

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. A Department permit provides UAOs with a contiguous parcel of land to maintain utilities, thereby saving the expense of contracting with individual parcel owners for placement of service lines and mains.

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.

The rule has been in effect since 1970 and the most recent revision occurred in 2010. Changes in the proposed UAM are to clarify the existing provisions and to authorize UAOs to provide mitigation in lieu of replacing trees removed or significantly damaged by the UAO within the right of way. A SERC was not initially prepared for the proposed rule because any additional costs imposed by the rule were based on the Department's proprietary interests, not regulatory.

On November 10, 2015, the Florida Electric Power Coordinating Group (FCG) provided a Proposal for a Lower Cost Regulatory Alternative. FCG suggested that the 2010 version of the UAM, which allows only for replacement of trees and fewer permit application requirements,

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

would be less costly than the proposed 2015 UAM. The Department incorporated some of the comments into a proposed 2016 UAM. 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? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 2. Is the rule likely to reduce total non-farm employment? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 3. Is the rule likely to reduce private housing starts? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 4. Is the rule likely to reduce visitors to Florida? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 5. Is the rule likely to reduce wages or salaries? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 6. Is the rule likely to reduce property income? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |

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? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 2. Is the rule likely to add regulation that is not present in other states or markets? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> 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? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 4. Is the rule likely to cause Florida businesses to reduce workforces? | <input type="checkbox"/> YES | <input checked="" type="checkbox"/> NO |
| 5. Is the rule likely to increase regulatory costs to the extent | | |

**FLORIDA DEPARTMENT OF TRANSPORTATION
STATEMENT OF ESTIMATED REGULATORY COSTS**

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.

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

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:

Minimal. Most of the impact from the proposed rule will be addressed within the current workload of the District Design Engineers and the District Utility Coordinators. Some additional work will be required of the District Landscape Designer to evaluate and review plans for the removal and replanting of vegetation.

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.

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

- 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 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.

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

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 to Proposal for a Lower Costs Regulatory Alternative from the Florida Electric Power Coordinating Group (FCG) was provided to the Department on November 10, 2015. (Attached as Exhibit A) The proposal suggested that the Department take no action and maintain the 2010 version of the UAM without any modifications.

The proposal has been rejected for the following reasons:

Initially, FCG's proposal assumes that all costs resulting from the UAM are regulatory in nature. The regulating agency for utility companies is the Public Service Commission, not the Department of Transportation. The Department holds a proprietary interest in land throughout Florida, some of which land is used for roadways and to provide for future roadway expansion (right of way). The contiguous nature of Department owned right of way makes it attractive for utilities to install above ground and below ground service lines. By permitting utilities to enter onto and utilize Department owned right of way, utilities are spared the expense of negotiating with individual landowners for placement of service lines and mains. The Department does not charge a permit fee, but has certain requirements to ensure that utilities are installed safely and allow the right of way to maintain its primary purpose as a transportation corridor with allowance for future roadway expansion.

Secondly, FCG's proposal does not recognize that most of the costs imposed by the UAM are costs imposed by statute. Section 337.401(2), F.S. provides that utility permits "shall require that the permit holder be responsible for any damage resulting from the issuance of such permit."

Section 337.402, F.S., provides:

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

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 337.405, F.S., provides:

The removal, cutting, marring, defacing, or destruction of any trees or other vegetation, either by direct personal action or by causing any other person to take such action, within the rights-of-way of roads located on the State Highway System or within publicly owned rail corridors is prohibited unless prior written permission to remove or cut such trees or other vegetation has been granted by the department, except where normal tree trimming is required to ensure the safe operation of utility facilities and such tree trimming is performed in accordance with the provisions of its utility accommodations guide, and any subsequent amendments thereto. The department shall adopt rules for the implementation of this section to achieve protection of vegetation while at the same time assuring safe utility operations.

A lower cost regulatory proposal must substantially accomplish the objective of the law and must also actually provide for a lower regulatory cost.

Paragraphs 1 through 11 of FCG's proposal are introductory in nature and do not require a response.

FCG's proposal suggests at paragraphs 12 through 23 that tree replacement as allowed for in the 2010 UAM is a lower regulatory cost than mitigation as authorized by the 2015 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.

The 2010 UAM also described how to measure a tree by diameter at breast height (DBH) 4 ½ feet above the ground before cutting and to measure replacement material in the nursery industry standard of caliper inches.

The proposed UAM, still provides that trees within the horizontal clearances do not need to be replaced, nor do invasive species. As to non-invasive species of trees outside the horizontal clearance, the proposed 2015 UAM would require utilities to submit a plan view showing where the trees are located, and determine the value of the trees based on the species and diameter. The utility can replace the trees or pay the department the value of the trees.

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

FCG's proposal includes a written opinion of economic impact by a certified arborist. The arborist opinion examines the costs of mitigation authorized under the 2015 UAM, but does not provide the cost of tree replacement authorized under the 2010 UAM. The proposal does not examine how the cost under the 2015 UAM exceeds the previous method. The proposal therefore, does not provide how the 2010 UAM is a lower cost alternative to the proposed UAM.

The arborist opinion states: "many times the species cannot be located in the required size and therefore replacement species values have to be substituted in, which in many cases will be the *Live Oak (Quercus virginiana)* valuation due to its widespread availability and stable market prices." This highlights the problem with reverting to the 2010 UAM, which requires the replacement of all trees and shrubbery with like sized replacement plants. As explained by FCG's arborist, like sized replacement plants are often not available and other species must be substituted. Further, trees in excess of 24 inches are not commonly available for any species making it cost prohibitive to replace larger trees with like sized trees. The proposed UAM allows for a method of valuation for the trees to replace removed trees with trees of an equal value, which may include replacing a 24 inch diameter tree with several trees of a smaller diameter. This is not a regulatory assessment, but compensation for the removal of property belonging to the Department. As a concession, the Department has proposed a rule change incorporating the 2016 UAM to allow utilities to choose any of three options:

- 1) Replace all trees in kind with like sized trees of the same species. This is similar to the 2010 UAM, but now requiring a description of the trees' location, size, and type before work begins.
- 2) Replace all trees in value. Allowing an arborist or landscape architect to establish the value of trees being removed, and authorize the utility to plant trees of equal value, regardless of size.
- 3) Provide payment for trees. Allowing an arborist or landscape architect to establish the value of trees being removed and have the utility compensate the Department for the cost.

As the 2016 changes to the UAM allow the utilities to comply under the same conditions as the 2010 UAM or utilize two other options, reversion to the 2010 UAM is not at lower cost. Furthermore, the costs imposed by the UAM are not regulatory, but based on the Department's proprietary interest in its right of way and the trees located within the right of way.

Paragraph 24 of FCG's proposal suggests that an increased cost is imposed by the permit requirements in sections 16, 17 and 18 of the UAM section 2.4.1. These sections require a permit application to include a traffic control plan (item 16), details of how the right of way will be restored (item 17), and details for controlling erosion (item 18). The Department is proposing a rule change that eliminates item 17 as a permit requirement in the 2016 UAM. FCG's proposal suggests "the proposed 2015 UAM will require

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

increased cost due to not providing direction to utilities on how to provide information to FDOT on erosion control”. Erosion control is an essential element in ensuring that Department property be restored to its condition before utility work began. Section 4.1.5 of the 2010 UAM and section 3.5 of the proposed 2015 UAM require utilities to install any required erosion and sediment controls in compliance with local, state, and federal requirements before beginning any utility work. The proposal does not explain what the increased costs are imposed by providing the Department with an erosion control plan at the permitting stage. The proposal does not offer a lower cost alternative or explain how a general requirement to provide an erosion control plan is more costly than a requirement with specific instruction on what the plan must include.

Paragraphs 25 and 26 of FCG’s proposal suggests that section 3.14.3 of the proposed UAM, which provides requirements for above ground utility relocation and adjustment when requested by the Department for the construction of projects, will result in an increased cost to the utilities. The proposal does not identify what the costs are or how they are increased from the 2010 UAM.

Paragraphs 27 through 30 of FCG’s proposal suggests that section 2.3 of the proposed UAM provides fewer exemptions from permitting than the 2010 UAM, thereby imposing an additional cost on the utility industry because of the requirements for additional permits. The 2010 UAM lists 10 items that qualify as “work not requiring new permits”. The proposed UAM lists 9 types of “work not requiring new permits.” The language is nearly identical for each item, except that items 8 and 9 from the 2010 UAM providing that permits are not required for tree trimming and routine maintenance of vegetation have been combined into a single item number 8 of the proposed UAM entitled “vegetation control”. Vegetation control is described in 3.16.1 to include tree trimming and routine maintenance of vegetation. This is unchanged in the 2016 UAM. The proposal suggests that reversion to the 2010 manual would be a lower cost alternative, but does not explain how the proposed UAM increases costs, or how the 2010 UAM offers a lower cost.

Paragraphs 31 through 34 of FCG’s proposal suggests that section 2.4.1, 2) f) of the proposed 2015 UAM providing permit application requirements for trenchless installations, expands on the requirements of the 2010 UAM which requires reporting of the proposed method of installation and materials to be used, to also require a reporting of bore diameter, and for any areas of excavation such entry points, exit points, slurry pits, relief and or observation holes when used. This information should be readily available to any utility planning on using a trenchless installation method. The proposal does not explain how providing the Department with this information increases its costs over the information required by the 2010 UAM.

Paragraphs 35 through 38 of FCG’s proposal suggests that section 3.14.6 of the proposed 2015 UAM increases cost by requiring a new permit for installation of replacement poles. Section 3.14.6, however, does not impose a requirement that a new permit be obtained and Section 2.3.1 specifically lists pole replacement as work not requiring a new permit.

FLORIDA DEPARTMENT OF TRANSPORTATION STATEMENT OF ESTIMATED REGULATORY COSTS

Paragraphs 39 through 42 of FCG's proposal suggests that Section 4.2 of the proposed 2015 UAM will increase cost by requiring 24 feet of vertical clearance for above ground utilities above any limited access highway without exception. The 2010 UAM likewise required 24 feet of vertical clearance in section 4.8.2, but it allowed for an exception if the utility demonstrated that compliance was impractical or would create an unreasonable hardship and a height variance would not interfere with the operation of future improvements to the transportation facility. The exception allowed by the 2010 version of the UAM is nearly identical to the requirements for requesting a variance from a rule requirement under Section 120.542, Florida Statutes. FCG's proposal, therefore, does not establish that costs would be increased by the 2015 or 2016 proposed UAM.

Paragraphs 43 through 46 of FCG's proposal suggests that the elimination of two index plans listed in the 2010 UAM, but not in the proposed 2015 UAM will result in additional costs by requiring a new permit for any road closure of 5 minutes or less or work in the vicinity of rail crossings. The elimination of these two plans does not impose a permit requirement where a permit was not previously required, it merely reduces unnecessary paperwork. The FCG proposal does not explain how reinserting these two index plans into the UAM would result in a lower cost.

Paragraphs 47 through 51 of FCG's proposal are conclusory and do not require a response.

IV. Conclusion

Based on the foregoing, the Department rejects the LCRA proposal in its entirety.