HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1055 Linear Facilities
SPONSOR(S): Ingram and others
TIED BILLS: None. **IDEN./SIM. BILLS:** SB 1048

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	14 Y, 0 N	Keating	Keating
2) Natural Resources & Public Lands Subcommittee	14 Y, 1 N	Moore	Shugar
3) Commerce Committee			

SUMMARY ANALYSIS

The Florida Electrical Power Plant Siting Act (PPSA) and the Florida Electric Transmission Line Siting Act (TLSA) establish centrally coordinated review processes for state and local permitting of certain electrical power plants and transmission lines. Under the PPSA, an 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 that constitute "development," with existing land use plans and zoning ordinances. Certain activities are excluded from the definition of development. Further, the PPSA and the TLSA authorize the establishment of conditions in an order granting certification, though both state that they do not affect in any way the ratemaking powers of the Public Service Commission (PSC).

The bill amends two of the items excluded from the definition of "development" in relation to the PPSA and the TLSA:

- The bill provides that the exclusion for work done on established rights-of-way applies to established rights-of-way and corridors and to rights-of-way and corridors *to be established*.
- The bill provides that the exclusion for the creation of specified types of property rights applies to creation of distribution and transmission corridors.

The bill makes identical changes to the definition of development in the Florida Local Government Development Agreement Act.

The bill establishes the standard to be used in authorizing variances in a site certification under the PPSA and the TLSA. Further, the bill provides that the PPSA and the TLSA do not affect in any way the exclusive jurisdiction of the PSC to require transmission lines to be located underground.

The bill does not appear to impact state or local government revenues or expenditures.

The bill provides that it will become effective upon becoming law.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Present Situation

The Florida Electrical Power Plant Siting Act[1] (PPSA) and the Florida Electric Transmission Line Siting Act[2] (TLSA) establish centrally coordinated review processes for state and local permitting of certain electrical power plants and transmission lines. These laws recognize the broad interests of the public that are addressed by various governmental bodies and agencies as well as the critical nature of the infrastructure at issue.[3] These laws intend to further the legislative goal of ensuring, through available and reasonable methods, that the location and operation of electrical power plants and transmission lines will produce minimal adverse effects on the environment and the public health, safety, and welfare and will not unduly conflict with the goals established by the applicable local comprehensive plans.[4] Both laws establish the Governor and Cabinet as the siting board responsible for approving or denying certification.[5]

Application of Local Land Use and Development Laws

Under the PPSA, an application for certification of a site for a power plant and associated facilities[6] must include a statement on the consistency of the site, and any associated facilities that constitute "development,"[7] 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.[8] The application must identify 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.[9]

Within 45 days after the filing of the application, each affected local government must file a determination with the Department of Environmental Protection, the applicant, the administrative law judge (ALJ), and all parties on the consistency of the site and nonexempt associated facilities with existing land use plans and zoning ordinances in effect on the date the application was filed.[10] If the local government issues a determination that the proposed site and any nonexempt associated facilities are not consistent or in compliance with local land use plans and zoning ordinances, the applicant may apply to the local government for the necessary approval to address the inconsistencies the local government identified in its determination.[11] Any substantially affected person may file a petition with the ALJ to dispute the local government's determination.[12] If a petition is filed, the ALJ must hold a land

[1] ss. 403.501-403.518, F.S.
[2] ss. 403.52-403.5365, F.S.
[3] *See* ss. 403.502 and 403.521, F.S.
[4] *Id.*
[5] ss. 403.509 and 403.529, F.S.
[6] "Associated facilities" means, for the purpose of certification, 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. s. 403.503(7), F.S.
[7] "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. s. 380.04(1), F.S.; *See also* s. 380.04(2), F.S.
[8] s. 403.50665(1), F.S.
[9] *Id.*
[10] s. 403.50665(2)(a), F.S.
[11] s. 403.50665(3)(a), F.S.
[12] s. 403.50665(4), F.S.

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.[13]

Associated facilities that do not constitute "development" are not subject to the land use consistency and compliance requirements. For purposes of this determination, "development" is defined in s. 380.04, F.S., and expressly excludes the following activities:

- 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.[14]
- The creation or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.[15]

Historically, administrative tribunals in Florida have held that siting of a transmission line does not constitute "development" and is thus exempt from application of the land-use-consistency provisions. One example of this interpretation is the following provision from a 2004 decision[16]:

> 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.' The Creation of the right-of-way falls within the § 380.04(3)(h). 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 § 380.04(3)(a), Fla. Stat. (2003).
>
> Therefore, the proposed powerline is not 'development' as defined in section 380.04, Fla. Stat. (2003).[17]

This decision recognized two exclusions from the definition of "development": (1) the exclusion under s. 380.04(3)(h), F.S., for creating a right of access by establishing a right-of-way in the siting proceeding; and (2) the exclusion under s. 380.04(3)(b), F.S., for constructing a power line within "the newly established right-of-way." Other decisions have relied only on the exclusion for constructing a power line within an established right-of-way. For example, a 2008 decision[18] found the following:

> 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.

[13] ss. 403.50665(4) and 403.508, F.S.
[14] s. 380.04(3)(b), F.S.
[15] s. 380.04(3)(h), F.S.
[16] *In Re: Petition for Declaratory Statement by Hughes*, 2004 Fla. ENV LEXIS 166, 4 ER FALR 113.
[17] *Id.* at *6-*7.
[18] *In Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line Siting Application No. TA07-15*, 2008 Fla. ENV LEXIS 115, 2008 ER FALR 175, at *30 (DOAH May 13, 2008), adopted in toto 2008 E.R. F.A.L.R. 175 (Siting Bd. Aug. 1, 2008).

In 2016, the Third District Court of Appeal (Court) took a different interpretation of the operative statutes.[19] In that 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. The siting board issued a final order of certification that, among other things, approved a back-up transmission corridor if adequate right-of-way could not be obtained in the primary corridor in a timely manner and at a reasonable cost. The final order did not consider local regulations and did not require FPL to underground its lines.[20] The final order was appealed, and the Court reversed and remanded the final order. With respect to interpretation of the term "development," the Court found that the siting board erred as follows:

- In the siting process, the siting board certifies a corridor,[21] not a right-of-way,[22] and the exclusion cannot be applied to the entire corridor.[23]
- The record reflects that the corridor is made up of parcels within and outside established rights-of-way, so the siting board has no way of knowing whether construction will take place in a right-of-way or a private easement.[24]
- The exclusion 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 or pre-existing right-of-way, this would make the word 'established' meaningless."[25]

The Court's decision appears to apply a "plain language" interpretation of the statute. However, a departure from the plain language of a statute is permitted when there are cogent reasons for believing that the language of the statute does not accurately reflect legislative intent.[26] A statute's plain and ordinary meaning must be given effect unless it leads to an unreasonable or ridiculous result.[27]

The effect of the Court's decision is to require, in a certification proceeding under the PPSA, that any associated transmission lines are consistent with existing land use plans and zoning ordinances that were in effect on the date the application was filed. By extension, the decision appears to require the same in a certification proceeding under the TLSA. This outcome conflicts with the consistent,

[19] *Miami-Dade County v. In Re: Florida Power & Light Co.*, 2016 Fla. App. LEXIS 5953 (April 20, 2016), *appeal denied*, 2017 Fla. LEXIS 393 (2017).; Opinion filed April 20, 2016, available at http://www.3dca.flcourts.org/opinions/3D14-1467.pdf. On February 24, 2017, the Florida Supreme Court declined to accept jurisdiction to hear Florida Power and Light's petition for review. https://efactssc-public.flcourts.org/casedocuments/2016/2277/2016-2277_disposition_137996.pdf.
[20] *Miami-Dade County*, at *11.
[21] A "corridor" is the proposed area within which an associated linear facility right-of-way is to be located. The width of the corridor proposed for certification as an associated facility, at the option of the applicant, may be the width of the right-of-way or a wider boundary, not to exceed a width of 1 mile. The area within the corridor in which a right-of-way may be located may be further restricted by a condition of certification. After all property interests required for the right-of-way have been acquired by the licensee, the boundaries of the area certified shall narrow to only that land within the boundaries of the right-of-way. The corridors proper for certification shall be those addressed in the application, in amendments to the application filed under s. 403.5064, F.S., and in notices of acceptance of proposed alternate corridors filed by an applicant and the DEP pursuant to s. 403.5271, F.S., as incorporated by reference in s. 403.5064(1)(b), F.S., for which the required information for the preparation of agency supplemental reports was filed. s. 403.503(11), F.S.
[22] A "right-of-way" is the land necessary for the construction and maintenance of a connected associated linear facility, such as a railroad line, pipeline, or transmission line as owned by or proposed to be certified by the applicant. The typical width of the right-of-way shall be identified in the application. The right-of-way shall be located within the certified corridor and shall be identified by the applicant subsequent to certification in documents filed with the DEP prior to construction. s. 403.503(27), F.S.
[23] *Miami-Dade County*, at *14.
[24] *Miami-Dade County*, at *15.
[25] *Miami-Dade County*, at *16-*17.
[26] *Holly v. Auld*, 450 So.2d 217, 219 (Fla. 1984).
[27] *City of Miami Beach v. Galbut*, 626 So.2d 192, 193 (Fla. 1993).

historical implementation of the PPSA and the TLSA and appears to conflict with the legislative intent of these laws.[28]

As some have noted,[29] if the statutes are interpreted and implemented as the Court has held, it is doubtful a transmission line could be sited. Local land use plans and ordinances create different classifications of property, each with different permitted uses. Each municipality and county establishes a different patchwork. It would be extremely difficult, if not impossible, for a transmission line crossing the jurisdiction of multiple local governments to find a path that maintains its compliance with each local government's land use plans and ordinances.

Siting Board Authority to Impose Conditions

The PPSA and the TLSA authorize the siting board to include conditions in a certification.[30] Both provide an express statement that they do not affect in any way the ratemaking powers of the Public Service Commission (PSC) under ch. 366, F.S.[31]

In its decision, the Court also reversed and remanded the final order of certification based on a finding that the siting board erroneously thought it did not have the power to require FPL to install the proposed transmission lines underground at its own expense. Specifically, the Court found:

> 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. [Citation removed.] 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.[32]

In rendering its decision, the Court distinguished a case on the basis that it contained nothing regarding whether undergrounding could be required as a condition of certification in a siting case, as follows:

> 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 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.[33]

In general, when an agency with regulatory authority over a regulated public utility orders that utility to take actions that require it to incur costs, such costs are considered to be prudently incurred and are recovered in utility rates. Thus, imposing a requirement for a utility to place facilities underground impacts the ratemaking authority of the PSC to determine whether the higher costs of undergrounding the facilities are prudent and reasonable under the circumstances, to determine who will bear the burden of such costs, and to determine how undergrounding may affect electric grid reliability.

Effect of Proposed Changes

[28] *See supra* notes 3 and 4; Public Service Commission. *Agency Bill Analysis for HB 1055*, (March 2, 2017), on file with the Florida House of Representatives.
[29] *See, e.g.,* Senate Committee on Communications, Energy, and Public Utilities, Bill Analysis and Fiscal Impact Statement for Senate Bill 1048, p. 4 (March 13, 2017).
[30] ss. 403.511 and 403.531, F.S.
[31] ss. 403.511(4) and 403.531(4), F.S.
[32] *Miami-Dade County*, at *17-*18.
[33] *Miami-Dade County*, at *19 and *22-*23; See *Florida Power Corp. v. Seminole County*, 579 So. 2d 105, 108 (Fla. 1991).

The bill amends the law to reflect the interpretation and implementation of the PPSA and the TLSA that was applied prior to the Third District Court of Appeals' *Miami-Dade County* decision, effectively eliminating any precedential value from that decision. The bill addresses two issues: (1) application of specific local laws in a siting proceeding; and (2) the authority of the siting board to order a transmission line to be installed underground.

The bill amends paragraphs 380.04(3)(b) and (h), F.S., which contain the exclusions from "development" discussed above. The bill provides that the exclusion for work done on established rights-of-way applies to established rights-of-way and corridors and applies to rights-of-way and corridors *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 identical changes to s. 163.3221, F.S., which provides definitions for use in the Florida Local Government Development Agreement Act.[34]

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 process shall be the standards set forth in s. 403.201, F.S., which authorizes variances in the following conditions:

- There is no practicable means known or available for the adequate control of the pollution involved;
- 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; or
- To relieve or prevent hardship of a kind other than those provided for above. Variances and renewals thereof granted under this provision are limited to a period of 24 months, except that certain variances may extend for the life of the permit or certification.

The bill also provides that the PPSA and the TLSA shall not affect in any way the exclusive jurisdiction of the PSC to require transmission lines to be located underground.

B. SECTION DIRECTORY:

Section 1. Amends s. 163.3221, F.S., relating to definitions in the Florida Local Government Development Agreement Act.

Section 2. Amends s. 380.04, F.S., relating to the definition of development.

Section 3. Amends s. 403.511, F.S., relating to the effect of certification under the Florida Electrical Power Plant Siting Act.

Section 4. Amends s. 403.531, F.S., relating to the effect of certification under the Florida Electric Transmission Line Siting Act.

Section 5. Provides an effective date upon becoming law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

[34] The Florida Local Government Development Agreement Act provides for agreements between local governments and developers to improve the growth management and public planning processes.

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill clarifies the application of local land use laws to transmission line corridors in siting cases under the PPSA and the TLSA. This may reduce expenses of siting and legal proceedings by providing certainty of the law.

D. FISCAL COMMENTS:

Placing transmission lines underground is more expensive than placing them overhead on poles. The actual cost difference depends on the specific circumstances surrounding the transmission line site. For the Turkey Point line, the estimate for undergrounding would cost nine times more; $13.3-$18.5 million per mile compared to $1.5-$2.5 million.[35]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

[35] Senate Committee on Communications, Energy, and Public Utilities, Bill Analysis and Fiscal Impact Statement for Senate Bill 1048, p. 6 (March 13, 2017).