HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 405 Linear Facilities
SPONSOR(S): Williamson
TIED BILLS: **IDEN./SIM. BILLS:** SB 494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Energy & Utilities Subcommittee	11 Y, 1 N	Keating	Keating
2) Natural Resources & Public Lands Subcommittee	12 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).

In 2016, the Third District Court of Appeal (Court) determined that transmission lines associated with a proposed power plant under the PPSA constitute "development" and, thus, require review for consistency with existing local land use plans and zoning ordinances. This decision conflicts with the historical interpretation and application of the PPSA by administrative tribunals in Florida. Further, the Court determined that the siting board empowered by the PPSA would not infringe on the PSC's exclusive ratemaking jurisdiction if the siting board were to require, as a condition of certification, that a utility install such transmission lines underground at its own expense.

The bill appears to make the law consistent with the historical interpretation of the PPSA by amending two of the items excluded from the definition of "development" in relation to the PPSA:

- 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 also establishes the standard to be used in authorizing variances in a site certification under the PPSA and under the TLSA. Further, the bill provides that the PPSA and the TLSA do not affect in any way the PSC's exclusive jurisdiction 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," 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.[7] 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. 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.[8] 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 non-exempt associated facility is consistent and in compliance with existing land use plans and zoning ordinances.[9]

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, among others:

- 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.[10]

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[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] s. 403.50665(1), F.S.
[8] s. 403.50665(2)(a), F.S.
[9] s. 403.508, F.S.
[10] s. 380.04(3)(b), F.S.

- The creation or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.[11]

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[12]:

> 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 § 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 § 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 Matanzas, 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).

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 established rights-of-way.[13] Other decisions have relied only on the exclusion for constructing a power line within an established right-of-way. For example, a 2008 decision[14] 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.

In 2016, the Third District Court of Appeal (Court) took a different interpretation of the operative statutes.[15] 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. 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[16]:

- In the siting process, the siting board certifies a corridor, not a right-of-way, and the exclusion cannot be applied to the entire corridor.

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[11] s. 380.04(3)(h), F.S.
[12] *In Re: Petition for Declaratory Statement filed by Hughes and Knowles*, No. DCA-03-DEC-295, 2004 Fla. ENV LEXIS 166, at *6-*7 (DCA April 9, 2004).
[13] *Id.* at *6.
[14] *In Re: Tampa Electric Company Willow Oak-Wheeler-Davis Transmission Line Siting Application No. TA07-15*, 2008 WL 3896725, Finding of Fact No. 50 (Fla. DOAH May 13, 2008), *adopted in toto* (Fla. Siting Bd. Aug. 1, 2008).
[15] *Miami-Dade County, v. In Re: Florida Power & Light Co.*, Nos. 3D14-1467, 3D14-1466, 3D14-1465, 3D14-1451 (Fla. 3d DCA April 20, 2016), *appeal denied*.; *See* http://www.3dca.flcourts.org/opinions/3D14-1467.pdf and https://efactssc-public.flcourts.org/casedocuments/2016/2277/2016-2277_disposition_137996.pdf, respectively.
[16] *Miami-Dade County*, at 12-14.

- 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 an easement.
- 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 right-of-way, this would make the word 'established' meaningless."

The effect of the Court's decision is to require, in a certification proceeding under the PPSA, that any associated transmission lines require review for consistency with existing land use plans and zoning ordinances that were in effect on the date the application was filed. This outcome conflicts with the consistent, historical implementation of the PPSA and appears to conflict with the legislative intent of this law.[17]

Local land use plans and ordinances create different classifications of property, each with different permitted uses. Each municipality and county establishes a different patchwork. As a result, the Court's decision may make it 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,[18] but 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.[19]

In its decision, the Court also reversed and remanded the final order of certification based on a finding that the siting board erroneously determined that 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.[20]

In rendering its decision, the Court distinguished a prior case in which the PSC's "exclusive and superior" authority to regulate public utility rates and service was found to preclude a local government from requiring, by ordinance, a public utility to bear the cost to place its power lines underground.[21] The Court determined that, unlike the local government in the prior case, the siting board has the power to impose such conditions. The Court further found that the siting board's power in no way infringes on the PSC's authority with regard to ratemaking.

Section 366.04(1), F.S., provides:

> The jurisdiction conferred upon the commission shall be *exclusive and superior to that of all other boards*, agencies, political subdivisions, municipalities, towns, villages, or counties, and, in case of conflict therewith, all lawful acts, orders, rules, and regulations of the commission shall in each instance prevail. (Emphasis supplied.)

[17] *See* Footnotes 3 and 4, *supra*.
[18] ss. 403.511 and 403.531, F.S.
[19] *Id.*
[20] *Miami-Dade County*, at 14-15.
[21] *See Florida Power Corp. v. Seminole County*, 579 So. 2d 105, 108 (Fla. 1991).

This same statutory section establishes the PSC's jurisdiction over the rates and service of each public utility and over the planning, development, and maintenance of a coordinated electric grid to assure adequate and reliable electric service.

Placing transmission lines underground is more expensive than placing them overhead on poles.[22] The actual cost difference depends on the specific circumstances surrounding each particular transmission line site.[23] In its order certifying FPL's proposed Turkey Point facilities, the siting board noted the ALJ's finding of fact that undergrounding would cost roughly nine times more than overhead construction: $13.3-$18.5 million per mile compared to $1.5-$2.5 million per mile.[24]

In general, when a board or agency with regulatory authority over a 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, if the siting board were to impose a requirement for a utility to place facilities underground, that decision would impact the PSC's ratemaking authority to determine whether the higher costs of undergrounding the facilities are prudent under the circumstances and to determine who will bear the burden of such costs. Further, imposing such a requirement impacts the PSC's authority to determine how undergrounding of a transmission line may affect electric grid reliability.

Effect of Proposed Changes

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 local land use and development 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(b) and (h), F.S., which contain the exclusions from "development" discussed above. The bill provides that the exclusion for construction on established rights-of-way applies to established rights-of-way and corridors and 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.[25]

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 standard 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 taking 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.

[22] Edison Electric Institute, *Out of Sight, Out of Mind*, January 2013, *available at* http://www.eei.org/issuesandpolicy/electricreliability/undergrounding/Documents/UndergroundReport.pdf (last visited November 13, 2017).
[23] *Id.* at 29-30.
[24] *In Re: Florida Power & Light Company Turkey Point Units 6&7 Power Plant Siting Application No. PA03-45A3*, 2014 WL 2154563 (Fla. Siting Bd. May 19, 2014).
[25] The Florida Local Government Development Agreement Act provides for agreements between local governments and developers to improve the growth management and public planning processes.

The bill also provides that the PPSA and the TLSA shall not affect in any way the PSC's exclusive jurisdiction 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:

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.

D. FISCAL COMMENTS:

None.

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.