STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA CABLE TELEVISION ASSOCIATION, CABLEVISION INDUSTRIES OF CENTRAL FLORIDA, INC. and CABLEVISION INDUSTRIES OF MIDDLE FLORIDA, INC.,	)	
Petitioners,	)	
vs.	)	CASE NO. 93-0239RP
STATE OF FLORIDA, DEPARTMENT OF REVENUE,	)	
Respondent,	)	
and	)	
BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Intervenor.	)	

FINAL ORDER

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on March 11, 1993, in Tallahassee, Florida.

APPEARANCES

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STATEMENT OF THE ISSUE

Whether a proposed amendment to Rule 12A-1.053(7), Florida Administrative Code, constitutes an invalid exercise of delegated legislative authority and/or is unconstitutional?

PRELIMINARY STATEMENT

On January 21, 1993, the Petitioners, Florida Cable Television Association, Cablevision Industries of Central Florida, Inc. and Cablevision Industries of Middle Florida, Inc., filed a Petition for Administrative Determination of the Invalidity of Proposed Rule. The Petitioners challenged a proposed amendment by the Respondent, the Florida Department of Revenue (hereinafter referred to as the "Department"), to Rule 12A-1.053(7), Florida Administrative Code (hereinafter referred to as the "Challenged Rule").

By Order of Assignment entered January 22, 1993, the petition was designated case number 93-0239RX and was assigned to the undersigned. By a Notice of Hearing entered January 25, 1993, the final hearing was scheduled for February 19, 1993.

On February 16, 1993, an Agreed Motion for Continuance was filed. Pursuant to this motion, it was requested that the final hearing be rescheduled for March 11 and 12, 1993. On February 17, 1993, an Order Granting Agreed Motion for Continuance was entered. The final hearing was rescheduled for March 11 and 12, 1993.

On March 3, 1993, the Intervenor, BellSouth Telecommunications, Inc. (hereinafter referred to as "BellSouth") filed a Petition for Leave to Intervene in the Administrative Determination of the Validity of a Proposed Rule. BellSouth sought to intervene in support of the Challenged Rule. The Petitioners and the Department filed a Stipulated Agreement to Intervention of BellSouth Telecommunications, Inc. On March 4, 1993, an Order Granting Petition for Leave to Intervene was entered.

On February 19, 1993, the Petitioners filed a Motion for Official Recognition. That motion was granted by Order entered March 8, 1993. On March 10, 1993, the Petitioners filed Petitioners' Second Motion for Official Recognition. The Department also filed two motions for official recognition just prior to, or at the final hearing. Finally, requests for official recognition were made during the final hearing. All requests for official recognition, which are reflected in the motions filed by the parties or in the transcript of the final hearing, were granted.

On March 8, 1993, the Petitioners filed a Motion for Leave to File Amended Petition and an Amended Petition for Administrative Determination of the Invalidity of Proposed Rule. After hearing argument on the motion at the final hearing, the Petitioners amended petition was accepted.

At the final hearing the Petitioners presented the testimony of Robert John Brillante, J. W. Taylor and Carl Newberry. Petitioners offered one composite exhibit which was accepted into evidence.

The Department presented the testimony of Paul DeFrank and Melton H. McKown. The Department offered no exhibits.

BellSouth called no witnesses. The parties, however, stipulated that the facts alleged by BellSouth in its petition to intervene in support of its standing to participate in this proceeding were true. BellSouth offered two exhibits which were accepted into evidence.

Finally, seven exhibits were offered and accepted as joint exhibits, including the deposition testimony of Dennis LaBelle.

The parties agreed to file proposed final orders within twenty days of the filing of a transcript of the final hearing. The transcript was filed on March 30, 1993. Proposed final orders were, therefore, to be filed on or before April 19, 1993. On April 7, 1993, the parties filed an Agreed Motion for Extension of Time to File Proposed Final Order requesting an extension of time until April 29, 1993, to file their proposed final orders. The motion was granted by Order entered April 12, 1993.

All of the parties have filed proposed final orders containing proposed findings of fact. A ruling on each proposed finding of fact has been made either directly or indirectly in this Final Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

FINDINGS OF FACT

A. The Parties.

1. Petitioner, Florida Cable Television Association (hereinafter referred to individually as the "Association"), is a voluntary association of franchised cable television operators in the State of Florida. The Association's membership is reflected on Joint Exhibit 7.

2. Petitioner, Cablevision Industries of Central Florida, Inc. (hereinafter individually referred to as "Central"), and Petitioner, Cablevision Industries of Middle Florida, Inc. (hereinafter individually referred to as "Middle"), are franchised cable system operators in Orange County, Florida.

3. Central and Middle are members of the Association.

4. Central provides cable television services in the cities of Clermont, Edgewater, Groveland, Helen, Holly Hill of Lake County, Mascotte and Oak Hill, and the Town of Minneola. Central also provides services in the Winter Garden, Orange County, Florida, franchise area.

5. Middle provides cable television services in the cities of Belle Glade, Live Oak, Pahokee, Palatka, South Bay and the Town of Interlachan. Middle also provides cable television services in the unincorporated areas of Bradford, Palm Beach and Putnam Counties. Middle also provides services in the MAGNA franchise area, an area of Orange County.

6. The Respondent is the Florida Department of Revenue, an agency of the State of Florida. The Department is charged with responsibility for administering the State's revenue laws. See Section 213.05, Florida Statutes.

7. The following facts concerning the Intervenor, BellSouth, were stipulated by the parties to be true:

> 1. BellSouth is a corporation authorized to do business in Florida . . . .
> . . . .
> 5. . . . a) BellSouth is a utility service provider which owns utility or transmission poles and receives fees from others for the privilege of attaching wires and other equipment to those poles; and, b) BellSouth pays fees to others who own utility or transmission poles for the privilege of attaching wires and other equipment to those poles.
> . . . .

B. Adoption of the Challenged Rule.

8. On December 31, 1992, the Department caused to be published notice of its intent to amend Rule 12A-1.053, Florida Administrative Code. The notice was published in the Florida Administrative Weekly, Volume 18, No. 53, December 31, 1992 (hereinafter referred to as the "Notice"). See Joint Exhibit 1.

9. On January 21, 1993, the Petitioners initiated a challenge to the proposed amendment of Rule 12A-1.053(7), Florida Administrative Code, by instituting a Section 120.54, Florida Statutes, proceeding.

10. The Challenged Rule provides the following:

> The charge by the owner of a utility or transmission poles to anyone other than a utility service provider as the term "utility service" is defined in s. 203.012(9), Florida Statutes, for the privilege of attaching wires and other equipment thereto is taxable as provided in s. 212.031, Florida Statutes, as a license to use real property.

Joint exhibit 1.

11. The "specific authority" for the Challenged Rule cited by the Department in the Notice was Sections 212.17(6), 212.18(2), and 213.06(1), Florida Statutes.

12. The "law implemented" by the Challenged Rule cited by the Department in the Notice was Sections 212.02(20), 212.05(1)(b)(e), 212.06(1)(a)(b) and (2)(a), 212.08(4) and (7)(j), and 212.18(2), Florida Statutes, and Sections 13 and 14 of Chapter 92-319, Laws of Florida.

C. The Taxable Event; Effect on the Petitioners.

13. Typically, members of the Association, including Central and Middle, deliver cable television services in the State of Florida through wires and equipment attached to utility poles. Typically the wires are utilized by cable television providers to transmit audio and video signals to subscribers of the providers' services.

14. Although cable television providers may own some poles and, in some instances, may install their own poles, most cable television providers, including Central and Middle, enter into agreements with owners of utility poles, such as electric and telephone providers, for the use of existing poles (hereinafter referred to as "Attachment Agreements"). See Joint Exhibits 2(a)-1, 2(a)-2, 2(b)-1, 2(b)-2, 2(c)-1 and 2(c)-2, which are examples of Attachment Agreements.

15. Pursuant to the Attachment Agreements, cable television providers agree to pay a fee to the owner of utility poles for the right to attach cable television wires and equipment to the poles. The fee is typically calculated based on the number of poles used each year.

16. Pursuant to the Challenged Rule, members of the Association, and Central and Middle, will be required to pay sales and use tax on the charges they pay pursuant to Attachment Agreements they enter into.

D. Utility Pole Characteristics.

17. Utility poles to which cable television provider wires and equipment is attached are usually owned by utility service providers and are installed on public and private streets or rights-of-way. The underlying land and right-of-way may or may not be owned by the utility provider.

18. Utility poles remain the property of the utility provider and do not become the property of the owner of the land or the right-of-way upon which the pole is located.

19. Electric service provider utility poles are generally considered to be components of the "overhead electric distribution system," which consists primarily of the poles wires and transformers. The components are suppose to be designed and installed in accordance with the National Electric Safety Code.

20. Poles installed pursuant to the National Electric Safety Code are to be installed in the ground and are anchored to the ground to insure that the pole remains in a vertical position. Anchoring may be secured by cement anchors and bolts embedded in concrete which is placed in the ground.

21. Poles are installed and anchored to withstand the forces of nature. Generally, poles are installed to withstand winds of up to 150 miles per hour.

22. In general, poles are intended to be installed permanently and, on average, have a useful life of twenty-five to thirty years.

23. In practice, utility poles are sometimes replaced or moved. Poles become rotten and have to be replaced. Poles are also replaced when damaged. Poles are also removed and relocated for various reasons. Central and Middle were aware of approximately 200 utility pole changes during one year.

24. In order to replace or move a utility pole, heavy equipment is required.

E. Exemption for Utilities.

25. Most poles to which cable television wires are attached are already being used by utilities for utility services.

26. Pursuant to the Challenged Rule fees paid by "utility service providers" for the use of utility poles to attach wires and other equipment to utility poles are exempt from sales and use tax.

27. The Department's exemption of utility service providers is based upon the provisions of Section 212.031(1)(a), Florida Statutes:

> (1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of any real property unless such property is:
> . . . .
> 5. A public or private street or right-of-way occupied or used by a utility for utility purposes.

28. Currently only utilities and cable television providers enter into Attachment Agreements.

F. Local Government Franchise Agreements.

29. Central and Middle operate in their respective areas of the State of Florida pursuant to agreements with local governments (hereinafter referred to as "Franchise Agreements"), authorizing them to provide cable television services within the jurisdiction of the city or county with which the agreement has been entered into. See Joint exhibit 3.

30. Franchise Agreements entered into by Central and Middle generally give them a nonexclusive right to provide cable television services in the areas they serve.

31. Central and Middle both operate within areas located in Orange County, Florida. Orange County has enacted Chapter 12 of the Orange County Code, Community Antenna Television Systems; Cable Television, Etc. Joint exhibit 5a.

32. Section 12-48 of the Orange County Code, provides, in part, the following:

> (a) Payment to the grantor of franchise consideration. A cable operator shall pay to the county a franchise fee of five (5) percent of its gross annual revenues for each year of the term of the franchise. . . . The franchise fee shall be in addition to all other taxes, fees and assessments which are

> required to be paid to the county, and which do not constitute a franchise fee under the Act. . . .
> . . . .
> (b) Time of Payment.
> . . . .
> (3) Nothing in this subsection (b) shall limit the cable operator's liability to pay other applicable local, state or federal taxes, fees, charges or assessments.

33. A fee (hereinafter referred to as a "Franchise Fee"), similar to that charged pursuant to Section 12-48 of the Orange County Code is imposed by Palm Beach and Hillsborough Counties. See Joint exhibits 5(b) and 5(c).

34. Franchise Fees are paid by cable television providers for the right to serve a given community.

35. Not all cable television service providers are required to pay Franchise Fees of 5 percent.

36. Central and Middle report their gross income on a quarterly basis to Orange County for purposes of paying the Orange County Franchise Fee imposed by Section 12-48 of the Orange County Code. Central and Middle calculate and pay to Orange County a Franchise Fee of 5 percent of their annual gross income. The Orange County Franchise Fee is paid quarterly. See Joint exhibits 4(a) and 4(b).

37. The Orange County Franchise Fee is imposed on all gross revenues of Central and Middle, i.e., installation charges, leases of remote and converter boxes, sale of program guides and advertising.

38. Central and Middle have entered into Attachment Agreements to utilize utility poles located in Orange County. A fee is paid for the use of those poles pursuant to the Attachment Agreements.

39. The State of Florida does not impose a Franchise Fee on cable television service providers in Florida.

40. In addition to paying Franchise Fees, some cable television service providers, including Central and Middle, also pay sales taxes in the State of Florida.

41. 47 U.S.C. Sections 521-559 (hereinafter referred to as the "Cable Act"), provides Federal regulations governing cable television systems operated in the United States.

G. Rule 12A-1.046(4)(b), Florida Administrative Code.

42. Rule 12A-1.046(4)(b), Florida Administrative Code, provides:

> (b) The charge by the owner of utility or transmission poles to others for the privilege of attaching wires or other equipment thereto is exempt as a service transaction.

43. The provisions of Rule 12A-1.046(4)(b), Florida Administrative Code, are in conflict with the Challenged Rule.

44. Rule 12A-1.046(4)(b), Florida Administrative Code, has not been amended or repealed by the Department. It is, therefore, a valid rule of the Department.

45. The Department, after proposing to amend Rule 12A-1.046(4)(b), Florida Administrative Code, to eliminate the inconsistency with the Challenged Rule, decided to await the outcome of this case. Although a final decision has not been made, it is reasonable to conclude that the discrepancy between the Challenged Rule and Rule 12A-1.046(4)(b), Florida Administrative Code, will be eliminated if the validity of the Challenged Rule is ultimately upheld.

CONCLUSIONS OF LAW

A. Jurisdiction.

46. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.54(1), Florida Statutes.

B. Burden of Proof.

47. The burden of proof in this proceeding was on the Petitioners. See Adam Smith Enterprises v. Department of Environmental Regulation, 553 So.2d 1260, (Fla. 1st DCA 1990); and Agrico Chemical Co. v. Department of Environmental Regulation, 365 So.2d 759 (Fla. 1st DCA 1979).

C. Standing.

48. Section 120.54(4)(a), Florida Statutes, provides, in pertinent part, the following:

> (4)(a) Any substantially affected person may 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.

49. In order to conclude that a person is a "substantially affected" person, it must be proved:

> 1) that he will suffer injury in fact which is of sufficient immediacy to entitle him to a . . . hearing, and 2) that his substantial injury is of a type or nature the proceeding is designed to protect.

Florida Society of Ophthalmology v. Board of Optometry, 532 So.2d 1279, 1285 (Fla. 1st DCA 1988), rev. denied, 542 So.2d 1333 (1989). See also Agrico Chemical Company v. Department of Environmental Regulation, 406 So.2d 478 (Fla. 2d DCA 1981); and Professional Firefighters of Florida, Inc. v. Department of Health and Rehabilitative Services, 396 So.2d 1194 (Fla. 1st DCA 1981).

50. Additionally, in order for an association to be considered a "substantially affected" person, the association must also prove the following:

> (1) . . . a substantial number of its members, although not necessarily a majority, are substantially affected by the challenged rule;
> (2) the subject matter of the proposed rule is within the association's general scope of interest and activity; and
> (3) the relief requested is of a type appropriate for a trade association to receive on behalf of its members.

Farmworker Rights Organization, Inc. v. Department of Health and Rehabilitative Services, 417 So.2d 753 (Fla. 1st DCA 1982). See also Florida Homebuilders Association v. Department of Labor and Employment Security, 412 So.2d 351 (Fla. 1982).

51. Based upon the evidence presented in this proceeding and the stipulation of the parties, the Petitioners have standing to institute this proposed rule challenge pursuant to Section 120.54, Florida Statutes.

52. The evidence also supports a finding that BellSouth has standing to participate in this proceeding.

D. The Petitioners' Challenge.

53. Section 120.54, Florida Statutes, authorizes a substantially affected person to seek an administrative determination that any proposed agency rule is an "invalid exercise of delegated legislative authority" as those terms are defined in Section 120.52(8), Florida Statutes.

54. An "invalid exercise of delegated legislative authority" is 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 exceed 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);
> (d) The rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency; or
> (e) The rule is arbitrary or capricious.

55. In the petition filed in this case, it has been alleged that the Challenged Rule is an invalid exercise of delegated legislative authority as defined in Sections 120.52(8)(b), (c), (d) and (e), Florida Statutes.

E. The General Authority of Agencies to Adopt Rules.

56. Statutorily created agencies, such as the Department, are without inherent rulemaking authority. Section 120.54(15), Florida Statutes. Any such authority granted to an agency is limited by the statute conferring the authority. See U.S. Shoe Corp. v. Department of Professional Regulation, 578 So.2d 376 (Fla. 1st DCA, 1991).

57. Where an agency is granted rulemaking authority, it is granted wide discretion in exercising that authority. Department of Professional Regulation v. Durrani, 455 So.2d 515 (Fla. 1st DCA 1984). An agency's interpretation of statutes which govern the agency's statutory duties and responsibilities is to be given great weight and should not be rejected unless clearly erroneous. Florida Hospital Association, Inc. v. Health Care Cost Containment Board, 593 So.2d 1137 (Fla. 1st DCA 1992).

58. Where authorization for rulemaking is not clearly conferred or fairly implied and consistent with the agency's general statutory duties, an agency is without authority to adopt a rule. See Department of Professional Regulation v. Florida Society of Professional Land Surveyors, 475 So.2d 939 (Fla. 1st DCA 1985). Any attempt to extend or enlarge an agency's jurisdiction beyond its statutory authority will be declared to be invalid. Board of Trustees of the Internal Improvement Trust Fund v. Board of Professional Land Surveyors, 566 So.2d 1358 (Fla. 1st DCA 1990).

F. Are Attachment Agreements "Licenses" as Defined in Section 212.02(10)(i), Florida Statutes?

59. The Petitioners have argued that the Challenged Rule improperly treats their Attachment Agreements as creating a "license" taxable under Section 212.031, Florida Statutes. Section 212.031(1), Florida Statutes, provides, in pertinent part, the following:

> (1)(a) It is declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of renting, leasing, letting, or granting a license for the use of real property unless such property is:
> . . . .
> 5. A public private street or right-of-way occupied or used by a utility for utility purposes. [Emphasis added].

60. The Petitioners have argued that, by treating their Attachment Agreements as taxable licenses for the use of real property, the Department has enlarged, modified or contravened the specific provisions of law implemented. See Section 120.52(8)(c), Florida Statutes.

61. A "license" for purposes of Chapter 212, Florida Statutes, is defined in Section 212.02(10)(i), Florida Statutes, as:

> (i) "License," as used in this chapter with reference to the use of real property, means the granting of a privilege to use or occupy a building or a parcel of real property for any purpose.

62. Attachment Agreements generally grant a privilege for the use of poles. Attachment Agreements may even refer to a cable television party to an Attachment Agreement as "licensee" and may be titled "Grant of License." The use of such terms in the Attachment Agreements, however, is not dispositive of the question of whether the Attachment Agreements create a "license" as defined in Section 212.02(10)(i), Florida Statutes. To be a taxable license, the privilege granted by Attachment Agreements must be for the use of a "building" or a "parcel of real property."

63. A utility pole does not constitute a "building" under any definition. Therefore, in order for the Department to impose a tax on a license to use utility poles, it must be concluded that a utility pole constitutes a "parcel of real property."

64. The term "real property" is defined in Section 212.02(10)(h), Florida Statutes, as:

> (h) "Real property" means the surface land, improvements thereto, and fixtures, and is synonymous with "realty" and "real estate."

65. In arguing that utility poles constitute "real property" as defined in Section 212.02(10)(h), Florida Statutes, the Department has not suggested that a utility pole is "surface land" or an "improvement thereto." Instead, the Department has suggested that a utility pole is a "fixture."

66. The test for determining whether property constitutes a fixture was established in Commercial Finance Company v. Brooksville Hotel Co., 98 Fla. 410, 123 So. 814 (1929). See also, Wetjen v. Williamson, 196 so.2d 461 (Fla. 1st DCA 1967). The Court in Commercial Finance Company considered the following questions in determining whether property constitutes a "fixture":

(a) Is the property actually annexed to realty;

(b) Is the property appropriate to the use or purpose of the part of the realty to which it is connected; and

(c) Was it the intent of the person making the annexation that the property connected to the realty was to become a permanent accessory of the freehold.

Of these tests, the intent of the person attaching the property to the realty is given more weight. County Manors Association, Inc. v. Master Antenna Systems, Inc., 458 So.2d 835 (Fla. 4th DCA 1984); and Plante v. Canal Authority, 218 So.2d 243 (Fla. 1st DCA 1969).

67. The evidence in this case supports a conclusion that utility poles are actually annexed to realty. Although removable, they are placed in the right-of-way in a manner intended to insure that they remain affixed to the land for a relatively long period of time.

68. The evidence also supports a conclusion that the utility poles are appropriate to the use or purpose of that part of the realty (the right-of-way) that the poles are connected to.

69. The evidence, however, fails to support a conclusion that it is the intent of the utility companies that place their poles in the right-of-way, to the extent that a utility company does not own the right-of-way, that the poles are to become a permanent accessory to the freehold. The Department has mistakenly suggested that because utility companies intend that their poles are to remain attached to realty permanently, that the test of intent has been met. What is required in order for the requisite intent to be found is not only permanency of attachment but also an intent that the property being attached become a part of the realty to which it is attached; that ownership of the property being attached become one with the realty. See County Manors Association, Inc., supra; and Strickland's Mayport, Inc. v. Kingsley Bank, 449 So.2d 928 (Fla. 1st DCA 1984). But see, Attorney General Opinion 62-45 (March 27, 1962).

70. In County Manors Association the issue before the court was the question of whether cable television wires placed in the walls of buildings and underground in order for the owner of the wires to provide cable television services to the owners of the real property owned the wires. This issue turned on the question of whether the wires were "fixtures." Applying the test of Commercial Finance Company, the court concluded that, although the wires (like utility poles) were actually annexed to the real property and appropriate to the use of the part of the realty to which the wires were attached, the company that annexed the wires to the realty never intended to give up its ownership of the wire to the owners of the realty. Therefore, the wire did not become a permanent accessory to the freehold, which was held by the owners of the realty, and the wire remained personalty.

71. Applying the rationale of County Manors Association to this case, when a utility pole is attached to real property that is not owned by the utility company attaching the pole, the utility company does not intend that the pole become a part of the freehold. The utility company attaching the pole retains ownership and responsibility for the pole. Therefore, the pole does not become a part of the freehold.

72. Based upon the foregoing, it is concluded that a utility pole attached to realty that is not owned by the utility company does not constitute a "fixture" unless the utility company gives up ownership of the pole. Utility poles attached to property owned by the utility, however, do become a part of the freehold and constitutes a "fixture." Based upon this conclusion, some, but not all, utility poles may constitute real property as defined in Section 212.02(10)(h), Florida Statutes.

73. For the same reasons, it is also concluded that a utility pole not owned by the owner of the realty is not an improvement to the realty.

74. The conclusion that some utility poles may constitute real property, however, does not resolve this matter. Those poles that constitute real property (because the owner of the real property to which a pole is attached and the owner of the pole are, or become, the same) must still be considered a "parcel" of real property in order to be considered a taxable "license" under Section 212..02(10)(i), Florida Statutes. Applying the definitions cited by the Petitioners in their proposed final order, it is concluded that utility poles that constitute a fixture and, thus, real property, constitute a parcel of real property. Although Attachment Agreements may only speak to the use of the utility pole, where the pole is part of the real property to which it is attached, the Attachment Agreement by necessity allows the use of the entire bundle of rights which make up the real property being licensed and not just the poles. That bundle of rights licensed by Attachment Agreements may constitute a parcel of real property.

75. The Challenged Rule is susceptible of being interpreted to apply only Attachment Agreements that are taxable pursuant to Section 212.031(1), Florida Statutes--they must be licenses to use real property. Therefore, the Challenged Rule, by its terms, only applies to Attachment Agreements which involve utility poles which are owned by the owner of the underlying land or right-of-way to which the poles are attached. Consequently, the weight of the evidence failed to prove that the Challenge Rule enlarges, modifies or contravenes the provisions of law the Challenged Rule was intended to implement. The evidence only proved that the Challenged Rule, if applied by the Department to impose tax on an Attachment Agreement involving a license to use utility poles which are not owned by the owner of the underlying land or right-of-way, would be invalidly applied.

G. Does 47 U.S.C.S. Sections 521-559 Preclude the Taxation of Cable Television Attachment Agreements?

76. Congress has enacted the Cable Communication Policy Act of 1984, 47 U.S.C.S. Sections 521-559 (hereinafter referred to as the "Cable Act"), regulating cable television operations in all states.

77. Section 542 of the Cable Act authorizes the imposition of "franchise fees" by local governments on cable operators within the jurisdiction of the local government.

78. The amount of the franchise fee which may be imposed during any twelve-month period, however, is limited to 5 percent of a cable television provider's gross revenues:

> (b) For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system. . . .

47 U.S.C.S Section 542(b).

79. The terms "franchise fee" are defined in 47 U.S.C.S. Section 542(g)(1), as follows:

> (1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

80. The terms "franchise fee" do not include "any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers); . . . ." 47 U.S.C.S. Section 542(g)(2)(A).

81. The Petitioners have argued that the Challenged Rule imposes a "franchise fee" on them which exceeds the 5 percent limitation of franchise fees of 47 U.S.C.S. Section 542(b). As a consequence, the Petitioners have argued that the Challenged Rule is invalid because it exceeds the Department's grant of rulemaking authority, enlarges, modifies, or contravenes the specific provisions of law implemented, or vests unbridled discretion in the agency or is arbitrary or capricious.

82. As concluded, infra, the imposition of sales and use tax on Attachment Agreements is not unduly discriminatory against cable operators or cable subscribers. The tax is a tax of general applicability. There can be no dispute that the sales and use tax in Florida, which the Petitioners pay, is a tax of general application. The imposition of sales tax on the lease, rental or license of real property is also a tax of general application. Section 212.031, Florida Statutes. With some exceptions, most leases, rentals or licenses of real property are subject to Florida sales tax. Florida's sales tax in general and the imposition of sales tax on real property rental transactions does not constitute the imposition of a franchise fee. The Challenged Rule is only intended to clarify that Attachment Agreements are also considered to be taxable real property transactions. Therefore, the Challenged Rule does not single out the cable television industry and impose a tax on it as a direct tax on a cable system. The Challenged Rule merely clarifies that a particular type of transaction (Attachment Agreements), in the Department's view, constitutes one of many types of taxable real property transactions. The Petitioners place too much emphasis on the exclusion of utility companies and ignore the inclusion of most other forms of real property rental.

83. The Petitioners have failed to prove that the Challenged Rule imposes a "franchise fee" on them which exceeds the 5 percent limitation of franchise fees of 47 U.S.C.S. Section 542(b). Consequently, the Petitioners have failed to prove that the Challenged Rule is invalid because it exceeds the Department's grant of rulemaking authority, enlarges, modifies, or contravenes the specific provisions of law implemented, or vests unbridled discretion in the agency or is arbitrary or capricious.

H. Does the Challenged Rule Conflict with the Exemption of 212.031(1)(a)5, Florida Statutes?

84. Section 212.031(1)(a)5, Florida Statutes, exempts licenses from imposition of tax under Chapter 212, Florida Statutes, if the property licensed is "[a] public or private street or right-of-way occupied or used by a utility for utility purposes" (hereinafter referred to as the "Utility Exemption"). The Petitioners have argued that the utility poles at issue in this proceeding are being "used by a utility for utility purposes" and, therefore, a license for the use of those poles is exempt.

85. The Petitioners have argued that the Challenged Rule, by failing to apply the Utility Exemption to them, enlarges, modifies, or contravenes the specific provisions of law implemented, is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency and is arbitrary or capricious.

86. The Petitioners have argued that it is the "property" that determines whether the Utility Exemption applies. Thus, the Petitioners suggest that since the property at issue in this proceeding consists of utility poles which are being used by "utilities" to provide electricity and telephone services (utility services), the use of those poles are exempt for all purposes.

87. In support of the Petitioners' argument, the Petitioners point out that the Department has exempted utility companies which rent or lease utility poles from other utility companies. The Petitioners argue that this action is contrary to a more strict reading of the Utility Exemption that the property exempted is limited to a "public or private street or right-of-way." The Department, however, has not relied upon such a strict reading of the Utility Exemption. In fact, it was the position of the Department's representative at the final hearing of this matter that utility poles are a part of the right-of-way.

88. The Department's interpretation of the Utility Exemption is reasonable. While the property and the use to which property may be put determines whether the Utility Exemption applies, the determination of what the property is and the use to which it is put must be viewed from the standpoint of the person claiming the Utility Exemption. Therefore, if property is not being used for utility purposes by the person claiming the exemption, the Utility Exemption does not apply.

89. In order to qualify for the Utility Exemption, the taxpayer seeking the exemption must demonstrate that the property is being used for "utility purposes" by the taxpayer and that the taxpayer is a "utility." The Petitioners have not suggested, nor does the law support a conclusion, that the cable television operators are utilities. See Section 203.012(9), Florida Statutes. Cable television operators are not, therefore entitled to the Utility Exemption.

90. The Petitioners have failed to prove that the Challenged Rule, in failing to apply the Utility Exemption to them, enlarges, modifies, or contravenes the specific provisions of law implemented, citation to which is required by s. 120.54(7), is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency or is arbitrary or capricious.

I. Does the Challenged Rule Conflict with Rule 12A-1.046, Florida Administrative Code?

91. Rule 12A-1.046, Florida Administrative Code, exempts from taxation pursuant to Chapter 212, Florida Statutes, all charges for utility pole attachments. The exemption of Rule 12A-1.046, Florida Administrative Code, applies to Attachment Agreements. The Challenged Rule is in conflict with Rule 12A-1.046, Florida Administrative Code.

92. The Petitioners have argued that the Challenged Rule is vague, fails to establish adequate standards for agency decisions, or vests unbridled discretion in the agency, and is arbitrary or capricious because it is contrary to Rule 12A-1.046, Florida Statutes.

93. The Department has not argued that the Challenged Rule is not inconsistent with Rule 12A-1.046, Florida Administrative Code. Instead, the Department has suggested that the Department will amend Rule 12A-1.046, Florida Administrative Code, if the Challenged Rule is ultimately upheld as a result of this case.

94. As pointed out by the Department, Rule 12A-1.046, Florida Administrative Code, is not the subject of this proceeding. Therefore, Rule 12A-1.046, Florida Administrative Code, unlike the Challenged Rule, must be accepted as valid and as the law of this State. The Department may not enact a rule which contradicts or is contrary to its existing, valid rules. Until Rule 12A-1.046, Florida Administrative Code, is amended or repealed, the Department may not enact a rule which conflicts with Rule 12A-1.046, Florida Administrative Code.

95. The Petitioners have proved that the Challenged Rule is arbitrary or capricious because it is contrary to Rule 12A-1.046, Florida Administrative Code. The Challenged Rule is also vague when read in conjunction with Rule 12A-1.046, Florida Administrative Code. Taxpayers, who are not privy to the Department's possible plan to modify Rule 12A-1.046, Florida Administrative Code, will not be able to determine which rule should be followed: the Challenged Rule or Rule 12A-1.046, Florida Administrative Code, while both are in effect.

J. Constitutionality of the Challenged Rule.

96. The Petitioners have argued that the Challenged Rule is unconstitutional because it discriminates against cable television operators in violation of the Equal Protection Clause of the Constitution of the United States of America and Section 2 of Article I of the Constitution of the State of Florida. This issue may be reached in this Section 120.54, Florida Statutes, challenge. See Key Haven Associated Enterprises, Inc. v. Board of Trustees, 427 So.2d 153 (Fla. 1982).

97. The Challenged Rule does treat cable television operators and utility providers differently. That alone, however, does not support a conclusion that the Challenged Rule discriminates against cable television operators. It must also be concluded that the disparent treatment of cable television operators for purposes of this tax lacks a rational basis. See Florida League of Cities, Inc. v. Department of Environmental Regulation, 603 So.2d 1363 (Fla. 1992).

98. In light of the difference in the services provided by cable television operators, which consists of essentially, entertainment, and the services provided by utility service providers, which consists of necessary services, it is concluded that the Petitioners have failed to prove that the

State of Florida lacks a rational basis for imposition of sales tax on Attachment Agreements of cable television providers while not taxing similar agreements of utility providers.

99. The Legislature has broad discretion in determining classes for taxation purposes. See Exxon Corp. v. Eagerton, 542 U.S. 176, 76 L. Ed. 2d 497, 103 S. Ct. 2296 (1983), on remand, 440 So. 2d 1031 (Ala.). See also, Marine Fisheries Commission v. Organized Fisherman of Florida, 503 So.2d 935 (Fla. 1st DCA 1987), rev. denied, 511 So.2d 999.

ORDER

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

ORDERED that the proposed amendment to Rule 12A-1.053(7), Florida Administrative Code, conflicts with Rule 12A-1.046, Florida Administrative Code, and, consequently, constitutes an invalid exercise of delegated legislative authority.

DONE and ORDERED this 19th day of May, 1993, in Tallahassee, Florida.

LARRY J. SARTIN
Hearing Officer
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of May, 1993.

APPENDIX

Case Number 93-0239RP

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Final Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Petitioners' Proposed Findings of Fact

1 Accepted in 1.
2 Accepted in 2.
3 Accepted in 6.
4 Accepted in 7.
5 Accepted in 8 and 10.
6 See 14 and 16.
7 See 26.
8 Accepted in 27.
9 Accepted in 25.

10	Hereby accepted.
11	Accepted in 28.
12	Accepted in 41.
13	See 29 and 34.
14	Accepted in 2, 30, 32 and 36.
15	Accepted in 36.
16	Accepted in 14 and 38.
17	Accepted in 17.
18	Accepted in 18 and hereby accepted.
19	See 20-23.
20	Accepted in 23.
21	Accepted in 42.
22	See 42-43.
23	See 45.

The Department's Proposed Findings of Fact

1	Accepted in 9.
2	Accepted in 1 and hereby accepted.
3	Accepted in 2, 4 and hereby accepted.
4	Accepted in 2, 5 and hereby accepted.
5	Accepted in 6.
6	Accepted in 8-9.
7	Accepted in 10 and 27.
8	Accepted in 7 and hereby accepted.
9-14	Hereby accepted.
15	Accepted in 2 and 14.
16	Accepted in 15.
17	Hereby accepted.
18	Accepted in 29 and hereby accepted.
19	Accepted in 31-33 and hereby accepted.
20	Accepted in 4, 31 and hereby accepted.
21	Accepted in 36 and hereby accepted.
22	Accepted in 37.
23	Accepted in 5, 31 and hereby accepted.
24	Accepted in 13-14.
25	See 19.
26	Accepted in 20-21.
27	Unnecessary. Concerns the weight to be given evidence.

BellSouth's Proposed Findings of Fact

1	Accepted in 8-9.
2	The purpose of the Challenged Rule is specifically included as part of the Notice. See Joint exhibit 1.
3-4	Hereby accepted.
5	See 7.
6	Hereby accepted.
7	Accepted in 13.
8	Accepted in 14.
9	See 14. But see 17-18.
10	See 20-23.
11	Accepted in 22.
12	Accepted in 21.
13	Accepted in 23.
14-15	Hereby accepted.

16 See 19.
17-18 Hereby accepted.
19 Not relevant. The evidence failed to prove why training is necessary.
20-21 Hereby accepted.
22 Accepted in 29 and 34.
23 Accepted in 34.
24 Accepted in 31, 34 and 36.
25 Accepted in 39.
26 Accepted in 14.
27 Accepted in 40.

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NOTICE OF RIGHT TO JUDICIAL REVIEW

ANY PARTY WHO IS ADVERSELY AFFECTED BY THIS FINAL ORDER IS ENTITLED TO JUDICIAL REVIEW PURSUANT TO SECTION 120.68, 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.