

IN THE SUPREME COURT  
STATE OF FLORIDA

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ROSARIO ROJO,

Case No.: SC11-1533

Appellate(s),

Lower Tribunal No.: 110069-EI

vs.

ART GRAHAM, ETC., et al.

Appellee(s)

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**FLORIDA POWER AND LIGHT COMPANY'S RESPONSE IN  
OPPOSITION TO APPELLANT'S MOTION FOR  
REINSTATEMENT OF CASE**

Florida Power and Light Company ("FPL"), hereby files, pursuant to Rule 9.300, Florida Rules of Appellate Procedure, this Response in Opposition to Appellant's Motion for Reinstatement of Case, and in support thereof states:

**BACKGROUND**

On June 29, 2011, the Florida Public Service Commission ("FPSC") issued a Final Order granting dismissal with prejudice of Appellant's Complaint against Florida Power and Light ("Complaint") before the FPSC. On August 1, 2011, Appellant filed an untimely Notice of Appeal of the FPSC's Final Order with the

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Supreme Court. On August 9, 2011, the Court dismissed Appellant's cause for failure to timely file her request for judicial review, subject to reinstatement on proper motion establishing timeliness within fifteen days from the date of the

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dismissal order. On August 25, 2011 (after the deadline set by the Court's order of dismissal), Appellant filed a Motion for Reinstatement of the case. On August 26, 2011, the Court noted that Appellant's Motion for Reinstatement did not include a Certificate of Service and, as such, would not be considered submitted until service on parties was effected and proof of service was provided to the Court. On September 14, 2011, Appellant filed a Certificate of Service claiming to have served her Motion for Reinstatement on FPL and the FPSC on September 10, 2011. FPL has not received a service copy of the Motion for Reinstatement from Appellant, but obtained a copy from the Court on September 21, 2011.

APPELLANT'S NOTICE OF APPEAL WAS UNTIMELY  
AND THUS JURISDICTIONALLY DEFECTIVE

The Court should reject Appellant's Motion for Reinstatement because Appellant's Notice of Appeal was untimely, and Appellant's Motion for Reinstatement has not shown otherwise. Rule 9.110, Florida Rules of Appellate Procedure, requires that a notice of appeal be filed within 30 days of rendition of the order to be reviewed. Additionally, the FPSC Final Order that Appellant seeks to appeal gave Appellant explicit instructions on what she had to do in order to appeal, clearly stating:

Any party adversely affected by the Commission's final action in this matter may request: ...

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.<sup>1</sup>

The FPSC Final Order was issued on June 29, 2011. The thirty-day period within which Appellant had to file a notice of appeal thus expired on July 29, 2011. Appellant's Notice of Appeal was filed with this Court on August 1, 2011, three days beyond the allowable time limit for filing. Failure to file a notice of appeal within 30 days constitutes "an irremediable jurisdictional defect." *Williams v. State*, 324 So.2d 74 (Fla. 1975). Appellant failed to follow the FPSC Final Order's or the Rule's explicit instructions. Moreover, Appellant has *never* filed the Notice of Appeal with the FPSC Clerk's office, as instructed by Rule 9.110 and the FPSC Final Order.

Appellant's Attachment "A" to her Motion for Reinstatement showing a postage receipt for something mailed to Tallahassee on July 29 does not constitute proof of filing. There is nothing on the postage receipt to indicate what was mailed, or where (other than to ZIP Code 32301 in Tallahassee). In any event, filing means receipt by the relevant clerk's office, not dropping something in the mail. "In order to be timely, a notice of appeal must be filed with the

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<sup>1</sup> *In re: Complaint of Rosario Rojo against Florida Power and Light Company*, Florida Public Service Commission, Case No. 858880E, Docket No. 110069-EI, Order No. PSC-11-02850FOF-EI, Issued June 29, 2011, at 6.

appropriate court within the required time, and merely mailing the notice or having the notice placed in a post office box within the required time period is not sufficient.” *Raysor v. Raysor*, 706 So. 2d 400, 401 (Fla. 1st DCA 1998); *see also Millinger v. Broward County Mental Health Division and Risk Management*, 672 So. 2d 24, 26 (Fla. 1996)(stating that “[i]t is a settled rule of law that mailing, as opposed to filing, a notice within the thirty-day filing period is insufficient to preserve appellate rights”). Thus, the post office receipt fails to demonstrate that Appellant timely filed her Notice of Appeal.

An untimely notice of appeal of an order of an administrative agency has the effect of defeating the appellate jurisdiction. For this reason, the filing of a notice of appeal beyond the time period prescribed by the appellate rules must invariably result in a dismissal of the case. No doctrine of “excusable neglect” applies to the jurisdictional act of timely filing a notice of appeal from an order of an administrative agency, so the reasons for delay stated in Appellant’s Motion for Reinstatement cannot be a basis for reinstatement as a matter of law. *Miami-Dade County v. Peart*, 843 So.2d 363 (Fla. 3d DCA 2003)(finding that a notice of appeal that was filed more than 30 days after an administrative hearing officer rendered her decision deprived the circuit court of jurisdiction to hear an appeal, even though notice was only one day late); *Rice v. Freeman*, 939 So.2d 1144 (Fla. 3d DCA 2006) review dismissed 977 So.2d 576, rehearing denied (Failure to file any

notice of appeal from lower tribunal within the 30 day period after rendition of a final judgment constitutes an irremediable jurisdictional defect); *Hawks v. Walker*, 409 So.2d 524 (1982) (Fla. 5th DCA 2006) (finding that a timely notice of appeal must be filed within 30 days in order for the District Court of Appeal to have jurisdiction; late filing is a defect no one can correct, not even the court). Even if such a doctrine applied, however, Appellant's Motion for Reinstatement has alleged no plausible excuse for her delay. First, Appellant claims not to have been properly instructed by the lower tribunal (the FPSC) as to how an appeal should be filed. In fact, however, the FPSC Final Order gave her explicit instructions on how and when to file an appeal, which Appellant simply failed to follow. Second, Appellant claims to have been delayed by a family member's "funeral and grievances," but says those started on August 9, 2011. That is well after the deadline to file the Notice of Appeal and therefore would not have affected the timeliness of her filing.

WHEREFORE, for the reasons stated above, Florida Power and Light Company respectfully requests that the Court deny Appellant's Motion for Reinstatement of the Case.

Respectfully submitted,

BY:   
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**CERTIFICATE OF SERVICE**

**Case No.: SC11-1533**

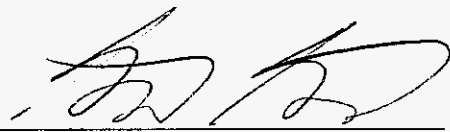
**I HEREBY CERTIFY** that the original of the foregoing Florida Power And Light Company's Response in Opposition to Appellant's Motion for Reinstatement of Case has been furnished by regular united states mail to honorable Thomas D. Hall, Clerk, the Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1926; a true and correct copy of the foregoing has been furnished by United States mail on September 29, 2011 to the following:

Ms. Ann Cole  
Division of the Commission Clerk and  
Administrative Services  
Florida Public Service Commission  
Betty Easley Conference Center  
2540 Shumard Oak Boulevard  
Room 110  
Tallahassee, FL 32399-0850

Blanco S. Bayo  
Director  
Florida Public Service Commission  
2450 Shumard Oak Boulevard  
Tallahassee, FL 32399-0850

Rosario Rojo  
2510 SW 17<sup>th</sup> Avenue  
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Appellate

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