STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

GTE FLORIDA, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3368RP
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	
FLORIDA POWER AND LIGHT COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3567RP
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3570RP
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	
UNITED TELEPHONE COMPANY,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3572RP
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	
FLORIDA NATURAL GAS ASSOCIATION,	)	
	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. 89-3577RP
	)	
DEPARTMENT OF TRANSPORTATION,	)	
	)	
Respondent.	)	
	)	

FINAL ORDER

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings) by its duly designated Hearing Officer, Daniel M. Kilbride, on November 2 and 3, 1989, and by stipulation on January 29, 1990, in Tallahassee, Florida. The following appearances were entered:

APPEARANCES

For Petitioner	Lorin H. Albeck, Esquire GTE FLORIDA, General Attorney INC., GTE Florida Incorporated Post Office Box 110, Mail Code 7 Tampa, Florida
For Petitioner Florida Power and Light Co.	Jean G. Howard, Esquire Law Department Florida Power and Light Company Post Office Box 029100 Miami, Florida
For Petitioner Southern Bell Telephone and Telegraph Co.	Robert G. Beatty, Esquire Southern Bell Telephone Legal Department Museum Tower, Suite 1910 150 West Flagler Street Miami, Florida
For Petitioner United Telephone Company	Kay L. Wolf, Esquire Assistant Vice President- Law United Telephone Company of Florida Post Office Box 5000 Altamonte Springs, Florida
For Petitioner Florida Natural Gas Association	Richard Brightman, Esquire Post Office Box 6526 Tallahassee, Florida
For Respondent	Robert P. Daniti, Esquire Senior Litigation Attorney Department of Transportation 605 Suwannee Street Tallahassee, Florida

STATEMENT OF THE ISSUES

Whether Respondent's proposed Rule 14-46.0011 is an invalid exercise of delegated legislative authority.

Whether paragraph 12 of the revised DOT utility permit, incorporated by reference in the proposed amendments to Rule 14- 46.001, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

Whether paragraph 15 of the revised DOT utility permit, incorporated by reference in the proposed amendments to Rule 14- 46.001, Florida Administrative Code, is an invalid exercise of delegated legislative authority.

Whether the economic impact statement prepared by DOT was inadequate so as to amount to an invalid exercise of delegated legislative authority.

PRELIMINARY STATEMENT

By notice in the Florida Administrative Weekly, Volume 15, Number 24, June 16, 1989, the Florida Department of Transportation (DOT) initiated Section 120.54 rulemaking proceedings to amend Rule 14-46.001, Florida Administrative Code, including a revised Utility Accommodation Guide (UAG) which is incorporated by reference. The revised UAG supersedes the 1979 edition which is incorporated by reference in Rule 14-15.014, which will be repealed. The notice also initiates rulemaking proceedings for proposed Rule 14-46.0011. Rule 14-46.001(3) requires utilities to obtain permits for use of DOT's right of way. The permit is to be issued in conformance with DOT's UAG. The revised UAG contains the revised Utility Permit (Permit) which is the subject of this rule challenge. In initiating rulemaking, the DOT filed with the appropriate agencies the documentation required by the applicable procedural rules at this stage of the rulemaking proceeding. The notice contains a summary of the estimated impact of the proposed amendments and provides for a public hearing.

The subject of the proposed amendments is DOT's policies regulating the accommodation of utility facilities on public roads and rights of way under DOT jurisdiction, including the location and manner of installing, adjusting or relocating these facilities. The revised UAG contains the reVised Utility Permit which is the primary subject of this rule challenge proceeding.

Five petitions to invalidate have been consolidated for hearing by order dated July 10, 1989. At the October 24, 1989 motion hearing, the undersigned granted the DOT and Florida Power and Light Company (FPL) motions for summary final order regarding the validity of proposed Rule 14-46.0011. That rule will be addressed in this order.

At the October 24, 1989 motion hearing, the undersigned also granted DOT's motion for partial abeyance of all issues raised by each Petitioner, except as stated in the issues section of these findings of fact. At the beginning of the final hearing, the undersigned also abated Florida Natural Gas Association's (FNGA) issue concerning the sufficiency of DOT's notice of incorporation by reference of the revised Utility Accommodation Guide. Jurisdiction over the abated issues is relinquished to the DOT to the extent necessary to resolve these issues through formally announced and noticed changes to the proposed rule.

Petitioner Southern Bell Telephone and Telegraph Company's (Southern Bell) Motion in Limine is denied. See: Buy-Low Save Centers, Inc. v. Glinert, 547 So.2d 1283 (Fla. 4th DCA 1989).

On November 2, 1989, the formal hearing commenced. Petitioners GTE Florida, Inc. (GTE) and FNGA did not present any evidence. Petitioner FPL presented three witnesses: Terry Vogel, a fact witness employed by FPL as a division relocation coordinator and permit administrator; Dennis LaBelle, an expert in the relocation of electric utilities; and Paul LaPointe, an expert in public utility accounting.

Petitioner FPL introduced 19 exhibits which were received into evidence, subject to DOT's objections as to relevancy and materiality as noted in the transcript. Petitioner Southern Bell introduced eight exhibits, including the Affidavit of an expert economic and financial consultant. These exhibits were admitted into evidence, subject to DOT's objections as to relevancy and materiality as noted in Southern Bell's stipulation with DOT. Petitioner United Telephone Company of Florida (UTF) presented five exhibits which were admitted, subject to DOT'S objections as to relevancy and materiality pursuant to UTF's stipulation with DOT. Respondent DOT presented the testimony of Robert D. Buser, P.E.; DOT Director of Construction; and Robert I. Scanlan, DOT Deputy General Counsel; together with Exhibits 1 through 9 and 13, which were admitted into evidence. The transcript of the hearing on November 2 and 3 was filed with the Clerk of the Division on December 4, 1989. As a result of stipulations by the parties, the need for a third day of hearing was obviated, and the evidentiary record as defined by Section 120.57(1)(a)6., Florida Statutes, was closed on January 29, 1990. By the amended order dated February 2, 1990, the parties were afforded an opportunity to present written proposed findings of fact, conclusions of law and argument of counsel by February 20, 1990, in which Petitioners GTE, FPL and Southern Bell and Respondent have submitted proposals. UTC joined in the proposals submitted by Petitioners. Each have been carefully considered and are addressed in the Appendix.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. Respondent, Florida Department of Transportation (DOT), an agency of the State of Florida, was created. and defined pursuant to Section 20.23, Florida Statutes, for the purposes delineated in that section, including the building and maintaining of public transportation facilities.

2. Petitioner, GTE Florida, Inc. (GTE), is a foreign corporation authorized to do business and doing business in the State of Florida. The company operates a telephone system in this State and, therefore, is regulated by the Florida Public Service Commission, pursuant to Chapter 364, Florida Statutes.

3. Petitioner, Florida Power and Light Company (FPL) is a Florida corporation and operates an electrical generating, transmission and distribution system in this State and, therefore, is regulated by the Florida Public Service Commission pursuant to Chapter 366, Florida Statutes.

4. Petitioner, Southern Bell Telephone and Telegraph Company (Southern Bell) is a foreign corporation authorized to do business and doing business in the State of Florida. The company operates a telephone system in this State and, therefore, is regulated by the Florida Public Service Commission pursuant to Chapter 364, Florida Statutes.

5. Petitioner, United Telephone Company of Florida (UTC) is a Florida corporation. The company operates a telephone system in this State and, therefore, is regulated by the Florida Public Service Commission pursuant to Chapter 364, Florida Statutes.

6. Petitioner Florida Natural Gas Association (FNGA) is a Florida corporation. FNGA is a trade association whose members are in the business of providing natural gas utility services in Florida.

7. All Petitioners are substantially affected persons who have standing to initiate this rule challenge proceeding.

8. By notice in the Florida Administrative Weekly, Volume 15, Number 24, June 16, 1989, DOT initiated Section 120.54 rulemaking proceedings to amend Rule 14-46.001, including a revised Utility Accommodation Guide (UAG). The revised UAG supersedes the 1979 edition which DOT had incorporated by reference in Rule 14-15.014, which will be repealed. The notice also initiates rulemaking proceedings for proposed Rule 14- 46.0011.

9. In initiating rulemaking, the DOT filed with the appropriate agencies the documentation required by the applicable procedural rules at this stage of the rulemaking proceeding. The notice contained a summary of the estimated economic impact of the proposed amendments and provides for a public hearing.

10. The subject of the proposed amendments is DOT's policies regulating the accommodation of utility facilities on public roads and rights of way under DOT's jurisdiction, including the location and manner of installing, adjusting or relocating these facilities.

11. Proposed Rule 14-46.0011 challenged by FPL provides:

> 14-46.0011 Utilities Liaison. Recognizing that all utility owners serving the public have a common obligation to provide their services in cost effective manner, the Department will coordinate its advance planning of highway projects with the affected utilities to facilitate the relocation of the utility in order to eliminate costly construction delays. As part of the project planning and process the Department will consider the cost of utility work necessary for the proposed project. The Department will keep utility agencies informed of future transportation projects and request the utility agencies to advise the Department of the location of existing and proposed structures within proposed project corridors.

12. This entire section (14-46.0011) is new and is a statement of policy direction. It announces DOT's determination to coordinate the advance planning of highway projects with affected utilities; to consider the cost of utility work necessary for a proposed project; and to keep utilities informed of future transportation projects. As such, DOT is free to refine this policy and to develop procedures to implement this rule on a case by case basis.

13. All Petitioners challenge paragraphs 12 and 15 of the amended Utility Permit form which appears at pages 36 and 37 of the UAG.

14. The new paragraph 12 of the Utility Permit provides:

> 12. It is agreed that in the event the relocation of said utility facilities are scheduled to be done simultaneously with the Department's construction work, the permittee will coordinate with the Department before proceeding, shall cooperate with the Department's contractor to arrange the sequence of work so as not to unnecessarily delay the work of the Department's contractor, defend any legal claims of the Department's contractor due to delays caused by the permittee's failure comply with the approved schedule, and shall comply with all provisions of the law and Rule 14-46, Florida Administrative Code. The Permittee shall not be responsible for delays beyond its normal control.

15. The new paragraph 15 of the Utility Permit provides:

> 15. Permittee convenants and agrees that it will indemnify and hold harmless Department and all of Department's officers, agents, and employees from any claim, loss damage, cost, charge or expense arising out of any act, action, neglect or omission by Permittee during the performance of the contract, whether direct or indirect, and whether to person or property to which Department or said parties may be subject, except that neither Permittee nor any of its subcontractors will be liable under this section for damages arising out of or damage to persons or property directly caused or resulting from the sole negligence of Department or any of its officers, agents or employees.

16. Public utilities are on DOT right-of-way by permit and statutory invitation. Frequently such utilities increase the cost to DOT for accomplishing its mission. These costs include expanded liability for DOT.

17. DOT has a separate utilities section that reports to the director of construction who is responsible for coordinating, in an orderly manner, the permitting of utilities on the right of way. This includes adjustments necessary because of new construction or improvements to existing roads.

18. Prior to 1987, the DOT was criticized by the Legislature and the public for delays in completing road construction projects.

19. The DOT formed a DOT Quality Improvement Team to study utility delays. The DOT team identified the root causes of DOT's problems with utility

relocation delays and the DOT practices and procedures. Time delays caused by utilities constituted more than 17% of the total time extensions the DOT granted on road work. However, approximately one-half of utility-caused time delays were due to water and sewer utilities.

20. The DOT team further determined that the majority of the utility delay claims were located in one area. Of 425 delay claims statewide, only 27 were utility related. Of the 27 utility related claims, 14 were in DOT District I, and 11 of the claims came out of one office within that District. Twelve of the 14 claims involved city or county utilities. After study and analysis of these facts, the DOT Team came up with solutions to help reduce utility delays. These solutions did not include the provisions of paragraphs 12 and 15 of the Utility Permit.

21. The DOT sends the utility a set of plans at the 60% and 90% completion stage. Usually the utility would submit a relocation schedule to DOT after it receives the 90% plans. In the DOT's District NO. 1, where most of the problems are, DOT sends the 60% and 90% plans together, so the utility is submitting a relocation schedule based on DOT plans, the utility gives DOT its "approved schedule," the estimate of the number of days that the utility will need in the field to relocate the utility facilities. The estimate is usually tied to the start of the DOT construction, e.g., the utility estimates that it will need 60 days in the field after starting of construction to relocate its facilities.

22. In DOT District 1, there is an average of four utilities involved on all road projects. Each utility files its own schedule with the DOT, and that schedule becomes part of the contract which the DOT signs with the contractor. DOT construction plans can change before construction starts. There can be a delay of as much as two or three years after the utility submits its relocation schedule and the start of the DOT construction.

23. Prior to the study, each individual utility would submit its own relocation schedule months, sometimes years, before the construction actually begins. An average of four different utilities are involved in a DOT relocation project at the same time. The project schedule did not coordinate the work of the utilities with that of the DOT contractor, resulting in delays to the project.

24. As a consequence of delays (other than for weather), including delays attributable to utilities, contractors file delay claims. Frequently delay claims are approved which increase the cost of road construction projects for DOT.

25. The increased costs stem from the amount of time the DOT contractor is forced by the delays, such as delays attributable to utilities, to exceed the contract time. These costs are the cost of labor, equipment, other resources and overhead which the contractor experiences when it does not finish the project on time.

26. Any delay in road construction work, including time delays caused by a utility's failure to comply with its DOT approved relocation schedule, presents significant disks to the safety of the traveling public and construction workers on the extended job since the construction zone is a hazard6us area. By reducing delays, DOT reduces the exposure of the public and the workers, thereby limiting safety risks. These risks include drop-offs, barricades, lane changes, and other road abnormalities that motorists endure when they drive through a road construction project.

27. As a result of its study of utility-related time delays to its road construction projects, DOT implemented the several recommendations it had made in its study of time delays.

28. One recommendation was to require any utilities affected by a road construction project to submit to DOT a detailed schedule of the utility's part of that project. DOT implemented this recommendation in September 1987, and this is now an ongoing DOT policy and practice.

29. Under the new procedures, where utilities are involved in a DOT road construction project, DOT requires the utilities to develop a schedule for relocating or installing their facilities. The DOT now involves the utilities at every stage of its road construction. Not only does DOT involve utilities at an early stage in the planning of the project, but it also gets the contractor and the utility to confer to reconcile their schedules at a preconstruction conference so that the road construction can proceed in an orderly fashion with utilities being relocated in a manner least disruptive to the job.

30. The relocation or installation schedule developed by utilities is incorporated by the road contractor in its master schedule for the road construction and is approved by the district construction engineer, resident engineer or project engineer when the job is let for bidding.

31. The utilities agreement forms the basis for DOT's contract with its road contractor so that the contractor knows what effect the utility will have on the project, with the aim that all parties work together in a coordinated fashion to get the road built.

32. Since utility time delays were one factor contributing to time delays in DOT road construction, DOT rationally chose to address all facets of the time delay problem, including utility-caused time delays. However, the claims tracking reports upon which DOT relied in determining the need for proposed rule changes do not reflect any reduction in delay claims from the new liaison procedure since it was not implemented at the time of DOT's claims reports.

33. As a further outgrowth of its study of road construction time delays, DOT determined that the addition of a defense to delay claim provision in the utility permit would increase utilities' compliance with their relocation or installation schedule.

34. DOT relied upon its claims tracking report as a source of data about the cost to DOT for utility-caused delay claims to support this new permit provision.

35. While the dollar amounts attributable to settled road contractor delay claims caused by utility time delays are often less than the initial amounts claimed by the contractors, the cost to DOT is a significant total.

36. The DOT has a policy and procedure for the direct review, processing and resolution of all categories of road contractor claims against DOT and has a specific procedure for processing contractor delay claims attributable to utility delays.

37. Proposed Paragraph 12 of the Utility Permit will have limited impact with respect to the utility schedules and there is limited connection between paragraph 12 of the permit and reducing contractor delay claims.

38. The requirement that the utility defend any legal claims of DOT's contractor due to delays caused by the utility's failure to comply with the approved schedule is likely to result in increased litigation and expense for DOT and the Utility.

39. The DOT utilizes the phrase in paragraph 12 of the Utility Permit: "The permittee shall not be responsible for delays beyond its normal control" in the same way it grants its road contractors extensions of time for circumstances beyond the control of the contractor. This determination is an issue of fact which can be made by the DOT district construction engineer on a case by case basis, following general guidelines developed by the DOT.

40. The DOT's intent in including the defense requirement in paragraph 12 of the Permit is to give DOT "extra clout" with which to threaten the utility with revocation of the Permit if the utility refuses to defend DOT or fails to comply with the schedule.

41. DOT's recently adopted practice and procedure for processing delay claims and for determining whether a utility should defend DOT from a delay claim attributable to utility delays, provides written notice to the utility and contains extensive levels of review by the DOT professionals involved in the particular road project. If the road contractor's claim of utility delay is not deemed valid, DOT will not require the utility to defend against the claim.

42. The majority of Petitioner FPL's facilities are not covered by the Permit, in that the facilities are not installed on DOT right-of-way or were installed on DOT right-of- way under the old permit which did not have this provision.

43. Petitioner Utilities cooperate with DOT in utility relocations, and the utility relocation is a complex process in which there will be projects on which there are problems.

44. The DOT intends that both paragraphs 12 and 15 of the revised utility permit also become part of its standard form contract for utility installation or relocation, so that the contract mirrors these permit provisions.

45. The DOT's utility contract or agreement is a separate document, distinct from the DOT utility permit.

46. The purpose of the permit process is the grant or denial of utility access to DOT's right-of-way and to ensure utility compliance with DOT rules.

47. The purpose of the DOT utility agreement is to negotiate the time within which a utility must complete its relocation or installation on the DOT right-of-way and provide specific provisions relating to the particular job embraced by the agreement.

48. The DOT currently requires any utility which seeks to be accommodated on DOT right-of-way to indemnify DOT as follows:

> a) The existing Utility Permit provides:
> 15. It is understood and agreed that the rights and privileges herein set out are granted only to the extent of thin State's right, title and interest in the land to be

> entered upon and used by the holder, and the holder will, at all times, assume all risk of and indemnify, defend, and save harmless the State of Florida and the Department from and against any and all loss, damage, cost or expense arising in any manner on account of the exercise or attempted exercises by said holder for the aforesaid rights and privileges.

b) Master Agreements and project specific agreements with DOT contain provisions resembling the existing paragraph 15 of the utility permit.

> c) The Master Agreement states:
> 2. The COMPANY further agrees that said adjustment, changes or relocation of facilities will be made by the COMPANY with sufficient promptness so as to cause no delay to the DEPARTMENT or its contractor in the prosecution of such construction or reconstruction work; provided, however, that the COMPANY shall not be responsible for delay beyond its control; and that such "Relocation Work" will be done under the direction of the DEPARTMENT'S engineer; and the COMPANY further agrees that in the event the changes, adjustments or relocation of such facilities or utilities are bone simultaneously with the construction project, that it will be directly responsible for the handling of any legal claims that the contractor may initiate due to delays caused by the COMPANY'S negligence; and that the COMPANY will not either proceed with the "Relocation Work" with its own forces or advertise or let a contract for such Work until it has received the DEPARTMENT'S written authority to proceed.

49. Only a small percentage (6%) of Petitioner FPL utility facilities are on DOT right-of-way, and this percentage will remain constant in the future because of FPL's design philosophy.

50. Since DOT's utility permit is not required for utility facilities unless the facilities are on the right-of-way, nor for existing facilities not being relocated, the challenged paragraphs of the revised utility permit will not impact a vast majority (94%) of Petitioner FPL facilities.

51. Utility relocation within DOT right-of-way is at the utility's expense; but if the relocation is from private property to the right-of-way it is at DOT's expense.

52. For both types of relocations, DOT requires the utility to indemnify and to defend DOT for the utility's own negligence.

53. The utility is not a party to the contract between the DOT and the road contractor. The control of the DOT contract, contractor and relocation procedures is with the DOT.

54. Utility relocation schedules do not require work to commence on a calendar date, but rather references definable markers in the progress of the road work.

55. The DOT did not intend paragraph 12 to require a utility to defend a vehicle owner against claims of the DOT road contractor.

56. DOT's utility coordinator alerts the utility as to the commencement of the utility's deadline for completing its schedule, and the preconstruction conference also provides the utility with information and guidance.

57. The DOT road construction plans show all utilities on the project and the location of their facilities.

58. Proposed paragraph 15 requires a utility, as a condition of its permit, to indemnify the DOT for any act or omission of the utility under its contract (with DOT) to install or relocate utility facilities in the right-of-way, except where the DOT is the sole negligent party.

59. Since 1984, the DOT has required its construction contractors to indemnify DOT for everything, except for DOT's sole negligence, through a supplemental specification practically identical with proposed paragraph 15.

60. The indemnification provision of paragraph 15 of the Permit requires as a condition of use of DOT right-of-way that the utility pay for the DOT's joint negligence. This will lessen DOT's exposure to liability and free up more dollars for DOT to spend on roads.

61. As an example, under paragraph 15 of the Permit, if there were a judgment that DOT was 99% negligent and the utility was 1% negligent, the utility would have to pay the entire judgment under the proposed indemnification clause.

62. The control of road design and maintenance is with DOT.

63. DOT intends proposed paragraph 15 to pertain only to tort liability, and the utility must indemnify DOT for DOT's joint liability and not the joint liability of any other person or entity.

64. Utility installations on DOT right-of-way raise land use issues relating to adequate and efficient use of land which include: (a) reduced overall cost of DOT road improvements; (b) the private landowner's property is not encumbered by utility facilities, which are installed in the DOT right-of-way; (c) less clearing of trees or other vegetation is needed if facilities are installed on the DOT right-of-way; and (d) efficiency of land use is maximized. The utility in some instances has no choice but to put its facilities on public right-of-way. In cases involving building setbacks or road crossings, the utility must obtain a permit and put its facilities in DOT or other public right-of-way. The DOT did not consider these important public policy and land use considerations in proposing the defense and indemnification provisions of paragraphs 12 and 15.

65. The requirement that the utility defend any legal claims of DOT's contractor due to delays caused by tube utility's failure to comply with the approved schedule and the requirement that the utility indemnify DOT for DOT's joint negligence will shift DOT expenses to the utility and cause the utility to incur additional costs and expenses for use of DOT right-of-way.

66. Utilities do not pass all of their operating costs on to the ratepaying customers; shareholders bear the increase until, and unless, the increase is favorably accepted by the Public Service Commission for inclusion as a factor in the utility's rate structure.

67. The utilities, in some instances, have no choice but to install their facilities on the DOT right-of-way.

68. Having utility facilities on DOT right-of-way is an efficient use of land.

69. The DOT is attempting to force provisions on the utilities through rulemaking because the utilities will not voluntarily sign contracts which contain the indemnification and defense provisions.

70. The EIS prepared by DOT and incorporated in the June 16, 1989 edition of the Florida Administrative Weekly states in pertinent part:

> * * *
>
> The following specific statements of economic impact are provided as required by 120.54(2), Florida Statutes:
>
> * * *
>
> (2) An estimate of the costs on the economic benefit to all persons directly affected by the proposed action:
> Provisions presumed to have cost impact on utilities include:
> Utilities Liaison: Favorable cost impact is anticipated from advance coordination provisions of the rule chapter as amended. Current reports indicate approximately 22 construction claims for $3.7 million relate to utilities problems. A significant number of these will be reduced or eliminated by consistent liaison during the design process.
> Maintenance of Traffic: Specific new requirements for training of onsite supervisors of Utilities Work Zones may impact certain utilities who do not conduct required training at present. This overhead should be of such limited nature that it will be offset by benefits such as improved safety, reduced hazards, and lower costs of accidents attributable to improperly supervised traffic control in utility work zones.

> The Florida Utilities Coordinating Committee has been materially involved in the development process for these matters and has provided continuous input to this revision of the Utility Accommodation Guide.

71. As stated in the EIS, the Florida Utilities Coordinating Committee provided continuous input to the revision of the Utility Accommodation Guide; it did not consider whether the "delay claims" provision should be added to paragraph 12 or whether the "indemnification" provision should be added to paragraph 15 of the new Utility Permit.

72. The EIS prepared by DOT and incorporated in the June 16 edition of the Florida Administrative Weekly is inaccurate and misleading in claiming construction delays of $3.7 million are attributable to utilities.

73. The DOT did not consider in the EIS the costs to the utilities of defending "delay claims" filed by the road contractor.

74. The DOT did not consider in the EIS that in shifting the cost of DOT's joint negligence to the utility, DOT is imposing substantial costs on the utility.

75. The DOT did not consider that the indemnification amounts which the utility would have to pay DOT for DOT's joint negligence could be in excess of the $100,000-$200,000 allowed under the waiver of sovereign immunity statute, Section 786.28, Florida Statutes (1989).

CONCLUSIONS OF LAW

76. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to Sections 120.54(4) and 120.57(1), Florida Statutes.

77. Each Petitioner in this proceeding has the burden to demonstrate that it is a substantially affected person in order to have standing to seek an administrative determination of the invalidity of any proposed rule on the ground that the proposed rule is an invalid exercise of delegated legislative authority. Section 120.54(4)(a), Florida Statutes (1989).

78. A trade or professional association has standing to institute a rule challenge proceeding even though it is acting solely as the representative of its members. Florida Homebuilders Association v. Department of Labor and Security, 412 So.2d 351 (Fla. 1982). The elements of associational standing recognized by the Supreme Court in Florida Homebuilders are elements of proof, which a trade or professional association must prove up at hearing in order to demonstrate that the association has standing to institute a rule challenge proceeding. At hearing, all parties stipulated that FNGA is substantially affected by the challenged rule.

79. Each of the Petitioners in this consolidated rule challenge matter has met its burden and has standing to seek an administrative determination of the invalidity of the proposed rules.

80. Petitioners have the burden to demonstrate by the preponderance of the evidence that the proposed rule constitutes an invalid exercise of delegated legislative authority, as that phrase is defined in Section 120.52(8), Florida

Statutes (1989). Adam Smith Enterprises, Inc. v. Florida Department of Environmental Regulation, 553 So.2d 1260, 1274, 14 FLW 2722, at footnote 23, (Fla. 1st DCA 1989).

81. The phrase "invalid exercise of delegated legislative authority" is statutorily defined in Section 120.52(8), Florida Statutes, as follows:

> (8) "Invalid exercise of delegated legislative authority" means action which goes beyond the powers, functions, and duties delegated by the Legislature. A proposed or existing rule is an invalid exercise of delegated legislative authority if any one or more of the following apply:
> (a) The agency has materially failed to follow the applicable rulemaking procedures set forth in S. 120.54;
> (b) The agency has exceeded its grant of rulemaking authority, citation to which is required by S. 120.54(7);
> (c) The rule enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by S. 120.54(7);
> The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
> The rule is arbitrary or capricious.

This subsection was added to the definitions section of Section 120.52 by legislative act in 1988, and essentially codified judicial interpretation of the term "invalid exercise of delegated legislative authority." See: Grove Isle, Ltd. v. Department of Environmental Regulation, 454 So.2d 571, 573, 575 (Fla. 1st DCA 1984); Department of Business Regulation v. Salvation Limited, Inc., 452 So.2d 65 (Fla. 1st DCA 1984).

82. The Petitioners, by asserting the affirmative of the issues, have the burden of proof which includes the ultimate burden of persuasion. Florida Department of Transportation v. J.W.C. Co., Inc., 396 So.2d 778 (Fla. 1st DCA 1981).

83. In Department of Professional Regulation, Board of Medical Examiners v. Durrani, 455 So.2d 515 at 517 (Fla. 1st DCA 1984), the court stated:

> The well recognized general rule is that agencies are to be accorded wide discretion in the exercise of their lawful rulemaking authority, clearly conferred or fairly implied and consistent with the agencies' general statutory duties . . . An construction of the statute it administers is entitled to great weight and is not to be overturned unless clearly erroneous . Moreover, the agency's interpretation of a statute need not be the sole possible

> interpretation or even the most desirable one; it need only be within the range of possible interpretations . .

It is not this tribunal's function to say if the Department's interpretation is preferable; this tribunal is concerned only if the proposed rule is within the range of permissible construction that comports with and effectuates discerned legislative intent. Florida League of Cities v. Department of Insurance, 540 So.2d 850, 857-858 (Fla. 1st DCA 1989); Department of Administration v. Nelson, 424 So.2d 852 (Fla. 1st DCA 1982)

84. Petitioners' attack on the propriety and constitutionality of the rules on grounds that they are an impairment of contract under Section 10, of the Florida Constitution, are more appropriately dealt with by another forum, since they are not invalid on their face. Department of Administration, Division of Personnel v. Department of Administration, Division of Administrative Hearing, 326 So.2d 187 (Fla. 1st DCA 1976); Department of Revenue v. Young American Builders, 330 So.2d 864 (Fla. 1st DCA 1976); Smith v. Willis, 415 So.2d 1331 (Fla. 1st DCA 1982).

85. The DOT has followed the rulemaking procedure, as set forth in Section 120.54, Florida Statutes, in every material way. DOT gave proper notice, and followed the correct procedure for incorporating by reference the permit provisions in the proposed amendments to Rule 14-46.01, Florida Administrative Code. Section 120.52(8)(a), Florida Statutes (1989)

86. The DOT cites as specific authority in support of the proposed rules Sections 120.53(l) and 334.044(2), Florida Statutes, and, as the law implemented, cites Sections 337.401, 337.403, 337.404 and 339.05, Florida Statutes. These provisions provide in pertinent part:

> 334.044 Powers and duties of department.--
> The Department shall have the following general powers and duties:
> (2) To adopt rules, procedures, and standards for the conduct of its business operations and the implementation of any provision of law for which the department is responsible.
>
> * * *
>
> 337.401 Use of right-of-way for utilities subject to regulation; permit; fees.--
> (1) The department and local governmental entities, referred to in ss. 337.401-337.404 as the "authority," that have jurisdiction and control of public roads are authorized to prescribe and enforce reasonable rules or regulations with reference to the placing and maintaining along, across, or on any road under their respective jurisdictions any electric transmission, telephone, or telegraph lines; pole lines; poles; railways; ditches; sewers; water, heat, or gas mains; pipelines; fences; gasoline tanks and pumps; or other structures hereinafter referred to as the "utility."
> (2) The authority may grant to any person

who is a resident of this state,. or to any corporation which is organized under the laws of this state or licensed to do business within this state, the use of a right-of-way for the utility in accordance with such rules or regulations as the authority may adopt. No utility shall be installed, located, or relocated unless authorized by a written permit issued by the authority. 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 or any rule or order issued or entered into pursuant thereto.

337.403 Relocation of utility; expenses.--

(1) Any utility heretofore or hereafter placed upon, under, over, or alone any public road that is found by the authority to be unreasonably interfering in any way with the convenient, safe, or continuous use, or the maintenance, improvement, extension, or expansion, of such public road shall, upon 30 days written notice to the utility or its agent by the authority, be removed or relocated by such utility at its own expense except as provided in paragraphs (a) and (b).

(a) If the relocation of utility facilities, as referred to in S. 111 of the Federal-Aid Highway Act of 1956, Pub.L.No. 627 of the Eighty-Fourth Congress, is necessitated by the construction of a project on the federal-aid interstate system, including extensions thereof within urban areas, and the cost of such project is eligible and approved for reimbursement by the Federal Government to the extent of 90 percent or more under the Federal Aid Highway Act, or any amendment thereof, then in that event the utility owning or operating such facilities shall relocate such facilities upon order of the department, and the state shall pay the entire expense properly attributable to such relocation after deducting therefrom any increase in the value of the new facility and any salvage value derived from the old facility.

(b) When a joint agreement between the department and the utility is executed for utility improvement, relocation, or removal work to be accomplished as part of a contract for construction of a
facility, the department may participate in those utility improvement, relocation, or removal costs that exceed the departments official estimate of the cost of such work by

more than 10 percent. The amount of such participation shall be limited to the difference between the official estimate of all the work in the joint agreement plus 10 percent and the amount awarded for this work in the construction contract for such work. The department may not participate in any utility improvement, relocation, or removal costs that occur as a result of changes or additions during the course of the contract.
(2) If such removal or relocation is incidental to work to be done on such road, the notice shall be given at the same time the contract for the work is advertised for bids, or 30 days prior to the commencement of such work by the authority.
(3) Whenever an order of the authority requires such removal or change in the location of any utility from the right-of-way of a public road, and the owner thereof fails to remove or change the same at; his own expense to conform to the order within the time stated in the notice, the authority shall proceed to cause the utility to be removed. The expense thereby incurred shall be paid out of any money available therefore, and such expense shall, except as provided in subsection (1), be charged against the owner and levied and collected and paid into the fund from which the expense of such relocation as paid.
337.404 Removal or relocation of utility facilities; notice and order; court review--
(1) Whenever it shall become necessary for the authority to remove or relocate any utility as provided in the preceding section, the owner of the utility, or his chief agent, shall be given notice of such removal or relocation and an order requiring the payment of the cost thereof, and shall be given reasonable time, which shall not be less than 20 or more than 30 days, in which to appear before the authority to contest the reasonableness of the order. Should the owner or his representative not appear, the determination of the cost to the owner shall be final. Authorities considered for the purposes of chapter 120 shall adjudicate removal or relocation of utilities pursuant to chapter 120.
(2) A final order of the authority shall constitute a lien on any property of the owner and may be enforced by filing an authenticated copy of the order in the office of the clerk of the circuit court of the county wherein the owner's property is located.

(3) The owner may obtain judicial review of the final order of the authority within the time and in the manner provided by the Florida Rules of Appellate Procedure by filing in the circuit court of the county in which the utility was relocated a petition for a writ of certiorari in the manner prescribed by said rules or in the manner provided by chapter 120 when the respondent is an agency for purposes of chapter 120.

339.05 Assent to federal aid given.--The state hereby assents to the provisions of the Act of Congress approved July 11, 1916, known as the Federal Aid Law, which Act of is entitled "An act to provide that the United States shall aid the states in the construction of rural post roads and for other purposes," and assents to all subsequent amendments to such Act of Congress and any other act heretofore passed or that may be hereafter passed providing for federal aid to the states for the construction of highways and other related projects. The department is authorized to make application for the advancement of federal funds and to make all contracts and do all things necessary to cooperate with the United States Government in the construction of roads under the provisions of such Acts of Congress and all amendments thereto.

A. Rule 14-46.0011

87. The DOT's proposed Rule 14-46.0011 concerning DOT's liaison with utilities is a statement of general policy, and is a reasonable rule authorized by Sections 334.044(2), 337.401, 337.403, 337.404 and 337.405, Florida Statutes These statutes are correctly cited by DOT in support of this proposed rule. On its face, this proposed rule does not offend any of the provisions of Sections 120.52(8) or 120.54(4), Florida Statutes, and, therefore, does not constitute an invalid exercise of delegated legislative authority. As a statement of general policy it is not vague. Since no decisions affecting substantial interest are intended under this proposed rule, the rule need not specify any standards for agency decisions. Since the rule directs DOT to coordinate with utilities in planning its highway projects, the rule does not vest unbridled discretion in DOT.

B. Rule 14-46.001 - Utility Permit, Paragraph 12

88. Proposed paragraph 12 of the Utility Permit provides:

12. It is agreed that in the event the relocation of said utility facilities are scheduled to be done simultaneously with the Department's construction work, the permitee will coordinate with the Department before proceeding, shall cooperate with the Department's contractor to arrange the

> sequence of work so as not to unnecessarily delay the work of the Department's contractor, defend any legal claims of the Department's contractor due to delays caused by the permittee's failure to comply with the approved schedule, and shall comply with all provisions of the law and Rule 14-46, Florida Administrative Code. The Permittee shall not be responsible for delays beyond its normal control.

89. The DOT cites in support of the proposed rule, in particular, Sections 334.044(2), 337.401, 337.403, 337.404 and 339.05, Florida Statutes. This statutory scheme authorizes DOT to make and enforce reasonable rules with which utilities must comply before receiving a permit to be accommodated on the DOT right-of-way. The DOT's mission under the State Transportation Code is to plan, construct and maintain transportation facilities. Section 334.404(13), Florida Statutes (1989). The accommodation of utilities by permit is subject to compliance by utilities with reasonable DOT rules. Section 337.401(1), Florida Statutes (1989), authorizes DOT to "prescribe and enforce reasonable rules or regulations" with reference to the accommodation of utilities on roads within DOT's jurisdiction. While Section 337.401(2), Florida Statutes, states, in pertinent part:

> (2) . . . No utility shall be installed, located or relocated unless authorized by a written permit issued by the authority. The permit shall require the permitholder to be responsible for any damage resulting from the issuance of such permit.

90. It is clear that a statutory condition of the permit requires that the utility shall be responsible for any damage resulting from the issuance of a permit [Section 337.401(2)], and also, the utility must, at its own expense, restore any public road which it damages or impairs in any way because of the installation, inspection or repair of its facilities located on the road. The DOT may charge the cost of such restoration to the utility if the utility fails to act. Section 337.402, Florida Statutes.

91. Under this statutory scheme, the right of utilities, including whatever rights are provided telephone companies under Section 362.01, Florida Statutes (1987), are subordinate to DOT and the rights of the traveling public to the use of the public roads of this state.

92. The DOT argues that it is requiring the utility to bear the burden of defense only for claims which DOT would not have had but for the utility's failure to follow its schedule, and only if the failure was within the utility's control. This is a reasonable interpretation of the statutory requirement that a permitholder shall be responsible for "any damage resulting from the issuance of such permit." Section 337.401(2), Florida Statutes.

93. The DOT has a problem with the mechanics of implementing paragraph 12. The DOT cannot explain which utility would defend the DOT if more than one utility is involved, a frequent occurrence. The DOT testified that the utilities' duty to defend did not extend to "delays beyond its normal control," and that "normal control" is construed to mean a precondition of the defense duty. "Normal control" could be interpreted in different ways even if

guidelines were established. The DOT admitted that there could be litigation over the term "normal control." However, the sentence is not so vague that a person of common intelligence cannot say with certainty from the terms of such rule or statute what is required. See: D'Alemberte v. Anderson, 349 So.2d 164 (Fla. 1977).

94. The DOT put the defense provision in the Permit to force such provisions upon the utility without its consent, because they would not voluntarily consent to the provision during contract negotiations.

95. The DOT wants this provision: (l) to enforce the provision that utilities will do what they are supposed to do to keep a contractor from being delayed in relocation work; and (2) to give the DOT an additional remedy, a "clout of enforcement," with respect to relocations whereby the DOT could revoke the utility permit in the event of noncompliance. The DOT's intent is to force the provisions through rulemaking into the Permit; then, by the fact the provisions are in the Permit, to require the same type of language be included in a relocation contract.

96. The utility permit is issued when the utility installs its facilities on the DOT right-of-way; a separate agreement controls relocations. A DOT permit)S only to a utility's facilities that are located on the DOT right-of-way and not to those facilities located in public right-of-way owned by other government agencies, platted utility easements or private easements. Any of these facilities -- to which the Permit does not apply -- could be relocated as the result of a DOT construction project.

97. The DOT Quality Improvement Team, after studying delay claims, determined the primary root cause of the problems were outdated and inadequate DOT procedures. The recommended solutions to help reduce utility delays did not include the defense and indemnification provisions contained in proposed paragraphs 12 and 15 of the Permit.

98. The DOT did not consider all relevant facts. The DOT looked at only three things in considering the impact of the proposed rule. The conclusion that the proposed rule would result in a $2 million saving due to reduction in utility delays is an estimate only. The DOT did not consider settlement amounts or the fact that the majority of delay claims were associated with water and sewer relocation. The DOT made no effort to break the claims down into type of utilities and, even though it is not surprised that the majority of claims involved water and sewer facilities, doesn't know why that should be so.

99. It is the DOT and the DOT's contractor who are responsible for coordinating the various utility schedules and the construction work into one project schedule. The DOT contractor submits this project schedule to the DOT and the DOT project engineer and the district construction engineer review that schedule and have authority to disapprove that schedule. It is not this project schedule, however, but the "approved" utility schedule of the individual utility which gives rise to the utility's duty to defend the DOT against the claims of the DOT's contractor in paragraph 12 of the Permit This approved schedule is prepared at the time that the utility has no knowledge of how the contractor wants to proceed on the job --. the contractor may have a different approach to constructing the job which could result in the utility changing their plane as to where they planned to start work.

100. The requirement of a pre-construction conference and a project schedule was implemented by the DOT only toward the end of 1987, when DOT's

standard form contract was amended to include scheduling requirements on the part of the contractor. It is too early, and there is no data yet available, to tell whether this new procedure will be effective, as it is anticipated to be, in helping to reduce delays caused by utility relocations.

101. Further, the DOT in proposing paragraph 12 did not reasonably consider the fact that the utility is not a party to the construction contract between DOT and the DOT contractor. The utility has no control over the terms and conditions of that contract, including the ability of the DOT contractor to sue the DOT for delay claims. When the DOT contractor sues because of a utility delay, it sues the DOT based on its construction contract with the DOT and may allege the DOT's failure to coordinate the relocation efforts of the utility owners constituted a breach of the Contract. DOT may then join the utility as a third party.

102. Although it may not be wise or efficient, it is not arbitrary to force a utility as a condition of right-of-way use to defend the DOT against DOT's own contractors, when the delay claim is allegedly due to delays caused by the utility's failure to comply with the approved schedule.

103. The preponderance of evidence is that the phrase ". . . defend any legal claims of the Department's contractor due to delays caused by the permittee's failure to comply with the approved schedule . . . " within DOT's proposed paragraph 12 of the new Utility Permit is not an invalid exercise of delegated legislative authority, as defined in Section 120.52(8), Florida Statutes.

C. Paragraph 15 of the Utility Permit Indemnification of DOT's Joint Negligence

104. The proposed paragraph 15 of the Utility Permit, which is a part of the Utility Accommodations Guide (UAG), is incorporated by reference into Rule 14-46.001. By its terms, the "except [for the] . . . sole negligence" provision requires the utility to pay for the joint negligence of the DOT as a condition of use of the DOT right-of-way.

105. Under the provisions of Section 337.401, Florida Statutes, DOT can require the utility to be responsible for any damage resulting from the issuance of a permit. Under the existing provisions of paragraph 15 of the Utility Permit, utilities are required to indemnify, defend, and save harmless the DOT from all loss, damage, cost or expense arising from the permit. The proposed new paragraph 15 provision which requires indemnification, except for DOT's sole negligence is an extension of that provision. Paragraph 12 of the existing standard form Master Agreements, previously executed by Petitioners, requires utilities to defend against contractor delay claims due to delays caused by the utilities' negligence that were not beyond its control. The new permit requires the utility to defend DOT from any delay claims caused by the utility's failure to comply with its approved work schedule other than for delays beyond the utility's normal control, and indemnify DOT for any claim, loss, damage, cost, charge or expense except for damages resulting from the sole negligence of the DOT.

106. Under proposed paragraph 15, if there was a judgment finding that the DOT was 99% negligent and the utility was 1% negligent, the utility would have to pay the entire judgment. Under the general law relating to comparative fault and contribution among tort-feasors, the utility would have a judgment entered against it and, therefore, have to pay for only 1% of that liability -- the part

directly attributed to the utility's own fault. Paragraph 15 of the Utility Permit modifies Florida negligence law, Section 768.81, Florida Statutes, and enlarges, modifies or contravenes the specific provisions of Section 337.401(2), Florida Statutes, permitting the DOT to hold the utility responsible for any damage that the utility causes. State Board of Optometry v. Florida Society of Ophthalmology, 539 So.2d 878. As the court stated at p. 885

> We recognize that in [Department of Professional Regulation, Board of Medicine v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984] we indicated that the court must approve the agency's selection of any possible interpretation of the enabling statute. But in so stating, we did not mean that any conceivable construction of a statute must be approved irrespective of how strained or ingeniously reliant or implied authority is might be; rather, as made clear in the cases cited in Durrani in support of the stated proposition, only a permissible construction by the agency that comports with and effectuates discerned legislative intent will be sustained by the court. (citations omitted)."

DOT's interpretation of the statute goes beyond the permissible construction that can be given to the statute and is an invalid exercise of delegated legislative authority.

107. The DOT found it necessary to put the indemnification provision in the Permit because the utilities would not sign a contract with that language in the contract. Because Florida law views indemnification of another for that other's own negligence with disfavor, it allows such indemnification only in contracts freely entered into, provided that the indemnification is expressed in clear and unequivocal terms. See: Charles Poe Masonry, Inc. v. Spring Scaffolding Rental Equipment Company,

108. The DOT strongly relies on the case of Mitchell Maintenance Systems v. State, Department of Transportation, 442 So.2d 276 (Fla. 4th DCA 1983), in its justification for implementing paragraph 15. The sole issue decided by the court in Mitchell, supra, is that the indemnification language identical to the language which DOT proposes for paragraph 15 of the Permit is clear and unequivocal. However, the Mitchell case is limited by its facts to a contract situation. It is limited to a contract willingly entered into by a private individual who wished to perform maintenance work on DOT utility poles. Mitchell does not involve rulemaking, does not involve public utility use of right-of-way and does not involve the public policy issues of providing economic utility service or land use discussed above.

109. Further, unlike the situation in Mitchell where the maintenance work is completely under the control of the party agreeing to indemnify the DOT with respect to any damage arising out of that maintenance work, the control on the right-of-way situation is with the DOT or third persons. The road construction and maintenance of the road is under the control and is the responsibility of DOT. The DOT's use of the Mitchell case, as justification for shifting the cost of the DOT's joint negligence to the utility through rulemaking is not legal authorization for requiring the utility to pay for DOT's joint negligence.

110. Prior to the adoption of any rule, Section 120.54(2)(b), Florida Statutes, mandates that an agency prepare an economic impact statement (EIS) to promote agency introspection in administrative rulemaking; to ensure a comprehensive and accurate analysis of economic factors which work with social and legislative goals to facilitate informed decision making and to expose the administrative rulemaking process to public scrutiny. Florida-Texas Freight, Inc. v. Hawkins, 379 So.2d 933, at 946 (Fla. 1979). In Dept. of Health & Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983), the court held that an economic impact statement which insufficiently addressed the potentially substantial economic repercussions of a proposed rule change was invalid and, hence, the rule was an invalid exercise of delegated legislative authority. The court said:

> . . .materiality of the economic impact statement to the rulemaking process cannot be given short shrift. Preparation of the statement is a sobering task, one designed to arrest agency discretion bordering on the despotic, and to channel it through logic and reason to a rational end. Id. at 641

111. The EIS prepared by DOT and incorporated in the June 16 edition of the Florida Administrative Weekly is inaccurate and misleading in claiming that construction delays of $3.7 million are attributable to utilities. The costs of claims for delays related to utilities' problems are insignificant overall and cannot serve as a reasonable basis for adoption of the proposed rules.

112. A public utility has a general requirement under Section 366.03, Florida Statutes (1989), to provide the public with adequate and economical utility installations and services. The DOT did not consider the fact in the EIS that in shifting the cost of DOT's joint negligence to the utility, DOT is imposing substantial costs on the utility and is, in fact., increasing those costs by an unquantifiable amount. These additional costs can have a negative impact on the utility's ability to provide economical service.

113. The DOT did not consider that the indemnification amounts which the utility would have to pay DOT foil DOT's joint negligence could be in excess of the $100,000 - $200,000 allowed under the waiver of sovereign immunity statute, Section 786.28, Florida Statutes (1989).

114. The EIS discussing the costs and benefits of the proposed rule change, completely ignores the cost of requiring utilities to assume all of DOT's tort and contract liability, except where the Department is solely negligent.

Section 120.54(2), Florida Statutes (1989), provides that an agency's failure to include within its rule an "adequate" statement of economic impact is grounds for invalidation of the rule. The Florida Supreme Court has observed that the procedure envisioned by this section does not "command adherence to form over substance," Florida-Texas Freight, supra, and that provision does not require perfection but only "substantial compliance" with Section 120.57(2)(b), Florida Statutes (1989). In the matter before this tribunal, DOT gave no consideration at all to the economic impact of shifting liability from the Department to the utility and ultimately the utility's ratepayers. This section of the rule could be devastating economically to the utility permitholder and, therefore, the Department's reasoning for its adoption is not supported by law

or logic and is invalid. Department of Health and Rehabilitative Services v. Wright, 439 So.2d 937 (Fla. 1st DCA 1983).

115. Paragraph 15 of the Utility Permit enlarges, modifies or contravenes the law implemented, and the EIS is not adequate as pertains to this section and is, therefore, an invalid exercise of delegated legislative authority under Sections 120.52(8)(c) and 120.54(2)(b), Florida Statutes (1989). Therefore, based on the foregoing findings of fact and conclusions of law it is

ORDERED, as follows:

1. Proposed Rule 14-46.0011 is not an invalid exercise of delegated legislative authority;

2. Proposed Rule 14-46.001 and the Utility Accommodation Guide, adopted by reference therein, Which includes a new form Utility Permit, are not an invalid exercise of delegated legislative authority, except for Paragraph 15 of the Utility Permit, contained within the UAG and adopted by reference in proposed Rule 14-46.001, which is held to be invalid. Section 120.52(8)(c) and 120.54(2)(b), Florida Statutes (198).

3. Except for the issues abated (see: Preliminary Statement), all other issues are dismissed, and the Department of Transportation is free to conclude its rule promulgation of the rules and Utility Accommodation Guide. Jurisdiction of the abated issues are remanded to the Department of Transportation for resolution through formally announced and noticed changes to the proposed rules.

DONE and ORDERED this 8th day of March, 1990, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of March, 1990.

APPENDIX

The following constitutes my specific rulings, in accordance with section 120.59, Florida Statutes, on findings of fact submitted by the parties.

Proposed Findings of Fact - GTE Florida Inc.

Accepted: Paragraphs 1, 2, 4, 5 (impart) , 6, 7, 8 (in substance) 9, 10, 13, 14, 15
Rejected: Against weight: 3, 5 (in part) Argument: 11, 12

Proposed Findings of Fact-Florida Power and Light Co.

Accepted 1, 2 (in substance), 3, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 23, 24, 25 (in substance), 26, 27, 28 (in substance), 29, 31
Rejected: - Against greater weight of the evidence: 4, 5
- Subservient: 14
- conclusions of law: 22, 30, 32

Proposed Findings of Fact - Southern Bell Telephone and Telegraph Co.

Accepted: 1, 2, 4, 5, 6, 7, 10 (in substance), 12 (in substance) Rejected:
Resolved in the Preliminary Statement: 3
- conclusion of law: 8, 9, 13, 14, 17
- not supported by the greater weight of the evidence: 11, 15, 16

Proposed Findings of Fact - Department of Transportation

Accepted: (as stated or in substance): 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21 (in part), 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 36, (in part), 42, 46, 47, 48, 49, 50, 51, 55(in part), 57, 60, 62, 63, 64, 65, 68, 69, 70, 71, 72, 75, 77, 82, 84, 87, 88
Rejected as resolved in the Preliminary Statement: 1, 2, 3, 4, 5, 6, 7, 8, 9, 14
Rejected as irrelevant or subservient: 58, 79, 80, 81, 85, 94
Rejected as argument: 44, 45, 54, 56, 61, 66, 67, 73, 74, 78, 83, 90, 91, 95, 96, 91
Rejected as not supported by the greater weight of the evidence: 21 (in part), 37, 38, 39, 40, 41, 43, 52, 53, 55 (in part), 59, 76, 85, 86, 87

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 102.68, FLORIDA STATUTES. REVIEW PROCEEDINGS ARE GOVERNED BY THE FLORIDA RULES OF APPELLATE PROCEDURE. SUCH PROCEEDINGS ARE COMMENCED BY FILING ONE COPY OF A NOTICE OF APPEAL WITH THE AGENCY CLERK OF THE DIVISION OF ADMINISTRATIVE HEARINGS AND A SECOND COPY, ACCOMPANIED BY FILING FEES PRESCRIBED BY LAW, WITH THE DISTRICT COURT OF APPEAL, FIRST DISTRICT, OR WITH THE DISTRICT COURT OF APPEAL IN THE APPELLATE DISTRICT WHERE THE PARTY RESIDES. THE NOTICE OF APPEAL MUST BE FILED WITHIN 30 DAYS OF RENDITION OF THE ORDER TO BE REVIEWED.