Holland & Knight

315 South Calhoun Street, Suite 600 | Tallahassee, FL 32301 | T 850.224.7000 | F 850.224.8832
Holland & Knight LLP | www.hklaw.com

Karen D. Walker
+1 850-425-5612
Karen.Walker@hklaw.com

February 15, 2018

Via E-mail (Susan.Schwartz@dot.state.fl.us)

Susan Schwartz
Assistant General Counsel
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399

Re: Comments of Crown Castle NG East LLC on Proposed Text of Rule 14-46.005, Wireless Facilities

Dear Susan:

Holland & Knight LLP represents Crown Castle NG East LLC ("Crown Castle") with respect to rulemaking by the Florida Department of Transportation ("FDOT") involving permitting of wireless facilities on Department controlled right-of-way. At the rule development workshop held on February 7, 2018, FDOT invited those in attendance to submit written comments to FDOT on the proposed text of Rule 14-46.005, Wireless Facilities (the "Draft Rule") by Monday, February 19, 2018. Crown Castle's comments on the Draft Rule are set forth below.

2.1 Utility Permit Requirements. The Draft Rule includes a heading for Section 2.1 Utility Permit Requirements, but does not include any text under that heading. Accordingly, either the heading should be removed and the subsequent sections of the Draft Rule renumbered, or text added under the heading for this section of the Draft Rule.

2.2 Interference and Placement Limitations. Crown Castle proposes that Section 2.2 of the Draft Rule be revised, and that new Section 2.3 of the Draft Rule be created to read as follows:

2.2 Placement Limitations

The UAO shall not install any Small Wireless Equipment that operates on the 900 MHz frequency band.

2.3 Interference

The UAO shall comply with all applicable Federal Communications Commission regulations relating to interference. In the event that a UAO's Small Wireless Equipment interferes with any existing FDOT equipment or any existing Wireless Equipment within FDOT's rights-of-way, the UAO shall immediately remedy the situation to eliminate the interference.

Renumber subsequent sections of the rule.

Crown Castle proposes elimination of the language currently in Section 2.2(c) of the Draft Rule that would prohibit installation of Small Wireless Equipment if it is attached to an FDOT structure or on FDOT equipment. Removing this language will provide FDOT with maximum flexibility should FDOT desire at some point in the future to authorize the attachment of Small Wireless Equipment to its structures or equipment. Under Section 2.4 of the Draft Rule, with Crown Castle's suggested revisions as described below, the UAO would be required to include in its permit application package a certification that the UAO has authorization to attach its Small Wireless Equipment to a Small Wireless Structure owned by a third-party, including FDOT.

Crown Castle also proposes that the language in Sections 2.2(a) and 2.4(c) of the current Draft Rule relating to interference be eliminated from those sections and combined in a new section of the Draft Rule specific to interference using the language set forth above with the subsequent sections of the Draft Rule renumbered accordingly.

2.4 Utility Permit Application Package. Crown Castle proposes that Section 2.4 of the Draft Rule be revised to read as follows:

2.4 Utility Permit Application Package

When applying for a utility permit, the UAO shall submit a utility permit application in accordance with the UAM and this rule. In addition to the submittals required in UAM Section 2.4, the UAO shall include the following:

a) If the Small Wireless Equipment is attached to a Small Wireless Structure owned by a third-party, the UAO must certify that it has obtained authorization to attach its Small Wireless Equipment to the third-party's Small Wireless Structure; and
b) Plans view drawings (to scale) showing the location of the proposed Small Wireless Equipment and Small Wireless Structure.

As noted above, Crown Castle proposes removing paragraph (c) in Section 2.4 of the current Draft Rule and, instead, addressing all issues involving interference under a new section using the language proposed in this letter for new Section 2.3. In addition, as we noted during the February 7, 2018 workshop, the current language in Section 2.4(a) of the Draft Rule is problematic because many executed agreements for joint use of third-party Small Wireless Structures include confidentiality provisions. Thus, we have instead proposed language that would require an applicant to certify that it is authorized to attach its Small Wireless Equipment to a third-party's Small Wireless Structure in lieu of requiring an actual copy of the agreement.

* * *

Thank you for providing Crown Castle with the opportunity to comment in writing on the Draft Rule. We look forward to continuing to work with FDOT throughout the rulemaking process.

Sincerely yours,

HOLLAND & KNIGHT LLP

Karen D. Walker

KDW:jg

BERGER SINGERMAN

Floyd R. Self
(850) 521-6727
fself@bergersingerman.com

February 19, 2018

VIA ELECTRONIC MAIL

Susan Schwartz
Assistant General Counsel
Florida Department of Transportation
605 Suwanee St., MS 58
Tallahassee, FL 32399-0458
susan.schwartz@dot.state.fl.us

Re: CTIA Comments On Florida Department Of Transportation Proposed Rule 14-46.005 ("Wireless Facilities"), Florida Administrative Code

Dear Ms. Schwartz,

This firm represents CTIA.[1] On Wednesday, February 7, 2018, the Florida Department of Transportation ("FDOT") held a Workshop Hearing on proposed Rule 14-46.005, Florida Administrative Code, "Wireless Facilities" (the "Proposed Rule"). At the Workshop Hearing, FDOT indicated that it will allow interested persons to submit comments for the record until Monday, February 19, 2018. On behalf of CTIA, we submit these comments on the Proposed Rule.

FDOT has stated that "[t]he purpose of the Wireless Utility Rule is to establish requirements for the installation, operation, maintenance, relocation, and adjustment of Small Wireless Equipment and Small Wireless Structures within the [FDOT's] rights-of-way."[2] On its face, the Proposed Rule:

a. Defines "Wireless Equipment" and "Small Wireless Equipment;"[3]

b. Articulates when "utility permits" are needed and when they must be obtained;[4]

---

[1] CTIA-The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st-century connected life. The association's members include wireless carriers, device manufacturers, suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry, and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984.

[2] Proposed Rule, 1.1.

[3] Proposed Rule, 1.2.

c. Delineates "interference and placement limitations;"[5]

d. Prohibits both "small wireless structures" that are more than "50 feet above ground level at the location of installation," and "Small Wireless Equipment" "extend[ing] more than 10 feet above the Small Wireless Structure it is attached to;"[6] and

e. Addresses additional criteria for a "Utility Permit Application Package."[7]

Taken as a whole, the Proposed Rule exceeds FDOT's statutory authority granted under Florida law. While FDOT does have some statutory authority to promulgate rules regarding the use of state rights of way, as will be discussed further below, FDOT has acted outside the bounds of its authority; the Proposed Rule enlarges, modifies, or contravenes FDOT's granted statutory authority; the Proposed Rule is arbitrary and capricious; and FDOT has failed to comply with the basic rulemaking requirements of Florida law. In addition to these failures, the Proposed Rule also violates federal law, and is unnecessary from a policy and operational perspective. For these reasons, the FDOT should withdraw the Proposed Rule and not pursue any further rulemaking on the matters it is attempting to address in the Proposed Rule.

I. THE PROPOSED RULE FAILS TO COMPLY WITH CHAPTER 120

There is no ambiguity that the Proposed Rule is a "rule" under Chapter 120 of the Florida Statutes. The scope and detail of the regulations being proposed, some of which are summarized above, constitute "an agency statement of general applicability that implements, interprets, or prescribes law or policy or describes the procedure or practice requirements of an agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule."[8]

Any proposed or existing rule in Florida is deemed "an invalid exercise of delegated legislative authority" under Section 120.52(8) if it involves agency action "beyond the powers, functions, and duties delegated by the Legislature." An agency's action is an invalid exercise of delegated legislative authority under Section 120.52(8) if any one of the following apply:

- The agency materially fails to follow rulemaking procedures;
- The agency action exceeds statutorily conferred rulemaking authority;

[4] Proposed Rule, 2.0.
[5] Proposed Rule, 2.2.
[6] Proposed Rule, 2.3.
[7] Proposed Rule, 2.4
[8] Fla. Stat. § 120.52(16).

- The agency rule enlarges, modifies, or contravenes the provisions of law it implements;
- The agency rule is vague, does not establish adequate standards for agency decisions, or vests unbridled discretion in the agency;
- The agency rule is arbitrary or capricious; or,
- The agency rule imposes regulatory costs on the regulated person, county, or city that could be reduced.[9]

Additionally, prior to engaging in rulemaking activities, an agency must have a "specific law to be implemented" in its rule, beyond a "general grant of rulemaking authority" provided by statute.[10] The Proposed Rule violates several of these critical Chapter 120 requirements.

A. The Proposed Rule Exceeds FDOT's Rulemaking Authority

CTIA recognizes that Section 337.401(1), Florida Statutes, provides certain legislative authority to FDOT with respect to the regulation of state rights of way within FDOT's jurisdiction. During the Workshop Hearing, a request was made for FDOT to explain the purpose or basis for the Proposed Rule. FDOT's response was to the effect that FDOT needed or wanted to have a rule to address small wireless equipment, since the present rule, established pursuant to Section 337.401(1), does not expressly address such facilities. But any such kind of small wireless rule is unnecessary and unauthorized by the Legislature.

While state regulations to address "small wireless" facilities and equipment may be worthy, FDOT is completely without any statutory authority on the subject. In the notice for the Workshop Hearing and the Proposed Rule, FDOT did not identify any law pursuant to which it has any specific authority to establish policies or limitations with respect to small wireless.

CTIA recognizes that in 2017, the Florida Legislature enacted new Section 337.401(7), Florida Statutes, the "Advanced Wireless Infrastructure Deployment Act" ("2017 Act"). But this legislation does not apply to FDOT. The unambiguous language of the 2017 Act applies only to rights of way or public roads within the jurisdiction and control of a county or municipality. Indeed, FDOT is expressly excluded from the 2017 Act.[11] Thus, Section 337.401(7) cannot be the statutory basis for FDOT to promulgate a rule on small wireless or any aspect of the subject matter of what is enumerated in Section 337.401(7) given this statute's unambiguous exclusion of FDOT.

---

[9] *See* Fla. Stat. § 120.52(8).
[10] *See id.*
[11] Fla. Stat. § 337.401(7)(a)5 ("'Authority' means a county or municipality having jurisdiction and control of the rights-of-way of any public road. *The term does not include the Department of Transportation. Rights-of-way under the jurisdiction and control of the department are excluded from this section.*") (emphasis added)

In reviewing the statutes granting FDOT rulemaking authority, FDOT has not pointed to any specific legislative directive to FDOT to promulgate rules for small wireless structures, equipment, or related facilities - because there is none. Moreover, reliance on Section 337.401(7) for the Proposed Rule is equally legally deficient since that statute expressly excludes FDOT, and the legislative directive in that statute is to counties and municipalities to update their ordinances, not state FDOT rules. Without any statutory authority, the Proposed Rule exceeds FDOT's statutorily conferred rulemaking authority in violation of Section 120.52(8).

B. FDOT's Proposed Rule Enlarges, Modifies, or Contravenes The Provisions of the Law

CTIA also recognizes that in adopting the 2017 Act, the Legislature also amended Section 337.401(1)(a), Florida Statutes, which does apply to FDOT. Indeed, pursuant to Section 337.401(1)(a) FDOT has previously adopted its existing right of way rule, Rule 14-46.001 ("Utilities Installation and Adjustment"), Florida Administrative Code. So, as an initial matter, any amendment to Section 337.401(1)(a) should only affect FDOT's existing rule absent some new, specific mandate to do something different. A review of the amendment to Section 337.401(1)(a) makes clear that no new mandate is created, and, at most, only minor revisions to the existing rule may be necessary. Thus, any effort to promulgate a new rule and an entirely different, detailed set of regulations for small wireless improperly enlarges, modifies, and contravenes the provisions of Florida law.

To illustrate the general principle, in *Lamar Outdoor Advertising-Lakeland v. Florida Department of Transportation*, 17 So. 3d 799, 803 (Fla. 1st DCA 2009), the court struck down an FDOT rule that attempted to expand the meaning of the word "size," which previously meant the area of a sign, to also include the "height" of a sign. The court relied upon the statement in *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association,, Inc.*, 794 So.2d 696, 700 (Fla. 1st DCA 2001), wherein that court said that "improvising in an area that can be said to fall only generally within some class of powers or duties the Legislature has conferred on the agency" is not a sufficient basis to support rulemaking.

In amending Section 337.401(1)(a), the Legislature removed the word "telephone" and added "voice," "data," and "wireless facilities."[12] As FDOT is aware, some municipalities and counties, which are also subject to Section 337.401(1)(a) in addition to FDOT, had been denying wireless carriers and facilities providers access to their rights of way.[13] In removing the potentially ambiguous word "telephone" (which some jurisdictions had interpreted as meaning only traditional landline telephone service) and inserting "voice," "data," and "wireless

[12] Chapter 2017-136, Laws of Florida, Section 1.

[13] *See, e.g.,* Report of the Florida Association of County Attorneys (FACA) Cell Tower Right of Way Task Force, at 9 (January 2017) ("In conclusion, the 1996 Act and the Florida Statutes do not [currently] support a right of telecommunication firms to force local government to allow placement of cellular communication facilities in the local government's own right-of-way"), *available at* http://faca.fl-counties.com/sites/default/files/2017-01/1.6.17_FINAL%20Report%20of%20the%20FACA%20Cell%20Tower%20ROW%20Task%20Force%201.6.17%20revised_0.pdf. (emphasis added)

facilities," the Legislature was seeking to either confirm or expand the enumeration of entities, services, or equipment authorized to use the rights of way beyond landline telephone providers. The terms "voice" and "data," within the context of the statute and by their plain meaning, include a wide variety of technologies that can deliver such services. Moreover, to make it absolutely clear that those technologies included radio communications, the Legislature also added the phrase "wireless facilities." Thus, in this regard, if there is to be any rulemaking due to the amendment of Section 437.401(1)(a), it should be, at most, to simply amend the existing Rule 14-46.001 to include the new statutory enumeration of "voice," "data," and "wireless facilities" to the services and entities specifically authorized to use the FDOT-controlled state rights of way, and nothing more.

As is also clear on the face of Section 337.401(1)(a), there was no legislation with respect to "small wireless." Rather, the legislative change speaks broadly of "wireless facilities." There is no explanation or elaboration on wireless facilities in this statute, and certainly no direction to FDOT to consider, let alone adopt, rules regarding small wireless.

Notwithstanding the very simple word changes to Section 337.401(1)(a), FDOT has attempted to adopt as a rule essentially the regulatory system Section 337.401(7) created for municipalities and counties. For example, the Proposed Rule in section 2.3(b) seeks to limit pole heights to 50 feet. In addition, sections 1.2(a), (b) and (c), and 2.3(a), contain size requirements for enclosed antennae enclosures, "all other associated wireless equipment," and a limitation that Small Wireless Equipment not extend more than 10 feet above a small wireless structure. None of the requirements in Section 337.401(7) apply to FDOT right of way, and there is no basis in Section 337.401(1)(a) for FDOT to now apply them to state right of way users. [14] Further, the Legislature's distinction of "small" and "micro" wireless facilities in Section 337.401(7), coupled with its *exclusion* of the FDOT from the authority granted in that subsection, indicates a clear legislative intent that the FDOT *not* be permitted to make such specific distinctions.

In taking the general grant of authority from the Legislature and stretching it well beyond the specific mandate granted by the Legislature, the instant Proposed Rule is analogous to the overturned rule in *Lamar v. FDOT;* it represents "improvising in an area" that exceeds the FDOT's statutorily conferred grant of rulemaking authority, and therefore must be withdrawn.

C. The Proposed Rule Is Arbitrary And Capricious

Under Florida law, "A rule is arbitrary if it is not supported by logic or the necessary facts; a rule is capricious if it is adopted without thought or reason or is irrational."[15] Here, FDOT has not provided any reasoning for the detailed and specific provisions in the Proposed Rule, including the size limitations on "Small Wireless Equipment," the 50 foot height limitation

[14] It is also worth noting that to the extent FDOT was seeking inspiration from new Section 337.401(7), this statute is not a limitation on municipalities and counties but simply a roadmap for how cities and counties must process and approve applications that meet the small cell criteria, and so for FDOT to use Section 337.401(7) as a basis for limiting wireless carriers and facilities would be arbitrary and capricious.

[15] Fla. Stat. § 120.52(8)(e)

on "Small Wireless Structures," or the 10 foot extension limit on antennas. There was no supporting documentation for any of these requirements. There was no statement from FDOT that there was a problem that needed to be addressed by these requirements, or that there was some other reason for such detailed and specific rules other than the fact that the agency did not presently have small wireless rules. Indeed, contrary to needing rules in order to process wireless structures and equipment, FDOT representatives confirmed at the Workshop Hearing that they have been and will continue processing and approving permits for wireless carriers and facilities without the Proposed Rule.

The existence of such reviews and approvals confirms that the Proposed Rule either has no regulatory purpose or it is being crafted to limit or prevent types of equipment in the FDOT-managed state rights of way. In either case, such a regulatory scheme is arbitrary and capricious, and therefore an invalid exercise of delegated legislative authority under Chapter 120 that must be rejected.[16]

D. FDOT Materially Failed To Follow Proper Rulemaking Procedures In Promulgating The Proposed Rule

Pursuant to Rule 1-1.011, Florida Administrative Code, an agency notice to engage in rulemaking must include "a short, plain explanation of the purpose and effect of the proposed action; the full text of the proposed rule or amendment and a summary thereof; a reference to the grant of rulemaking authority pursuant to which the rule is adopted; and a reference to the section or subsection of the Florida Statutes or the Law of Florida being implemented or interpreted."[17]

The FDOT Proposed Rule fails to conform because: a) although it contains a "Purpose" it does not contain statement on the "effect of the proposed action"; b) there is no summary; c) there is no reference to general rulemaking authority; and, d) there is no reference to the law or statute being implemented. *See Osterback v. Agwunobi*, 873 So. 2d 437, 440 (Fla. 1st DCA 2004).

FDOT has failed to provide the public with adequate notice of its rulemaking as it pertains to the Proposed Rule. Therefore, the Proposed Rule is invalid for failing to comply with Rule 1-1.011.

III. THE PROPOSED RULE VIOLATES FEDERAL LAW

The state statutory and administrative code problems with the Proposed Rule discussed above constitute an illegal rulemaking, and FDOT by these comments is now on notice of such issues and no further commentary should be necessary. But to the extent FDOT believes that it does possess such sufficient statutory authority to promulgate the Proposed Rule, the agency is

[16] *See* Fla. Stat. § 120.52(8).
[17] F.A.C. §1-1.011.

hereby also advised that the Proposed Rule also violates federal law. Any rule that arbitrarily limits wireless structures or poles to no more than 50 feet unfairly and otherwise illegally attempts to create a regulatory scheme that limits or prohibits wireless carriers or facilities providers from having direct access to the FDOT-controlled rights of way. The Proposed Rule and any such actions constitute a violation of the Federal Telecommunications Act of 1996 (Pub. LA. No. 104-104, 110 Stat. 56 (1996)) (the "Telecom Act").

A primary purpose of the Telecom Act was to make advanced communications technologies universally available at affordable prices. The means to this end was the development of a robust telecommunications market, including the removal of barriers to entry for new communications services competitors. To facilitate the deployment of new telecommunications infrastructure, the Telecom Act mandates that state agencies (such as FDOT), counties, and municipalities with authority over roads and rights of way ***must*** make available their roads and rights of way to all communications services providers. Two key requirements of the Telecom Act are enacted as follows:

a. "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. §§ 253(a).

b. "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." 47 U.S.C. §§ 253(e).

In general, under the Telecom Act, Congress has made the fundamental policy decision that any entity providing any telecommunications service is authorized to use the public rights of way. FDOT's job is to manage the use of the streets and rights of way in a manner consistent with the public interest and applicable law.

To implement the requirements of the Telecom Act, the Florida Legislature has regularly updated Chapter 337, Florida Statutes, and other related statutory provisions[18] over the last twenty years to better reflect the principals of nondiscriminatory access, competitive neutrality, and minimal regulations. The 2017 amendments to Section 337.401(1)(a) continue this trend and further confirm the efforts of the Florida Legislature to implement the Telecom Act consistent with the Telecom Act's broad mandate to facilitate the widespread availability of telecommunications services by promoting competition. By removing the term "telephone" in

[18] *See, e.g.,* the legislative histories to Chapter 202, Florida Statutes ("Communications Services Tax Simplification Law"), Section 362.01, Florida Statutes ("Special Powers Of Telegraph And Telephone Companies"), Chapter 364 ("Telecommunications Companies"), and Section 365.172, Florida Statutes ("Emergency Communications Number E911").

Section 337.401(1)(a), which was being defined by some jurisdictions as meaning only traditional landline or wireline service, and by adding into the statute the terms "voice," "data," and "wireless facilities" the Legislature provided specific language to demonstrate that these services, facilities, and related equipment were entitled to the same nondiscriminatory access to the public rights of way as the other providers, services, and facilities already enumerated in the statute.

As it is in effect today, Section 337.401(1)(a) contains no words of limitation or exclusion, and this statute furthers the polices of the federal Telecom Act. However, FDOT, through the Proposed Rule, is attempting to establish rules that limit pole heights and prohibit certain equipment. As such, the Proposed Rule is not reasonable, competitively neutral, or nondiscriminatory, and does not include only those matters necessary to manage the road or right of way. The Proposed Rule prohibits or has the effect of prohibiting wireless carriers or wireless facilities providers from having direct and immediate access to the state right of way, in violation of the Telecom Act.

IV. THE PROPOSED RULE IS UNNECESSARY

Pursuant to the previously-stated authority it does possess, FDOT has promulgated Rule 14-46.001, which is a fairly complete set of regulations regarding how entities, such as CTIA's members, may utilize FDOT-controlled right of way. Indeed, at the Workshop Hearing, FDOT acknowledged that some wireless carriers and wireless facilities providers, including specifically some of CTIA's member wireless providers, have sought permits for the construction of their facilities within the FDOT rights of way and that FDOT has granted such permits pursuant to the existing Rule. Furthermore, FDOT advised wireless entities that desire to presently construct wireless facilities in the FDOT right of way to simply follow the specific requirements of its 2017 Utility Accommodation Manual ("2017 UAM"), pocket-sized copies of which it provided at the Workshop Hearing. Those seeking permits were directed to either contact the FDOT offices identified in the 2017 UAM or utilize the FDOT's "one-stop" permitting website, also referenced in the 2017 UAM.

Given this FDOT presentation and what FDOT is presently doing, the Proposed Rule is unnecessary. There was no indication by FDOT staff at the Workshop Hearing that the present rule and 2017 UAM were incomplete or unable to meet the industry's or the FDOT's needs. FDOT therefore has no policy or operational reason for the Proposed Rule. FDOT should therefore withdraw the Proposed Rule and continue to process approve applications as it has under the present rule and 2017 UAM.

V. CONCLUSION

Given the above discussion, a reading of the general grant of rulemaking authority and the Proposed Rule, it is readily apparent that FDOT has not complied with the requirements of rulemaking articulated in Chapter 120, Florida Statutes. In addition, the Proposed Rule prohibits

or would have the effect of prohibiting access to the state rights of way in violation of federal law.

Thus, for the reasons stated above, CTIA respectfully requests that FDOT withdraw and not adopt the Proposed Rule. If some change is considered necessary, then FDOT could amend Rule 14-46.001, to include the new Section 337.401(1)(a) language as follows – "(1) Purpose. This rule is established to regulate the location and manner for installation and adjustment of utility facilities, including but not limited to voice, data, and wireless, on any Florida Department of Transportation (FDOT) right-of-way, in the interest of safety and the protection, utilization, and future development of such rights of way, with due consideration given to public service afforded by adequate and economical utility installations, and to provide procedures for the issuance of permits."

Sincerely,

Berger Singerman LLP

Floyd R. Self

FRS/CM/am

Haran C. Rashes
Director of External Relations
O – (630) 245-2064
M – (734) 660-9283
hrashes@extenetsystems.com

February 15, 2018

Via Electronic Mail
To: Susan.Schwartz@dot.state.fl.us

Susan Schwartz
Assistant General Counsel
Florida Department of Transportation
605 Suwannee Street
Tallahassee, Florida 32399

Re: In the matter, on the Department's own motion, to promulgate rules governing the permitting of wireless facilities on Department controlled right-of-way
Proposed Wireless Utility Rule 14-46.004
Initial Comments of ExteNet Systems, Inc.

Dear Ms. Schwartz:

Attached, please find the Initial Comments of ExteNet Systems, Inc. on the Florida Department of Transportation's proposed Wireless Utility Rule.

If you have any questions, please feel free to call me at (734) 660-9283 or reach me via e-mail at <hrashes@extenetsystems.com>.

Very truly yours,

Haran C. Rashes

Attachment

cc: Thomas Bane, P.E. (via Electronic Mail)

STATE OF FLORIDA
BEFORE THE DEPARTMENT OF TRANSPORTATION

In the matter, on the Department's own motion, to promulgate rules governing the permitting of wireless facilities on Department controlled right-of-way.	))) /	Proposed Rule 14-46.004

INITIAL COMMENTS
OF EXTENET SYSTEMS, INC.

ExteNet Systems, Inc. ("ExteNet"), by and through its External Relations Department, and pursuant to the Florida Administrative Procedures Act, FLA. STAT. ch. 120.54, *et seq.*, the Advanced Wireless Infrastructure Deployment Act, 2017 Fla. Laws ch. 136, codified at FLA. STAT. ch. 337.401 *et seq.* (the "Act") and the oral schedule established by the Department of Transportation ("Department") at its February 7, 2018 Workshop to receive public comments on permitting of wireless facilities on Department controlled right-of-way, hereby submits it initial comments on the Department's proposed Wireless Utility Rule.

ExteNet has a vital interest in the proposed Wireless Utility Rule because ExteNet designs, builds, owns, manages & operates indoor and outdoor distributed network systems to help meet the growing demand for improved mobile and wireless broadband coverage and capacity in key strategic markets across the United States – including many such markets in Florida. Distributed network systems bring wireless network elements such as low-powered wireless antennas and access points closer to the user to ensure ubiquitous and high-capacity wireless broadband connectivity.

Utilizing distributed antenna systems, remote radio heads, small cells, Wi-Fi and distributed core soft-switching technologies, ExteNet enables wireless service providers, enterprises, and venues to better serve their subscribers, customers, workers, residents, tenants and communities.

ExteNet owns and operates multi-carrier -- often referred to as "neutral-host" -- and multi-technology distributed network systems to ensure multiple wireless service providers can provide their 3G and 4G LTE and eventually 5G services in the most effective and efficient manner. ExteNet creates a scalable network design utilizing its high-bandwidth fiber network to ensure the network densification needs of the wireless service providers are met and can evolve over time as user demands dictate.

Typically, ExteNet installs its distributed network systems on existing utility poles, street lights, and other existing poles located in the public right-of-way or on its own utility poles installed in the public right-of-way. Access to public rights-of-way, such as those of the Florida Department of Transportation for such distributed network systems are essential not only to ExteNet but also to the residents of the state of Florida, who are clamoring for more and more wireless access and bandwidth which they can only get from the natural increase in the number of wireless facilities installed by ExteNet and similar providers.

While ExteNet supports the proposed Wireless Utility Rule ("Rule"), ExteNet suggests several revisions to the Rule, prior to promulgation. ExteNet believes that the following changes will be mutually beneficial to the Department and industry.

Section 2.2:

ExteNet proposes the following changes to Section 2.2 of the proposed Rule:

> 2.2 Interference and Placement Limitations
>
> The UAO shall not install any Small Wireless Equipment that does any of the following:
>
> a) Interferes with FDOT equipment or any existing Wireless Equipment within FDOT's right-of-way; or,
> b) ~~Operates on the 900 MHz frequency band; or~~ Causes radio or electromagnetic interference with any FDOT equipment and/or operations.

~~c) Is attached to an FDOT structure or FDOT equipment.~~

2.2a Attachment on FDOT Structures and FDOT Equipment

The UAO may, with the approval of FDOT, install small Wireless Equipment on FDOT Structures and FDOT Equipment in compliance with Section 3.19 of the UAM and Section 7(f) of the Advanced Wireless Infrastructure Deployment Act, 2017 Fla. Laws ch. 136, codified at FLA. STAT. ch. 337.401(7)(f).

Proposed Section 2.2(B) prohibits the installation of small wireless equipment that operates in the 900 MHz frequency band. At the Public Workshop/Hearing held on February 7, 2018, in this matter, State Utility Engineer, Thomas Bane, P.E., indicated that this clause was inserted in the Rule to avoid interference with existing FDOT equipment and operations. ExteNet proposes that this restriction be re-written to accomplish the stated goal – to avoid "radio or electromagnetic interference with any FDOT equipment and/or operations."

The 900 MHz frequency band includes a small portion of unlicensed spectrum (902 – 928 MHz) and spectrum that is licensed by the Federal Communications Commission ("FCC").[1] 47 C.F.R. § 2.106. The regulated/licensed uses of the 900 MHz frequency band include: 901 – 902 MHz for Personal Communications;[2] 928-929 MHz for Public Mobile,[3] Private Land Mobile,[4] and Fixed Microwave;[5] 929 – 930 MHz for Private Land Mobile; 930 – 931 MHz for Personal Communications; 931 – 932 MHz for Public Mobile; 932 – 935 MHz for Public Mobile and Fixed Microwave; 935 – 940 MHz for Private Land Mobile; 940 – 941 MHz for Personal Communications; 941 – 960 MHz for Public Mobile, Aural Broadcast Auxiliary,[6] Low Power

[1] 47 C.F.R. § 2.106.

[2] 47 C.F.R. § 24.

[3] 47 C.F.R. § 22.

[4] 47 C.F.R. § 90.

[5] 47 C.F.R. § 101.

[6] 47 C.F.R. §74, part E.

Auxiliary,[7] and Fixed Microwave; and 960 – 1164 MHz for Aviation.[8] To limit appropriate and licensed use of Small Wireless Equipment based on such a broad range of frequency – without any proven interference with FDOT equipment and/or operations is arbitrary and capricious. Rather, language specifically prohibiting interference is more specific and inclusive of potential future equipment that FDOT may install.

Proposed Section 2.2(C) prohibits small wireless equipment on "an FDOT Structure or FDOT equipment." Such a prohibition appears to conflict with Section 3.19 of the 2017 Utility Accommodation Manual, as incorporated in Rule 14-46.001, F.A.C. ("UAM"), which expressly permits attachment of utilities and supporting hardware to Department structures.

Under the UAM utilities are defined as,

> Utility: All active, deactivated or out-of-service electric transmission lines, telephone lines, telegraph lines, other communication services lines, pole lines, ditches, sewers, water mains, heat mains, gas mains, pipelines, gasoline tanks and pumps owned by the [Utility Agency Owner].

ExteNet advocates for permitting small wireless equipment on FDOT structures, such as light poles and overhead signage support structures, that would not impact the current use of such structures and may be of benefit to FDOT. In many cases throughout the country, installation of small wireless equipment on pre-existing structures, for example light poles, often requires companies such as ExteNet, at its own cost, to replace the structure to accommodate small wireless equipment. In addition, allowing such an attachment can also be a question of aesthetics as it reduces the need for additional utility poles in the Department right-of-way.

[7] 47 C.F.R. §74, part H.

[8] 47 C.F.R. §87.

Any concerns the Department may have regarding such installations are already addressed in Section 3.19.1 of the UAM:

> 3.19.1 General
> The UAO shall not install, operate or maintain any utility on or near an FDOT structure that does any of the following:
> 1) Creates a hazard to the public.
> 2) Affects the FDOT structure's integrity.
> 3) Unreasonably hinders inspection and maintenance operations of the FDOT structure.
> 4) Adversely affects the aesthetics of FDOT structures placed in aesthetically sensitive environments.
> 5) Damages any FDOT structure's reinforcement or stressing ducts or strands.
> 6) Attaches to FDOT bridge girders.
> 7) Resides inside an FDOT box girder.
> 8) Lowers the FDOT structure's vertical clearance.
> 9) Restricts the FDOT structure's ability to expand and contract

While ExteNet acknowledges that the Department is specifically exempt, pursuant to Section 7(f)(b)(5) of the Act, from the requirement to allow small wireless attachments on Department structures or equipment that is imposed on counties or municipalities having jurisdiction and control of the rights-of-way of any public road in Florida, there is nothing in the Act or elsewhere in Florida law that prohibits the Department from allowing such small wireless attachments. Section 7(f) of the Act provides a framework for the Department's use in allowing small wireless equipment to be attached to Department structures and equipment.

ExteNet also acknowledges that any attachment to Department structures or equipment under ExteNet's proposed change to the Rule would be subject to the height restrictions contained in section 2.3 of the Rule.

Section 2.4

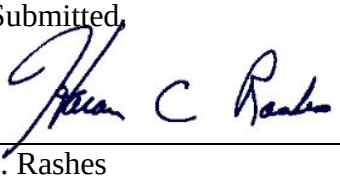
ExteNet proposes the following change to Section 2.4 of the proposed rule:

> 2.4 Utility Permit Application Package
>
> When applying for a utility permit, the UAO shall submit a utility permit application in accordance with the UAM and this rule. In addition to the submittals required in UAM Section 2.4, the UAO shall include the following:
>
> a) If the Small Wireless Equipment is attached to a Small Wireless Structure owned by a third-party, the UAO shall provide a~~n executed agreement for the~~ letter of authorization from the third-party permitting joint use of the third-party Small Wireless Structure;
> b) Plans view drawings (to scale) showing the location of the proposed Small Wireless Equipment and Small Wireless Structure; and
> c) An engineering analysis documenting the operational frequency band, any potential interference effects, and an RF interferences survey.

Many of the collocation agreements, entered into by ExteNet and other utilities, for the attachment of utility equipment on other utility company structures contain non-disclosure provisions. In many cases, these collocation agreements are voluminous and contain detail that would not be relevant to the Department. To protect the confidentiality of such collocation agreements ExteNet proposes that the Department rely upon letters of authorization permitting joint use of a third-party's structure. With such a letter of authorization, the Department could easily verify that the attachment is authorized by the owner of the structure upon which the attachment will be placed.

ExteNet Systems, Inc. encourages the Department to promulgate the Wireless Utility Rule with the changes outlined above to allow appropriate attachment of small wireless equipment and structures in the Department right-of-way.

Respectfully Submitted,

By: 

Haran C. Rashes
Director of External Relations
EXTENET SYSTEMS, INC.
3030 Warrenville Road, Suite 340
Lisle, IL 60532
(630) 245-3064 – Office
(734) 660-9283 – Mobile
hrashes@extenetsystems.com

Dated: February 15, 2018

FLORIDA ELECTRIC POWER COORDINATING GROUP, INC. (FCG)

3000 Bayport Drive, Suite 600, (813) 289-5644 • FAX (813) 289-5646

TAMPA, FLORIDA 33607-8411

February 15, 2018

Privileged and Confidential
Attorney-Client Communication

Mr. Austin Hensel
Assistant General Counsel
Florida Department of Transportation
605 Suwannee Street
Tallahassee, FL 32399-0458

Re: FCG TAC Comments on 14-46.005 Rulemaking

Dear Mr. Hensel:

The Florida Electric Power Coordinating Group Inc.'s Transportation Advisory Committee (FCG TAC) appreciates the opportunity to submit comments on the Florida Department of Transportation's draft rule language to create Rule 14-46.005, Fla. Admin. Code. Thank you for conducting the rulemaking workshop on Wednesday, February 7, 2018, and answering questions. We understand that this rule is intended to codify the process to permit small wireless facilities attached to a structure in the Department's right-of-way, and the FCG TAC supports your efforts in this regard.

As we mentioned at the workshop, the FCG TAC just has a few issues with the current draft language, as explained below. We are hopeful that they can be addressed via minor revisions, and offer the attached draft requested revisions in this regard (Attachment A).

1) **Ensure exclusion of electric utility wireless equipment** -- The Department's current draft language requires a permit for the installation of "wireless equipment," and defines this term relatively broadly. Specifically, the current draft could cover wireless equipment utilized by an electric utility as part of or in support of the distribution of electricity. Section 2.3.1(8) of the UAM already authorizes electric utilities to install and utilize a variety of wireless technologies in furtherance of electricity distribution. We do not believe the Department intended this new draft Rule 14-46.005 to override the UAM, and thus respectfully request that the draft definition of "wireless equipment" be revised to exclude "utility appurtenances that are part of or in support of electric distribution, and authorized in UAM Section 2.3.1(8)."

2) **Clarify that the permit application does not need to contain the actual agreement between the electric utility and the wireless provider** – As mentioned at the workshop, some agreements between an electric utility and a third-party wireless provider contain confidentiality conditions, and thus prohibit making the agreement

public. We understand the need for confirmation that such an agreement exists, however, before the Department issues a permit for its installation. Accordingly, we request that the draft language be revised to require "confirmation" that an agreement exists, which could be in the form of a letter from the electric utility or other documentation, and not require submission of the actual agreement.

3) **Clarify that retroactive permitting is not required for existing third-party wireless equipment** – There are currently electric utility poles to which third-party wireless-provider equipment is attached. To more closely follow the statutory language in Section 337.401(7), Fla. Stat., which deals with *new* equipment, and to avoid the need for retroactive permitting of *existing* third-party equipment on existing poles, we request that the word "existing" be removed from the draft rule language, and the word "new" added in several places for clarity.

4) **Consider developing a process for permitting new wireless equipment on poles taller than 50 feet** – The current draft language provides that a "small wireless structure shall not be taller than 50 feet." Electric utilities have many poles taller than 50 feet, and do not want to foreclose the option of permitting new wireless equipment on such poles, especially given the rapidly changing nature of wireless technology. Moreover, there may be some existing poles taller than 50 feet in the Department's ROW to which third-party wireless equipment is currently attached and properly permitted, and per comment (3) above, such existing equipment should not be prohibited or required to obtain additional permitting. Accordingly, we request that the Department limit this new rule to *new* wireless equipment, and consider developing a process for the permitting of new wireless equipment on a pole taller than 50 feet.

Thank you for your time and consideration of these comments. We look forward to working with you as this rulemaking proceeds. If you have any questions, or need any additional information, please feel free to contact me at (352) 459-4671, or Robert Manning at Hopping Green & Sams at (850) 222-7500.

Respectfully,

Robb A. Brown
Chair, FCG Transportation Advisory Committee

Cc: Susan Schwartz, FDOT
Tom Bane, FDOT
FCG TAC
Robert Manning, HGS

ATTACHMENT A

FCG-TAC REQUESTED REVISIONS TO FDOT'S DRAFT RULE 14-46.005

1.0 General

1.1 Purpose

The purpose of the Wireless utility Rule is to establish requirements for the installation, operation, maintenance, relocation, and adjustment of Small Wireless Equipment and Small Wireless Structures within the Florida Department of Transportation's (FDOT) rights-of-way.

1.2 Terms and Acronyms

The following definitions of terms and acronyms apply only as used in this rule:

Wireless Equipment: means equipment at a fixed location which enables wireless communications between user equipment and a communications network, including radio transceivers, antennas, wires, coaxial or fiber optic cable or other cables, and equipment associated with wireless communications. The term includes Small Wireless Equipment. The term does not include any structure or pole on which the equipment is attached, physical lines for backhaul facilities, or physical lines between wireless structures. <u>The term also does not include utility appurtenances that are part of or in support of electric distribution, and authorized in UAM Section 2.3.1(8).</u>

Small Wireless Equipment: means Wireless Equipment that meets all the following conditions:

a) Each enclosed antenna is located inside an enclosure of no more than six (6) cubic feet in volume;
b) Or, in the case of antennas that have exposed elements, each antenna and all its exposed elements can fit within an enclosure of no more than six (6) cubic feet in volume; and
c) All other associated wireless equipment is cumulatively no more than twenty-eight (28) cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume:
    1) electric meters,
    2) concealment elements,
    3) telecommunications demarcation boxes,
    4) ground-based enclosures,
    5) grounding equipment,
    6) power transfer switches,
    7) cutoff switches,
    8) vertical cable runs for power and other service lines, and
    9) Small Wireless Structures.

Small Wireless Structure: means ~~an existing, proposed or~~ <u>a</u> new pole or other structure that ~~has or~~ is intended to have Small Wireless Equipment attached to it.
UAM: 2017 Utility Accommodation Manual, as incorporated in Rule 14-46.001, F.A.C.

UAO: The utility agency/owner of Small Wireless Equipment, a Small Wireless Structure, or both.

2.0 Utility Permits

No Wireless Equipment may be installed pursuant to a utility permit in any FDOT right-of-way except as provided in this rule. The UAO shall obtain a utility permit pursuant to the UAM prior to installing new Small Wireless Equipment attached to a Small Wireless Structure in FDOT's right-of-way. The UAO shall comply with this rule and the UAM. An existing structure that is already authorized to be within FDOT's right-of-way may be used as a Small Wireless Structure provided it meets the requirements of ~~this rule and~~ the UAM.

2.1 Utility Permit Requirements

2.2 Interference and Placement Limitations

The UAO shall not install any Small Wireless Equipment that does any of the following:

a) Interferes with FDOT equipment or any existing Wireless Equipment within FDOT's right-of-way;
b) Operates on the 900 MHz frequency band; or
c) Is attached to an FDOT structure or FDOT equipment.

2.3 Height Requirements

The height of any ~~existing or~~ new Small Wireless Equipment and any ~~existing or~~ new Small Wireless Structure are limited as follows:

a) New Small Wireless Equipment shall not extend more than 10 feet above the new Small Wireless Structure it is attached to; and
b) A new Small Wireless Structure shall not be taller than 50 feet above ground level at the location of installation.

2.4 Utility Permit Application Package

When applying for a utility permit, the UAO shall submit a utility permit application in accordance with the UAM and this rule. In addition to the submittals required in UAM Section 2.4, UAO shall include the following:

a) If the Small Wireless Equipment is attached to a Small Wireless Structure owned by a third-party, the ~~UAO~~ applicant shall provide confirmation of an executed agreement for the joint use of the third-party Small Wireless Structure;
b) Plans view drawings (to scale) showing the location of the proposed Small Wireless Equipment and Small Wireless Structure; and
c) An engineering analysis documenting the operational frequency band, any potential interference effects, and an RF interference survey.

The following comments were received from Vertical Bridge.

1.0 General

1.1 Purpose

The purpose of the Wireless Utility Rule is to establish requirements for the installation, operation, maintenance, relocation, and adjustment of Small Wireless Equipment and Small Wireless Structures within the Florida Department of Transportation's (FDOT) rights-of-way.

1.2 Terms and Acronyms

The following definitions of terms and acronyms apply only as used in this rule:

Wireless Equipment: means equipment at a fixed location which enables wireless communications between user equipment and a communications network, including radio transceivers, antennas, wires, coaxial or fiber optic cable or other cables, and equipment associated with wireless communications. The term includes Small Wireless Equipment. The term does not include any structure or pole on which the equipment is attached, physical lines for backhaul facilities, or physical lines between wireless structures.

Small Wireless Equipment: means Wireless Equipment that meets all the following conditions:

a) Each enclosed antenna is located inside an enclosure of no more than six (6) cubic feet in volume;
b) Or, in the case of antennas that have exposed elements, each antenna and all its exposed elements can fit within an enclosure of no more than six (6) cubic feet in volume; and
c) All other associated wireless equipment is cumulatively no more than twenty-eight (28) cubic feet in volume. The following types of associated ancillary equipment are not included in the calculation of equipment volume:
    1) electric meters,
    2) concealment elements,
    3) telecommunications demarcation boxes,
    4) ground-based enclosures,
    5) grounding equipment,
    6) power transfer switches,
    7) cutoff switches,
    8) vertical cable runs for power and other service lines, and
    9) Small Wireless Structures.

Small Wireless Structure: means an existing, proposed, or new pole or other structure that has or is intended to have Small Wireless Equipment attached to it.

UAM: 2017 Utility Accommodation Manual, as incorporated in Rule 14-46.001, F.A.C.

UAO: The utility agency/owner of Small Wireless Equipment, a Small Wireless Structure, or both.

2.0 Utility Permits

No Wireless Equipment may be installed pursuant to a utility permit in any FDOT right-of-way except as may be provided in this rule. The UAO shall obtain a utility permit pursuant to the UAM

prior to installing Small Wireless Equipment attached to a Small Wireless Structure in FDOT's right-of-way. The UAO shall comply with this rule and the UAM**.** An existing structure that is already authorized to be within FDOT's right-of-way may be used as a Small Wireless Structure provided it meets the requirements of this rule (including Sections 2.2 and 2.3) and the UAM, and the UAO otherwise obtains such existing structure's owner's consent to do so.

2.1 Utility Permit Requirements.

2.2 Interference and Placement Limitations

The UAO shall not install any Small Wireless Equipment that does any of the following:

a) Interferes with FDOT equipment or any existing Wireless Equipment within FDOT's right-of-way;
b) Operates on the 900 MHz frequency band; or
c) Is attached to an FDOT structure or FDOT equipment.

2.3 Height Requirements

The height of any existing or new Small Wireless Equipment and any existing or new Small Wireless Structure are limited as follows:

a) Small Wireless Equipment shall not extend more than 10 feet above the Small Wireless Structure it is attached to; and
b) A Small Wireless Structure shall not be taller than 50 feet above ground level at the location of installation.

2.4 Utility Permit Application Package

When applying for a utility permit, the UAO shall submit a utility permit application in accordance with the UAM and this rule. In addition to the submittals required in UAM Section 2.4, the UAO shall include the following:

a) If the Small Wireless Equipment is attached to a Small Wireless Structure owned by a third-party, the UAO shall provide an executed agreement for the joint use of the third-party Small Wireless Structure;
b) Plans view drawings (to scale) showing the location of the proposed Small Wireless Equipment and Small Wireless Structure; and
c) ~~An engineering analysis documenting the operational frequency band, any potential interference effects, and an RF interference survey~~Information as to the proposed operating frequency band of the Small Wireless Equipment and, if requested by FDOT, an interference analysis.
~~c)~~d) Information relating to the appropriate local windspeed requirements under the Florida Building Code to verify structural integrity of the proposed Small Wireless Structure and any attachments of Small Wireless Equipment to such Small Wireless Structure.