BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for declaratory statement regarding applicability of Rule 25-6.0423, F.A.C., by Florida Power & Light Company.	DOCKET NO. 080083-EI ORDER NO. PSC-08-0295-DS-EI ISSUED: May 5, 2008

The following Commissioners participated in the disposition of this matter:

MATTHEW M. CARTER II, Chairman
LISA POLAK EDGAR
KATRINA J. McMURRIAN
NANCY ARGENZIANO
NATHAN A. SKOP

ORDER DENYING REQUEST FOR HEARING AND GRANTING PETITION FOR DECLARATORY STATEMENT

BY THE COMMISSION:

Background

On February 5, 2008, Florida Power & Light Company (FPL), pursuant to Section 120.565, Florida Statutes, and Rule 28-105.002, Florida Administrative Code, filed a Petition for Declaratory Statement (Petition) related to its planned Turkey Point Units 6 & 7 nuclear power plant. As discussed in the Petition, FPL, in effect, asks us to state that:

> If the Commission grants Florida Power & Light Company's petition to determine the need for the proposed Turkey Point Units 6 & 7, advance payments made prior to the completion of site clearing work are properly characterized as "preconstruction costs" to be recovered pursuant to the mechanism provided in Rule 25-6.0423, F.A.C.

Petition, p. 6.

As background demonstrating the need for the declaratory statement, FPL describes the special circumstances relevant to constructing the proposed nuclear power plant:

> One of the potential bottlenecks that could impede FPL's efforts to bring TP 6 & 7 into service in the 2018-2020 timeframe is the availability of "long-lead procurement items," which include but are not necessarily limited to heavy forgings like the reactor pressure vessel, steam generator shell, etc. Because there are only a very limited number of facilities in the world capable of supplying these long-lead procurement items and there is considerable worldwide interest in developing nuclear units, FPL anticipates that lengthy queues may form for their procurement. Therefore, assuming that the Commission grants an affirmative determination of need for TP 6 & 7, and in order to retain the potential for 2018-2020 in-service dates, FPL expects that it will have to make substantial advance

> payments associated with long-lead procurement items beginning soon, perhaps as early as summer 2008.

Petition, p. 4.

Because pre-construction costs are subject to favorable cost recovery treatment pursuant to Rule 25-6.0423(5)(a), F.A.C.,[1] and advance payments for long-lead procurement items are not specifically identified as pre-construction costs in either Rule 25-6.0423 or Section 366.93, Florida Statutes, FPL seeks the declaratory statement at issue here in order to definitively establish the eligibility of long-lead procurement expenses for the capacity clause recovery treatment provided for in Rule 25-6.0423(5)(a).[2] FPL acknowledges that the prudency of specific payments for long-lead procurement items is not at issue here.

On March 11, 2008, the Office of Public Counsel (OPC or Citizens) filed a Notice of Intervention pursuant to Section 350.0611, Florida Statutes,[3] a Position in Opposition to Petition for Declaratory Statement (Opposition) and a Request for Hearing. On March 14, 2008, FPL filed a Response to OPC's Statement of Position and Request for Hearing (Response). We have jurisdiction pursuant to Section 120.565, Florida Statutes.

OPC's Request for Hearing

At the outset, we deny OPC's request for a separate hearing, noting OPC was provided with the opportunity to address us at our agenda conference where we decided FPL's Petition. Rule 28-105.003, F.A.C., states that an agency may hold a hearing to consider a petition for declaratory statement. The rule further states, however, that the agency may rely on the statement of facts set out in the petition without taking any position with regard to the validity of the facts.

OPC states that a record adequate to inform us as to the impact of FPL's preferred interpretation on customers' bills must be developed:

> FPL's petition is devoid of any quantification of the impact of its preferred interpretation on customer's bills . . .. Citizens assert the portions of long lead procurement items associated with Turkey Point 6 and 7 that FPL plans to expend prior to completion of site clearing and therefore are the subject of FPL's petition, could amount to $100 million or more.

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[1] Rule 25-6.0423(5)(a) provides: "A utility is entitled to recover, through the Capacity Cost Recovery clause, its actual and projected pre-construction costs." Compare, Rule 25-6.0423(5)(b) which provides for recovery of the carrying costs on the annual projected construction cost balance associated with the power plant.

[2] FPL alleges it will be substantially affected by whether advanced payments for long-lead items may be considered to be pre-construction costs subject to cost recovery pursuant to Rule 25-6.0423(5)(a). Pursuant to Section 120.565, Florida Statutes, "Any substantially affected person may seek a declaratory statement regarding an agency's opinion as to the applicability of . . . any rule . . . of the agency, as it applies to the petitioner's particular set of circumstances."

[3] We acknowledged OPC's intervention in Order No. PSC-08-0152-PCO-EI, issued March 14, 2008. Also, the Florida Industrial Power Users Group (FIPUG) was granted intervention by Order No. PSC-08-0231-PCO-EI, issued April 7, 2008, and AARP was granted intervention by Order No. PSC-08-0232-PCO-EI, issued April 7, 2008.

Opposition, p. 5.

We do not, however, believe a hearing is necessary in this instance. FPL's petition involves a legal interpretation of Rule 25-6.0423, F.A.C. The petition specifically states that the company is not asking us to determine the prudency of specific payments for long-lead procurement items. As noted by FPL in its Response to OPC's Statement of Position and Request for Hearing, p. 7, "One of the key purposes of [the annual rule proceedings], is to examine and quantify nuclear plant pre-construction costs for recovery, and the proceedings will result in determination of bill factors for recovery through the Capacity Cost Recovery Clause."

We therefore rely on the statement of facts set out in FPL's petition without taking any position with regard to the validity of the facts, as authorized by Rule 28-105.003, F.A.C

FPL's Petition for Declaratory Statement

As to the merits, we grant FPL's petition for a declaratory statement to the effect that advance payments for long-lead procurement items up to and including the date of site clearing for Turkey Point Units 6 & 7 are preconstruction costs subject to cost recovery as provided for by Rule 25-6.0423(5)(a), F.A.C. Moreover, we clarify that advance payment for long-lead procurement items is the sole subject matter at issue herein, as verified by the petitioner.[4] Other fact patterns pertaining to the applicability of Rule 25-6.0423(5)(a), F.A.C., may be addressed on a case-by-case basis in future proceedings.

The definition of "pre-construction costs" in Rule 25-6.0423(2)(g), F.A.C., as well as several other definitions within Rule 25-6.0423(2), F.A.C., set out below are relevant to the analysis of FPL's petition, including the following:

> (g) "Pre-construction costs" are costs that are expended after a site has been selected in preparation for the construction of a nuclear . . . power plant, incurred up to and including the date the utility completes site clearing work.
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> (h) Site selection costs and pre-construction costs include, but are not limited to: any and all costs associated with preparing, reviewing and defending a Combined Operating License (COL) application for a nuclear power plant; costs associated with site and technology selection; costs of engineering, designing, and permitting the nuclear . . . power plant; costs of clearing, grading, and excavation; and costs of on-site construction facilities (i.e., construction offices, warehouses, etc.).
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> (i) "Construction costs" are costs that are expended to construct the nuclear . . . power plant including, but not limited to, the costs of constructing power plant buildings and all associated permanent structures, equipment and systems.

Since FPL identified examples of long-lead procurement items as including, but not necessarily limited to, heavy forgings like the reactor pressure vessel, steam generator shell, etc.,

[4] Transcript of April 8, 2008, Agenda Conference, p. 69, l. 8-10.

the difficulties and ambiguities involved in applying the rule are apparent. The items described by FPL sound more like the "construction costs," i.e., "power plant buildings and all associated permanent structures, equipment and systems," listed in Rule 25-6.0423(2)(i), F.A.C., than the "pre-construction costs" listed in Rule 25-6.0423(2)(h).

In support of its position that advanced payments for long-lead procurement items made up to and including the date of site clearing should be treated as "pre-construction costs," FPL's argument emphasizes the timeframe of the expense:

> Assuming a favorable need determination is issued and other project requirements are met, FPL plans to complete site clearing work in 2011. Advance payments associated with long-lead procurement items are likely to be required before the completion of site clearing work for TP 6 & 7. Such payments if made prior to completion of site clearing work should clearly constitute "preconstruction costs" pursuant to Section 366.93 and the Rule and should thus be eligible for annual recovery. [emphasis supplied]

Petition, p. 5.

In opposing the petition, OPC's argument emphasizes the nature of the costs:

> FPL states such long-lead procurement items "include, but are not limited to heavy forgings like the reactor pressure vessel, steam generator shell, etc."
>
> . . .
>
> [T]he nature of the costs identified by FPL places them squarely and indisputably within the definition of "construction costs," which under the rule include "the costs of constructing power plant buildings and all associated permanent structures, equipment and systems." [emphasis supplied]

Opposition, pp. 2-3. OPC further stated that

> In essence, FPL proposes to expense these enormous capital investments in the years in which they are incurred, even though the alternative mechanism devised specifically for construction costs is limited to collecting associated carrying costs prior to the commercial in-service date. Under the method contemplated by both statute and rule, the investment itself would be reflected in base rates following the commercial in-service date and collected over the 30 or 40 year lives of the assets. Allowing FPL to roll through the capacity cost recovery clause the entire amounts expended on such long-lead construction items prior to completion of site clearing would result in dramatic increases in customers' bills that were not intended by the Legislature and that would contravene Rule 25-6.0423, Florida Administrative Code. [emphasis supplied]

Opposition, pp. 5-6.

In response, FPL observes that:

> pre-construction cost recovery should tend overall to have both a rate lowering and leveling effect for nuclear project costs. Preconstruction cost recovery (and recovery of carrying costs on construction) pursuant to the Rule reduces the total amount of plant costs ultimately placed into rate base and upon which a return is paid over the life of a plant, lowering costs to customers. In addition, recovery of some costs during development and construction that would otherwise be capitalized negates the need to recover such costs after the plant is in service, thus helping levelize rates associated with new nuclear plants. Finally, FPL is committed to making only reasonable and prudent decisions concerning costs that need to be incurred for Turkey Point 6 & 7 - of course including decisions concerning advance payments – all of which decisions will be subject to Commission review in the appropriate Rule proceedings.

Response, p. 8.[5]

In evaluating these contrasting positions, we again note OPC's point that heavy forgings like the reactor pressure vessel and steam generator shell sound more like the "construction costs," i.e., "power plant buildings and all associated structures, equipment and systems," listed in Rule 25-6.0423(2)(i), than the "pre-construction costs" listed in Rule 25-6.0423(2)(h). However, the context provided by FPL indicates that the long lead costs at issue are advance payments on construction costs required to secure a place in the queue, without which the plant, yet to be constructed, cannot either be constructed or be operational at the planned in-service date. In other words, the advanced payment on the long-lead items is a hybrid, certainly related to construction costs, but required by factual exigencies to be paid during the pre-construction phase if the project is to go forward at all.

Moreover, the definition of "construction costs" in Rule 25-6.0423(2)(i), F.A.C., is silent as to any explicit timeframe, whereas the timeframe for "pre-construction costs" referenced in Rule 25-6.0423(2)(g), F.A.C., is explicit and absolute:

> "Pre-construction costs" are costs that are expended after a site has been selected . . . incurred up to and including the date the utility completes site clearing work. [emphasis supplied]

In contrast, the definition of pre-construction costs in Rule 25-6.0423, F.A.C., includes, but is not limited to, the items listed therein. In our view, this supplies the key to how the rule should apply to the "hybrid" which FPL refers to as advance payment on long-lead procurement items. Because the types of pre-construction costs in Rule 25-6.0423(2)(h), F.A.C., are flexible and not limited to those listed, but the timeframe in Rule 25-6.0423(2)(g), F.A.C., for pre-construction costs is explicit and absolute, the timeframe must be considered dispositive as to the correct characterization of these "queuing" costs under the rule. Thus, what would otherwise be related to "construction costs" based on the type of expenses involved, are "pre-construction

[5] See also Transcript of April 8, 2008, Agenda Conference, pp. 47 – 57.

costs" if advance payments thereof for queuing purposes are necessarily incurred within the timeframe described in Rule 25-6.0423(2)(g).

As stated on page 5 of the Opposition, OPC is concerned that, if the petition is granted, the amounts that FPL will collect from customers will reflect the full amounts expended on permanent structures and equipment prior to the completion of site clearing. However, treating any construction-related cost, let alone the entirety of such costs, as long lead advance payments would have to be justified as prudent because such advance payments are necessitated by the facts and circumstances on a case-by-case basis.[6] This harmonizes what would otherwise appear to be conflicting definitions between the rule subparts, so as to forward the intent of the rule to carry out the statutory scheme envisioned by the Legislature in Section 366.93, Florida Statutes:

> 2) . . . the commission shall establish by rule, alternative cost recovery mechanisms for the recovery of costs incurred in the siting, design, licensing, and construction of a nuclear . . . power plant. Such mechanisms shall be designed to promote utility involvement in nuclear . . . power plants and allow for the recovery of all prudently incurred costs, and shall include, but are not limited to:
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> > (a) Recovery through the capacity cost recovery clause of any preconstruction costs. [emphasis supplied]

We believe that the foregoing interpretation of Rule 25-6.0423, F.A.C., and the rule subparts discussed above is reasonable and effectuates the purposes of the statute.

Conclusion

In view of the above, we grant FPL's Petition for a Declaratory Statement to the effect that advance payments for long-lead procurement items up to and including the date of site clearing for Turkey Point Units 6 & 7 are preconstruction costs subject to cost recovery as provided by Rule 25-6.0423(5)(a), F.A.C. FPL is on notice that granting the petition does not determine the prudency of any specific payment for a long-lead procurement item.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the Office of Public Counsel's Request for Hearing is denied. It is further

ORDERED that Florida Power & Light Company's Petition for Declaratory Statement is granted as set forth in the body of this order. It is further

ORDERED that this docket shall be closed.

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[6] See Rule 25-6.0423(5)(c) providing for our review and approval of previous, current and projected pre-construction costs on a case-by-case basis.

By ORDER of the Florida Public Service Commission this 5th day of May, 2008.

ANN COLE
Commission Clerk

(SEAL)

RCB

CONCURRENCE BY: COMMISSIONER SKOP
DISSENT BY: COMMISSIONER ARGENZIANO

COMMISSIONER SKOP, concurring specially with a separate opinion:

I concur with the majority view, but write separately to reflect upon the appropriate scope of our declaratory statement in relation to the breadth of the question raised by the petitioner.

In this regard, I would hold that "advanced payments" made during the preconstruction period need not be solely limited to the "queuing purposes" example provided within the staff recommendation.[7] In the instant case, the petitioner sought a declaratory statement as to whether, "...advance payments made prior to the completion of site clearing work are properly characterized as "preconstruction costs" to be recovered pursuant to the mechanism provided in Rule 25-6.0423, F.A.C.". The intervening parties raised objection to any such payments on the basis of the nature or character of the expense. While the staff recommendation effectively harmonized any such tension within the rule subparts through the use of the "hybrid" concept, I do not believe that the staff recommendation fully appreciated the fact that the underlying statute

[7] Notwithstanding the requirements of Rule 25-6.0423, F.A.C., the statutory support for this position is clearly found within a plain reading of section 366.93, Florida Statutes. This statute provides for cost recovery irrespective of plant completion and provides a "bright line" rule for preconstruction costs that is based upon a date in time rather than the nature or character of the expense. Accordingly, this statute seemingly provides a new paradigm for cost recovery as opposed to the traditional notion of how capital investments have been viewed and accounted for in the past. In this regard, the underlying tension between the statute and rule will be further discussed below. When the adopted rule and statute are in direct conflict, however, the adopted rule must yield to the controlling statute. The staff recommendation avoided this result by effectively harmonizing any such tension within the rule through the use of the "hybrid" concept. Nevertheless, it would appear to me that the underlying statute appears to be broader than the adopted rule on face and supports this conclusion on a separate and independent basis.

appears to be broader than the adopted rule on face and supports this conclusion on a separate and independent basis.[8]

As articulated during the bench discussion, I could clearly envision instances under which advanced payments could be made to various vendors for work-in-progress on capital equipment components during the preconstruction period reflecting the standard industry practice of making progress or performance payments to vendors upon reaching contractual or project milestones. The petitioner, however, would bear the burden of demonstrating that any such payments were prudently incurred.[9]

Additional rationale advancing this conclusion is provided by the following discussion:

Analysis of Rule and Statute

Rule 25-6.0423, F.A.C. and section 366.93, Florida Statutes both provide a "bright line" rule for pre-construction costs that is based upon a date in time rather than the nature or character of the expense. As demonstrated by the instant case, however, an underlying tension between the subparts of the adopted rule and the underlying statute exists in relation to whether advanced payments associated with capital equipment may be properly characterized as preconstruction costs. The intervening parties raised objection to any such payments on the basis of the nature or character of the expense. Specifically, the intervening parties argued that the definition of "Construction costs" found in subpart (2)(i) of the rule, qualifies and limits the nature of the expenses that may be properly incurred within the definition of "Pre-construction costs" found in subpart (2)(g) of the rule. While the staff recommendation effectively harmonized any such tension within the rule subparts through the use of the "hybrid" concept, a plain reading of the statute provides a separate and independent basis as to why the argument of the intervening parties must be rejected. In stark contrast to the rule, section 366.93(1)(a), Florida Statutes, provides the definition of "Cost" which, "...includes, but is not limited to, all capital investments...." Therefore, since the term "Cost" was expressly defined within the statute, a plain reading of section 366.93(1)(f), Florida Statutes, implies that any costs prudently incurred for capital investments during the preconstruction period may be properly characterized as preconstruction costs.[10] Accordingly, the statute seemingly provides a new paradigm for cost recovery as opposed to the traditional notion of how capital investments have been viewed and accounted for in the past.

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[8] Any such discussion of the adopted rule, by nature, implicates a comparison to the controlling statute.

[9] In this regard, I could also envision the extreme and rare circumstance under which a piece of capital equipment could be purchased and expensed in its entirety as a preconstruction cost under a plain reading of the existing statute if such an expenditure would provide substantial cost savings to the consumer as a result of the advanced purchase and the expense was prudently incurred.

[10] The term "preconstruction costs" draws directly upon the express definition of "Costs" provided within the statute which encompasses capital investments.

Effect of Frontloading Costs During the Pre-construction Period

Notwithstanding the intergenerational inequity argument raised by the intervening parties, it was undisputed during the Agenda Conference discussion that the frontloading of certain prudently incurred costs on a case-by-case basis during the preconstruction period would actually result in an overall cost savings to the consumer with respect to the total cost of completion and the total cost of ownership of the proposed plants. This cost savings results from the fact that any costs which are expensed during the preconstruction period are completely paid for in full.[11] In this regard, the costs which are expensed, as opposed to being capitalized, do not incur AFUDC carrying costs and are not placed into the rate base where they would increase the revenue requirement.

It is also important to recognize that section 366.93, Florida Statutes, provides for cost recovery irrespective of plant completion.[12] Accordingly, cost recovery is simply a timing issue where paying for costs as they are incurred is substantially less expensive than the deferral of such costs. While this may be an unintended consequence of the statute, the overall cost savings to the consumer resulting from considering such a practice on a case-by-case basis could be substantial. As the Commission is equally tasked with ensuring affordable rates, I feel that it is critically important for the Commission to consider any such opportunities that would serve to minimize costs on a case-by-case basis while remaining ever mindful of the intergenerational inequities associated with such decisions.[13]

In summary, the overall cost savings to the consumer resulting from considering the frontloading of prudently incurred costs on a case-by-case basis during the preconstruction period could be substantial. In this regard, I would strongly emphasize that all stakeholders are adequately protected by their voice in the process and the fact that all costs sought for recovery must be shown to be prudently incurred.

Other Arguments Raised by the Intervening Parties

While I may share a difference of opinion with respect to some of the arguments raised by the intervening parties, OPC (McGlothlin), AARP (Twomey), and FIPUG (McWhirter) jointly advanced at least two other arguments that are worthy of recognition. First, the argument

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[11] Analogous to a "pay-as-you-go" methodology.

[12] From the utility perspective, however, it is reasonable to conclude that nuclear cost recovery will be an exercise in risk management under which a utility will seek to expense or capitalize prudently incurred costs pursuant to the rule or statute, and will balance any such decisions in a manner analogous to that of maintaining an optimal capital structure. The trade off between capturing higher expected returns over the long term (supporting the capitalization of costs) versus obtaining a prudency determination in the near term (supporting the expensing of costs) will be a driving force in the decision making process.

[13] In this regard, any such decision would be public policy driven, giving due consideration as to whether the opportunity to capture substantial cost savings on behalf of consumers outweighed the resulting intergenerational inequities.

suggesting that it would be appropriate for a utility to submit a spreadsheet identifying the preconstruction costs that it reasonably expected to incur during the preconstruction period would seem to have merit recognizing that any such projection would not be binding upon the utility and subject to further revision. Second, the argument regarding the possibility of a utility repeatedly sliding the site clearing completion date in order to lengthen the preconstruction period to its advantage would also seem to present a valid concern if a utility repeatedly engaged in such conduct.

COMMISSIONER ARGENZIANO, dissenting with opinion as follows:

I dissent from the Order of the majority in the following particulars:

1) Request for hearing

The majority cites Rule 28-105.003, F.A.C., in defending its discretionary decision not to hold a hearing, and further cites that rule as permitting the Commission's absolute reliance on FPL's statement of facts in issuing its Order. The suggestion that the "opportunity for OPC to address the Commission" in the matter at the agenda conference somehow imparts the same testimonial assurances as the adversarial inquiries of a hearing is preposterous. The position that denying the adduction of facts is proper because the FPL Petition "involves a legal interpretation" of a rule is frustrated by the majority's reference to "factual exigencies" (Page 5) in the Order, where this Commission is without knowledge of the establishment of such as fact.

I believe the appropriate standard to be used in denying an interested party a hearing, especially in a matter of such magnitude as this, is simple: if there is any rationally conceivable fact which may be adduced such as to influence or possibly influence the Commission in its deliberations, a hearing is indicated. In the instant case, the impact on the customer of "favorable cost recovery treatment" for FPL in including long lead procurement items as preconstruction costs is such a fact, as are any number of others.

Any reliance on subsequent review to remedy a finding of a failure of "prudency," is contemplation of a futile safeguard, given the largesse of the Declaratory Statement, and would be as effective as trying to put toothpaste back in a tube.

2) Grant of Declaratory Statement

Refusal to permit the accelerated recovery of construction costs as a consequence of the length of the time pipeline is not denial of recovery, but simply would provide for recovery pursuant to Rule 25-6.0423, F.A.C. Any "queuing up" is simply a consequence of those decisions that a reasonably prudent project manager would undertake, and assuredly will undertake in the instance of any number of exotic items required in the construction of a nuclear power plant, in the interest of bringing the project to timely completion.

The majority's reliance on Section 366.93(2), F.S. is misplaced. Had the Legislature not intended the term "preconstruction costs" to mean precisely what the term is ordinarily

understood to mean, and which excepts the already indentified "construction costs," (and what Rule 25-6.0423(2) clearly takes it to mean) then F.S. 366.93(2)(a) would read:

> "(a) Recovery through the capacity cost recovery clause of all costs incurred prior to construction costs."

The majority's finding the temporal aspect of Rule 25-6.0423 to trump the express language of the rule is an exercise in mere casuistry.

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.