DOE/CS/20289-40

STUDY OF THE IMPACTS OF REGULATIONS AFFECTING THE ACCEPTANCE OF INTEGRATED COMMUNITY ENERGY SYSTEMS

PRELIMINARY BACKGROUND REPORT

Public Utility, Energy Facility Siting and Municipal Franchising Regulatory Programs in Rhode Island

DUANE A. FEURER
CLIFFORD L. WEAVER
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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
under Contract No. DE-AC02-78CS20289

ABSTRACT

This report is one of a series of preliminary reports describing the laws and regulatory programs of the United States and each of the 50 states affecting the siting and operation of energy generating facilities likely to be used in Integrated Community Energy Systems (ICES). Public utility regulatory statutes, energy facility siting programs, and municipal franchising authority are examined to identify how they may impact on the ability of an organization, whether or not it be a regulated utility, to construct and operate an ICES.

This report describes laws and regulatory programs in Rhode Island. Subsequent reports will (1) describe public utility rate regulatory procedures and practices as they might affect an ICES, (2) analyze each of the aforementioned regulatory programs to identify impediments to the development of ICES and (3) recommend potential changes in legislation and regulatory practices and procedures to overcome such impediments.

CHAPTER 1

INTRODUCTION

One response to current concerns about the adequacy of the nation's energy supplies is to make more efficient use of existing energy sources. The United States Department of Energy (DOE) has funded research, development and demonstration programs to determine the feasibility of applying proven cogeneration technologies in decentralized energy systems, known as Integrated Community Energy Systems (ICES), to provide heating, cooling and electrical services to entire "communities" in an energy conserving and economic manner.

The relevant "community" which will be appropriate for ICES development will typically consist of a combination of current energy "wasters" -- i.e., installations with large energy conversion facilities which now exhaust usable amounts of waste heat or mechanical energy -- and current energy users -- i.e., commercial or residential structures which currently obtain electricity and gas from a traditional central utility and convert part of it on customer premises to space heating and cooling purposes.

In most current applications, energy conversion facilities burn fuels such as coal, oil or natural gas to produce a single energy stream, such as process steam or electricity, for various industrial processes or for sale to other parties. However, the technology exists to produce

more than one energy stream from most energy conversion processes so that the input of a given amount of fuel could lead to the production and use of far more usable energy than is presently produced. This technology is the foundation of the ICES concept. Current examples of the technology can be found on university campuses, industrial or hospital complexes and other developments where a central power plant provides not only electricity but also thermal energy to the relevant community.

It is generally assumed by DOE that ICES will be designed to produce sufficient thermal energy to meet all the demands of the relevant community. With a given level of thermal energy output, an ICES generation facility will be capable of producing a level of electricity which may or may not coincide with the demand for electricity in the community at that time. Thus, an ICES will also be interconnected with the existing electric utility grid. Through an interconnection, the ICES will be able to purchase electricity when its community's need for electricity exceeds the amount can be produced from the level of operations needed to meet the community's thermal needs. In addition, when operations to meet thermal needs result in generation of more electricity than necessary for the ICES community, the ICES will be able to sell excess electricity through the interconnection with the grid.

ICES may take a variety of forms, from a single owner-user such as massive industrial complex or university campus where all energy generated is used by the owner without sales to other customers, to a large residential community in which a central power plant produces heat and electricity which is sold at retail to residents of the community. Since successful operation of an ICES presupposes that the ICES will be able to use or sell all energy produced, it can be anticipated that all ICES will at some point seek to sell energy to customers or to the electric utility grid from which the electricity will be sold to customers. By their very nature ICES are likely to be public utilities under the laws of many, or even all, states.

The Chicago law firm of Ross, Hardies, O'Keefe, Babcock & Parsons has undertaken a contract with the Department of Energy to identify impediments to the implementation of the ICES concept found in existing institutional structures established to regulate the construction and operation of traditional public utilities which would normally be the suppliers to a community of the type of energy produced by an ICES.

These structures have been developed in light of policy decisions which have determined that the most effective means of providing utility services to the public is by means of regulated monopolies serving areas large enough to permit economies of scale while avoiding wasteful

duplication of production and delivery facilities. These existing institutional structures have led to an energy delivery system characterized by the construction and operation of large central power plants, in many cases some distance from the principal population centers being served.

In contrast, effective implementation of ICES depends to some extent upon the concept of small scale operations supplying a limited market in an area which may already be served by one or more traditional suppliers of similar utility services. ICES may in many instances involve both existing regulated utilities and a variety of non-utility energy producers and consumers who have not traditionally been subject to public utility type regulation. It will also require a variety of non-traditional relationships between existing regulated utilities and non-regulated energy producers and consumers.

Ross, Hardies, O'Keefe, Babcock & Parsons is being assisted in this study by Deloitte Haskins & Sells, independent public accountants, Hittman Associates, Inc., engineering consultants, and Professor Edmund Kitch, Professor of Law at the University of Chicago Law School.

The purpose of this report is to generally describe the existing programs of public utility regulation, energy facility siting and municipal franchising likely to relate to the development and operation of an ICES, and the construction of ICES facilities in Rhode Island. Attention is

given to the problems of the entry of an ICES into a market for energy which has traditionally been characterized by a form of regulated monopoly where only one utility has been authimplementation of the ICES concept and a series of recommendations for responding to those impediments. orized to serve a given area and to the necessary relationships between the ICES and the existing utility. In many jurisdictions legal issues similar to those likely to arise in the implementation of the ICES concept have not previously been faced. Thus, this report cannot give definitive guidance as to what will in fact be the response of existing institutions when faced with the issues arising from efforts at ICES implementation. Rather, this report is descriptive of present institutional frameworks as reflected in the public record.

Further reports are being prepared describing the determination and apportionment of relevant costs of service, rates of return and rate structures for the sale and purchase of energy by an ICES. Impediments presented by existing institutional mechanisms to development of ICES will be identified and analyzed. In addition to identifying the existing institutional mechanisms and the problems they present to implementation of ICES, future reports will suggest possible modifications of existing statutes, regulations and regulatory practices to minimize impediments to ICES.

This report is one of a series of preliminary reports covering the laws of all 50 states and the federal government. In addition to the reports on individual states, Ross, Hardies, O'Keefe, Babcock & Parsons is preparing a summary report which will provide a national overview of the existing regulatory mechanisms and impediments to effective implementation of the ICES concept and a series of recommendations for responding to those impediments.

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN RHODE ISLAND

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Rhode Island statutes vest in the Public Utility Commission (Commission) and the Division of Public Utilities (Division) the exclusive power and authority to regulate public utility companies in that state.[1/] Both bodies have been established within the Department of Business Regulation but are independent of the Department's director and are not under his jurisdiction.[2/] The jurisdiction to regulate utilities is shared by the Commission and the Division. The Commission serves as a quasi-judicial tribunal with jurisdiction, powers, and duties to hold investigations and hearings involving rates, sufficiency and reasonableness of facilities, gas, electric, water, and pipeline public utilities. The administrator, who is chief executive officer of the Division, is responsible for exercising the jurisdiction, supervision, powers and duties not specifically assigned to the Commission. By virtue of his office, the chairman of the Commission serves also as the administrator and he supervises and directs the execution of all laws relating to public utilities and carriers and all regulations and orders of the Commission governing the conduct and charges of public utilities.[3/]

The Supreme Court of Rhode Island has, in Narragansett Electric Co. v. Harsch,[4/] recognized that "the statute is not

entirely clear in its delineation of the powers of the Commission and division."[5] The Court, however, concluded that the General Assembly intended by its enactment:

> to segregate the judicial and administrative attributes of ratemaking and utilities regulation and to vest them separately and respectively in the commission and the administrator (or division).

In Narragansett Electric, the court found considerable evidence of the judicial nature of the Commission's function under the Rhode Island statutes. The court pointed out that the Commission is given the powers of a court of record in adjudicating matters within its jurisdiction.[6] The Commission is described as an "impartial, independent body" which renders decisions affecting both the public interest and private rights based upon the law and evidence.[7] Clearly, such quasi-judicial functions as determining public utility service rates are part of the Commission's responsibility.

In contrast to these judicial powers of the Commission are the general administrative powers conveyed to the administrator and the Division. An example of the administrative function of the Division was provided in Providence Gas Company v. Public Utilities Comm.[8] There, the court found that jurisdiction to give consent and approval to one utility's purchase of another utility's property is vested solely in the Division and not in the Commission. The court, in Narragansett Electric, found that the Rhode Island Legislature intended that, in matters brought for hearing before the Commission, the Division would assume a role not unlike that of a party in interest. This party-like posture of the Division is in addition to its

role as the administrative arm of the bifurcated regulatory machinery.

The problem of separating the responsibilities of the Commission and the Division is further complicated by the dual role played by the single individual who serves as both the Commission's Chairman and the Division's administrator and who must distinguish between his actions in one capacity and the other.

The Commission consists of three members appointed by the governor with the advice and consent of the state senate.[9/] The term of each commissioner is six years.[10/] The governor also selects one of the commissioners for the post of chairman of the Commission.[11/] The chairman is also the administrator of the Division.[12/] If a vacancy arises, the successor, appointed by the governor and confirmed by the senate, serves only for the unexpired portion of the original term.[13/]

Municipalities are authorized to grant exclusive service territories under the franchising statute.[14/] However, even this limited municipal authority is subject to the continuing control of the Division in the exercise of its enumerated powers.[15/] Under this provision, the Division can upset any municipal regulation imposed on the exercise of a franchise that it believes does not conform to the public's interest.[16/] However, as noted in the next section, it appears that municipally owned utilities are exempt from the Commission's jurisdiction.

II. JURISDICTION OF THE PUBLIC UTILITY COMMISSION

Rhode Island law expressly gives the Commission and

Division the exclusive power and authority to supervise, regulate, and make orders governing the conduct of public utilities.[17/]

The statutory definition of "public utility" encompasses a broad array of services and functions.[18/] The term includes among others:

> every company operating or doing business in [Rhode Island] as a ... gas, liquiefied natural gas, electric, water, and pipeline company, and every company owning, leasing, maintaining, managing or controlling any plant or equipment or any part of any plant or equipment within this state for generating, manufacturing, producing, transmitting, distributing, delivering or furnishing natural or manufactured gas, steam, electrical or nuclear energy, heat, light or power, directly or indirectly to or for the public . . . or any pipes, mains, poles, wires, conduits, fixtures, through, over, across, under or along any public highways, parkways, or streets, public lands, waters or parks for the transmission, transportation or distribution of gas or electric current for sale to the public for light, heat, cooling . . . [19/]

The jurisdiction of the Commission and Division covers a wide variety of utility functions including the generation, manufacture, production, transmission, distribution or furnishing of natural or manufactured gas, steam, electrical or nuclear energy, heat, light or power.[20/] The storage of liquified natural gas is presumed to be for intrastate use and is subject to the laws of Rhode Island applicable to public utilities.[21/] The term "public" is not defined in the statute and there are no judicial decisions or Commission orders which indicate the scope of the term's coverage.[22/] The assistant attorney general assigned to the Division at the time of this report's preparation expressed the opinion that sales to a single user make the vendor a public

utility.[23]

"Company" is defined to include "a person, firm, partnership, corporation, association, joint stock association or company, and his, her, its or their lessees, trustees or receivers appointed by any court."[24] The legislature has expressly excluded from regulation as a public utility only certain water companies owned by cities or towns, the Public Transit Authority, or production and distribution of steam heat or water by the Rhode Island Port Authority and Economic Development Corporation in the town of North Kingstown.[25] By negative implication, other municipally owned utilities should be subject to the Commission's jurisdiction. A spokesman for the Commission confirmed this interpretation of the statutory definitions.[26]

The requirement that the services be furnished "to or for the public" precludes the regulation of utility services for purely private use.[27] As stated earlier, sales to a single customer may be treated as sales to the public and thus subject to regulation.[28] The Division's legal counsel has expressed the opinion that when a landlord provides utility services to his tenants for compensation, he takes on the character of a public utility and may be regulated.[29] There are no cases on the subject but Rules and Regulations governing sales by landlords have been drafted and may soon be promulgated.[30]

III. POWERS OF THE DIVISION AND THE COMMISSION

In addition to the general grant of regulatory auth-

ority, the Division and the Commission are granted specific regulatory powers over the activities of public utilities, including the following:

1) Rates. No utility may change its rates without giving notice to the Commission and the public.[31/] After a public hearing and an investigation, the Commission "shall make such order in reference to any proposed rate, toll or charge as may be proper."[32/] The ratemaking provisions do not distinguish rates for direct sales from those for indirect sales.

2) Issuance of securities. A public utility may not, without receiving authorization from the Division, issue stocks, bonds, notes or other evidences of indebtedness.[33/]

3) Accounts. The Division has the authority to establish and require utilities to use a standardized system of accounts.[34/]

4) Mergers and consolidations. Without the consent of the Division, no public utility may purchase the stock of another public utility.[35/] A public utility may purchase all or part of the property or business of another utility if it first secures the consent of the Division.[36/] With the Division's consent, and not otherwise, a public utility may sell all or part of its property or business to another utility.[37/]

5) Affiliated interest transactions. Any contract or arrangement and any modification of such a contract or arrangement, the consideration of which exceeds five hundred dollars ($500), entered into between a public utility and an affiliate and which provides for the furnishing of managerial, supervisory, construction, engineering, accounting, purchasing, financial or

any other services, must be filed with the Division within ten days after it was entered into. The Division may also require a public utility to file full information with respect to any purchase from or sale to an affiliate.[38/] If the Division finds that any such agreements are unjust or unreasonable, it shall "make such reasonable order relating thereto as the public good requires."[39/]

6) Agreements and arrangements with other utilities. Public utilities may enter into contracts with each other that will enable such public utilities to operate their lines or plants in connection with each other if they first have the Division's consent.[40/]

7) Extensions of service to new customers. No public utility may extend gas or electric service into a town or city already served by another such utility.[41/] The utility does not need a certificate to furnish gas or electricity to another public utility or to an electric power or power transmission company.[42/] A utility is also exempt from the certificate requirement if it served the public generally in a city or town prior to March 1, 1926.[43/]

8) Standards of Service. "Every public utility is required to furnish safe reasonable and adequate services and facilities."[44/] Upon a written complaint made by a city or town council or by any twenty-five qualified electors that any act of a public utility affecting the production, delivery or furnishing of heat, light or power is in any respect unreasonable, the Division must proceed to make such investigation as it may deem

convenient or necessary.[45] If it finds that the acts or practices are unreasonable, the Division shall make such orders relating thereto as are just and reasonable.[46]

The Division has the power and duty to fix the "standard amount, quality, pressure, initial voltage and character of each kind of product or service to be furnished or rendered "by public utilities in Rhode Island."[47]

IV. AUTHORITY TO ASSIGN RIGHTS TO PROVIDE SERVICE IN A GIVEN AREA

No public utility may furnish or sell gas or electricity to consumers in municipalities where the public is already served by another utility unless the newcomer obtains a certificate of public convenience and necessity from the Division.[48] No certificate is required if the utility was actually furnishing such services to the public generally in the municipality in question prior to March 1, 1926.[49] A utility that seeks to furnish gas or electricity only to another "public utility or electric power or power transmission company" does not need to obtain a certificate.[50] The statute does not expressly require a utility to obtain a certificate before the construction of new facilities. It also does not require that a public utility must obtain a certificate to furnish gas or electricity in an area where there is no existing gas or electricity. A Commission spokesman indicated that all areas of the state are presently being served and, therefore, this distinction has no practical significance. He also indicated that the Commission does require a public utility to obtain a certificate before constructing new facilities.[51]

The statute does not mandate that all service areas be exclusive. It simply requires that before a utility may serve the public, in an area already being served, the utility must obtain a certificate from the Division certifying that public convenience and necessity require the additional service. Although the statute does not establish exclusive service areas, it provides the Division with a means for precluding competition where such is not in the public interest. The Division, according to its Counsel, has not had occasion to explore the question of competition between electric or gas companies.[52/] The only discussion of competition among public utilities is in the transportation field. In Abbott v. Public Utilities Commission,[53/] the court upheld a Commission decision denying a certificate to a bus company that would have competed with an existing railway. The court said that in evaluating the public convenience and necessity the Commission must consider whether a proposed route is "suited to and tends to promote the accommodation of the public and also whether it is reasonably required to meet a need for such accommodation."[54/] The court approved the Commission's consideration of factors such as the substantial character and probable permanence of the existing service, the capital investment made by the owners of the existing carrier, the effect that competition would have on revenues of the existing company, and the probable effect on existing service of admitting competition.[55/]

The court in Yellow Cab Co. v. Public Utility Hearing Bd.,[56/] refused to overturn a grant by the Commission of certi-

ficates to operate additional taxicabs in the city. Because of the finding that existing taxi service in the Providence area was inadequate, the additional certificates were granted.[57] The existing taxi-cab companies contended that their substantial investments should have precluded the authorization of additional competition. However, the court concluded that the first obligation of the Commission was not to protect existing investments but rather to secure adequate service for the public.[58] The court, however, distinguished between the mere holder of a certificate and a utility which operates under a franchise as well as a certificate. The court suggested that a franchise holder has a greater claim for monopoly status and protection from competition than a taxicab company which merely holds a certificate.[59]

The procedure for obtaining a certificate of public convenience and necessity is prescribed by statute. A petition in writing for the issuance of a certificate must first be filed with the Division. The Division then sets a time and place of hearing, gives notice of the hearing to petitioner, to the mayor of each city, and to the president of the town council of each town, in which the petitioner desires to furnish or sell gas or electricity and to any public utility furnishing or selling gas or electricity in such town or city. After a hearing has been conducted, the Division enters an order granting or refusing to grant said petition.[60]

The procedure for issuing a certificate is a contested case within the meaning of the Administrative Procedures Act,[61]

and its provisions must be followed. In all contested cases, all parties must be afforded an opportunity to be heard after reasonable notice.[62/]

The statutes do not provide a special procedure for the transfer of a certificate from one utility to another. However, if a utility has the consent of the Division, it may purchase the property, plant or business of another public utility and:

> in connection therewith may exercise and enjoy all of the rights, powers, easements, privileges and franchises theretofore exercised and enjoyed by such other public utility with respect to the property, assets, plant and business so purchased or leased. [60/]

The utility which is the vendor must obtain Division approval of the transaction.[64/]

The statute also provides a mechanism to resolve disputes involving public utilities. Upon a written complaint made against any public utility by any corporation, that any act of that utility relating to the production, transmission, delivery or furnishing of heat, light or power is in any respect unreasonable the Division must proceed to make such investigation as it deems necessary or convenient.[65/] No order affecting the act or service complained of may be entered by the Division without a formal public hearing.[66/] If upon such hearing the Division finds that a public utility's act is in violation of any provision of the law applicable to it (including the certification provisions), the Division has the power to make such order respecting the service or act as shall be just and reasonable.[67/]

There are no statutory provisions which require a public utility to apply to the Division for permission to abandon service to a given territory. However, such a requirement may be implicit in that public utilities are required to furnish safe, reasonable and adequate services and facilities.[68/]

V. APPEAL OF DIVISION AND COMMISSION DECISIONS

1. Decisions of the Division

Decisions of the administrator of the Division may be appealed in accordance with the provisions of Rhode Island's Administrative Procedure Act.[69/] Aggrieved parties must initiate proceedings for review within thirty days after the receipt of notice of the Division's final decision.[70/] Such proceedings are begun by filing a complaint in the superior court of Providence County.[71/] Copies of the complaint must be served on the Division and all parties of record.[72/] The filing of the complaint, however, does not stay enforcement of a Division order.[73/] Within thirty days after service of the complaint, the Division shall deliver to the reviewing court a copy of the entire record of the case.[74/] If the court finds that there is additional evidence which for good reason was not presented at the hearing, the court may order that the Division hear the additional evidence.[75/] The Division may, if it sees fit, modify its findings and forward them to the court.[76/]

The court conducts its review without a jury and such review is confined to the record.[77/] The court may not

substitute its judgment for that of the Division as to the weight of the evidence on questions of fact.[78] The court may modify or reverse the Division's decision if the appellant's rights have been prejudiced because the Division's findings, inferences, conclusions, or decisions are:

(1) in violation of constitutional or statutory provisions;

(2) in excess of the statutory authority of the agency;

(3) made upon unlawful procedure;

(4) affected by other error of law;

(5) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. [79]

Any party aggrieved by the final judgment of the superior court may within seven days petition the supreme court for a writ of certiorari.[80]

2. Decisions of the Commission

The appeal of a Commission decision follow a different procedure. The provisions of the Administrative Procedures Act dealing with appeals from agency decisions[81] do not apply to appeals from the Commission.[82] Any person aggrieved by an order of the Commission has seven days within which to petition the supreme court for a writ of certiorari.[83] This mode of appeal is the exclusive remedy for persons aggrieved by any order or judgment of the Commission.[84] The issuance of a writ of certiorari is automatic upon the filing of a proper petition.[85]

On appeal the court must conform to the following

standards of review:

> The findings of the commission on questions of fact shall be held to be prima facie true and as found by the commission and the supreme court shall not exercise its independent judgment nor weigh conflicting evidence. An order or judgment of the commission made in the exercise of administrative discretion shall not be reversed unless the commission exceeded its authority or acted illegally, arbitrarily or unreasonably. 86/

There is no provision in the statutes for a rehearing of decisions by either the Administrator of the Division or the Commission.

FOOTNOTES

1. R. I. Gen. Laws §39-1-1 (1977).
2. Id. at §39-1-3.
3. Id. at §39-1-3.
4. Narragansett Electric Co. v. Harsch, 368 A.2d 1194 (R.I. 1977).
5. Id. 368 A.2d at 1199.
6. R. I. Gen. Laws §39-1-7(1977).
7. Id. §39-1-11.
8. Providence Gas Co. v. Public Utilities Comm., 352 A. 2d 630 (R. I. 1976).
9. R. I. Gen. Laws §39-1-4 (1977).
10. Ibid.
11. Ibid.
12. Ibid.
13. Ibid.
14. R. I. Gen. Laws §39-17-2 (1977).
15. Id. §39-3-35.
16. Mr. Douglas O'Donnell, Assistant Attorney General, Telephone conversation, 9/29/78.
17. R. I. Gen. Laws §39-1-1 (1977).
18. Id. §39-1-2.
19. Ibid.
20. R. I. Gen. Laws §39-1-2 (1977).
21. Id. §39-1-2.
22. Mr. Douglas O'Donnell, Assistant Attorney General, Telephone conversation, 9/29/78.
23. Id.
24. R. I. Gen. Laws §39-1-2 (1977).

25. Ibid.

26. Mr. Lindsey Johnson, Counsel, Commission, Telephone conversation, 4/16/79.

27. Id.

28. Id.

29. Id.

30. Id.

31. R. I. Gen. Laws §39-3-11 (1977).

32. Ibid.

33. R. I. Gen. Laws §39-3-15 (1977).

34. Id. §39-3-14.

35. Id. §39-3-24(d).

36. Id. §39-3-24(b).

37. Id. §39-3-24(c).

38. Id. §39-3-28.

39. Id. §39-3-30.

40. Id. §39-3-24(a).

41. Id. §39-3-1.

42. Ibid.

43. Ibid.

44. R. I. Gen. Laws §39-2-1 (1977).

45. Id. §39-4-3.

46. Id. §39-4-10.

47. Id. §39-3-7.

48. Id. §39-3-1.

49. Ibid.

50. Ibid.

51. Mr. Lindsey Johnson, Counsel, Commission, Telephone conversation, 4/16/79.

52. Mr. Douglas O'Donnell, Assistant Attorney General, Telephone conversation, 9/29/78.

53. Abbott v. Public Utilities Commission, 48 R. I. 196, 136 A. 490 (1927).

54. Id., 136 A. at 491.

55. Id., 136 A. at 492.

56. Yellow Cab Co. v. Public Utility Hearing Bd., 73 R.I. 217, 54 A.2d 28 (1947).

57. Id., 54 A.2d at 31.

58. Id., 54 A.2d at 33.

59. Id.

60. R. I. Gen. Laws §39-3-5 (1977).

61. Id. §42-35-1 et seq.

62. Id. §42-35-9(a).

63. Id. §39-3-24(b).

64. Id. §393-24(c).

65. Id. §39-4-3.

66. Ibid.

67. R. I. Gen. Laws §39-4-10 (1977).

68. Id. §39-2-1.

69. Id. §39-5-1.

70. Id. §42-35-15(b).

71. Ibid.

72. Ibid.

73. R. I. Gen. Laws §42-35-15(c) (1977).

74. Id., §49-35-15(d).

75. Id. §42-35-15(e).

76. Ibid.

77. R. I. Gen. Laws §42-35-15(f) (1977).

78. Id., §4235-15(g).

79. Ibid.

80. R. I. Gen. Laws §42-35-16 (1977).

81. Id. §42-35-15.

82. Id. §39-5-1.

83. Ibid.

84. Ibid.

85. R. I. Gen. Laws §39-5-2 (1977).

86. Id. §39-5-3.

CHAPTER 3

SITING OF ENERGY FACILITIES IN RHODE ISLAND

The State of Rhode Island is in the process of adopting a comprehensive statute dealing with the siting of energy facilities.[1/] Several different proposals have been drafted. The latest proposal, by the Governor's Energy Office, envisioned a one-stop process, which would centralize decision-making in a Commission, composed of various agency heads.[2/] However, the General Assembly wishes to have authority to ratify any approvals given by the proposed Commission, thus changing the proposal to a two-stop process.[3/] A complex bill incorporating this feature of ratification was submitted to the General Assembly on March 7, 1979.[4/] As the legislature only meets on a part-time basis, the fate of energy facility bill may not be known before the end of May[5/] when the legislature is expected to complete its business for the current term.[6/] Although it is unclear what the statute will ultimately provide concerning the siting of energy facilities, it is likely that the statute will exempt smaller powerplants, probably plants with less than 100 megawatts generating capacity.[7/] It is therefore worth considering the siting jurisdiction of other state and local agencies which may affect such smaller plants.

I. PLANNING AUTHORITIES

Each town and city in Rhode Island is required to

have a planning board or commission.[8] It is the duty of such bodies to prepare comprehensive plans for the development of the municipalities.[9] Zoning ordinances must be adopted only in accordance with the comprehensive plans.[10]

The utility chapters of the Rhode Island statutes expressly provide the Public Utilities Commission (Commission) with authority to review decisions of the zoning boards of review which affect the placing, erection and maintenance of any plant, building wires, conductors, fixtures, structures or equipment of any company under Commission supervision, as well as every ordinance enacted or regulation promulgated by any town or city affecting the mode or manner of operation or the placing or maintenance of the plant and equipment of any company under the supervision of the Commission. See Chapter 2, Part II, for a discussion of the Commission's jurisdiction.[11] Appeals to the Commission must be made within ten days of an adverse determination by the local body.[12] Upon notice to all parties in interest, the Commission must hold a hearing.[13] The Commission may affirm, revoke or modify such decision after weighing the public convenience, necessity and safety against public zoning considerations.[14]

II. ENVIRONMENTAL AGENCIES

A. Department of Environmental Management

The authority to control air pollution, which was formerly a power of the Department of Health,[15] now belongs to the Department of Environmental Management (DEM).[16] DEM has the power to:

> require the prior submission and approval of plans, specifications and other data relative to the construction, installation or modification of any machine, equipment, device, article or facility capable of becoming a source of air pollution, subject, however, to the promulgation of rules and regulations hereunder defining the classes and types of machines, equipment, devices, articles or facilities subject to such approval. 17/

DEM may also approve plans and specifications relating to the construction, installation or modification of any air pollution control systems. 18/

Authority for administering regulations promulgated by the Department of Health was also transferred to DEM. 19/ The regulations list several kinds of facilities, the construction of which requires agency approval, including fossil fuel burning equipment designed to burn:

> (a) Residual oil and solid fuel and having a heat input of one million BTU per hour or more;
>
> (b) All other liquid fuels and having a heat input of five million BTU per hour or more; and
>
> (c) Gaseous fuel and having a heat input capacity of 15 million BTU per hour or more. 20/

Persons constructing or modifying liquid storage tanks which are to be used for storage of 40,000 gallons or more of volatile organic liquids must obtain agency permission. 21/

A separate application is required for each piece of equipment capable of becoming a source of air pollution 22/ and for each air pollution control system. 23/ The application should be accompanied by a set of plans. 24/ To obtain approval, an applicant must prove that the equipment or system will operate without causing a violation of the applicable air

pollution rules and regulations and that it will not prevent the maintenance or attainment of any applicable ambiant air quality standard.[25/]

The power to regulate water pollution was also transferred from the Department of Health to DEM.[26/] It is unlawful for a person to discharge "sewage" into the waters of the state without having first obtained an order from DEM approving the system or the means adopted to prevent pollution.[27/] No industrial, commercial or other establishment may be constructed or modified which may result in a discharge of "sewage" unless such discharge is made into a system or other means to prevent pollution.[28/] It is also unlawful without the approval of DEM to construct or install a system to prevent pollution or to expand an existing system.[29/]

The statute broadly defines "sewage,"[30/] to include chemicals, acids, oil, tar, radio-active substances and every substance which may be injurious to the public health or injure or affect the propagation of aquatic creatures.[31/]

DEM has authority to enforce the "fresh water wetlands" laws of the state.[32/] The term "fresh water wetlands" means and includes marshes, swamps, bogs, ponds, rivers, and river and stream flood plains and banks.[33/]

No person, firm, corporation, city, town, state or local agency, or company may excavate, drain, fill, direct waters into or out of, add to or otherwise alter the character of any fresh water wetland without first obtaining the approval of DEM.[34/] Application for such approval must include

plans and drawings of the project.[35] As soon as DEM receives the application it notifies all abutting landowners, the town council, the town's conservation, planning and zoning bodies, and any other agencies or individuals within the town whom DEM has reason to believe will be concerned with the proposal.[36] If DEM receives any substantive objection within forty-five days it schedules a public hearing in an appropriate place convenient to the site of the proposed project.[37] DEM publishes notice of the hearing in one local and one statewide newspaper.[38]

A permit to carry on the proposed activity may be granted if DEM finds that such approval would be in the best public interest.[39] However, DEM may not grant a permit if the council for the municipality within which the site is located disapproves the project.[40] Under special reverse condemnation proceedings, when a landowner has been denied a permit, he may petition the superior court to order the disapproving entity to purchase the property.[41] If the court finds that the proposed alteration would not essentially change the natural character of the wetland, injure the rights of others or be unsuited to the land in its natural state, the court is required to direct the disapproving entity to purchase the property for the fair market price of the parcel as a wetland.[42] If the disapproving town or the state refuse to buy the property, the landowner is free to carry out his proposed project.

B. Coastal Resources Management Council

The Coastal Resources Management Council (Council) is composed of seventeen members, representing the state

Senate, House of Representatives, the general public, coastal communities and local government.[43] The Council may also have a varying number of non-voting advisory members, representing federal and regional agencies and other groups.[44]

The principal responsibility of the Council is planning, management, use and protection of the resources of the coastal region.[45] The Council develops management programs which are required to take into account particular requirements in protecting each resource, the need for proposed developmental activities and their environmental impact, compatability with other desirable activities, water quality standards, and existing contiguous land uses. The Council issues permits for land uses and grants permission to physically alter wetlands.[46]

The Council's authority is primarily directed towards areas below the tidal mean high water mark.[47] All persons, firms, or governmental agencies proposing any operations in such areas must demonstrate to the Council that its proposal would not conflict with any management plan, make the area unsuitable for any activity that the Council had planned for it, or significantly damage the environment of the coastal zone.[48] The council may approve, reject or modify such proposals.[49]

With respect to land areas along the Coast, the Council may approve, modify, set conditions for, or reject the design location construction of certain specified land uses, including power generating plants and petroleum storage

facilities only where "there is a reasonable probability of conflict [between the proposed use and] the plan or program for resources management, or damage to the coastal environment."[50/]

FOOTNOTES

1. Mr. Dante Ionata, Director of Energy Capabilities & Management, Governor's Energy Office, telephone conversation, August 29, 1978.

2. Mr. Sean Keleher, Governor's Energy Office, telephone conversation, March 8, 1979.

3. Id.

4. Id.

5. Id.

6. Mr. Dante Ionata, Director of Energy Capabilities and Management, Governor's Energy Office, telephone conversation, August 29, 1978.

7. Id.

8. R. I. Gen. Laws §45-22-1 (Supp. 1977).

9. Id. §45-22-6.

10. Id. §45-24-3 (1970).

11. Id. §39-1-30 (1977).

12. Ibid.

13. Ibid.

14. Ibid.

15. Id. §23-25-4 (1968).

16. Id. §42-17.1-2(e)(Supp. 1977).

17. Id. §23-25-5(k).

18. Id. §23-25-5(j).

19. R. I. Air Pollution Control Reg. No. 9; Id. §42-17.1-2(e).

20. R. I. Air Pollution Control Regs. 9.3.1.

21. Id. 9.3.2.

22. Id. 9.4.2.

23. Id. 9.4.3.

24. Id. 9.5.1.

25. Id. 9.6.1.

26. R. I. Gen. Laws 42-17.1-2(e)(Supp. 1977).

27. Id. §46-12-4(b).

28. Id. §46-12-4(e).

29. Id. §46-12-4(c).

30. Id. §46-12-1 (1970).

31. Ibid.

32. Id. §42-17.1-3 (Supp. 1977).

33. Id. §2-1-20 (1976).

34. Id. §2-1-21.

35. Id. §2-2-22.

36. Ibid.

37. Ibid.

38. Ibid.

39. Id. §2-1-21(a).

40. Id. §2-1-22.

41. Id. §2-1-22(b).

42. Ibid.

43. Id. §46-23-2 (Supp. 1977).

44. Ibid.

45. Id. §46-23-6(A).

46. Id. §46-23-6(D).

47. Id. §46-23-6(B).

48. Ibid.

49. Ibid.

50. Ibid.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN RHODE ISLAND

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

Any city or town may pass ordinances or make contracts which grant rights and franchises in, over or under the streets of those municipalities.[1/] This authorization is limited to only those services and upon those conditions specified in the statutes dealing with franchises.[2/] These franchise grants:

> May confer upon any corporation created by the general assembly of Rhode Island for the purpose of distributing water, or for the purpose of producing, selling and distributing currents of electricity to be used for light, heat, or motive power, or for the purpose of manufacturing, selling and distributing illuminating or heating gas, or for the purpose of operating street railways by any motive power, or for the purpose of operating telephones, the exclusive right, for a time not exceeding twenty-five (25) years, to erect, lay, construct and maintain for the purposes for which such corporation is created, poles, wires, pipes, conduits, rails or cables . . . over or under the streets of such town or city. [3/]

However, every franchise that a city or town grants to a public utility and "all contracts, ordinances, rules, regulations and orders entered into or made by any town or city regulating the use and enjoyment" of such right and franchises are subject to the continuing control of the Division of Public Utilities and Carriers (Division).[4/] Thus, while the statutory power of municipalities to grant franchises to public utilities has not been repealed, this power may be

insignificant in light of the Division's authority to regulate these franchises. The assistant attorney general assigned to the Division is of the opinion that this provision removes from municipalities all the powers that they once had to franchise.[5] The counsel for one of Rhode Island's largest electric companies said that his company no longer seeks to renew municipal franchises.[6]

II. IMPLIED AUTHORITY TO GRANT FRANCHISES (FROM HOME RULE POWERS)

Since the authority to grant franchises is limited to the corporations and services stated in the statute, in order to grant franchises for other purposes, authority under the home rule amendment must be sought.

An amendment to the state's constitution was adopted with the intention of granting cities and towns the right to self government in "all local matters."[7] Every city and town has the power:

> at any time to adopt a charter, amend its charter, enact and amend local laws relating to its property, affairs and government not inconsistent with this Constitution and laws enacted by the general assembly in conformity with the powers reserved to the general assemly. [8]

The general assembly retains the power to enact general laws which apply to all cities and towns.[9] The home rule amendment does not grant to any municipality the power to levy assess or collect taxes or borrow money; these acts can be done only if authorized by the general assembly.[10]

No cases have been found which imply franchising

powers from the home rule amendment. However, two cases deal with a municipality's licensing authority under its home rule powers.

In Newport Amusement Co. v. Maher, the Supreme Court of Rhode Island held[11] that the home rule amendment does not empower municipalities to demand licenses from business enterprises. In that case, the city of Newport sought to impose a licensing tax on coin-operated amusement devices and juke boxes. The court ruled that the home rule amendment did nto take away from the state legislature its exclusive power over licensing.[12] Licensing, in the court's opinion, was an attribute of sovereignty not an incident of municipal administration. The court held that since licensing was "definitely not a local matter," the power to demand licenses was not conferred on municipalities by the constitutional amendment.[13]

In Nugent ex rel. Hurd v. City of East Providence,[14] the court had occasion to apply its Newport holding to the power to grant what appeared to be a franchise to use the city streets for the erection of poles and lines for a cable television service. The court, without explaining the reasoning for its conclusion, determined that what the city council actually sought to grant was a license to conduct a business, not a franchise to use the streets.[15] Following its Newport decision, the court held that barring authority either expressly granted by the state or conferred by necessary implication, home-rule municipalities had no power to regulate or control by licensing, the conduct of businesses.[16]

The court did not directly address the extent of a municipality's franchising authority under a home rule charter. It did state the general rule that the home rule amendment does not inhibit the state from enacting laws where the subject matter is statewide in character. It also seemed to indicate that even home rule municipalities only had those powers which had been delegated to them. If this is true, then even home rule municipalities cannot grant franchises for steam services since the statute [17/] only authorizes franchises for water, electric, gas, street railway, and telephone services.

III. PROCEDURES FOR GRANTING FRANCHISES

The franchise statute provides little guidance as to what constitutes proper procedure. It merely provides that municipalities "by vote of the town council or city council, may pass ordinances or make contracts" granting franchises.[18/] No other procedural requirements are provided by statute. Nor do the Rhode Island statutes provide for procedures for the enactment of ordinances. Each municipality has its own charter which governs such matters.

An example of this is the ordinance procedure provided in the charter for the City of Providence.[19/] Each city ordinance must be in written form when introduced.[20/] No ordinance may be passed until it has been read on two separate days; at least forty-eight hours must have elapsed between the two readings.[21/] The second reading must be in full unless each council member receives a copy of the ordinance

prior to the reading.[22] No ordinance shall be amended in its passage so as to change its original purpose.[23] Each legislative act must be by ordinance.[24] An ordinance so passed is then sent to the mayor who has ten days to approve or veto it.[25] If he takes the latter course he must submit his objections to the city clerk.[26] The council may then attempt to override the veto by a two-thirds vote within thirty days of the mayor's action.[27] Within fifteen days after passage, the ordinance must be published at least once in such manner as the council may prescribe by ordinance.[28]

There is no requirement that a certificate of public convenience and necessity be obtained in order to grant a franchise. However, a public utility furnishing gas or electricity is required to obtain such a certificate in order to provide services in any municipality where another utility is already providing such services.[29]

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The franchise statute limits the term of exclusive franchises to twenty-five years.[30] The law makes no provision for non-exclusive franchise and it is unclear whether a non-exclusive franchise could be granted for a longer term. There have been no cases dealing with attempts by cities to oust former holders of franchises.

B. Exclusivity

The statute permits the grant of exclusive franchises for water, gas, electric, telephone and street railway ser-

vices.[31] In Smith v. Town of Westerly,[32] it was held that municipalities have no authority to grant exclusive franchises unless expressly granted by statute or by necessary interpretation. An exclusive franchise may not be granted to a newcomer where a corporation or other person is already using the streets for the same purpose.[33] Where more than one corporation is currently operating in a municipality, no exclusive right or franchise may be granted to one without the consent of the other.[34] No exclusive grant may prevent a city or town from permitting a person or corporation to use the streets in order to connect utilities to any two or more estates owned by such person or corporation.[35]

According to statute, a corporation acquiring an exclusive franchise may not raise its rates during the continuance of the franchise.[36] However, this provision appears to be obsolete.[37]

C. Relocation

Rhode Island appears to subscribe to the common law view that in absence of a statute to the contrary, a public utility which uses the public streets under a franchise implicitly agrees to relocate at its own expense whenever the municipality, in a reasonable exercise of its police power, requires such relocation.[38] In requiring the Newport Redevelopment Agency to compensate an electric company for removing overhead lines and replacing them with underground lines, the Rhode Island Supreme Court indicated that it was not convinced that this common law rule would apply to relocations made at the

request of municipal agencies, the creation of which is authorized by an act of the state legislature, which were not known at common law.[39] The court also noted, however, that the agency had entered into a contract with the utility in which it agreed to compensate it for the relocation, and contracts of this type were within the authority of the agency.[40]

D. Other Characteristics

No criteria are provided by statute to be used in evaluating a franchise request.

Every corporation which accepts an exclusive franchise must pay to the city or town a tax for the privilege at a rate not exceeding three percent of the corporation's gross earnings in that municipality.[41] Where the corporation does business in more than one municipality and it is unable to ascertain separately the amount of gross earnings derived from the operations in the community, the gross earnings from the municipality are assumed to be a proportion of the total gross earnings of the company corresponding to the ratio of the length of pipelines or wires in the town to the total length of all pipelines or wires in the system.[42] If a utility neglects to pay the tax (which comes due on a quarterly basis) the municipal treasurer may exact double the amount originally owed.[43] Other than this tax, no municipality may make any charge to any corporation for the use of its streets.[44]

The abandonment of a franchise is not provided for. An assistant attorney general has stated that a public

FOOTNOTES

1. R.I. Gen. Laws §39-17-1 (1977).
2. Ibid.
3. Id. §39-17-2.
4. R.I. Gen. Laws §39-3-35 (1977).
5. Mr. Ken O'Donnell, Assistant Attorney General, Telephone conversation, August 28, 1978.
6. Pasco Gasbarrow, Attorney for Narragansett Electric Company, Telephone conversation, August 29, 1978.
7. R.I. Const., amend. XXVIII, §1.
8. Id. §2.
9. Id. §4.
10. Id. §5.
11. Newport Amusement Co. v. Maher, 92 R.I. 51, 166 A. 2d 216 (1960).
12. Id. 166 A.2d at 218.
13. Id.
14. Nugent ex rel. Hurd v. City of East Providence, 103 R.I. 518, 238 A.2d 758 (1968).
15. Id. 238 A.2d at 761.
16. Id. 238 A.2d at 763.
17. R.I. Gen. Laws §39-17-2 (1977).
18. Id. §39-17-1.
19. 1940 R.I. Pub. Laws Ch. 832.
20. Id. §25.
21. Ibid.
22. Ibid.
23. Ibid.
24. Ibid.
25. Id. §26.

26. Ibid.

27. Ibid.

28. Id. §28.

29. Id. §39-3-1.

30. Id. §39-17-2.

31. Id. §39-17-2.

32. Smith v. Town of Westerly, 19 R.I. 437, 35 A.526 (1896).

33. Ibid.

34. Ibid.

35. Ibid.

36. R. I. Pub. Laws §39-17-6.

37. Mr. Ken O'Donnell, Assistant Attorney General, Telephone conversation, August 29, 1978.

38. Newport Elec. Corp. v. Redev. Agency of Newport, 351 A.2d 590 (R.I. 1976).

39. Id. 351 A.2d at 592.

40. Id. 351 A.2d at 593.

41. R.I. Gen. Laws §39-17-3 (1977).

42. Id. §39-17-4.

43. Id. §39-17-5.

44. Id. §39-17-8.

45. Mr. Ken O'Donnell, Assistant Attorney General, Telephone conversation, August 28, 1978.

46. Id.