

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint against AT&T d/b/a BellSouth for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and AT&T regulations pertaining to billing of charges and collection of charges, fees, and taxes.

DOCKET NO. 100175-TL

In re: Complaint against Florida Power & Light Company for alleged violations of various sections of Florida Administrative Code, Florida Statutes, and FPL tariffs pertaining to billing of charges and collection of charges, fees, and taxes.

DOCKET NO. 100312-EI
ORDER NO. PSC-11-0117-FOF-PU
ISSUED: February 17, 2011

The following Commissioners participated in the disposition of this matter:

ART GRAHAM, Chairman
LISA POLAK EDGAR
RONALD A. BRISÉ
EDUARDO E. BALBIS
JULIE I. BROWN

ORDER GRANTING MOTIONS TO DISMISS WITH PREJUDICE

BY THE COMMISSION:

CASE BACKGROUND

On April 7, 2010, Petitioner¹ filed a formal Complaint (the "AT&T Complaint") against AT&T Florida, Inc. ("AT&T"). The Complaint states "[p]etition seeks action according to AT&T regulations and that benefits customers according to law e.g. Commission declares customer free from paying tax obligations of the company."² On May 3, 2010, AT&T filed a Motion to Dismiss Complaint ("AT&T Motion to Dismiss") on the grounds that the Complaint

¹ The Petitioner has requested confidentiality of her name and identifying information. There is no statutory or rule authority for us to make an exception from Florida's Public Records laws regarding the identity of a customer making a complaint, and the Petitioner's name will have to be released upon request. However, in an effort to accommodate the customer's concerns, our staff has redacted and/or omitted her name and address from all written materials in this docket, including our online Case Management System. Both AT&T and FPL have likewise redacted the Petitioner's name from their written materials as a voluntary accommodation.

² As will be discussed below, we do not believe Petitioner, who is not an attorney, is actually requesting a Declaratory Statement under Section 120.565, F.S., but is rather requesting a decision on the merits. In any event, the method by which we address the Complaint (either as a Declaratory Statement or a decision on the merits determining substantial interests) will not have any effect on the ultimate disposition of the Complaint.

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fails to state a cause of action for which relief can be granted. On May 14, 2010, Petitioner filed a Response to AT&T's Motion to Dismiss (the "AT&T Response"). The Response opposes AT&T's Motion to Dismiss and adds new facts and arguments regarding the allegations of the original Complaint.

On May 28, 2010, Petitioner filed a Complaint (the "FPL Complaint") against Florida Power & Light Company ("FPL"). The FPL Complaint closely follows the form and substance of the April 7, 2010 AT&T Complaint, including the same request for relief. On June 28, 2010, FPL filed a Motion to Dismiss Complaint ("FPL Motion to Dismiss") on the grounds that the Complaint fails to state a cause of action for which relief can be granted. On July 2, 2010, Petitioner filed a Response to FPL's Motion to Dismiss (the "FPL Response"). The Response very closely mirrors Petitioner's AT&T Response, and opposes FPL's Motion to Dismiss, with substantially the same assertions and supplemental factual and legal arguments as contained in the AT&T Response.

On October 6, 2010, Petitioner filed a "Motion to Suspend 10/12/10 Regular Agenda Pending Clarification." In her Motion, Petitioner sought clarification of the effect of FPL's September 2, 2010, Verified Motion to Disqualify Commission Skop, as well as certain concerns with the staff recommendation. On October 8, 2010, both FPL and AT&T filed Responses in opposition to Petitioner's Motion. Both companies agreed to a temporary deferral of the item until the October 26, 2010, Agenda Conference, but objected to any long term suspension. As a result of Petitioner's request, this matter was administratively deferred until the Verified Motion to Disqualify was resolved in early January, 2011, at which time this matter was scheduled to be brought before us for our consideration.

STANDARD OF REVIEW

A motion to dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law. Varnes v. Dawkins, 624 So.2d 349, 350 (Fla. 1st DCA 1993). In disposing of a motion to dismiss, this Commission must assume all of the allegations of the complaint to be true. Id. In determining the sufficiency of a complaint, this Commission should limit its consideration to the complaint and the grounds asserted in the motion to dismiss. Flye v. Jeffords, 106 So.2d 229 (Fla. 1st DCA 1958).

In reviewing a motion to dismiss, this Commission should take all allegations in the petition as though true, and consider the allegations in the light most favorable to the petitioner in order to determine whether the petition states a cause of action upon which relief may be granted. See, e.g., Ralph v. City of Daytona Beach, 471 So.2d 1, 2 (Fla. 1983); Orlando Sports Stadium, Inc. v. State of Florida ex rel Powell, 262 So.2d 881, 883 (Fla. 1972); Kest v. Nathanson, 216 So.2d 233, 235 (Fla. 4th DCA, 1968); Ocala Loan Co. v. Smith, 155 So.2d 711, 715 (Fla. 1st DCA, 1963).

We have jurisdiction under Sections 364 and 366, Florida Statutes.

PETITIONER'S COMPLAINTS

Petitioner's AT&T Complaint

In her April 7, 2010 AT&T Complaint, Petitioner makes the following assertions:

- The Complaint is intended to replace “filings” made October 2, 2009, and October 19, 2009;³
- The Complaint is for violation of Rule 25-4.113(f), Florida Administrative Code (“F.A.C.”), and violation of “various sections of Florida Administrative Code, Florida Statutes, and AT&T Regulations that pertain to billing of charges and collection of charges, fees and taxes;”
- AT&T committed fraud when it “demanded and received payment of charges⁴ that customers are not required to pay according to...” Sections 202, 203, 350, 364, 365, 366, 367, and 427, Florida Statutes (“F.S.”), and “company regulations;”
- “Federal law does not demand payment of taxes or money from those e.g. children, elderly and jobless who lack adequate access to it;”
- “Customers are obligated to pay for services and products received and permitted to pay another’s obligations though not obligated to pay the company’s costs;”
- “Language of Florida Administrative Code Chapter 25-4.113(f) and Florida Statutes Chapter 364.10(d)⁵ and 427.704(4)⁶ appear ambiguous. Some persons read the code and statutes in a manner that is harmful to the ordinary customer;”
- “The issue is according to AT&T regulations and it appears according to law also AT&T is ultimately responsible for payment of charges, taxes, etc. in excess of services and products furnished by company to the subscriber/customer;” and
- “Petition seeks action according to AT&T regulations and that benefits customers according to law e.g. Commission declares customer free from paying tax obligations of the company.”

Petitioner's FPL Complaint

In her May 28, 2010, Complaint against Florida Power & Light Company, Petitioner makes the following assertions:

³ We have been unable to locate any documents filed by Petitioner on these dates. We understand various members of our staff have been in informal communication with Petitioner during this time period, and it is possible Petitioner is referring to documents mailed to our staff.

⁴ In response to a request from our staff, on July 2, 2010, Petitioner identified the following as items not related directly to fees for service: Federal Subscriber Line Charge; Telecommunications Relay Services Charge; Regulatory Assessment Fees/Regulatory Carrier Cost Recovery Fee; Federal Universal Service Fund Fee; Telecommunications Access System Act Surcharge; Federal Excise Tax; Florida State Communications Tax; Florida Local Communications Tax; and Emergency 911 Service.

⁵ §364.10(d) prohibits the collection of a number-portability charge from Lifeline subscribers.

⁶ §427.704(4) relates to our duties to establish cost recovery mechanisms to support the Telecommunications Access System.

- The Complaint is for violation of Rules 25-6.103, 25-6.105, 25-6.106, Florida Administrative Code, various Florida Statutes, and FPL tariffs that pertain to billing of charges and collection of charges, fees and taxes and that are not service charges;
- FPL violated Florida law when it demanded and received prior payment of charges that customers are not required to pay according to Chapters 203, 350, 366, 367, F.S. and company regulations;
- “Federal law does not demand payment of taxes or money from people e.g. children, elderly and jobless with inadequate access to it;”
- “Customers are obligated to pay for services and products received and permitted though not required to pay FPL’s costs;”
- “Language of Florida Administrative Code Chapter, specifically 25-6.105 is read by some people in a manner that is harmful to the ordinary customer;”
- The issue is, under FPL’s tariff and Florida and Federal law, “FPL is ultimately responsible for payment of charges, taxes, etc. in excess of services and products furnished by company to the customer;” and
- “Petition seeks action according to FPL regulations and that benefits customers according to law e.g. Commission declares customer free from paying tax obligations of FPL.”

MOTIONS TO DISMISS

AT&T’s Motion to Dismiss

On May 3, 2010, AT&T Florida filed a Motion to Dismiss Complaint on the grounds that the Complaint fails to state a cause of action for which relief can be granted. In support thereof, AT&T advances the following arguments:

- The Complaint should be summarily dismissed because it is vague and legally insufficient as to established pleading requirements;
- A Motion to Dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law, and that in this case, the Complaint fails to state a cause of action for which relief can be granted by the Commission;
- The Complaint fails to explain how and why AT&T violated any rules, including Rule 25-4.113(f) when it allegedly billed and collected certain unnamed “charges, fees and taxes;”
- The Complaint does not allege which specific sections of state law AT&T allegedly violated or how AT&T may have violated them;
- The claim fails to state a cause of action in that the Petitioner fails to allege which of AT&T’s regulations were violated;
- The Complaint fails to allege which federal statutory provisions AT&T allegedly violated and how AT&T may have violated them, and that in any event, the legislature has not granted the Commission authority to enforce federal law;
- The Commission has no general authority to regulate public utilities, and the Commission instead only possesses express powers (and those powers granted by necessary implication) granted by the Legislature;

- The Complaint fails to allege with specificity which “charges, fees and taxes” AT&T has improperly charged or collected from Petitioner and how it improperly billed or collected these unnamed “charges fees and taxes;”
- The Complaint fails to allege with specificity, as required by law, any facts or circumstances that could support a fraud claim, and moreover, fraud is not a cause of action within the Commission’s authority to adjudicate; and
- The Commission is without authority to issue a declaratory statement under these circumstances, since under Section 120.565, F.S., a declaratory statement may not be used as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons; Section 120.565(2), F.S., requires a request for a declaratory statement to state with particularity the petitioner’s set of circumstances and shall specify the statutory provision, rule or order that petitioner believes may apply to the set circumstances; and a declaratory statement is not the proper vehicle to determine the conduct of another person.

FPL’s Motion to Dismiss

On June 28, 2010, FPL timely responded to the Complaint with a Motion to Dismiss. In the Motion to Dismiss, FPL requests that the Complaint “be summarily dismissed because it falls far short of the well established pleading requirements that a complaint must meet to be deemed sufficient.” FPL maintains that the Complaint is “so vague as to both the operative facts and the law...that it would be impossible for the Commission to properly issue a decision” and that “vagueness makes it impossible for FPL to adequately respond without engaging in a substantial amount of conjecture.” In support of its requested relief, FPL makes the following arguments:

- A Motion to Dismiss questions whether the complaint alleges sufficient facts to state a cause of action as a matter of law, and that in this case, the Complaint fails to state a cause of action for which relief can be granted by the Commission;
- The Complaint fails to explain how and why FPL violated any rules when it allegedly billed and collected certain unnamed “charges, fees and taxes;”
- The Complaint does not allege which specific sections of state law FPL violated or how FPL may have violated them;
- The claim fails to state a cause of action in that the Petitioner fails to allege which of FPL’s tariffs were violated;
- The Complaint fails to allege which federal statutory provision FPL allegedly violated and how FPL violated it, and that in any event, the legislature has not granted the Commission authority to enforce federal law;
- The Commission has no general authority to regulate public utilities; the Commission instead only possesses express powers (and those powers granted by necessary implication) granted by the Legislature;
- The Complaint fails to allege with specificity which “charges fees and taxes” FPL has improperly charged or collected from Petitioner and how it improperly billed or collected these unnamed “charges fees and taxes;”

- The Commission is without authority to issue a declaratory statement under these circumstances, since under Section 120.565, F.S., a declaratory statement may not be used as a vehicle for the adoption of a broad agency policy or to provide statutory or rule interpretations that apply to an entire class of persons. Further, Section 120.565(2), F.S., requires a request for a declaratory statement to state with particularity the petitioner's set of circumstances and shall specify the statutory provision, rule or order that petitioner believes may apply to the set circumstances. Finally, a declaratory statement is not the proper vehicle to determine the conduct of another person.

PETITIONER'S RESPONSES TO MOTIONS TO DISMISS

Response to AT&T's Motion to Dismiss

On May 14, 2010, Petitioner filed a Response to AT&T Florida's Motion to Dismiss. In opposing AT&T's Motion, Petitioner makes the following arguments:

- AT&T "committed wrong" and Petitioner "has full right to express facts and be heard by Commission that it may resolve the issues according to law;"
- AT&T's representatives are attorneys, the Motion to Dismiss is in "legalese," and absent some statutory requirement to the contrary, the parties should use plain English;
- The Complaint should not be dismissed for failure to comply with "well established pleading requirements," since there is no law that "would deny Petitioner this opportunity for AT&T's actions to be made right;"
- AT&T and Commission have received numerous written and verbal communications between June, 2008, and April, 2010, that provide sufficient clarity and detail as to the facts and to state causes of action;
- The substance of the Complaint is clear and supersedes form;
- As an arm of the legislature, the Commission possesses general authority to adjudicate these issues and to grant the relief requested;
- The required elements of a fraud claim exist and the Commission can make a determination on the fraud claim consistent with federal law;
- Customers should be free from paying the tax obligations of AT&T, and AT&T, and not the customer, is responsible where charges, fees, and taxes billed are not services the customer received.
- Internal Revenue Service documents (IRS Booklet 1040, Publications 17 and 555, and Form 56) and a May 13, 2010, communication with the IRS support Petitioner's argument that "one is permitted though not required to pay another's taxes (unless married to or otherwise responsible for) and no agent is to demand payment of money from people e.g. children, jobless and elderly who lack adequate access to taxable income."

Petitioner's Response to FPL's Motion to Dismiss

On July 2, 2010, Petitioner filed a Response in opposition to FPL's Motion to Dismiss. The form and substance of this Response is extremely similar to Petitioner's Response to the AT&T Motion to Dismiss. In the Response, Petitioner makes the following arguments:

- FPL "committed wrong" and that Petitioner "has full right to express facts and be heard by Commission that it may resolve the issue according to law;"
- FPL's representatives are attorneys, the Motion to Dismiss is in "legalese," and that absent some statutory requirement to the contrary, the parties should use plain English;
- The Complaint should not be dismissed for failure to comply with "well established pleading requirements," since there is no law that "would deny Petitioner this opportunity for FPL's actions to be made right;"
- FPL and Commission have received written and verbal communications between June, 2008, and April, 2010, that "address issues with sufficient clarity and detail to state causes of action..... The substance of Petitioner's many pleas is clear and supersedes form;"
- Review of all communications between Petitioner and FPL and Petitioner and staff would provide sufficient details and facts;
- That the Commission does in fact possess general authority to adjudicate and grant the relief requested;
- The required elements of a fraud claim exist and the Commission can make a determination on the fraud claim consistent with federal law;
- Customers should be free from paying the tax obligations of the company, and FPL, and not the customer, is responsible where charges, fees, and taxes billed are not services customer received;
- "Trade secrets exist," "[e]mployees engaging in business with companies may expect to pay their costs," and recent communications with the IRS confirms that "one is permitted though not required to pay another's taxes."

DECISION

Both Complaints are based upon Petitioner's belief that she is not obligated to pay any portions of her telephone or electric bills that are not specifically identified as a direct charge for telephone or electrical service, including taxes, surcharges, or fees.⁷ That is, Petitioner believes that in order to receive telephone service and electrical service, she is only responsible for payment of the bill items for "service," and any other items listed on the bills are optional. However, as AT&T and FPL correctly argue, Petitioner has failed to present any legal or factual claim upon which this Commission can grant relief and AT&T and FPL's Motions to Dismiss should be granted and the Complaint dismissed with prejudice.

⁷ As stated in Footnote 4, Petitioner has identified a number of specific items she believes are unrelated to the direct charge for telephone service. However, Petitioner's FPL Complaint and Response to FPL's Motion to Dismiss do not indicate which specific items on her electric bill are disputed by Petitioner as "taxes, fees or charges unrelated to service."

We specifically note that, despite the lack of legally sufficient pleading in the Complaints and Responses, our staff has expended a significant number of hours attempting to resolve Petitioner's complaints informally, and failing resolution, to determine whether amendment of either or both Complaints could lead to a situation where we might have some jurisdiction to grant Petitioner some relief. Our staff has conducted significant research into the substance of the Complaints' allegations, and cannot present us with any situation in which Petitioner's alleged facts and legal arguments constitute a claim within our statutory jurisdiction to resolve. After review of the Complaints and Responses to the Motions to Dismiss, it is clear that the Complaints fail to state any claim upon which we can grant any relief.

As pointed out by AT&T and FPL, we have no jurisdiction to interpret or enforce federal law except as specifically authorized by federal or state law (for example, the adjudication of inter-carrier interconnection disputes). We certainly have no jurisdiction to determine liability for or exemption from federal taxes. Furthermore, review of Chapters 350, 364, and 366, F.S., do not reveal any grant of jurisdiction to adjudicate or determine any liability for or exemption from state taxes. In fact, review of relevant Chapters of the Florida Statutes (for example, Chapters 202 and 203) clearly indicate that the Florida Department of Revenue is the agency granted jurisdiction by the legislature to interpret and adjudicate matters involving the Florida tax code. Further, with respect to Petitioner's allegations of fraud, irrespective of the fact that the Complaints and Responses unequivocally fail to allege any facts which could support an inquiry into whether an action for fraud lies, Florida law is clear that this Commission lacks jurisdiction to adjudicate that type of claim.⁸

In addition, review of the statutory chapters referenced by Petitioner reveals a legislative intent diametrically opposed to Petitioner's view of the law. First, state law requires telecommunications companies to separately list taxes on a customer's bill. This taxing structure is enumerated in Chapters 202 and 203, F.S., whereby the Legislature creates a comprehensive Simplified Communications Surcharge system to replace piecemeal taxation schemes. The plain language of the statutes therefore demonstrates the Legislature's intent that residential consumers of communications services pay taxes, and those taxes would be listed as separate line items on a customer's bill.

Second, a review of Petitioner's bill indicates numerous additional amounts that both Federal and Florida Law require be collected from consumers of electrical and telecommunications services, and which are required to be listed separately on the bill. As examples, Section 365.172, F.S., requires collection of a monthly fee of up to \$.50 to fund E911 services; Section 427.704(4)(a)1. requires us to "[r]equire all local exchange telecommunications

⁸ See, for example, Order Number PSC-99-1092-FOF-TP, Issued June 1, 1999, in Docket Number 981833-TP, *In re: Petition of Supra Telecommunications and Information Systems, Inc. to initiate investigation into unfair practices of BellSouth Telecommunications, Inc. in negotiating agreements with alternative local exchange carriers (ALECs) and in filing such agreements with the Florida Public Service Commission* Page 3: "However, matters of contract fraud and gross negligence in contracts are matters for the courts, not this Commission." See also Order Number PSC-07-0311-FOF-TL, Issued April 12, 2007, in Docket Number 060763-TL, *In re: Petition for waiver of carrier of last resort obligations for multitenant property in Collier County known as Treviso Bay, by Embarq Florida, Inc.*, Page 14, "Embarq argues that estoppel and detrimental reliance are civil law concepts based on fraud and contract law, which are outside our jurisdiction."

companies to impose a monthly surcharge on all local exchange telecommunications company subscribers on an individual access line basis...” for Florida Relay Services; 26 United States Code Section 4251 imposes a Federal Communications Tax of 3% which “shall be paid by the person paying for such services;” and various provisions of Chapters 166, 180, and 203, F.S. require electric utilities to separately list taxes on a customer’s bill. We therefore conclude the plain language of these and other statutory sections makes clear that Petitioner’s arguments are legally incorrect. The cited statutes demonstrate that any person receiving electrical or telecommunications services is required to pay taxes and surcharges in addition to the charge for monthly service, and further, that the legislative scheme in Florida is for consumers of electrical and telecommunications services to receive a bill with various taxes, fees and surcharges listed separately, and not combined into a general “rate for service.”

Further, we have a specific rule, Rule 25-6.100, F.A.C., relating to residential customer billings by electric companies. Subsection (2) requires bills separately show franchise fees and taxes. Furthermore, Rule 25-6.100(7)(b) specifically prohibits a utility from incorporating the franchise fee into any rate for service. FPL is in compliance with this Rule, and thus, any argument by Petitioner that she is not required to pay items not specifically listed as a “rate for [electrical] service” is incorrect.

Therefore, in addition to being beyond our statutory power to grant any of the relief requested, Petitioner’s underlying premise for relief is misplaced, and thus, even were Petitioner to file an amended pleading which meets statutory pleading requirements, and even were we to determine we have jurisdiction to consider any elements of such an amended complaint, underlying Federal and Florida law does not support Petitioner’s positions, and any such complaint would likely be dismissed on the merits.

Finally, we believe that Petitioner’s request that we “declare Petitioner is free from paying taxes complained of” is not a request for a declaratory statement pursuant to Section 120.565, F.S., and should not be treated as such. In the first place, the request cannot be stretched in any such way that would allow it to meet the requirements of Section 120.565, F.S., and Rule 28-105.002, F.A.C., which enumerate the requirements for a Petition for Declaratory Statement. Second, it is clear that the type of decision Petitioner wishes us to make is well outside our jurisdiction.⁹ Finally, as defined by Florida statute and rule, a declaratory statement is a statement of general applicability and in this case, Petitioner is requesting concrete action in the nature of a judicial ruling which would affect her relationship with third persons, AT&T and FPL. Accordingly, it appears that Petitioner (who states she is not a lawyer and is concerned about the use of “legalese” in this docket), despite her choice of the words “declare” and “declaratory statement” is not in fact requesting a “Declaratory Statement” as defined by Florida law, but rather is seeking some type of affirmative relief, e.g. an Order requiring AT&T and FPL to continue to provide Petitioner with telephone and electric service but prohibiting AT&T and FPL from collecting any taxes, fees, or surcharges.

⁹ It appears to us that the Florida Department of Revenue is the agency most likely to have statutory authority to determine the resolution of Petitioner’s requests regarding taxes, although it is possible the Florida Attorney General may have some ability to issue an Opinion. However, we offer no opinion as to whether either agency does in fact have jurisdiction, nor whether either agency may or may not be able to assist Petitioner in any way.

Because both Complaints fail to plead any facts or cause of action upon which we can grant relief, both Complaints must be dismissed. Furthermore, because the underlying substance of Petitioner's Complaints is factually and legally incorrect, we will not give Petitioner an opportunity to amend either Complaint to comply with statutes and rules regarding pleading requirements, and both Complaints are dismissed with prejudice.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that AT&T Florida, Inc.'s Motion to Dismiss is GRANTED, with prejudice. It is further

ORDERED that Florida Power & Light Company's Motion to Dismiss is GRANTED, with prejudice. It is further

ORDERED that these dockets shall be closed.

By ORDER of the Florida Public Service Commission this 17th day of February, 2011.



ANN COLE
Commission Clerk

(SEAL)

LDH

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 Office of Commission Clerk, 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 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.