Tab 1	**SB 494** by **Lee**; (Identical to H 00405) Linear Facilities

Tab 2	**SPB 7008** by **CU**; OGSR/Local Government Electric Utility

The Florida Senate

COMMITTEE MEETING EXPANDED AGENDA

COMMUNICATIONS, ENERGY, AND PUBLIC UTILITIES
Senator Bean, Chair
Senator Montford, Vice Chair

MEETING DATE: Tuesday, November 14, 2017
TIME: 2:00—4:00 p.m.
PLACE: 301 Senate Office Building

MEMBERS: Senator Bean, Chair; Senator Montford, Vice Chair; Senators Broxson, Campbell, Grimsley, Stargel, and Young

TAB	BILL NO. and INTRODUCER	BILL DESCRIPTION and SENATE COMMITTEE ACTIONS	COMMITTEE ACTION
1	**SB 494** Lee (Identical H 405)	Linear Facilities; Revising the definition of the term “development” to exclude work by certain utility providers on utility infrastructure on certain rights-of-way or corridors; requiring the consideration of a certain variance standard when including conditions for the certification of an electrical power plant; clarifying that the Public Service Commission has exclusive jurisdiction to require underground transmission lines, etc. CU 11/14/2017 CA	
	Consideration of proposed bill:		
2	**SPB 7008**	OGSR/Local Government Electric Utility; Amending provisions relating to an exemption from public records requirements for proprietary confidential business information held by a local government electric utility; removing the scheduled repeal of the exemption, etc.	
	Other Related Meeting Documents		

The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

BILL: SB 494

INTRODUCER: Senator Lee

SUBJECT: Linear Facilities

DATE: November 13, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell	CU	**Pre-meeting**
2.			CA	

I. Summary:

SB 494 amends the exemptions from the land-use-consistency provisions of the Power Plant Siting Act (PPSA)[1] and Transmission Line Siting Act (TLSA)[2] to provide that they apply to established rights-of-way and corridors, to rights-of-way and corridors yet to be established, and to creation of distribution and transmission corridors.

The bill establishes the standard to be used in authorizing variances in a site certification under the PPSA and the TLSA.

It also provides that the PPSA and TLSA cannot affect in any way the Public Service Commission's (PSC) exclusive jurisdiction to require transmission lines to be located underground.

II. Present Situation:

The bill partially overturns a Third District Court of Appeal (the court) decision in a power plant siting case.[3] The bill addresses two issues: application of specific local laws in a siting proceeding and the authority of the Siting Board to order undergrounding, or burying, of a transmission or distribution power line.

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[1] Sections 403.501-403.519, F.S.

[2] Sections 403.52-403.539, F.S.

[3] *Miami-Dade County, et al, v. In Re: Florida Power & Light Co., etc., et al*, Opinion filed April 20, 2016, available at http://www.3dca.flcourts.org/opinions/3D14-1467.pdf. The Florida Supreme Court denied Florida Power and Light's petition for review, Friday, February 24, 2017, available at https://efactssc-public.flcourts.org/casedocuments/2016/2277/2016-2277_disposition_137996.pdf.

Application of Local Laws / "Development"

Statutes

Under the PPSA, the application for certification of a site for a power plant and associated facilities must include a statement on the consistency of the site, and any associated facilities[4] that constitute a "development," with existing land use plans and zoning ordinances that were in effect on the date the application was filed and a full description of the consistency.[5] The statement must include an identification of those associated facilities that the applicant believes are exempt from the requirements of land use plans and zoning ordinances under the Community Planning Act provisions of ch. 163 and s. 380.04(3), F.S. Each affected local government must file a determination of the consistency of the site and non-exempt associated facilities with existing land use plans and zoning ordinances in effect on the date the application was filed. Any substantially affected person may file a petition with the designated administrative law judge (ALJ) to dispute the local government's determination.[6] If a petition is filed, the ALJ must hold a land use hearing at which the sole issue for determination is whether the proposed site or nonexempt associated facility is consistent and in compliance with existing land use plans and zoning ordinances.[7] After the hearing, if the Siting Board determines that the proposed site or non-exempt associated facility does not conform with existing land use plans and zoning ordinances, the board may authorize a variance or other necessary approval to the adopted land use plan and zoning ordinances required to render the site consistent with the local land use plans and zoning ordinances.[8]

Associated facilities that are exempt from the term "development" are not subject to the land use consistency and compliance requirements. The relevant definition of "development" is set out in s. 380.04, F.S., which expressly excludes the following activities from the term development:

- Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like.
- The creation or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.[9]

[4] "Associated facilities" means, for the purpose of certification, those onsite and offsite facilities which directly support the construction and operation of the electrical power plant such as electrical transmission lines, substations, and fuel unloading facilities; pipelines necessary for transporting fuel for the operation of the facility or other fuel transportation facilities; water or wastewater transport pipelines; construction, maintenance, and access roads; and railway lines necessary for transport of construction equipment or fuel for the operation of the facility. Section 403.503(7), F.S.
[5] Section 403.50665(1), F.S.
[6] Section 403.50665(2)(a), F.S.
[7] Section 403.508, F.S.
[8] Section 403.508(1)(f), F.S. To do this, the Siting Board must determine after notice and hearing and upon consideration of the recommended order on land use and zoning issues that it is in the public interest to authorize the use of the land for a site or associated facility.
[9] Section 380.04(3)(b) and (h), F.S.

Administrative Orders

Several administrative orders on this issue have held that siting of the transmission line is exempt from "development" and thus exempt from application of the land-use-consistency provisions. This interpretation turns on the meaning of the term "established."

One illustration of this interpretation is the following quote:

> First, Gulf Power will create a new right-of-way for the powerline. A right-of-way is a 'right of access,' an easement, or an "other right" in land. Second, Gulf Power will construct the powerline on the newly established right-of-way. Gulf Power is a utility engaged in the distribution or transmission of electricity. The construction of the powerline in the established right-of-way falls within s. 380.04(3)(b). See, *Bd. Of County Commrs. of Monroe County v. Dept. of Community Affairs*, 560 So.2d 240 (Fla. 3d DCA 1990); *Friends of Mantanzas, Inc. v. Dept. of Environmental Protection*, 729 So.2d 437 (Fla. 5th DCA 1999), and *1000 Friends of Florida, Inc. v. St. Johns County*, 765 So.2d 216 (Fla. 5th DCA 2000), interpreting the similar exemption for road improvements within the right-of-way in s. 380.04(3)(a), *Fla. Stat*. (2004).
>
> Therefore, the proposed powerline is not 'development' as defined in section 380.04, *Fla. Stat.* (2003).[10]

In another case, the exemption was applied as follows:

> After certification of this project, TECO will acquire the necessary property interests in a ROW within the certified corridor for placement of the line. Construction of transmission lines on such established ROWs is excepted from the definition of 'development' in Section 163.3164(5), Florida Statutes. Accordingly, the provisions of the local comprehensive plans related to 'development' that have been adopted by the local governments crossed by the line are not applicable to this project.[11]

Miami-Dade County vs. In Re: Florida Power & Light

In this case, Florida Power & Light Company (FPL) filed an application under the PPSA to obtain a permit to construct and operate two new nuclear generating units and associated facilities at Turkey Point, including new transmission lines. They obtained a recommended order and a final order on certification, both approving FPL's West Preferred Corridor as a back-up western transmission corridor if adequate right-of-way could not be obtained in the primary corridor in a timely manner and at a reasonable cost. Neither order considered local regulations nor required FPL to underground its lines.

The final order was appealed and the court reversed and remanded the final order based on three errors, including holding that the order incorrectly applied the "development" exemption based on an erroneous interpretation of the exemption for:

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[10] *In re Petition for Declaratory Statement by Hughes*, 2004 Fla. ENV LEXIS 166, 4 ER FALR 113.

[11] *In Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line Siting Application*, 2008 Fla. ENV LEXIS 115, 2008 ER FALR 175, at 50 (DOAH May 13, 2008), adopted in toto 2008 E.R. F.A.L.R. 175 (Siting Bd. Aug. 1, 2008).

> Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like.[12]

The court found the following errors in the Siting Board's application of the exemption law:

- In the siting process, the Siting Board certifies a corridor, not a right-of-way, and the exemption cannot be applied to the entire corridor.[13]
- The record reflects that the corridor is made up of parcels within and outside established rights-of-way, so the board has no way of knowing whether construction will take place in a right-of-way or an easement.[14]
- The exemption is for work conducted on "established rights-of-way." "And as the City of Miami contends, were this Court to accept FPL's argument on this issue, that an established right-of-way is not the same as an existing right-of-way, this would make the word 'established' meaningless."[15]

Analysis of Decisions

The court does not cite or quote previous administrative law and appears not to consider it as precedent. Instead, the court appears to have based its decision solely on interpretation of the statutes at issue. The court's interpretation is supported by the plain English meaning of the words in the statute: establish means to institute, to make firm, to bring into existence, to put on a firm basis, to gain full recognition or acceptance, or to put beyond doubt.[16] The past tense usage means the act has been accomplished, that the right-of-way is in existence at the time of the siting proceedings.

However, the decision appears to conflict with the legislative intent for the PPSA and TLSA. The stated intent for the siting acts is to establish a centralized, efficient procedure for approving a single license for power plant and transmission line sites, through application of both the state and local standards and recommendations of all involved agencies, while balancing the need for additional electricity against the need to minimize adverse effects on citizens and the environment, without undue conflict with the goals established by the applicable local comprehensive plan.[17]

The local land use laws classify property uses into multiple types of residential, commercial, and industrial property, with different permitted uses for each type. Each municipality and county is a different patchwork of these types of property, but application of the land use laws of each would likely restrict a transmission line to industrial use property. A transmission line cannot be constructed across multiple local governments using only the unconnected industrial property

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[12] *Miami-Dade County*, supra note 1, at 11.
[13] *Miami-Dade County*, supra note 1, at 12.
[14] *Miami-Dade County*, supra note 1, at 12.
[15] *Miami-Dade County*, supra note 1, at 13-14.
[16] *See*, e.g., https://www.merriam-webster.com/dictionary/establish and https://ahdictionary.com/word/search.html?q=establish
[17] Sections 403.502 and 403.521, F.S., respectively.

within each; as such, if the statutes were interpreted and implemented as the court has held, it is doubtful a transmission line could ever be sited.

The previous administrative orders, on the other hand, appear to achieve the statutory intent, but appear to do so by a tortured interpretation of the word "established" within the context of "development."

It appears that the s. 380.04, F.S., standard for "development," incorporated into the PPSA and TLSA by cross reference, is ambiguous in those contexts. The apparent intent of the bill is to clarify this ambiguity.

Authority of the Siting Board to Order Undergrounding of Transmission Lines

Statutes

The PPSA and TLSA authorize the Siting Board to include conditions in the certification.[18] Both also contain a limitation that the act does not affect in any way the ratemaking powers of the PSC under ch. 366, F.S.

Miami-Dade County vs. In Re: Florida Power & Light

In the *Miami-Dade* decision, the court also reversed and remanded based on a finding that the Siting Board erroneously thought it did not have the power to require FPL to install the lines underground at FPL's expense.

The court made the following finding:

> The general grant of power in the PPSA to "impose conditions" upon certification, other than those listed in the PPSA, gave the Siting Board the power to impose the condition of requiring that the power lines be installed underground, at FPL's expense. See s. 403.511(1), Fla. Stat.; s. 403.511(2)(b)(2). Undergrounding of the transmission lines is a condition upon certification encompassed by the Siting Board's ability to impose "site specific criteria, standards, or limitations" on FPL's project. As such, the Siting Board had the power to require it, contrary to the Siting Board's conclusion that it had no such power. Accordingly, reversal is required on this point.[19]

FPL had argued that the Siting Board did not have jurisdiction to order undergrounding based on a previous case on an issue unrelated to the siting act. The court distinguished that case on the basis that it contained nothing regarding whether undergrounding could be required as a condition of certification in a siting case.

> The Seminole holding was made in the context of rate-making with regard to the power vested in the Public Service Commission and not in the context of any of the Siting Board's powers. The Siting Board's power in no way infringes on the

[18] Sections 403.511 and 403.531, F.S., respectively.
[19] *Miami-Dade County*, supra note 1, at 14-15.

> PSC's authority with regard to rate-making, and there is no conflict with the PSC's role. The Seminole case is simply inapplicable to the case before us.[20]

Analysis

Again, the court appears to have based its decision solely on interpretation of the siting statutes. Interpretation and implementation is more complex when ch. 366, F.S., and the facts of economic regulation and undergrounding of power lines are considered as well.

Undergrounding of transmission lines is more expensive than placing them overhead on poles. The actual amount of the cost difference depends on the actual circumstances of the transmission line site. For the Turkey Point line, the estimate was that undergrounding would cost nine times more; $13.3-$18.5 million per mile compared to $1.5-$2.5 million. An estimated average is that the costs are around ten times more to underground a transmission line.[21]

Additionally, when an agency with regulatory authority over a regulated public utility orders that public utility to incur costs, the PSC *must* allow the utility to recover those costs. This affects the ratemaking power of the PSC under ch. 366, F.S., in at least two significant ways:

- It denies the PSC its oversight and ratemaking function of making the initial determination of whether the higher costs of undergrounding the transmission line are prudent and reasonable under the circumstances. This determination is an essential element of determining what utility costs are recoverable, which, in turn, is the first step in ratemaking.
- It denies the PSC the ability to make a determination of how undergrounding would affect grid reliability. Grid reliability is a part of ratemaking through the underlying regulatory compact, which includes customer service requirements.

III. Effect of Proposed Changes:

The bill amends paragraphs 380.04(b) and (h), F.S., which contain the exemptions from "development" discussed above. The bill extends the existing exemption for work done on established rights-of-way to established corridors and to rights-of way and corridors yet to be established. It also provides that the exemption for the creation of specified types of property rights applies to creation of distribution and transmission corridors.

The bill makes the same changes to s. 163.3221, F.S., which provides definitions for use in the Florida Local Government Development Agreement Act, which provides for agreements between local governments and developers to improve the growth management and public planning processes.

The bill also amends ss. 403.511 and 403.531, F.S., which relate to the effect of certification under the PPSA and the TLSA, respectively. First, the bill specifies that the standard for granting variances in the certification is to be the standards set forth in s. 403.201, F.S. Section 403.201, F.S., authorizes variances in the following conditions:

- There is no practicable means known or available for the adequate control of the pollution involved.

[20] *Miami-Dade County*, supra note 1, at 18.
[21] Email from David Childs; Hopping Green & Sams, on March 10, 2017.

- Compliance with the particular requirement or requirements from which a variance is sought will necessitate the taking of measures which, because of their extent or cost, must be spread over a considerable period of time. A variance granted for this reason shall prescribe a timetable for the taking of the measures required.
- To relieve or prevent hardship of a kind other than those provided for above. Variances and renewals thereof granted under authority of this paragraph shall each be limited to a period of 24 months, except that variances granted pursuant to part II may extend for the life of the permit or certification.

Second, the bill provides that the PPSA and TLSA cannot affect in any way the PSC's exclusive jurisdiction to require transmission lines to be located underground.

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill will clarify the application of local land use laws to transmission line corridors in siting cases under the PPSA and TLSA. This will provide certainty to both the utilities and the local governments, and will reduce expenses of siting and legal proceedings.

The express prohibition against the Siting Board ordering undergrounding of transmission lines will save utility ratepayers additional costs. As the PSC is a party to PPSA proceedings and may be a party to TLSA proceedings, it is possible that some coordination of siting proceedings and PSC ratemaking could be accomplished to incorporate undergrounding as a condition of certification while still maintaining PSC ratemaking authority.

C. Government Sector Impact:

The bill will clarify the application of local land use laws to transmission line corridors in siting cases under the PPSA and TLSA. This will provide certainty to both the utilities and the local governments, and will reduce expenses of siting and legal proceedings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

The bill substantially amends the following sections of the Florida Statutes: 163.3221, 380.04, 403.511, and 403.531.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

By Senator Lee

20-00438-18 2018494__

A bill to be entitled

An act relating to linear facilities; amending s. 163.3221, F.S.; revising the definition of the term "development" to exclude work by certain utility providers on utility infrastructure on certain rights-of-way or corridors; revising the definition to exclude the creation or termination of distribution and transmission corridors; amending s. 380.04, F.S.; revising the definition of the term "development" to exclude work by certain utility providers on utility infrastructure on certain rights-of-way or corridors; revising the definition to exclude the creation or termination of distribution and transmission corridors; amending s. 403.511, F.S.; requiring the consideration of a certain variance standard when including conditions for the certification of an electrical power plant; clarifying that the Public Service Commission has exclusive jurisdiction to require underground transmission lines; amending s. 403.531, F.S.; requiring the consideration of a certain variance standard when including conditions for the certification of a proposed transmission line corridor; clarifying that the Public Service Commission has exclusive jurisdiction to require underground transmission lines; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

CODING: Words ~~stricken~~ are deletions; words underlined are additions.

20-00438-18 2018494__

Section 1. Paragraph (b) of subsection (4) of section 163.3221, Florida Statutes, is amended to read:

163.3221 Florida Local Government Development Agreement Act; definitions.—As used in ss. 163.3220-163.3243:

(4) "Development" means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

(b) The following operations or uses shall not be taken for the purpose of this act to involve "development":

1. Work by a highway or road agency or railroad company for the maintenance or improvement of a road or railroad track, if the work is carried out on land within the boundaries of the right-of-way.

2. Work by any utility and other persons engaged in the distribution or transmission of gas, electricity, or water, for the purpose of inspecting, repairing, or renewing on established rights-of-way or corridors, or constructing on established or to be established rights-of-way or corridors, any sewers, mains, pipes, cables, utility tunnels, power lines, towers, poles, tracks, or the like.

3. Work for the maintenance, renewal, improvement, or alteration of any structure, if the work affects only the interior or the color of the structure or the decoration of the exterior of the structure.

4. The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.

5. The use of any land for the purpose of growing plants,

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59 crops, trees, and other agricultural or forestry products;
60 raising livestock; or for other agricultural purposes.
61 6. A change in use of land or structure from a use within a
62 class specified in an ordinance or rule to another use in the
63 same class.
64 7. A change in the ownership or form of ownership of any
65 parcel or structure.
66 8. The creation or termination of rights of access,
67 riparian rights, easements, distribution and transmission
68 corridors, covenants concerning development of land, or other
69 rights in land.
70 Section 2. Paragraphs (b) and (h) of subsection (3) of
71 section 380.04, Florida Statutes, are amended to read:
72 380.04 Definition of development.—
73 (3) The following operations or uses shall not be taken for
74 the purpose of this chapter to involve "development" as defined
75 in this section:
76 (b) Work by any utility and other persons engaged in the
77 distribution or transmission of gas, electricity, or water, for
78 the purpose of inspecting, repairing, or renewing on established
79 rights-of-way or corridors, or constructing on established or to
80 be established rights-of-way or corridors, any sewers, mains,
81 pipes, cables, utility tunnels, power lines, towers, poles,
82 tracks, or the like. This provision conveys no property interest
83 and does not eliminate any applicable notice requirements to
84 affected land owners.
85 (h) The creation or termination of rights of access,
86 riparian rights, easements, distribution and transmission
87 corridors, covenants concerning development of land, or other

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88 rights in land.
89 Section 3. Paragraph (b) of subsection (2) and subsection
90 (4) of section 403.511, Florida Statutes, are amended to read:
91 403.511 Effect of certification.—
92 (2)
93 (b)1. Except as provided in subsection (4), and in
94 consideration of the standard for granting variances pursuant to
95 s. 403.201, the certification may include conditions which
96 constitute variances, exemptions, or exceptions from
97 nonprocedural requirements of the department or any agency which
98 were expressly considered during the proceeding, including, but
99 not limited to, any site specific criteria, standards, or
100 limitations under local land use and zoning approvals which
101 affect the proposed electrical power plant or its site, unless
102 waived by the agency and which otherwise would be applicable to
103 the construction and operation of the proposed electrical power
104 plant.
105 2. No variance, exemption, exception, or other relief shall
106 be granted from a state statute or rule for the protection of
107 endangered or threatened species, aquatic preserves, Outstanding
108 National Resource Waters, or Outstanding Florida Waters or for
109 the disposal of hazardous waste, except to the extent authorized
110 by the applicable statute or rule or except upon a finding in
111 the certification order that the public interests set forth in
112 s. 403.509(3) in certifying the electrical power plant at the
113 site proposed by the applicant overrides the public interest
114 protected by the statute or rule from which relief is sought.
115 (4) This act shall not affect in any way the Public Service
116 Commission's ratemaking powers or its exclusive jurisdiction to

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117 require transmission lines to be located underground ~~of the~~
118 ~~Public Service Commission~~ under chapter 366; nor shall this act
119 in any way affect the right of any local government to charge
120 appropriate fees or require that construction be in compliance
121 with applicable building construction codes.
122 Section 4. Paragraph (b) of subsection (2) and subsection
123 (4) of section 403.531, Florida Statutes, are amended to read:
124 403.531 Effect of certification.—
125 (2)
126 (b) In consideration of the standard for granting variances
127 pursuant to s. 403.201, the certification may include conditions
128 that constitute variances and exemptions from nonprocedural
129 standards or rules of the department or any other agency which
130 were expressly considered during the certification review unless
131 waived by the agency as provided in s. 403.526 and which
132 otherwise would be applicable to the location of the proposed
133 transmission line corridor or the construction, operation, and
134 maintenance of the transmission lines.
135 (4) This act does not in any way affect the commission's
136 ratemaking powers or its exclusive jurisdiction to require
137 transmission lines to be located underground ~~of the commission~~
138 under chapter 366. This act does not in any way affect the right
139 of any local government to charge appropriate fees or require
140 that construction be in compliance with the National Electrical
141 Safety Code, as prescribed by the commission.
142 Section 5. This act shall take effect upon becoming a law.

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The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Communications, Energy, and Public Utilities

BILL:	SPB 7008
INTRODUCER:	For consideration by the Communications, Energy, and Public Utilities Committee
SUBJECT:	OGSR/Local Government Electric Utility
DATE:	November 13, 2017 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Wiehle	Caldwell		**Pre-meeting**

I. Summary:

SPB 7008 removes the scheduled repeal of the public records exemption for proprietary confidential business information held by a local government electric utility, thus continuing the exemption from disclosure requirements under the public records laws. The bill takes effect on October 1, 2018.

II. Present Situation:

Public Records Law

The Florida Constitution provides that the public has the right to inspect or copy records made or received in connection with official governmental business.[1] This applies to the official business of any public body, officer, or employee of the state, including all three branches of state government, local governmental entities, and any person acting on behalf of the government.[2]

In addition to the Florida Constitution, the Florida Statutes provide that the public may access legislative and executive branch records.[3] Chapter 119, F.S., constitutes the main body of public records laws, and is known as the Public Records Act.[4] The Public Records Act states that:

> it is the policy of this state that all state, county and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.[5]

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[1] FLA. CONST., art. I, s. 24(a).
[2] FLA. CONST., art. I, s. 24(a).
[3] The Public Records Act does not apply to legislative or judicial records. *Locke v. Hawkes*, 595 So. 2d 32 (Fla. 1992). Also see *Times Pub. Co. v. Ake*, 660 So. 2d 255 (Fla. 1995). The Legislature's records are public pursuant to s. 11.0431, F.S. Public records exemptions for the Legislature are primarily located in s. 11.0431(2)-(3), F.S.
[4] Public records laws are found throughout the Florida Statutes.
[5] Section 119.01(1), F.S.

According to the Public Records Act, a public record includes virtually any document or recording, regardless of its physical form or how it may be transmitted.[6] The Florida Supreme Court has interpreted public records as being "any material prepared in connection with official agency business which is intended to perpetuate, communicate or formalize knowledge of some type."[7] A violation of the Public Records Act may result in civil or criminal liability.[8]

The Legislature may create an exemption to open meetings requirements by passing a general law by a two-thirds vote of the House and the Senate.[9] The exemption must explicitly lay out the public necessity justifying the exemption, and must be no broader than necessary to accomplish the stated purpose of the exemption.[10] A statutory exemption which does not meet these two criteria may be unconstitutional and may not be judicially saved.[11]

When creating a public records exemption, the Legislature may provide that a record is 'confidential and exempt' or 'exempt.'[12] Records designated as 'confidential and exempt' may be released by the records custodian only under the circumstances defined by the Legislature. Records designated as 'exempt' may be released at the discretion of the records custodian under certain circumstances.[13]

Open Government Sunset Review Act

The Open Government Sunset Review Act (referred to hereafter as the "OGSR") prescribes a legislative review process for newly created or substantially amended public records or open meetings exemptions.[14] The OGSR provides that an exemption automatically repeals on October 2nd of the fifth year after creation or substantial amendment; in order to save an

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[6] Section 119.011(12), F.S., defines "public record" to mean "all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency." Section 119.011(2), F.S., defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency."

[7] *Shevin v. Byron, Harless, Schaffer, Reid and Assoc. Inc*., 379 So. 2d 633, 640 (Fla. 1980).

[8] Section 119.10, F.S. Public records laws are found throughout the Florida Statutes, as are the penalties for violating those laws.

[9] FLA. CONST., art. I, s. 24(c).

[10] FLA. CONST., art. I, s. 24(c).

[11] *Halifax Hosp. Medical Center v. New-Journal Corp.,* 724 So. 2d 567 (Fla. 1999). In *Halifax Hospital*, the Florida Supreme Court found that a public meetings exemption was unconstitutional because the statement of public necessity did not define important terms and did not justify the breadth of the exemption. *Id*. at 570. The Florida Supreme Court also declined to narrow the exemption in order to save it. *Id.* In *Baker County Press, Inc. v. Baker County Medical Services, Inc.*, 870 So. 2d 189 (Fla. 1st DCA 2004), the court found that the intent of a statute was to create a public records exemption. The *Baker County Press* court found that since the law did not contain a public necessity statement, it was unconstitutional. *Id*. at 196.

[12] If the Legislature designates a record as confidential, such record may not be released to anyone other than the persons or entities specifically designated in the statutory exemption. *WFTV, Inc. v. The School Board of Seminole*, 874 So. 2d 48 (Fla. 5th DCA 2004).

[13] A record classified as exempt from public disclosure may be disclosed under certain circumstances. *Williams v. City of Minneola*, 575 So. 2d 687 (Fla. 5th DCA 1991).

[14] Section 119.15, F.S. Section 119.15(4)(b), F.S., provides that an exemption is considered to be substantially amended if it is expanded to include more information or to include meetings. The OGSR does not apply to an exemption that is required by federal law or that applies solely to the Legislature or the State Court System pursuant to section 119.15(2), F.S.

exemption from repeal, the Legislature must reenact the exemption.[15] In practice, many exemptions are continued by repealing the sunset date rather than reenacting the exemption.

The OGSR provides that a public records or open meetings exemption may be created or maintained only if it serves an identifiable public purpose and is no broader than is necessary.[16] An exemption serves an identifiable purpose if it meets one of the following purposes *and* the Legislature finds that the purpose of the exemption outweighs open government policy and cannot be accomplished without the exemption:

- It allows the state or its political subdivision to effectively and efficiently administer a program, and administration would be significantly impaired without the exemption;[17]
- Releasing sensitive personal information would be defamatory or would jeopardize an individual's safety. If this public purpose is cited as the basis of an exemption, however, only personal identifying information is exempt;[18] or
- It protects trade or business secrets.[19]

The OGSR also requires specified questions to be considered during the review process.[20] In examining an exemption, the OGSR asks the Legislature to carefully question the purpose and necessity of reenacting the exemption.

If, in reenacting an exemption, the exemption is expanded, then a public necessity statement and a two-thirds vote for passage are required.[21] If the exemption is reenacted without substantive changes or if the exemption is narrowed, then a public necessity statement and a two-thirds vote for passage are *not* required. If the Legislature allows an exemption to sunset, the previously exempt records will remain exempt unless provided for by law.[22]

Section 119.0713(4), F.S. – Exemption of Proprietary Confidential Business Information Held by a Local Government Electric Utility

In 2013, the Legislature created s. 119.0713(4), F.S., to exempt from the public record requirements proprietary confidential business information held by a local government electric utility in conjunction with a due diligence review of an electric project or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources. The term "proprietary

[15] Section 119.15(3), F.S.
[16] Section 119.15(6)(b), F.S.
[17] Section 119.15(6)(b)1., F.S.
[18] Section 119.15(6)(b)2., F.S.
[19] Section 119.15(6)(b)3., F.S.
[20] Section 119.15(6)(a), F.S. The specified questions are:

- What specific records or meetings are affected by the exemption?
- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?

[21] FLA. CONST. art. I, s. 24(c).
[22] Section 119.15(7), F.S.

confidential business information" means information, regardless of form or characteristics, which:

- is held by an electric utility that is subject to chapter 119, F.S.;
- is intended to be and is treated by the entity that provided the information to the electric utility as private in that the disclosure of the information would cause harm to the entity providing the information or its business operations; and
- has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public.

The term "proprietary confidential business information" includes, but is not limited to:

- Trade secrets.
- Internal auditing controls and reports of internal auditors.
- Security measures, systems, or procedures.
- Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the electric utility to contract for goods or services on favorable terms.
- Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

This public record exemption stands repealed on October 2, 2018, unless reviewed and reenacted by the Legislature under the Open Government Sunset Review Act (section 119.15, F.S.).

Open Government Sunset Review of Exemption

Accordingly, in the summer of 2017, Senate and House committee staff conducted a survey of Florida local government electric utilities relating to their use of the exemption. Six entities responded: JEA (previously Jacksonville Electric Authority), Orlando Utilities Commission (OUC), Kissimmee Utility Authority (KUA), Lakeland Electric (LE), City of Leesburg Electric Department (LED), and Florida Municipal Power Agency (FMPA).[23, 24]

The statute applies to a local government electric utility that holds proprietary confidential business information in conjunction with either a due diligence review[25] of an electric project or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources. An electric project includes:

- Any plant, works, system, facilities, and real property and personal property of any nature whatsoever, together with all parts thereof and appurtenances thereto, which is located within

[23] Responses are on file with the Senate Committee on Communications, Energy, and Public Utilities.

[24] While there are 34 municipal electric utilities, only 13 of these utilities generate electricity. Florida Public Service Commission, *2017 Facts and Figures of the Florida Utilities Industry*, page 11 http://www.psc.state.fl.us/Files/PDF/Publications/Reports/General/Factsandfigures/March%202017.pdf
Also, the projects that this public records exemption addresses involve the acquisition of large scale facilities, are very expensive, and don't happen often. Finally, the FMPA represents the collective interests of 13 municipal electric utilities, and its response is considered a response for all 13 utilities. Collectively, then, 19 municipal utilities responded. Amy Zubaly, email to Diana Caldwell, September 6, 2017.

[25] A due diligence review is an investigation and review of the business seeking the contract and of their financial and technical resources to fulfill the contract, of the proposal itself, and of the costs associated with the proposal, including ratepayer impacts.

or without the state and which is used or useful in the generation, production, transmission, purchase, sale, exchange, or interchange of electric capacity and energy, including facilities and property for the acquisition, extraction, conversion, transportation, storage, reprocessing, or disposal of fuel and other materials of any kind for any such purposes.
- Any interest in, or right to, the use, services, output, or capacity of any such plant, works, system, or facilities.
- Any study to determine the feasibility or costs of any of the foregoing, including, but not limited to, engineering, legal, financial, and other services necessary or appropriate to determine the legality and financial and engineering feasibility of any project referred to above. [26]

The types of projects include construction, acquisition, maintenance, or upgrading of electricity generating facilities, transmission or distribution power lines, operating systems, or storage facilities. Projects may involve: traditional fuels or new sources, such as solar; traditional forms of transmission, distribution, and metering equipment or new equipment, such smart meters and components of a smart grid; and new storage technologies, such as Li-Ion batteries and Vanadium Flow battery systems. The project goals may include: producing and delivering electricity to meet increased demands; increasing efficiency and cutting costs; or improving technologies to obtain purely economic or socioeconomic advantages.

A business may provide project proposals and related information to a municipal utility either pursuant to a utility announcement of a project and issuance of a Request for Proposals, or through an unsolicited business proposal. These proposals may be made by other electric utilities or by designers or manufacturers of equipment or systems. Typically proposals include:
- Technical specifications, data, plans, drawings, and design information about the equipment, technology, and systems being proposed; and
- Terms and conditions, including identification and quantification of benefits to be provided and pricing information.

Much of this information is either patented, proprietary, or confidential.

The Legislature enacted the exemption statute based on a finding that it was a public necessity that this information be made confidential and exempt from public records requirements because the disclosure of this information could injure the provider in the marketplace by giving its competitors detailed insights into its financial status and strategic plans, thereby putting the provider at a competitive disadvantage. Without this exemption, providers might be unwilling to enter into discussions with the electric utility regarding the feasibility of future contracting. This could, in turn, limit opportunities the electric utility might otherwise have for finding cost-effective or strategic solutions for providing electric service or improving the delivery, cost, or diversification of fuel or renewable energy. This would put public providers of electric utility services at a competitive disadvantage by limiting their ability to optimize services to their customers and adversely affecting the customers of those utilities by depriving them of opportunities for rate reductions or other improvements in services. The Legislature also found that the public and private harm in disclosing such proprietary confidential business information significantly outweighed any public benefit derived from disclosure of the information and that

[26] Section 163.01(3)(d), F.S.

the exemption would enhance the ability of electric utilities to optimize their performance, thereby benefiting the ratepayers.

The survey responses reflect that these findings are borne out in these utilities' operations. Prior to enactment of the exemption, some of the responding utilities were able to enter into contracts by using a due diligence process in which no documents came into the utility's possession, using third party providers of due diligence services, or using detailed nondisclosure agreements. They note, however, that businesses have become more willing to make proposals and enter into agreements since the exemption was enacted, particularly with new or emerging technology such as solar energy and battery storage. Respondents also stated that the protected information could not be readily obtained by alternative means and that it was not protected by any other exemption. As such, all recommend retaining the exemption in its current form.

Based on this information, the exemption both protects confidential business information related to competitiveness and allows these governmental utilities to effectively and efficiently produce and deliver electricity to their customers, and these services would be significantly impaired without the exemption. This purpose appears sufficient to override public policy favoring open government, and the purpose could not be accomplished without the exemption.

III. Effect of Proposed Changes:

The bill amends s. 119.0713(4), F.S., to remove the scheduled repeal of the public records exemption for proprietary confidential business information held by a local government electric utility. As a result, these records will remain exempt from disclosure requirements under the public records laws.

The bill takes effect on October 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Article I, s. 24(c) of the State Constitution requires a two-thirds vote of the members present and voting for final passage of a newly created or expanded public records exemption. The bill does not create or expand a public records exemption, therefore it does not require a two-thirds vote for final passage.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The exemption allows business entities to propose and negotiate projects with municipal utilities without the risk of disclosure of proprietary confidential business information, which allows these entities to increase their business activities.

The exemption allows municipal utility customers to benefit from the improvements to utility infrastructure and systems.

C. Government Sector Impact:

The exemption allows the municipal utilities to increase the size and efficiency of their electricity generation and delivery infrastructure, to utilize newer technologies, and to reduce costs.

VI. Technical Deficiencies:

None.

VII. Related Issues:

The First Amendment Foundation conducted its annual review of exemptions from public records subject to review during the 2018 legislative session. It concluded that the public record exemption which this bill maintains "is sufficiently narrow and the Foundation does not object to its reenactment as currently worded."[27]

VIII. Statutes Affected:

This bill substantially amends section 119.0713 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

[27] Letter from Barbara A. Peterson, President, First Amendment Foundation, to Senator Dennis Baxley, Chair, Senate Committee on Government Oversight and Accountability (Aug. 17, 2017).

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

FOR CONSIDERATION By the Committee on Communications, Energy, and Public Utilities

579-00900-18 20187008pb

A bill to be entitled

An act relating to a review under the Open Government Sunset Review Act; amending s. 119.0713, F.S., relating to an exemption from public records requirements for proprietary confidential business information held by a local government electric utility; removing the scheduled repeal of the exemption; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Subsection (4) of section 119.0713, Florida Statutes, is amended to read:

119.0713 Local government agency exemptions from inspection or copying of public records.—

(4)(a) Proprietary confidential business information means information, regardless of form or characteristics, which is held by an electric utility that is subject to <u>this</u> chapter ~~119~~, is intended to be and is treated by the entity that provided the information to the electric utility as private in that the disclosure of the information would cause harm to the entity providing the information or its business operations, and has not been disclosed unless disclosed pursuant to a statutory provision, an order of a court or administrative body, or a private agreement that provides that the information will not be released to the public. Proprietary confidential business information includes, but is not limited to:

1. Trade secrets.

2. Internal auditing controls and reports of internal

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.

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auditors.

3. Security measures, systems, or procedures.

4. Information concerning bids or other contractual data, the disclosure of which would impair the efforts of the electric utility to contract for goods or services on favorable terms.

5. Information relating to competitive interests, the disclosure of which would impair the competitive business of the provider of the information.

(b) Proprietary confidential business information held by an electric utility that is subject to <u>this</u> chapter ~~119~~ in conjunction with a due diligence review of an electric project as defined in s. 163.01(3)(d) or a project to improve the delivery, cost, or diversification of fuel or renewable energy resources is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

(c) All proprietary confidential business information described in paragraph (b) shall be retained for 1 year after the due diligence review has been completed and the electric utility has decided whether or not to participate in the project.

~~(d) This subsection is subject to the Open Government Sunset Review Act in accordance with s. 119.15, and shall stand repealed on October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.~~

Section 2. This act shall take effect October 1, 2018.

CODING: Words ~~stricken~~ are deletions; words <u>underlined</u> are additions.