother's Kitchen account.

At the first informal conference, Mr. Anthony Brooks stated that he paid FPUC \$160 toward the account balance on July 11, 1996. At that time, according to Mr. Brooks, a new account should have been initiated in the Complainants' names. Clearly, however, FPUC is not restricted to accept payment on an account only from the account's customer-of-record. If an individual other than Mr. Byrd made payments on the Mother's Kitchen account, a new account would not automatically be opened for that individual, nor would that individual automatically become the customer-of-record.

5. The Complainants allege that FPUC violated Rule 25-7.089(6)(e), Florida Administrative Code. This Rule states that one of the grounds which does not constitute sufficient cause for refusal or discontinuance of service is "[f]ailure to pay the bill of another customer as guarantor thereof." In its second response, FPUC notes that Mr. Byrd was the customer-of-record and the account was not delinquent on September 13, 1996.

We find that Rule 25-7.089(6)(e), Florida Administrative Code, is inapplicable to this situation. Mr. Byrd was the customer-of-record on this account from inception until termination. There is no allegation and no evidence that the Complainants were guarantors of the Mother's Kitchen account.

6. We note that the Complainants also allege that FPUC violated Rule 25-7.048, Florida Administrative Code, concerning continuity of service. This Rule concerns unplanned service interruptions, not the type of planned discontinuance of service at issue in this docket. This Rule is inapplicable to this situation.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that Florida Public Utilities Company properly established service in the name of Alfred Byrd, d/b/a Mother's Kitchen, and managed the deposit for the Mother's Kitchen account in compliance with Commission rules concerning customer deposits. It is further

ORDERED that Florida Public Utilities Company administered the Mother's Kitchen account in compliance with Commission rules concerning refusal or discontinuance of service and all other applicable Commission rules. It is further

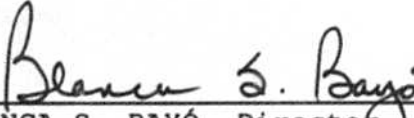
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ORDERED that Florida Public Utilities Company shall not be required to provide a refund of all or any part of the deposit made on the Mother's Kitchen account or any amounts paid for service or fees on the Mother's Kitchen account.

ORDERED that the provisions of this Order, issued as proposed agency action, shall become final and effective unless an appropriate petition, in the form provided by Rule 25-22.036, Florida Administrative Code, is received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings or Judicial Review" attached hereto. It is further

ORDERED that in the event this Order becomes final, this Docket shall be closed.

By ORDER of the Florida Public Service Commission this 29th day of September, 1997.



BLANCA S. BAYÓ, Director
Division of Records and Reporting

(S E A L)

WCK

DISSENT

Chairman Johnson and Commissioner Garcia dissent.

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.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

The action proposed herein is preliminary in nature and will not become effective or final, except as provided by Rule 25-22.029, Florida Administrative Code. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, as provided by Rule 25-22.029(4), Florida Administrative Code, in the form provided by Rule 25-22.036(7)(a) and (f), Florida Administrative Code. This petition must be received by the Director, Division of Records and Reporting, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on October 20, 1997.

In the absence of such a petition, this order shall become effective on the day subsequent to the above date as provided by Rule 25-22.029(6), Florida Administrative Code.

Any objection or protest filed in this docket before the issuance date of this order is considered abandoned unless it satisfies the foregoing conditions and is renewed within the specified protest period.

If this order becomes final and effective on the date described above, any party substantially affected may request judicial review by the Florida Supreme Court in the case of an electric, gas or telephone utility or by the First District Court of Appeal in the case of a water or wastewater utility by filing a notice of appeal with the Director, Division of Records and Reporting 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 of the effective date 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.