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A SOLUTION TO THE REGULATORY MAZE: THE TRANSMISSION LINE SITING ACT

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I. INTRODUCTION

Land development in the United States has become a much-regulated endeavor over the years. When a landowner wants to build on, excavate, fill, mine, or subdivide property, it may be necessary to obtain local, regional, state, and/or federal approvals, depending on the exact size and nature of the proposed development. It may also be necessary to obtain these numerous approvals from different agencies at the same level of government. It may even be necessary to obtain numerous approvals from the *same* agency. And, typically, each approval requires a separate application and involves a separate approval process. Each agency has a different set of standards and criteria—sometimes conflicting with the standards and criteria of other agencies—which determine whether or not the development will be approved. *One* agency's disapproval may scuttle an entire development, no matter how worthy the development seems to any of the other regulatory agencies.

Many regulators (and most land developers) recognize that the current multi-approval system is inefficient, expensive, burdensome, and illogical for all concerned. The solution for the current regulatory maze is consolidation and coordination of these various regulatory processes. As stated by the authors of a 1976 study of land use regulation:

If, at a certain point in time, government intentionally set out to determine the proper development of land through an administrative complex in which multiple and duplicative permits were issued by agencies dealing with different issues and residing in different cities, one would probably conclude that the procedure was an unnecessarily complex waste of public and private resources. The mere fact that the present plethora of control systems evolved incrementally does not alter the situation or afford

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relief to the people involved, whether they are potential developers, potential opponents of development, or taxpayers.

. . . .
 An efficient system of government will . . . attempt to reduce the cost of governmental processes, wherever possible. The taxpayers' dollars should not be wasted by devoting the time of governmental officials to unproductive work. Similarly, the government should be conscious of the costs incurred by private persons in dealing with government processes. Where private business is concerned, many of these costs are ultimately passed on to the consumer in the form of higher prices. Private citizens who wish to express their views can quickly become disillusioned about the willingness of the government to hear those views if the costs of expressing them is not kept to reasonable levels.¹

Coordination and consolidation of land use regulatory processes should mean that less time and money is spent by developers in seeking development approval, by government in reviewing the merits of a development, and by opponents of development in exposing the adverse effects of a development. Also, in a consolidated review process, *all* of the effects of a development, both beneficial and adverse, will be subject to review and balancing by a single regulatory body (or only a few regulatory bodies).

Florida's legislature has recognized the benefits of a coordinated and consolidated review process for land use regulation. The Transmission Line Siting Act (TLSA),² passed by Florida's 1980 legislature, became the third act in Florida designed to simplify and consolidate the necessary permitting processes for the location (siting) and construction of a specific type of development.³

1. URBAN LAND INSTITUTE, *THE PERMIT EXPLOSION* 78 (1976).

2. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. §§ 403.520-535). *See also id.* § 3 (to be codified at FLA. STAT. § 366.14) and *id.* §§ 2, 4 (not to be codified). The need for the TLSA was acknowledged in the final report of the Governor's Resource Management Task Force. The Task Force recommended that a consolidated permitting process similar to the electrical Power Plant Siting Act be enacted for the siting of major transmission lines. 1 RESOURCE MANAGEMENT TASK FORCE, *FINAL REPORT TO GOVERNOR BOB GRAHAM* 24 (1980). Chapter 80-65 was approved by the Governor on June 5, 1980.

3. The other two coordinated land use regulation acts are the Florida Electrical Power Plant Siting Act, FLA. STAT. §§ 403.501-517 (1979), and the Florida Industrial Siting Act, FLA. STAT. §§ 288.501-518 (1979).

At least three other states have a special permitting process for major transmission lines. These states are Montana, New York, and South Dakota.

The provisions of the Montana Major Facility Siting Act relating to transmission lines, MONT. REV. CODES ANN. §§ 70-801 to 70-829 (1977), are substantially similar to the TLSA with the following exceptions:

1. The Montana Act applies to transmission lines of 69 kilovolts or greater capacity

The TLSA provides "an efficient, centrally coordinated, one-stop permitting process" for the location and maintenance of electrical transmission line corridors and the construction of transmission lines.⁴ Certification under the terms of the TLSA is the sole license required from the state or any local or regional governmental agency to construct a transmission line or to establish the location of a transmission line corridor.⁵ This article will examine the need for the TLSA, its scope, the step-by-step procedure created by the TLSA, and the legal and practical implications of its statutory provisions.

other than transmission lines which are 10 miles or less in length and 230 kilovolts or less in capacity.

2. The provisions of the Montana act may be waived if an immediate replacement transmission line is needed for a transmission line destroyed by a natural disaster or an act of war.

3. The permitting process is designed to take over a year from submission of an application to certification or denial. *Id.* §§ 70-803(3)(b); 70-807(1), (4), 70-810(1); 70-811(4)(b).

New York's statutory provisions for the siting of major utility transmission facilities, N.Y. PUBLIC SERVICE LAW §§ 120-130 (McKinney 1979), establish a coordinated permitting process which is different from the TLSA in several respects:

(1) Generally, the New York process applies to transmission lines of 125 kilovolts or greater capacity of one mile or more length, or transmission lines of between 100 and 125 kilovolts capacity of 10 miles or more length.

(2) The replacement of existing facilities with like facilities is not covered by these provisions.

(3) All residents of municipalities through which the transmission line may pass must be granted party status in the certification proceeding upon their timely filing of an intent to be a party.

(4) Substantive local laws and regulations can be superseded by the approving authority's order only upon an express finding that such laws or regulations are unreasonably restrictive. *Id.* §§ 120(2); 121(1); 124(1)(j); 126(1)(f).

The permitting process for transmission lines established by the South Dakota Energy Facility Permit Act, S.D. COMP. LAWS ANN. §§ 49-41B-1 to 49-41B-37 (1979), is different from the TLSA process in several respects:

(1) The permit issued pursuant to this act supersedes local land use, zoning, and building codes *only* if the approving body expressly finds that the local rule is unreasonably restrictive.

(2) The permit issued pursuant to this act does not supersede permits required by state agencies; rather, a single, comprehensive application is submitted to all the state-level agencies.

(3) The provisions of this act may be waived if an immediate urgent need exists for a transmission line and the utility had no advance knowledge of the need or if a transmission line was destroyed by natural disaster or an act of war.

(4) The permitting process is designed to take approximately one year. *Id.* §§ 49-41B-23; 49-41B-24; 49-41B-28; 49-41B-35.

4. See ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.530(3)).

5. *Id.* (to be codified at FLA. STAT. § 403.531).

II. THE NEED FOR A CONSOLIDATED PROCESS

Until the substantive provisions of the TLSA take effect on January 1, 1981, an electric utility planning to construct a new major transmission line in Florida must still obtain various permits from numerous state and local agencies.⁶ Under this multi-agency approval system, the electric utilities face the burdensome task of applying separately for each agency's approval. On more than one occasion, lack of coordination among the agencies, particularly among the local governments, has resulted in a less-than-optimal transmission line path. In one instance, after an electric utility received all the necessary permits for a proposed transmission line corridor in one county, the corridor did not line up with the corridor approved in the adjacent county.⁷ This situation highlights the need for a consolidated approval process like the one established by the TLSA. After the substantive provisions of the TLSA become effective a single transmission line certification process replaces the uncoordinated, multi-agency method currently in effect. One important agency approval still remains separate from the TLSA certification process, however. A separate proceeding is still required to locate a transmission line corridor on state lands held by the Trustees of the Internal Improvement Trust Fund.⁸

6. Prior to enactment of the TLSA, agency approval most commonly required before siting an electrical transmission line included the following: (1) Florida Department of Transportation — a permit to cross or use any highway rights-of-way, FLA. STAT. § 338.17 (1979); (2) Florida Department of Agriculture and Consumer Services, Forestry Division — permits for the burning of debris resulting from corridor clearing operations, FLA. STAT. § 590.12 (1979); (3) Florida Department of Environmental Regulation — dredge and fill permits for construction in any wetlands area, FLA. ADMIN. CODE R. 17-4; (4) local governments, regional planning agencies, Department of Community Affairs, and Florida Land and Water Adjudicatory Commission (Governor and Cabinet) — development of regional impact approval, FLA. STAT. ch. 380 (1979) (this approval is issued by the local government and is appealable to the Commission, FLA. STAT. §§ 380.07-.08 (1979); under FLA. ADMIN. CODE R. 22-F-2.03(2), an electric transmission line of 230 kilovolts or greater capacity which crosses a county line is "presumed" to be a DRI); (5) water management districts — permits for any construction affecting works of the district and surface drainage, FLA. STAT. ch. 373 (1979); and (6) local agencies — for zoning and/or land use permits.

7. Telephone interview with Thomas R. Fair, Supervisor, Environmental Planning, Florida Power & Light Co., from Miami, Fla. (July 23, 1980). A two-mile gap occurred at the county line between St. Lucie and Indian River Counties for the Lake Poinsett-Martin-Midway 500 KV Transmission Line Project after the initial development of regional impact approval was secured. It was necessary for Florida Power & Light Co. to reinstitute proceedings in each county to obtain approval for a contiguous corridor.

8. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.531(3)). *But see* note 102 *infra*.

III. APPLICABILITY AND EXEMPTIONS

The TLSA applies to only major transmission lines, those "extending from a substation or power plant to an existing transmission network or rights-of-way or substation to which the applicant intends to connect which defines the end of the proposed project and which is designed to operate at 230 kilovolts or more and which crosses a county line. A transmission line's starting point and ending point must be specifically defined by the applicant and be *verified by the [Public Service Commission]* in its determination of need."⁹ Jurisdiction over the lower voltage distribution lines and over the transmission lines located solely within one county remains with the local governments and the various other involved agencies.

All construction of major transmission lines commenced after December 31, 1980, must comply with the TLSA except for (1) transmission lines certified pursuant to the Florida Electrical Power Plant Siting Act;¹⁰ (2) transmission lines located within established rights-of-way;¹¹ (3) transmission lines for which development approval has been obtained under the provisions of the Florida Environmental Land and Water Management Act;¹² (4) transmission lines exempted from the provisions of the Florida Environmental Land and Water Management Act by a binding letter of interpretation issued under the provisions of section 380.06(4), Florida Statutes;¹³ (5) transmission lines in which the Department of Community Affairs or its predecessor agency determined the utility to have vested development rights within the meaning of section 380.06(12) or section 380.05(18), Florida Statutes;¹⁴ and (6) any transmission lines, such as the "Duval-Georgia" Florida Power & Light/Jacksonville Electric Authority joint project, for the con-

9. *Id.* (to be codified at FLA. STAT. § 403.522(3)) (emphasis added). The appropriate starting and ending point of the transmission line becomes important in evaluating the need for the line, a prerequisite for certification. See part IV *infra*. A corridor is defined as "the proposed area within which a transmission line is to be located." Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.522(8)).

10. *Id.* (to be codified at FLA. STAT. § 403.524(1)).

11. *Id.* (to be codified at FLA. STAT. § 403.524(2)).

12. *Id.* (to be codified at FLA. STAT. § 403.524(2)(a)).

13. *Id.* (to be codified at FLA. STAT. § 403.524(2)(b)). The principle attorney for the Bureau of Land and Water Management, Department of Community Affairs, has taken the preliminary position that the act precludes the department from issuing binding letters of interpretation or vested rights determinations for transmission lines as of the act's effective date of June 5, 1980.

14. *Id.*

struction of a transmission line commenced by October 1, 1981, to transfer bulk power between Florida and other states.¹⁵

Also, if a transmission line application submitted in accordance with the Florida Environmental Land and Water Management Act has not been acted upon on or before December 31, 1980, the applicant may choose either to continue with its pending application or to withdraw it and proceed under the provisions of the TLSA.¹⁶

IV. DETERMINATION OF NEED FOR THE TRANSMISSION LINE

The TLSA provides that the Public Service Commission (PSC) is responsible for determining whether a proposed transmission line is needed.¹⁷ A hearing to determine need may be held upon request of the electric utility or upon motion of the PSC. A date for the hearing must be set by the PSC within ten days after it receives a hearing request and the hearing must be held within thirty days. The PSC must render its decision on whether the proposed major transmission line is needed within forty-five days of the initial request for a hearing.¹⁸ In determining the need for the proposed transmission line, the PSC must consider "the need for electric system reliability and integrity, the need for abundant, low-cost electric energy to assure the economic well-being of the citizens of this state, the appropriate starting and ending point of the line, and other matters within its jurisdiction deemed relevant to the determination of need."¹⁹ As noted in the definition of

15. *Id.* (to be codified at FLA. STAT. § 403.524). The transmission lines exempt from the TLSA under the final provision are also exempt from the development of regional impact process. *Id.* For the "Duval-Georgia" joint project, these exemptions advance the in-service date by fifteen months (to August 1, 1982). Changing energy circumstances, such as a surplus of electrical power generated by the burning of coal in Georgia, make this exemption particularly attractive. The ability of Florida's electric utilities to make power purchases of the "coal-by-wire" energy from this joint project at an advanced date will result in savings of millions of dollars as well as millions of barrels of oil. Telephone interview with Thomas R. Fair, Supervisor, Environmental Planning, Florida Power & Light Co., from Miami, Fla. (July 23, 1980).

16. *Id.* (to be codified at FLA. STAT. § 403.524(3)).

17. *Id.* § 3 (to be codified at FLA. STAT. § 366.14).

18. *Id.* The statutory time periods for the PSC's determination of need process are very short, particularly the first 10 days within which the PSC must set a date for the hearing and arrange for 20-days' public notice of the hearing in "newspapers of general circulation, in the Administrative Weekly, and by giving notice to any persons who have requested to be placed on the [PSC's] mailing list for this purpose." *Id.* (to be codified at FLA. STAT. § 366.14(1)). The authors anticipate that the PSC will have to routinely extend this time limit in order to fulfill its 20-day public notice requirement.

19. Ch. 80-65, § 3, 1980 Fla. Laws (to be codified at FLA. STAT. § 366.14(1) (emphasis added)).

“transmission line,” it is the applicant’s duty to specify the starting and ending points of a proposed transmission line and the PSC’s duty only to verify these points.

Once the PSC’s determination of need is made, it is binding on all parties to the certification hearing. The determination is a prerequisite to the TLSA certification hearing, and is included in a written analysis of the proposal submitted to the hearing officer by the Department of Environmental Regulation (DER).²⁰

The electric utility need *not* submit an application to the DER under the provisions of the TLSA *before* the PSC conducts its determination of need. Economic considerations on the part of the electric utility suggest that it will normally obtain the PSC’s determination of need for the proposed transmission line before submitting a TLSA application to the DER.²¹

The “form, content, and necessary supporting documentation and the required studies for the [PSC’s] determination of need” as well as the procedures to be followed²² are to be set forth by the PSC in procedural rules adopted to implement its duties under the TLSA provisions.²³

V. THE CERTIFICATION PROCESS

A. Designation and Duties of a Hearing Officer

The transmission line site certification process begins when an electric utility submits an application and the accompanying fee to the DER,²⁴ and it is conducted in accordance with the Florida Ad-

20. *Id.* §§ 1, 3 (to be codified at FLA. STAT. §§ 366.14 & 403.523(8)).

21. If, however, a TLSA application and its accompanying fee is never filed due to a finding of no need, the PSC will not be reimbursed for its expenses. *See id.* § 1 (to be codified at FLA. STAT. § 403.523(7)).

22. *Id.* § 3 (to be codified at FLA. STAT. § 366.14(2)(b)).

23. *Id.* § 4 (not to be codified). For more detail on promulgation of rules under the provisions of the TLSA see part VIII *infra*.

24. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.523(3)). An application consists of “the documents required by [DER].” *Id.* (to be codified at FLA. STAT. § 403.522(2)).

A fee of between \$1,000 and \$15,000, as determined by the DER and based on the length of the proposed transmission line corridor, is to be submitted with the application. This fee will be used to cover all reasonable expenses and costs incurred by the various state agencies and water management districts, and any local governments through whose jurisdictions the corridor passes and which become parties to the proceeding. *Id.* § 1 (to be codified at FLA. STAT. § 403.523(7)). Items payable from the fee include the cost of publishing notices of public hearings, preparing and conducting hearings, recording and transcribing the proceedings, and the cost of studies required by the TLSA. Within 90 days after the certification is either issued or denied, or after the application is withdrawn, the DER must provide the

ministrative Procedure Act.²⁵ Within seven days after the initial filing, the DER must request a hearing officer from the Department of Administrative Hearings and one must be assigned within another seven days after the DER's request. Whenever practicable, a hearing officer with prior experience or training in transmission line certification proceedings will be used.²⁶

The hearing officer is authorized by the TLSA to do the following: (1) determine the completeness and the sufficiency of the application if a dispute exists between the DER and the applicant;²⁷ (2) receive the DER's written analysis of the application;²⁸ (3) conduct the certification hearing;²⁹ (4) submit to the siting board (comprised of the Governor and Cabinet) a recommended order based on the record at the hearing;³⁰ (5) rule on motions to intervene;³¹ and (6) alter any time limitations contained in the TLSA "upon stipulation between the [DER] and the applicant or for good cause shown by any party."³²

B. Determination of Completeness and Sufficiency

An application is complete when it "has addressed all applicable sections of the prescribed application format."³³ The completeness of an application is determined as follows: (1) within ten days of filing, the DER submits a statement of its view on the completeness of the application of the Division of Administrative Hearings and to the applicant; (2) if the DER states that the application is

applicant with an itemized accounting of the expenditures from the application fee and return any remaining sums. *Id.* In addition to the PSC determination of need, other studies required by the TLSA include environmental studies, water resources studies, land use studies, and fish and wildlife resources studies. *Id.* (to be codified at FLA. STAT. § 403.526).

25. FLA. STAT. ch. 120 (1979).

26. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.525(1)).

27. *Id.* (to be codified at FLA. STAT. §§ 403.525(2) (determination of completeness) and 403.527(5) (resolution of disputes over completeness or sufficiency)).

28. *Id.* (to be codified at FLA. STAT. § 403.523(8)).

29. *Id.* (to be codified at FLA. STAT. § 403.527(1)). At the certification hearing, the hearing officer has the power "to swear witnesses and take their testimony under oath, to issue subpoenas upon the written request of any party or upon [the hearing officer's] own motion, and to effect discovery on the written request of any party by any means available to the courts and in the manner provided in the Florida Rules of Civil Procedure." *Id.* (to be codified at FLA. STAT. § 403.527(5)); FLA. STAT. § 120.58(1)(b) (1979).

30. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(2)); *see also* FLA. STAT. § 120.57(1)(b)8 (1979).

31. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(3)(d)).

32. *Id.* (to be codified at FLA. STAT. § 403.528).

33. *Id.* (to be codified at FLA. STAT. § 403.522(9)). Compare "complete" with "sufficient." *See* text at note 39 *infra*.

incomplete, the applicant has fifteen days to either withdraw the application or contest the DER's statement; (3) if the applicant contests the DER's statement, the hearing officer appointed by the Division of Administrative Hearings must hold a hearing on the completeness of the application within thirty days of the initial filing and must render a decision within ten days after the hearing.³⁴ If the hearing officer determines that the application is complete, all of the statutory time periods run from the date of the initial filing.³⁵ If the hearing officer determines that the application is incomplete, the applicant must either withdraw the application or complete it.³⁶ When additional material is filed to complete the application, time periods begin to run anew from the date of the additional filing.

An application may be altered before certification by submitting an amendment to the hearing officer and all other parties.³⁷ The filing of an amended application may constitute "good cause" for altering the TLISA time limits.³⁸

An application must also be "sufficient," that is, "not only complete but . . . sufficient in comprehensiveness of data or in quality of information provided."³⁹ The authors anticipate that the determination of sufficiency will be made in a manner similar to the one used for determining completeness and that the DER's initial determination of sufficiency will be accomplished within thirty days after the filing of an application. Under the corresponding provisions of the Electrical Power Plant Siting Act, the DER has typically taken a quick look to determine completeness and then initiated a more comprehensive, time-consuming review to determine sufficiency.

C. Parties to the Proceeding

Under the provisions of the TLISA certain enumerated persons and agencies have party status in the certification hearing but that status is waived if a notice of intent to be a party is not filed on or

34. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.525(2)).

35. *Id.*

36. *See, e.g., id.* (to be codified at FLA. STAT. §§ 403.523(6) (notice), .523(8) (analysis), .526 (reports & studies), .527 (certification hearing)).

37. *Id.* (to be codified at FLA. STAT. § 403.534(1)).

38. *Id.* (to be codified at FLA. STAT. § 403.534(2)). For modification procedures *after* certification see part VII *infra*.

39. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.522(10)). The DER is authorized by the TLISA to adopt rules setting forth the procedure to determine the sufficiency of applications. *Id.* (to be codified at FLA. STAT. § 403.525(3)).

before the fifteenth day prior to the hearing.⁴⁰ Status as a party confers the right to participate in the certification hearing,⁴¹ to request disqualification of the assigned hearing officer,⁴² to "respond, to present evidence and argument on all issues involved, to conduct cross-examination and submit rebuttal evidence, to submit proposal findings of fact and orders, to file exceptions to any order or hearing officer's recommended order, and to be represented by counsel."⁴³ Parties who are "adversely affected" by the final outcome of the certification hearing have the right to seek judicial review of the siting board's order.⁴⁴

Most nonprofit corporations or associations which represent certain environmental and business interests may be parties to the certification hearing if they file a notice of intent to become a party at least fifteen days prior to the hearing.⁴⁵ If the fifteen-day filing deadline is missed, these corporations and associations, as well as any person whose substantial interests will be affected by the proposed transmission line or corridor, have the alternative of intervening. To be an intervenor a motion must be filed at least five days prior to the hearing. Intervention is at the discretion of the hearing officer and upon such conditions as the hearing officer may prescribe.⁴⁶

Finally, the right of other persons to present oral or written com-

40. *Id.* (to be codified at FLA. STAT. § 403.527(3)(a)). The listed parties are (1) the applicant; (2) the DER; (3) the PSC; (4) the Department of Community Affairs; (5) the Department of Natural Resources; (6) the Game & Fresh Water Fish Commission; (7) each water management district in whose jurisdiction the proposed transmission line or corridor is to be located; (8) any local government in whose jurisdiction the proposed transmission line or corridor is to be located; and (9) any other state agency as to matters within its jurisdiction. *Id.*

41. FLA. STAT. § 120.57(1)(b)2 (1979); ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(3)(a)).

42. FLA. STAT. § 120.57(1)(b)3 (1979).

43. FLA. STAT. § 120.57(1)(b)4 (1979).

44. *See* FLA. STAT. § 120.68(1) (1979).

45. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(3)(b)2). Many nonprofit environmental associations are low-budget and somewhat informal groups. They are more able to participate as parties in certification hearings if they can be "represented" by a qualified lay member rather than an attorney. The Florida Administrative Procedure Act, which clearly applies to the certification hearing, *id.* (to be codified at FLA. STAT., § 403.527(1)), makes provision for "qualified" lay representation in administrative proceedings. FLA. STAT. § 120.62(2) (1979). In order for a "qualified" lay person to represent the interests of his or her group, however, the DER must adopt a rule setting standards for the determination by a hearing officer of whether the lay person is "qualified." *See The Florida Bar v. Moses*, 380 So. 2d 412 (Fla. 1980).

46. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(3)(d)); *see also* FLA. ADMIN. CODE R. 22I-2.13.

munications to the hearing officer without becoming a party is preserved by the TLSA. When nonparty testimony is considered by the hearing officer in formulating the recommended order, all parties must have had the opportunity to cross-examine, challenge, or rebut the testimony.⁴⁷

The TLSA does *not* require all government agencies whose properties or works will be affected by the proposed transmission line or corridor to be made a party to the certification hearing. But upon the request of such an agency or of any party to the proceeding, including the applicant, the agency must be made a party.⁴⁸ The importance of bringing these governmental entities in as parties is that an agency which does not have notice of the certification proceeding is not bound by the certification order unless it is made a party. The applicant should therefore identify all government properties and works which may be affected by the proposed transmission line or corridor and, early in the certification process, request that the owner-agencies be made parties. If such an agency is not made a party to the certification proceeding, the electric utility will have to seek the necessary interest in the agency's property or works in a *separate* proceeding after the TLSA certification order is entered. On the other hand, when such an agency *is* made a party, TLSA certification makes the issuance of any license, easement, or other interest required by the proposed transmission line or corridor a mere "ministerial act."⁴⁹

In contrast to government agencies, a private landowner through whose property the proposed transmission line may pass does not have party status in the certification proceeding. These landowners, like all other persons, may present oral or written testimony to the hearing officer.⁵⁰ They may also request intervenor status as persons whose substantial interests will be affected by the certification proceeding.⁵¹ But under the TLSA provisions, they need not be given any special notice of the certification proceeding; rather, the DER is instructed only "to provide adequate public notice" of the proceeding.⁵² The DER is similarly instructed in the Electrical

47. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(4)).

48. *Id.* (to be codified at FLA. STAT. § 403.527(3)(e)).

49. *Id.* (to be codified at FLA. STAT. § 403.531(3)). Note, however, that land title which is vested in the Internal Improvement Trust Fund cannot be divested by this procedure. See text at notes 8 *supra*, 101, 102 *infra*.

50. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.527(4)).

51. See *id.* (to be codified at FLA. STAT. § 403.527(3)(d)); FLA. ADMIN. CODE R. 22I-2.13.

52. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.523(9)).

Power Plant Siting Act, and in its rules implementing that act, the DER did not require actual notice to landowners whose property would be the site of the proposed power plant.⁵³ The DER rules implementing the TLSA are expected, similarly, to require only that notice of the nature, date, and location of the proceeding be published in newspapers of general circulation in the affected region, in the *Florida Administrative Weekly*, and possibly in a news release to the media. This type of notification requirement avoids the burdensome and expensive process of identifying, locating, and contacting each and every landowner through whose property a proposed transmission line corridor may pass. Of course, once the transmission line and corridor are certified and it has been determined exactly which property must be purchased prior to construction of the transmission line, the landowners will be contacted and the electric utility will negotiate with them for the purchase of the required property or the utility will initiate an eminent domain proceeding, whichever is appropriate.⁵⁴

D. Agency Reports and Comments

Within seven days of the initial filing, the DER must provide copies of the application to all the parties enumerated in the TLSA.⁵⁵ Each of these parties, including the DER but excluding the PSC and the local government(s), must prepare a report on how the proposed transmission line or corridor will impact on matters within its jurisdiction.⁵⁶ These reports must be initiated within fifteen days of the filing of a complete application and submitted to the DER within sixty days after the agency's receipt of the application for inclusion in the DER's written analysis.⁵⁷ Also within fifteen days of filing the DER must notify all "affected agencies" of

53. See, FLA. ADMIN. CODE R. 17-17.06(4).

54. See FLA. STAT. §§ 361.01, .13(2), 425.04(12) (1979) (power of eminent domain). Certification of a transmission line under the provisions of the TLSA is admissible as evidence of the "public need and necessity" for the transmission line in eminent domain proceedings under FLA. STAT. chs. 73 & 74. Ch. 80-65, § 2, 1980 Fla. Laws (not to be codified). This provision will assist any electric utility which must initiate condemnation proceedings in order to procure the land necessary for the siting of an electrical transmission line.

55. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.526(1)).

56. *Id.* (to be codified at FLA. STAT. § 403.526).

57. *Id.* Actually, the statutory language is ambiguous as to whether these agency reports must be submitted to the DER within 60 days of the applicant's filing of a complete application with the DER or within 60 days of the agencies' receipt of the complete application. It is anticipated that this ambiguity will be resolved in favor of the latter construction when rules are promulgated.

the filing.⁵⁸ Affected agencies (or any other agency) may make comments to the DER for inclusion in the DER's written analysis.⁵⁹

E. Proposed Conditions of Certification

When the PSC's determination of need and the various agency reports and comments are received, but no later than three months after the complete application is filed, the DER must prepare a written analysis of the application to be filed with the hearing officer. The analysis will contain the DER's recommendations "as to the disposition of the application and any proposed conditions of certification which [it] believes should be imposed."⁶⁰ The DER's proposed conditions of certification are expected to identify a corridor of a specified width (for example, one mile) from point A to point B which is to be certified. The proposed conditions of certification may also identify "areas of concern" located in the corridor within which the electric utility may *not* place the transmission line due to environmental sensitivity (for example, bodies of water and wetlands), and to identify "directed locations" within which the electric utility *must* place the transmission line (for example, existing rights-of-way and designated paths through unavoidable areas of concern). Beyond the location constraints contained in the conditions of certification, the electric utility should be free to locate the transmission line within the certified corridor based on economic considerations and the willingness of various landowners to cooperate in the land purchase negotiations. By giving the electric utility some latitude in the exact placement of the transmission line while at the same time preserving the environmentally sensitive property in the area, the DER would be striking "a reasonable balance between the need for the facility as a means of providing abundant low-cost electrical energy and the environmental impact resulting from construction of the line and the location and maintenance of the corridor."⁶¹

F. Certification Hearing

The certification hearing is to be conducted no later than four months after the complete application is filed and at least sixty

58. *Id.* (to be codified at FLA. STAT. § 403.523(6)).

59. *Id.* (to be codified at FLA. STAT. § 403.523(8)(f)).

60. *Id.* (to be codified at FLA. STAT. § 403.523(8)(g)).

61. *See id.* (to be codified at FLA. STAT. § 403.521).

days after the DER publishes notice of the hearing and of the deadline for filing a notice of intent to be a party.⁶² The certification hearing is to be conducted "in [geographic] proximity to the proposed transmission line or corridor to allow participation by interested citizens in the area affected."⁶³

During the certification hearing, the evidence presented should enable the hearing officer to "fully balance the need for transmission lines with the broad interests of the public."⁶⁴ The legislature intends that the state "ensure through available and reasonable methods that the location and maintenance of transmission line corridors and the construction of transmission lines will produce minimal adverse effects on the environment and public health, safety, and welfare."⁶⁵

G. *Recommended Order of the Hearing Officer*

After the certification hearing, but no more than five months after the filing of a complete application, the hearing officer must prepare a recommended order containing findings of fact, conclusions of law, and recommendations as to the conditions of certification. The recommended order is filed with the siting board (Governor and Cabinet), the ultimate deciding authority.⁶⁶ By law, the hearing officer's findings of fact must be based solely on "the evidence of record and on matters officially recognized,"⁶⁷ and *are not* subject to reversal by the board or by the courts unless they are not based on competent substantial evidence.⁶⁸ Although the findings are to be accorded this great weight, in practice the board tends to be more sensitive to political realities than to legal niceties.⁶⁹

H. *Final Order of the Governor and Cabinet*

Within thirty days after receiving the hearing officer's recommended order, the siting board must dispose of the application by either "approving in whole, approving with such modification as the board shall deem appropriate, or denying the issuance of a cer-

62. *Id.* (to be codified at FLA. STAT. § 403.527(1)).

63. *Id.*

64. *Id.* (to be codified at FLA. STAT. § 403.521).

65. *Id.*

66. *Id.* (to be codified at FLA. STAT. § 403.527(2)); FLA. STAT. § 120.57(1)(b)8 (1979).

67. FLA. STAT. § 120.57(1)(b)7 (1979).

68. *Id.* §§ 120.57(1)(b)9, .68(10) (1979).

69. *See Estuary Properties, Inc. v. Askew*, 381 So. 2d 1126 (Fla. 1st Dist. Ct. App. 1979).

tificate and stating the reasons for issuance or denial."⁷⁰ If certification is denied, the board must also state what steps the applicant would have to take in order to secure approval.⁷¹

The entire certification process is designed to take no more than six months from the filing of a complete application with the DER to the board's disposition of the application. A diagram of the TLSA time lines is contained in the appendix (located in the back of this issue). Since the board's issuance or denial of certification is "the final administrative action required as to that application," any party who is adversely affected by the board's decision may within thirty days of the order's rendition seek judicial review in the First District Court of Appeal or in the district court of appeal in the appellate district where a party resides.⁷²

I. Variances and Exemptions from Agency Regulations

Conditions of certification may include variances and exemptions, as allowed by law, from standards or regulations of any agency normally applicable to location and maintenance of transmission line corridors and construction of transmission lines. Such variances and exemptions, however, must have been expressly considered during the certification proceeding.⁷³ Accordingly, it is imperative that an electric utility identify all agency standards applicable to the proposed transmission line or corridor 'but for' the TLSA, and then assure that needed variances and exemptions from these standards are "expressly considered" at the certification hearing. Under administrative rules promulgated pursuant to the Electrical Power Plant Siting Act, an applicant seeking a variance from otherwise applicable standards must give notice at least sixty days prior to the certification hearing to the hearing officer and to all parties advising them of the variance sought and that notice has been given to the agency involved.⁷⁴ Because of the overall shorter time limits contained in the TLSA, it is anticipated that the applicant will be required to give the hearing officer and all parties approximately forty-five days' notice of variances or exemptions sought from any agency standards.⁷⁵ Consequently, the

70. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.529(1)).

71. *Id.*

72. *Id.* (to be codified at FLA. STAT. § 403.529(2)); FLA. STAT. § 120.68(1) (1979).

73. *Id.* (to be codified at FLA. STAT. § 403.531(2)).

74. FLA. ADMIN. CODE R. 17-17.11(2)(d).

75. The exact notice requirement will be contained in the rules adopted by the DER. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.523(1)).

issue of such a variance or exemption must be raised early in the certification process in order to meet this notice requirement.

VI. EFFECT OF CERTIFICATION

Certification by the board authorizes an electric utility to "locate and maintain the transmission line corridor and to construct the transmission lines subject only to the conditions of certification set forth in such certification."⁷⁶

Certification of a transmission line or corridor is "in lieu of any [other] license, permit, certificate, or similar document" required by any state, regional, or local governmental unit or entity.⁷⁷ The TLSA expressly supersedes all approval, licensing, and permitting processes authorized by any other state laws governing transmission lines and corridors.⁷⁸ In addition, certification under the TLSA will suffice for the state certification required by the federal government assuring that federal water pollution control standards will be complied with prior to the issuance of a National Pollutant Discharge Elimination System permit.⁷⁹ The TLSA does not affect, however, the PSC's ratemaking powers nor the right of local government to charge fees and to require compliance with the National Electrical Code.⁸⁰

76. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.531(2)).

77. *Id.* (to be codified at FLA. STAT. § 403.531(3)).

78. The laws superseded by the TLSA include, *but are not limited to*, FLA. STAT. ch. 125 (county government powers); FLA. STAT. ch. 161 (beach and shore preservation including coastal construction control lines); FLA. STAT. ch. 163 (intergovernmental programs including the provisions governing local government comprehensive plans); FLA. STAT. ch. 253 (state lands ownership, easements and use); FLA. STAT. ch. 258 (state parks and preserves including provisions relating to wilderness areas and aquatic preserves); Florida Nuclear Code and Southern Interstate Nuclear Compact Law, FLA. STAT. ch. 290; FLA. STAT. ch. 298 (drainage and water control); Florida Transportation Code, FLA. STAT. chs. 334-339 and 341; FLA. STAT. ch. 370 (saltwater fisheries, relating to dredge and fill activities); FLA. STAT. ch. 373 (water resources including provisions relating to the state water resource plan, the consumptive use of water, works of the district, and the management and storage of surface waters); FLA. STAT. ch. 380 (land and water management including the provisions relating to areas of critical state concern and developments of regional impact); FLA. STAT. ch. 381 (public health including provisions relating to private and public water systems); FLA. STAT. ch. 387 (pollution of waters including provisions relating to drainage of surface waters); and FLA. STAT. ch. 403 (environmental control including provisions relating to air and water pollution and wetland protection).

79. 33 U.S.C. § 1341 (1976); ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.531(3)).

80. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.531(4)). See NATIONAL FIRE PROTECTION ASSOCIATION, NATIONAL ELECTRICAL CODE 1978 (ed. 1978).

VII. MODIFICATION, REVOCATION, OR SUSPENSION OF CERTIFICATION

A. *Modification*

The TLSA provides three alternative methods by which certification may be modified *after* board approval: (1) the board may delegate the authority to modify certain conditions of certification to the DER;⁸¹ (2) *all* the parties to a certification proceeding may submit a modification to the terms and/or conditions of certification to the board for approval;⁸² or (3) the applicant may file a petition for modification with the DER setting forth (a) the proposed modification, (b) the factual reasons which support the need for the modification, and (c) the anticipated additional environmental effects which the modification will cause.⁸³ Such a petition for modification will be disposed of in a manner similar to the one in which an application for certification is processed.⁸⁴

When a modification to the certification is sought pursuant to (2) or (3) above, the DER is authorized to require a certification modification fee of up to \$2,000.⁸⁵ Like the application fee, the modification fee is used to cover the costs of publication of notices, of preparation and conduct of hearings, of recordation and transcription of the hearings, and of the required studies of the various agencies. Any remaining sums are returned to the applicant within ninety days of the board's disposition of the request for modification.⁸⁶ If the DER initiates the request for modification, however, no fee is required from the applicant; each agency must bear the cost of its own required study and participation in the modification proceeding, and the DER must bear all additional costs of the proceedings.⁸⁷

B. *Revocation or Suspension*

Certification may be revoked or suspended by the board on any of the following grounds: (1) if the application or an amendment to the application contained a "material false statement" and the truth would have warranted a denial of the certification; (2) if the

81. *Id.* (to be codified at FLA. STAT. § 403.535(1)).

82. *Id.* (to be codified at FLA. STAT. § 403.535(2)).

83. *Id.* (to be codified at FLA. STAT. § 403.535(3)).

84. *Id.* (to be codified at FLA. STAT. § 403.535(4)).

85. *Id.* (to be codified at FLA. STAT. § 403.523(11)).

86. *Id.*

87. *Id.*

applicant failed to comply with any of the terms or conditions of the certification; or (3) if the applicant violated any of the provisions of the TLSA or any rule or order issued thereunder.⁸⁸ The TLSA, however, specifically provides that the applicant does not lose any of its postcertification procedural rights under Florida's Administrative Procedure Act.⁸⁹

In addition, failure to comply with the conditions of certification, or failure to obtain certification prior to the location and maintenance of a transmission line corridor or prior to construction of a transmission line constitutes a violation of the Florida Air and Water Pollution Control Act.⁹⁰ Such a violation activates the authority of the DER to seek several judicial and administrative remedies including (1) the institution of a civil action seeking actual damages for injury to the environment and/or a civil penalty of not more than \$10,000 for each day the violation exists;⁹¹ (2) the institution of a civil action seeking an injunction to cease the violation;⁹² (3) the possible institution of a criminal action charging the violator with a misdemeanor punishable by a fine of not less than \$2,500 or more than \$25,000, or punishable by one year in jail, or both, for each day the violation exists;⁹³ and (4) the institution of an administrative action before the board seeking actual damages for injury to the environment and/or an order prohibiting further violations.⁹⁴

VIII. RULES TO BE ADOPTED

The DER must adopt procedural rules for the implementation of the TLSA by October 31, 1980. These rules will cover such matters as: (1) the form of the application to be submitted by the applicant to the DER; (2) the method for determining the appropriate application fee, using a sliding scale based on the length of the proposed corridor; (3) the procedures to be followed for the expeditious processing of applications;⁹⁵ (4) the procedures for determining the completeness and sufficiency of applications;⁹⁶ (5) the procedures

88. *Id.* (to be codified at FLA. STAT. § 403.532).

89. *Id.* (to be codified at FLA. STAT. § 403.531(5)).

90. *Id.* (to be codified at FLA. STAT. § 403.533). The Florida Air and Water Pollution Control Act is codified at FLA. STAT. ch. 403 (1979).

91. FLA. STAT. § 403.121(1) (1979).

92. *Id.* § 403.131 (1979).

93. *Id.* § 403.161 (1979).

94. *Id.* § 403.121(2) (1979).

95. Ch. 80-65, § 1, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.523).

96. *Id.* (to be codified at FLA. STAT. §§ 403.523(3), .525(3)).

for notifying other agencies of the filing of an application; (6) the procedures for notifying the public of the filing of an application and of the proceedings conducted under the TLSA; (7) the procedure for monitoring compliance with the terms and conditions of certification;⁹⁷ and (8) the procedure for seeking modification of a certification.⁹⁸

The TLSA also authorizes the board to adopt "reasonable procedural rules to carry out its duties under [the TLSA] and to give effect to the legislative intent that this act provide an efficient, centrally coordinated, one-stop permitting process."⁹⁹ The board has the same authority under the Electrical Power Plant Siting Act but has adopted no rules to date.

IX. PITFALLS OF THE TLSA

The TLSA contains several "traps for the unwary" applicant. Some of these have previously been mentioned but deserve repetition. The TLSA expressly states that it is intended to establish a one-stop permitting process for transmission lines and corridors,¹⁰⁰ but several additional stops are latently contained in the act.

Any agency whose properties or works will be affected by the proposed transmission line or corridor must be made a party to the certification hearing upon the request of that agency or any other party to the proceeding.¹⁰¹ If such an agency has no notice of the certification proceeding and is not made a party, it will not be bound by the certification order and the applicant will be forced to seek *separate* approval to cross that agency's property. Therefore, early in the certification process, an applicant should identify all the governmental owners of land which may be affected by the proposed transmission line or corridor and request that those agencies be made parties to the proceeding.

If the applicant must obtain an interest in land title to which is vested in the Trustees of the Internal Improvement Trust Fund (Trustees), the applicant is *required* to seek that interest in a *separate* proceeding before the Trustees either "before, during, or after the certification proceeding, and certification may be made contingent on issuance of the appropriate interest in realty."¹⁰²

97. *Id.* (to be codified at FLA. STAT. § 403.523).

98. *Id.* (to be codified at FLA. STAT. § 403.535).

99. *Id.* (to be codified at FLA. STAT. § 403.530(3)).

100. *Id.*

101. *Id.* (to be codified at FLA. STAT. § 403.527(3)(e)).

102. *Id.* (to be codified at FLA. STAT. § 403.531(3)). Since the Trustees and the board are

Therefore, if an applicant anticipates the need to obtain an interest in land held by the Trustees, it should timely file the necessary application with the Trustees so that certification is not unnecessarily delayed. It should be noted that the legislature specifically provided that no environmental issues or other issues which could have been raised in the certification proceeding are to be relitigated before the Trustees.¹⁰³

The certification order may provide for variances and exemptions from substantive agency standards and regulations *if* the matter is expressly addressed during the certification proceeding.¹⁰⁴ Should an applicant overlook any agency standard or regulation from which it will require a variance or exemption, it will be necessary for the applicant to seek such variance or exemption in a *separate* proceeding before the appropriate agency.

In addition, the TLSA contains a potentially dangerous ambiguity. The TLSA clearly states that its provisions supersede any *existing* state or local law, ordinance, rule, or regulation.¹⁰⁵ But it is not clear whether *future* laws will be subordinate to the act. Those portions of the act which support the position for prospective application include the language that "[t]he *state* hereby preempts the certification of transmission lines and transmission line corridors,"¹⁰⁶ "certification shall constitute the sole license of the state and any agency as to the approval of the transmission line corridors and transmission lines,"¹⁰⁷ and "certification shall be in lieu of any license, permit, certificate, or similar document required by any agency pursuant to, but not limited to chapters 125, 161, 163, 253, 258, 290, 298, 370, 373, 380, 381, 387 and 403, the Florida Transportation Code, or 33 U.S.C. 1341."¹⁰⁸ From this language it appears that any *local* ordinance promulgated subsequent to the TLSA will not apply to transmission lines and corridors. *State* laws enacted in the future, however, could apparently apply to transmission lines and corridors because the state's preemption of the field does not preclude it from further regulation of the subject matter. The electric utility industry should be vigilant when future

both comprised of the Governor and the Cabinet, the hearing before the Trustees and the certification hearing may be held simultaneously.

103. *Id.*

104. *Id.* (to be codified at FLA. STAT. § 403.531(2)).

105. *Id.* (to be codified at FLA. STAT. § 403.530(1)).

106. *Id.* (to be codified at FLA. STAT. § 403.530(2) (emphasis supplied)).

107. *Id.* (to be codified at FLA. STAT. § 403.531(1)).

108. *Id.* (to be codified at FLA. STAT. § 403.531(3)).

land use and environmental laws are being adopted. They must assure that transmission lines and corridors are not subjected to future legislation unless expressly intended so by the legislature.¹⁰⁹ Such vigilance will prevent unintended additional stops from being added to the certification process.

X. SUMMARY

The TLSA has the potential to successfully accomplish the legislative intent of assuring the availability of "abundant low-cost electrical energy" while at the same time minimizing the adverse "environmental impact resulting from construction of [a transmission] line and the location and maintenance of the corridor."¹¹⁰ The TLSA is patterned after the highly successful Florida Electrical Power Plant Siting Act, under which more than ten power plants have been certified. Ultimately, however, the degree of success enjoyed by the TLSA will depend on the adoption of comprehensive and responsible rules by the DER and the PSC, and the ability of these two agencies to coordinate their responsibilities under the act.

109. For an illustration of the handling of the same problem under the Electrical Power Plant Siting Act, see the recently adopted Florida Resource Recovery and Management Act, ch. 80-302, § 6, 1980 Fla. Laws (to be codified at FLA. STAT. § 403.7045(3)(c)).

110. *Id.* (to be codified at FLA. STAT. § 403.521).

* See appendix for a removable schematic of the Transmission Line Siting Act.

