

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Amended petition for verified emergency injunctive relief and request to restrict or prohibit AT&T from implementing its CLEC OSS-related releases, by Saturn Telecommunication Services, Inc.

DOCKET NO. 090430-TP  
ORDER NO. PSC-09-0799-PAA-TP  
ISSUED: December 2, 2009

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman  
LISA POLAK EDGAR  
NANCY ARGENZIANO  
NATHAN A. SKOP  
DAVID E. KLEMENT

ORDER AUTHORIZING STAFF AUDIT AND GRANTING IN PART AND DENYING IN PART AT&T'S PARTIAL MOTION TO DISMISS AND NOTICE OF PROPOSED AGENCY ACTION ORDER DENYING STS' REQUEST FOR INJUNCTIVE RELIEF AND REQUEST TO RESTRICT OR PROHIBIT AT&T FROM IMPLEMENTING ITS CLEC OSS-RELATED RELEASE

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.

**I. Case Background**

Following the BellSouth and AT&T merger, AT&T began plans to migrate and consolidate the former BellSouth 9-state southeast OSS platform into a single pre-ordering and ordering operations support systems (OSS) platform for use across AT&T's 22-state region. AT&T determined that the 13-state OSS system would produce greater efficiencies for the benefit of both AT&T and its customers throughout the 22-state region.

In 2007, AT&T started the process of providing official notification to Competitive Local Exchange Carriers (CLECs) of its consolidated 22-state OSS Release plan. The plan involves a phased-in approach over several years. The first phase commenced on April 19, 2008 (April Release). On November 14, 2009, AT&T planned to implement and phase-in a front-end CLEC

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ordering interface. The interface, known as the Local Service Request Exchange System (LEX), is a web-based ordering application used for online creation, submittal, and maintenance of Local Service Requests (LSRs). The LEX interface was designed to replace the Local Exchange Navigator Service (LENS) interface currently available for use by CLECs in AT&T's 9-state region (the former BellSouth region).

On September 3, 2009, Saturn Telecommunication Services, Inc. ("STS"), a CLEC, filed an Emergency Petition for Injunctive Relief and a Request for Stay of AT&T's CLEC November 2009 OSS release. According to STS, the LEX ordering interface does not allow for the same pre-order edit-checking capabilities that are currently being provided and made available to CLECs via the LENS ordering interface. As a result, STS claims that it "will be irreparably harmed by erosion of customer confidence, inability to efficiently add, convert and service its customers on Petitioner's network, and loss of customers to Respondent [AT&T]."

On September 22, 2009, AT&T filed a Partial Motion to Dismiss and Answer and Affirmative Defenses to STS' petition. Within, AT&T asserts that the LEX interface includes additional features that are comparable to, and in some instances exactly like, the LENS interface. AT&T further denies that STS should be entitled to any relief in its petition.

On October 2, 2009, our staff conducted a conference call with the parties to present and discuss a proposed stipulation that it could recommend to this Commission. On the call, the parties agreed to review our staff's proposal and enter into discussions to resolve the issues presented in STS' petition.

After failure to resolve the issues at hand, on October 13, 2009, STS filed an Amended Petition for Injunctive Relief and Request to Restrict or Prohibit AT&T from Implementing its CLEC OSS-Related Releases. In its petition, STS claims that LEX continues to lack adequate edit checking capabilities.

In its amended petition, STS specifically requested:

- a. A Commission order to restrain or prohibit AT&T from implementing the AT&T 22-State OSS Alignment in November 2009, and/or file an action in circuit court for an injunction, until such time as AT&T can demonstrate through an independent third-party testing that they have provided pre-order edits substantially equal to what they provide to themselves in their retail order system "RNS";
- b. A Commission order requiring that AT&T Florida cannot retire LENS without this Commission's approval;
- c. A Commission order requiring that LEX has the same pre-order edits and that it has the same quality and capabilities as LENS, prior to retiring LENS;

- d. A Commission order requiring AT&T to correct any further deficiencies in LEX and Verigate which may be discovered during the course of these proceedings and as determined by this Commission through testing and otherwise, prior to the Commission's recommendation for the retirement of LENS;
- e. A Commission order prohibiting AT&T from retiring LENS until this Commission completes an audit of LEX and Verigate and AT&T corrects all deficiencies found by this Commission;
- f. A Commission order assessing penalties against Respondent pursuant to s. 364.03, Florida Statutes;
- g. A Commission order requiring that AT&T make its LENS OSS with its edit checking capabilities available to STS and other CLECs until any new OSS replacement system contains the same capabilities;
- h. A Commission order requiring that AT&T continue to provide its LENS OSS with all of its current capabilities available until such time as the Commission has verified that AT&T has complied with paragraph (e), and;
- i. A Commission order for costs and for such further relief as the Commission deems just and appropriate.

On October 23, 2009, AT&T filed a Partial Motion to Dismiss, Answer and Affirmative Defenses to STS' Amended Petition filed on October 13, 2009. In its Partial Motion, AT&T asserts the following:

- a. STS' Petition fails to state a cause of action upon which relief may be granted.
- b. STS lacks standing to allege violation of a Commission Order to which it was not a party.
- c. The provisions of s. 364.14, Florida Statutes, are not applicable to AT&T Florida and the Commission has no authority to find AT&T Florida in violation of this statute.
- d. Section 364.15, Florida Statutes, is limited solely to the provision of "basic local telecommunications services" and is not applicable to the systems at issue in the Petition.

On October 29, 2009, STS filed its response to AT&T's Partial Motion to Dismiss STS Amended Petition. In its response, STS is requesting of this Commission to deny AT&T's Partial Motion.

We are vested with jurisdiction over this matter pursuant to ss. 364.01(3) and (4)(g), F.S. Pursuant to s. 364.01(3), Florida Statutes, the Florida legislature has found that regulatory oversight is necessary for the development of fair and effective competition in the telecommunications industry. To that end, s. 364.01(4)(g), F. S., provides, in part, that this Commission shall exercise its exclusive jurisdiction in order to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior. Furthermore, it is noted that the FCC has encouraged the states to implement performance metrics and oversight for purposes of evaluating the status of competition under the Telecommunications Act of 1996.

## II. Analysis

### AT&T's Partial Motion to Dismiss

AT&T alleges that several portions of STS' Petition should be dismissed or stricken for failure to state a claim for which relief can be granted. Specifically, AT&T argues that the portion of STS' Petition seeking injunctive relief should be dismissed or stricken. AT&T contends that this Commission has acknowledged that it lacks authority to issue injunctions. Therefore, because STS' Petition seeks a remedy that we have no authority to provide, AT&T argues that portion of the Petition seeking injunctive relief should be dismissed or stricken.

AT&T further requests that the portion of STS' Petition that asks for "[a]n order for costs and for such other relief as the Commission deems just and appropriate" should also be dismissed or stricken because it has failed to state a claim for which relief can be granted. AT&T argues that this Commission has no statutory authority to award costs, and that STS has not cited any statute or contractual basis which authorizes us to award costs. AT&T argues that, as a legislative agency, we may not entertain STS' request that we act like a court and award costs. Therefore, again AT&T contends that because STS' Petition seeks a remedy that this Commission has no authority to provide, the portion of the Petition seeking costs should be dismissed or stricken.

Furthermore, AT&T contends that it is not subject to the provisions of s. 364.14, F.S., and that any allegation that AT&T violated s. 364.14(2), F.S., should be dismissed or stricken. AT&T argues that, by the express terms of s. 364.051(c), F.S., it is not subject to the provisions of s. 364.14, F.S. In its argument, AT&T cites s. 364.051(c), F.S., which states that "each company subject to this section is exempt from rate base, rate of return regulation, and the requirements of ss. 364.03, 364.035, 364.037, 364.05, 364.055, 364.14, 364.17, 364.18, and 364.19, F.S. (*Emphasis added*) Therefore, AT&T contends that as a matter of law, this

Commission cannot find that AT&T violated s. 364.14(2), F.S. because AT&T is subject to s. 364.051(c), F.S.<sup>1</sup>

Lastly, AT&T argues that STS' allegation that AT&T violated 364.15, F.S., should be dismissed or stricken. AT&T argues that the express language of s. 364.15, F.S. limits the application of the statute to "basic local telecommunications services" and, thus, it has no application to the systems at issue that AT&T provides to STS in Florida. Therefore, AT&T contends that as a matter of law, this Commission cannot find that AT&T violated s. 364.15, F.S.

#### STS Response

STS argues that assuming the allegations in the Petition are true, STS has stated a cause of action. STS contends that AT&T has taken its injunctive relief request out of context and states that what it is asking is for us to invoke our statutory right to enjoin and seek an injunction under Rule 25-22.030, Florida Administrative Code and ss. 364.015 and 364.285(2), F.S. STS further argues that it is not asking this Commission to act as a court by issuing injunctive relief and costs itself.

STS argues that AT&T is incorrect in its assertion that a request for costs is inappropriate. STS cites s. 120.69(7), F.S., which states that "[i]n any final order on a petition for enforcement, the court may award to the prevailing party all or part of the costs of litigation and reasonable attorney's fees and expert witness fees, whenever the court determines that such award is appropriate. STS asserts that it is requesting this Commission assert its order (Order No. PSC-98-1001-FOF-TP in Docket No. 980119-T) ("Supra Order") in circuit court, and in the event this Commission chooses to do so and prevails, the circuit court has the statutory authority to award attorney's fees to the prevailing parties under s.120.69(7), F.S. STS additionally argues that the parties' interconnection agreement allows for an award of reasonable attorneys' fees and costs to the prevailing party.

STS also contends, in addition to its statutory right to seek an injunction, this Commission may seek enforcement of an action by filing a petition for enforcement in the circuit court where the subject matter of the enforcement is located. See s. 120.69(1)(a), F.S. STS further asserts that a petition for enforcement of any agency action may also be filed by any substantially interested person, such as STS, who is a resident of Florida within 60 days after it notifies this Commission. See s. 120.69(1)(b), F.S.

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<sup>1</sup> As noted in STS' argument to follow, STS has voluntarily withdrawn its request that the Commission find that AT&T violated s. 364.14 (2).

Furthermore, STS asserts that, in considering the arguments cited by AT&T regarding STS' allegation that it violated s. 364.14(2), F.S., it agrees to voluntarily withdraw its request that we find that AT&T violated s. 364.14(2), F.S.

Lastly, STS argues that AT&T is incorrect in its assertion that s. 364.15, F.S., is inapplicable to the instant Amended Petition. STS argues that AT&T's OSS-Related Releases will directly impact the basic local telecommunications services that STS offers its customers and end users, and that it is thus, a nonsensical argument for AT&T Florida to claim that s. 364.15, F.S., is inapplicable.

#### Standard of Review

Under Florida law, the purpose of a motion to dismiss is to raise as a question of law the sufficiency of the facts alleged to state a cause of action. Varnes v. Dawkins, 624 So. 2d 349, 350 (Fla. 1st DCA 1993). In order to sustain a motion to dismiss, the moving party must demonstrate that, accepting all allegations in the petition as facially correct, the petition still fails to state a cause of action for which relief can be granted. In re Application for Amendment of Certificates Nos. 359-W and 290-S to Add Territory in Broward County by South Broward Utility, Inc., 95 FPSC 5:339 (1995); Varnes, 624 So. 2d at 350. The moving party must specify the grounds for the motion to dismiss, and all material allegations must be construed against the moving party in determining if the petitioner has stated the necessary allegations. Matthews v. Matthews, 122 So. 2d 571 (Fla. 2nd DCA 1960).

#### Section 364.15, F.S.

In its Petition, STS cites s. 364.15, F.S. to support its proposition that this Commission may require AT&T to stay its OSS release or require changes to the release. This statute provides:

Whenever the commission finds, on its own motion or upon complaint, that repairs or improvements to, or changes in, any telecommunications facility ought reasonably to be made, or that any additions or extensions should reasonably be made to any telecommunications facility, in order to promote the security or convenience of the public or employees or in order to secure adequate service or facilities for basic local telecommunications services consistent with the requirements set forth in this chapter, the commission shall make and serve an order directing that such repairs, improvements, changes, additions, or extensions be made in the manner to be specified in the order. This section authorizes the commission to impose only those requirements that it is otherwise authorized to impose under this chapter.

The express language of s. 364.15, F.S., limits the application of the statute to “basic local telecommunications services” and, thus, it has no application to the systems at issue in this proceeding. We find this section is not applicable in the instant proceeding because the statute does not apply to wholesale customers. The OSS is a system provided to wholesale customers, therefore s. 364.15 is not applicable. Accordingly, we dismiss STS’ request that this Commission take action pursuant to this statute.

#### Award Costs

STS has requested that this Commission issue an Order awarding “costs” associated with this proceeding. However, this Commission has consistently held that as an administrative body, it lacks statutory authority to assess costs and attorney’s fees. See In re: Application of George Dorman and M. Pate Snively for a certificate of public convenience and necessity to operate as a radio common carrier in the Winter Haven, Florida area, Docket No. 72401-RCC, Order No. 5579 (Commission found no statutory authority to assess costs against applicants); See also In re: Complaint and petition of John Charles Heekin against Florida Power & Light Company, Docket No. 981923-EI, Order No. PSC-99-1054-FOF-EI (May 24, 1999) (dismissing petition requesting attorney fees for lack of subject matter jurisdiction); See also In re: Application for certificates to provide water and wastewater service in Alachua County under grandfather rights by Turkey Creek, Inc. & Family Diner, inc. d/b/a Turkey Creek Utilities., Docket No. 921098, Order No. PSC-93-0816-FOF-WS ( Commission does not have authority to sanction a blanket award for attorney’s fees and costs); See also 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, Order No. PSC-05-0762-PCO-TL (we acknowledge a lack of subject matter jurisdiction to award attorney’s fees). Accordingly, we also find that STS’ request that the Commission award costs shall be dismissed.

#### Injunctive Relief

In its Motion, AT&T, citing several Orders in which this Commission found it lacked authority to issue injunctive relief, asserts that we should dismiss the portion of STS’ Petition that requests this Commission issue an order restraining or prohibiting AT&T from proceeding with its OSS. STS asserts that we should invoke our statutory right to enjoin and seek an injunction in circuit court under Rule 25-22.030, F.A.C., and ss. 364.015 and 364.285(2), F.S. However, we find that AT&T’s and STS’ arguments fail to take into consideration this Commission’s continuing oversight of AT&T’s OSS systems. Oversight which neither party to this proceeding disputes and which plays an integral role in this Commission’s exclusive

authority to ensure that all providers of telecommunications service are treated fairly by preventing anticompetitive behavior.<sup>2</sup>

We retain broad discretion to take the remedial actions necessary and appropriate in fulfilling its statutory obligations. Such actions may include requiring changes to the OSS plan, requiring refunds to CLECs, conducting audits, or in the instant case, if appropriate, requiring AT&T to stay its November OSS release. Without the ability to require such actions, this Commission would be severely impaired in fulfilling its statutory obligation to prevent anticompetitive behavior. Particularly, our authority to stay AT&T's November release makes seeking an injunction in circuit court unnecessary under these circumstances. Accordingly, this Commission shall not dismiss STS' request that we stay AT&T's OSS release to the extent that such request is related to our oversight role of AT&T's OSS system, as STS' cause of action is one for which relief may be granted by this Commission. However, this Commission shall take the remedial action regarding AT&T's OSS release addressed below.

#### STS' Original and Amended Emergency Petitions

In its amended petition, STS is seeking to restrict or prohibit AT&T from implementing the November 14, 2009 OSS release. According to STS, the LEX ordering interface does not have the same edit checking capabilities as the LENS interface currently in place for use by CLECs in the AT&T nine-state region. The pre-order edit checking capabilities available in LENS notify the CLEC of errors in the order and will not allow the CLEC to continue processing an order until the pre-order error is corrected. STS claims that many of these pre-order edit checks programmed into the LENS interface are omitted from the LEX interface. As a result, the omission of these prompts or edit checks in LEX would, in effect, cause orders with errors to be rejected or returned for clarification by AT&T after the order is completed. STS asserts that the delay in processing the order erodes customer confidence and may ultimately result in the loss of the customer.

According to STS, there are as many as 25 edits within LENS that will no longer be provided for in LEX. STS asserts that these edit checks available in LENS prevent CLEC customer service representatives from moving to the next page/screen until the error is corrected.

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<sup>2</sup> This Commission established permanent performance measures and benchmarks as well as a voluntary self executing enforcement mechanism (Performance Assessment Plan) for Bellsouth, by Order No. PSC-01-1819-FOF-TP, issued September 10, 2001 and has continued to exercise its authority over the Performance Assessment Plan. See PSC-02-1094-PAA-TP (implementing change request metrics and revising due date for tier 1 and tier 2 payments); See also Order No. PSC-02-1736-PAA-TP (implementing proposed revisions to Bellsouth's Performance Assessment Plan); See also Order No. PSC-03-0529-PAA-TP (directed Bellsouth to implement changes to the Performance Assessment Plan); See also PSC-05-0488-PAA-TP (approving stipulated changes to Bellsouth's performance assessment plan); See also PSC-07-0286-PAA-TP (approving changes to Bellsouth's performance assessment plan). The Commission has approved each version of AT&T's OSS Performance Assessment Plan in Docket No. 000121A.



Because of the lack of these edit checks in LEX, a CLEC customer service representative must work an order back-and-forth in LEX. In other words, the LEX system allows for a CLEC order to be submitted to AT&T with errors, rejected by AT&T, reworked by the CLEC, resubmitted by the CLEC, and possibly rejected by AT&T again, over and over. STS claims that it is highly unlikely for a CLEC to process an order through the system in a timely manner without errors. As a result, the CLEC's ability to satisfy and retain the end user will ultimately be affected.

LENS is comparable to AT&T Florida's Retail Navigation System (RNS), the ordering system used by AT&T customer service representatives for its own retail customers. According to STS, the pre-ordering OSS (Verigate) and LEX applications that will replace LENS are inferior or not at parity with AT&T's retail RNS.

#### AT&T's Response to STS' Original and Amended Petitions

AT&T argues that the new LEX interface will provide for all necessary functionality to create, manage, track, maintain, change or supplement orders. According to AT&T, the new LEX interface will also provide for a number of enhancements that are not currently available for use by CLECs via the LENS ordering interface. In sum, AT&T claims that the new LEX interface is every bit as efficient as the existing LENS interface.

AT&T notes that AT&T Florida began the testing phase for the new LEX interface on October 12, 2009, with testing scheduled to be completed by November 9, 2009. According to AT&T, only two CLECs, so far, have chosen to use the LEX testing environment for the November release. One of the testers is STS. AT&T's implementation plan calls for operating the existing LENS ordering interface in parallel to the LEX interface until at least March 22, 2010, as a means of providing additional time for CLECs to train their personnel on the LEX interface.

#### Commission Staff Conference Call

On October 2, 2009, our staff conducted a conference call with the parties to discuss a proposed stipulation in response to STS' petition. On the call, our staff proposed to conduct a post implementation evaluation of the LEX and LENS interfaces to determine if LEX provides the same or similar edit capabilities as LENS. This review would be conducted in lieu of staying the November 14, OSS Release. Additionally, our staff proposed that AT&T run LENS in parallel with LEX for a nine month period.

Upon completion of the review, our staff proposed bringing a recommendation back to us regarding the results of its evaluation and conclusions and any corrective or regulatory action, if

necessary. Additionally, our staff proposed that the specific date of LENS retirement be addressed in this follow-up recommendation. Last, our staff's proposal recommended removal of STS' request for the assessment of attorney fees and deferred the assessment of injunctive relief.

It is our understanding that the parties have since agreed to allow our staff to conduct the review. However, AT&T has not agreed to operating the LENS ordering interface any longer than its original planned retirement date of March 22, 2010. Whereas our staff will proceed expeditiously; AT&T shall be required to run the existing LENS interface in parallel until completion of staff's review and any Commission decision on this matter.

### **III. Decision**

This Commission finds that STS' request supported by s. 364.15, F.S. and request for costs shall be dismissed. This Commission also finds that STS has incorrectly relied on s.364.15 to support its request that the Commission stay AT&T's November OSS Release. Additionally, we find that we do not have subject matter jurisdiction to award costs as requested by STS.

However, this Commission, in its continuing oversight role of AT&T's operations support systems (OSS) and its exclusive authority to prevent anticompetitive behavior amongst telecommunication providers, may at its discretion, require AT&T to stay its November 14, 2009 release in the form requested by STS. However, we find no need to restrict or prohibit AT&T from implementing its OSS release scheduled for November 14, 2009, as our staff is allowed to conduct a post implementation review. AT&T shall be required to run the existing OSS ordering interface (LENS) in parallel to the LEX interface until completion of our staff's review and a decision by this Commission on this matter.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T's Partial Motion to Dismiss be hereby granted in part and denied in part as set forth in the body of this Order. It is further

ORDERED that AT&T shall be required to run the existing OSS ordering interface (LENS) in parallel to the LEX interface until completion of our staff's review and a decision by this Commission on this matter. It is further

ORDERED by the Florida Public Service Commission that is hereby denied as set forth in the body of this Order. It is further

ORDERED that the provisions of this Order denying STS' request for injunctive relief and request to restrict or prohibit AT&T from implementing its CLEC OSS-related releases,

issued as proposed agency action, shall become final and effective upon the issuance of a Consummating Order unless an appropriate petition, in the form provided by Rule 28-106.201, Florida Administrative Code, is received by the Commission Clerk, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on the date set forth in the "Notice of Further Proceedings" attached hereto. It is further

ORDERED that in the event the Proposed Agency Action portion of this Order becomes final, this docket shall be remain open pending the outcome of further proceedings including resolution of the remaining requests in STS' amended petition placed in abeyance until our staff brings a recommendation back to this Commission upon completion of a review.

By ORDER of the Florida Public Service Commission this 2nd day of December, 2009.



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ANN COLE  
Commission Clerk

( S E A L )

TJB

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.

As identified in the body of this order, our action regarding STS' request for injunctive relief and request to restrict or prohibit AT&T from implementing its CLEC OSS-related releases is preliminary in nature. Any person whose substantial interests are affected by the action proposed by this order may file a petition for a formal proceeding, in the form provided by Rule 28-106.201, Florida Administrative Code. This petition must be received by the Office of

Commission Clerk, at 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, by the close of business on December 23, 2009. If such a petition is filed, 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. In the absence of such a petition, this order shall become effective and final upon the issuance of a Consummating Order.

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.

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 Office of Commission Clerk, 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 or wastewater utility by filing a notice of appeal with the Office of Commission Clerk 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.