FLORIDA DEPARTMENT OF TRANSPORTATION
STATEMENT OF ESTIMATED REGULATORY COSTS

Rule Number: 14-46.001, F.A.C.
Rule Title: *Utilities Installation or Adjustment*
Contact Person: *Thomas Bane*

Introduction and Description of the Rule

Rule 14-46.001, F.A.C. incorporates the Utilities Accommodation Manual (UAM), providing the criteria under which a Utility Agency/Owner (UAO) may receive a permit to construct, alter, operate, relocate, remove or maintain a utility within the Department of Transportation (Department) right of way (R/W). A Department permit provides UAOs with a contiguous parcel of land to maintain utility service lines. The rule has been in effect since 1970 with the most recent revision occurring in 2010. Proposed changes are to update incorporated materials, including a 2017 version of the UAM.

The Department does not impose a permit fee, but through the UAM imposes requirements to ensure that the utilities are installed safely and allows the Department right of way to maintain its primary purpose as a transportation corridor. In accordance with Sections 337.401(2) and 337.402, Florida Statutes, the permit holder is responsible for any damage resulting from the issuance of the permit and must restore the right of way to its original condition before such damage.

A rule revision proposed in October 2015 incorporated a 2015 UAM including a requirement for the replacement or payment for trees removed or damaged by utilities in Department right-of-way. A SERC on that proposal was prepared in November 2015, in response to a Proposal for a Lower Cost Regulatory provided by the Florida Electric Power Coordinating Group (FCG). The October 2015 rule proposal was withdrawn in December 2015.

After two additional workshops attended by representatives of FCG, revisions to the rule were again proposed in August 2016 incorporating a 2016 version of the UAM. The August 2016 proposal was withdrawn on August 24, 2016.

FLORIDA DEPARTMENT OF TRANSPORTATION
STATEMENT OF ESTIMATED REGULATORY COSTS

On November 8, 2016, the Department published proposed revisions to Rule 14-46.001 to include incorporation of a 2017 UAM. To address previous concerns voiced by FCG representatives, the provision for replacement or payment for trees removed or damaged in Department right of way was not included in the 2017 UAM.

On November 29, 2016, FCG filed a Proposal for Lower Costs Regulatory Alternative and a document titled Information Regarding a Statement of Estimated Regulatory Costs. FCG suggests that the 2010 version of the UAM, would be less costly than the proposed 2017 UAM to electric utilities and electric cooperatives.

On November 29, 2016, a letter was submitted on behalf of Crown Castle NG East LLC (Crown Castle) providing "Information Regarding the Statement of Estimated Regulatory Costs and Proposal for a Lower Costs Regulatory Alternative". Crown Castle, suggests, that the proposed rule will result in increased cost to telecommunication providers.

RESPONSE AND STATEMENT

In accordance with Section 120.541(1)(a), Florida Statutes, the Department has prepared this Statement of Estimated Regulatory Cost on proposed Rule 14-46.001.

A. Is the rule likely to, **directly or indirectly**, have an adverse impact on economic growth, private-sector job creation or employment, or private-sector investment in excess of $1 million in the aggregate within 5 years after the implementation of the rule? No

1.	Is the rule likely to reduce personal income?	☐	YES	☒ NO
2.	Is the rule likely to reduce total non-farm employment?	☐	YES	☒ NO
3.	Is the rule likely to reduce private housing starts?	☐	YES	☒ NO
4.	Is the rule likely to reduce visitors to Florida?	☐	YES	☒ NO
5.	Is the rule likely to reduce wages or salaries?	☐	YES	☒ NO
6.	Is the rule likely to reduce property income?	☐	YES	☒ NO

FLORIDA DEPARTMENT OF TRANSPORTATION
STATEMENT OF ESTIMATED REGULATORY COSTS

B. Is the rule likely to, **directly or indirectly**, have an adverse impact on business competitiveness, including the ability of person doing business in the state to compete with persons doing business in other states or domestic markets, productivity, or innovation in excess of $1 million in the aggregate within 5 years after the implementation of the rule? No

1. Is the rule likely to raise the price of goods or services provided by Florida business? ☐ YES ☒ NO
2. Is the rule likely to add regulation that is not present in other states or markets? ☐ YES ☒ NO
3. Is the rule likely to reduce the quantity of goods or services Florida businesses are able to produce, i.e. will goods or services become too expensive to produce? ☐ YES ☒ NO
4. Is the rule likely to cause Florida businesses to reduce workforces? ☐ YES ☒ NO
5. Is the rule likely to increase regulatory costs to the extent that Florida businesses will be unable to invest in product development or other innovations? ☐ YES ☒ NO
6. Is the rule likely to make illegal any product or service that is currently legal? ☐ YES ☒ NO

If any of these questions are answered "YES", presume that there is a likely an adverse impact in Excess of $1 million, and the rule must be submitted to the legislature for ratification.

C. Is the rule likely, **directly or indirectly**, to increase regulatory costs, including any transactional costs (see F below for examples of transaction costs), in excess of $1 million in the aggregate within 5 years after the implementation of this rule? No.

1. Current one-time costs: $0 in regulatory costs
2. New one-time costs: $0 in regulatory costs
3. Subtract 1 from 2: $0

4. Current recurring costs: $0 in regulatory costs

5. New recurring costs: $0 in regulatory costs

6. Subtract 4 from 5: $0

7. Number of times costs will recur in 5 years: 0

8. Multiply 6 time 7: $0

9. Add 3 to 8: $0

If 9 is greater than $1 million, there is likely an increase of regulatory cost in excess of $1 million, and the rule must be submitted to the legislature for ratification.

D. Good faith estimates (numbers/types):

1. The number of individuals and entities likely to be required to comply with the rule.

   Approximately 615 utility companies have received Department permits.

2. A general description of the types of individuals likely to be affected by the rule.

All companies that have active, deactivated or out-of-service electric transmission lines, telephone lines, telegraph lines, other communication services lines, pole lines, ditches, sewers, water mains, heat mains, gas mains, pipelines, gasoline tanks and pumps within the Department's right-of-way.

E. Good faith estimates (costs):

1. Cost to the department of implementing the proposed rule:

None. The Department intends to implement the proposed rule within the current workload of the District Design Engineers and the District Utility Coordinators.

2. Cost to any other state and local government entities of implementing the proposed rule:

None.

3. Cost to the department of enforcing the proposed rule:

None. The Department intends to enforce the proposed rule within its current workload with existing staff.

4. Cost to any other state and local government of enforcing the proposed rule:

None.

F. Good faith estimate of transactional costs likely to be incurred by individuals and entities, including local government entities, required to comply with the requirements of the proposed rule. (*Includes filing fees, costs of obtaining a license, costs of equipment required to be installed or used, cost of implementing processes and procedures, cost of modifying existing processes and procedures, additional operating costs incurred, cost of monitoring, and cost of reporting, or any other costs necessary to comply with the rule).*

Transactional costs from the proposed rule are not increased from the 2010 version of this rule.

G. An analysis of the impact on small business as defined by s. 288.703, F.S., and an analysis of the impact on small counties and small cities as defined by s. 120.52, F.S.

A small business is defined in Section 288.703, F.S., as "…an independently owned and operated business concern that employs 200 or fewer permanent full-time employees and that, together with its affiliates, has a net worth of not more than $5 million or any firm based in this state which has a Small Business Administration 8(2) certification. As applicable to sole proprietorships, the $5 million net worth requirement shall include both personal and business investments."

A small county is defined in Section 120.52(19), F.S., as "any county that has an unincarcerated population of 75,000 or less according to the most recent decennial census." And, a small city is defined in Section 120.52(18), F.S., "any municipality that has an unincarcerated population of 10,000 or less according to the most recent decennial census."

Analysis of the impact on small business:

The Department cannot confirm the number of utility companies that will meet the definition of a small business, however it is estimated that less than 10% of the utilities permitted by the Department qualify as a small business. To the extent any small business requires use of Department right of way for the installation of its utilities, it will be required to comply with the provisions of the UAM to receive a permit. The costs are not regulatory, but proprietary, and needed to ensure that the utilities are installed safely, that the statutory requirement to restore all right of way to its original condition is met, and the right of way is able to continue with its primary function as a transportation corridor.

A small county or small city will be impacted. Analysis:
Several small counties and small cities operate and maintain their own utilities. To the extent that any small county or small city requires use of the Department right of way for installation of utilities, it will be required to comply with the provisions of the UAM to receive a permit. The costs are not regulatory, but proprietary, and needed to ensure that utilities are installed in a safe manner, that the statutory requirement to restore all right of way to its original condition is met, and the right of way is able to continue its primary function as a transportation corridor.

H. Any additional information that the agency determines may be useful.

None.

I. A description of any good faith written proposal for a lower cost regulatory alternative to the proposed rule which substantially accomplishes the objectives of the law being implemented and either a statement adopting the alternative or a statement of the reasons rejecting the alternative in favor of the proposed rule.

A document entitled "Proposal for a Lower Costs Regulatory Alternative" from the Florida Electric Power Coordinating Group (FCG) was provided to the Department on November 29, 2016. (Attached as Exhibit A) FCG also provided a document entitled "Information Regarding a Statement of Estimated Regulatory Costs" on November 29, 2016. (Attached as Exhibit B) The FCG proposal suggests that the Department take no action and maintain the 2010 version of the UAM without any modifications. Alternatively, FCG requests several modifications to the 2017 UAM.

On November 29, 2016, a letter was provided to the Department on behalf of Crown Castle NG East, LLC (Crown Castle), with the subject line:

> Information Regarding the Statement of Estimated Regulatory Costs and Proposal for a Lower Costs Regulatory Alternative to Proposed Rule 14-46.001 of the Florida Administrative Code Regarding Utilities Installation or Adjustment, and Incorporating Revisions to the Utility Accommodation Manual.

(Attached as Exhibit C). The letter references a November 25, 2016 letter submitted on behalf of Crown Castle with written comments on the proposed rule. (Attached as Exhibit D)

Response to FCG's Proposal

FCG, in its capacity as an umbrella organization for electric utilities and electric cooperatives, presented a Proposal for a Lower Costs Regulatory Alternative. FCG suggests that the 2010 version of the UAM, currently adopted in Rule 14-46.001, provides a lower regulatory cost

alternative to the proposed 2017 version of the UAM. Alternatively, FCG seeks to have the 2017 version of the UAM modified in several areas.

Paragraph 1 through 23 of FCGs proposal are introductory and will not be individually responded to herein.

A. Damage to FDOT

Paragraphs 24 through 33 of FCG's proposal suggests increased regulatory costs to utilities regarding tree and landscape costs would be imposed by Section 3.13 of the proposed 2017 UAM.

The proposed 2017 UAM provides in Section 3.13

> Pursuant to Section 337.402, F.S., when any public road or publicly owned rail corridor is damaged or impaired in any way because of the installation, inspection, or repair of a utility located on such road or publicly owned rail corridor, the owner of the utility shall, at his or her own expense, restore the road or publicly owned rail corridor to its original condition before such damage. If the owner fails to make such restoration, the authority is authorized to do so and charge the cost thereof against the owner under the provisions of s. 337.404.
>
> Pursuant to Section 337.401(2), F.S., the UAO is responsible for damage resulting from the issuance of the permit. FDOT may initiate injunctive proceedings as provided in section 120.69, F.S. to enforce provisions of this subsection or any rule or order issued or entered into pursuant thereto.
>
> This section shall not be applied to damage or impairment shown in the permit.

The proposed language is a verbatim recitation of Florida Statutes.

Section 337.402, F.S., provides:

> When any public road or publicly owned rail corridor is damaged or impaired in any way because of the installation, inspection, or repair of a utility located on such road or publicly owned rail corridor, the owner of the utility shall, at his or her own expense, restore the road or publicly owned rail corridor to its original condition before such damage. If the owner fails to make such restoration, the authority is authorized to do so and charge the cost thereof against the owner under the provisions of s. 337.404.

Section 337.401(2), F.S. provides as to utility permits:

> …The permit shall require the permitholder to be responsible for any damage resulting from the issuance of such permit. The authority may initiate injunctive proceedings as provided in s. 120.69 to enforce provisions of this subsection of any rule or order issued or entered into pursuant thereto.

FCG suggests the language provided in the 2010 UAM is a less costly alternative to the 2017 UAM.

The 2010 UAM provides:

> Except for trees or shrubs removed in accordance with the permit for purposes of complying with the horizontal clearances, the UAO shall replace all planted or naturally occurring trees and shrubbery irreparably damaged or destroyed by the UAO during utility work on the R/W. Such replacement shall be like sized.

Alternatively, FCG proposes changing the last line of the Section 3.1 of the 2017 UAM to:

> "For purposes of this section, tree and vegetation removal shown on the permit shall not be considered damage or impairment to be restored to original condition."

FCG alleges in paragraph 28 that it "anticipates additional costs to exceed $5,000,000 annually for the members of our industry." FCG does not identify how that dollar figure was calculated. The Department's mere recitation of statutory requirements does not, by its own effect, impose a regulatory cost. FCG's suggestion that the 2010 UAM imposed a lower regulatory cost by including language not specifically provided within the statute, is without basis.

B. Pole Replacement and Service Pole Installation

Paragraphs 34 through 39 of FCG's proposal suggests that changes from the 2010 UAM would result in increased costs of pole replacement of aboveground fixed utilities. FCG does not quantify the increased cost stating only in paragraph 37 that it "anticipates additional costs could be quite substantial."

Safety is of paramount concern to the Department. Horizontal clearance areas are established within the right of way to be clear of obstructions that might injure or kill persons should their vehicle inadvertently leave the roadway. Existing poles are authorized to remain in right or way clearance areas, however when replacing individual poles, the poles may not be moved closer to the roadway surface.

The 2010 UAM provides in section 4.2.2 that replacement poles can only be installed "within the existing alignment" of the pole line.

The 2017 UAM provides in Section 3.14.6 that replacement poles are to be installed "as close to the original permit alignment as possible" and when installing a replacement pole within the clearance area: "the new pole shall not reduce the existing pole's offset from the edge of lane along non-restricted roadsides or from the face of the curb along restricted roadsides." The 2017 UAM provides in Section 6, that UAOs may request a design alternative to Section 3.14 if compliance is not practical, would create an unreasonable hardship or the alternative provides a benefit to the Department.

FCG suggests that the 2010 UAM is a lower cost alternative, but does not explain how costs are diminished by authorizing pole replacement "within the existing alignment" as opposed to prohibiting movement of poles closer to the roadway.

As an alternative to reverting to the 2010 UAM, FCG proposes in paragraph 38, that language be added to allow new poles to move up to 12 inches closer to the roadway before requiring a permit or approval of a design alternative. FCG has not provided any estimate of how often situations arise when replacement of a pole cannot be accomplished either within the existing pole line or further away from the lanes of traffic. Authorizing twelve inches of pole movement towards moving traffic would compromise the safety of the traveling public and would not result in measurable cost savings to the UAO.

C. Work Not Requiring New Permits

Paragraphs 40 through 45 of FCG's proposal suggests that the section 2.3.1 of the 2017 proposed UAM entitled "Work Not Requiring New Permits" increases costs by an undetermined amount over the 2010 UAM. Relying on similar arguments as presented in paragraphs 34 through 39 of FCG's proposal, FCG suggests in paragraph 44 that not requiring permits for replacement of poles if pole movement is no more than 12 inches closer to the roadway would be less costly than the proposed language allowing for pole replacement without a permit only if the pole replacement is within the same alignment or further away from traffic.

The Department maintains that replacement of poles should be accomplished within the existing pole line or further away from lanes of traffic. If that cannot be accomplished, a design alternative may be requested. Authorizing twelve inches of pole movement towards moving traffic would compromise the safety of the traveling public and would not result in measurable cost savings to the UAO.

D. Laws to Be Observed and Other Agency Rules

Paragraphs 46 through 51 of FCG's proposal suggests additional unquantified costs would be imposed by Section 1.5 of the 2017 UAM, which requires UAOs to comply with State, Federal and Local rules and regulations. FCG seeks reversion to the 2010 UAM, which required compliance of "all applicable" State, Federal and Local rules and regulations. The FCG proposal suggests that elimination of the words "all applicable" would subject its members to additional "unknown impacts of all regulations from other agencies."

The Department agrees to modify the language in Section 1.5 to clarify that the permit requires compliance only with laws, rules, regulations, and ordinances that are applicable to the permitted area.

E. Conclusion of Response to FCG's Proposal

Paragraphs 52 through 55 are conclusory. Based on the foregoing, the Department agrees to modify section 1.5 of the UAM. The reminder of FCG's proposal to authorize movement of replacement poles closer to lanes of traffic and modify statutory language is rejected.

Response to Proposal from Crown Castle

Crown Castle NG East, LLC, as a provider of telecommunication services, has filed a Lower Regulatory Cost Alternative asserting that implementation of the 2017 UAM imposes a higher cost to Crown Castle because it would require entering into a competitively procured lease to maintain Distributed Antenna Systems and small cell networks within Department right of way.

Crown Castle proposal misidentifies the cost of a lease as an increased regulatory cost. The regulating agency for telecommunication companies, such as Crown Castle, is the Public Service Commission, not the Department of Transportation. As explained in Sexton v. Bd. of Trustees of the Internal Improvement Trust Fund of Fla., 101 So. 3d 946 (Fla. 1st DCA 2012), when an agency acts to manage or control state-owned lands, its actions may be considered proprietary, rather than regulatory, in nature. In providing for leases on land it controls (subject to maintaining its primary use as a transportation corridor), the Department is not acting in a regulatory capacity, but based on its proprietary interest in the land. The cost imposed by a lease is not regulatory in nature and therefore cannot be considered an increased regulatory cost.

Based on the foregoing, the Department rejects the LCRA proposal submitted by Crown Castle in its entirety.

Conclusion

The Department has considered the Lower Regulatory Cost Alternatives provided by FCG and Crown Castle and has modified Section 1.5 of the UAM. The Department otherwise rejects the proposals as unsupported by the record.