DOE/CS/20289-39

2

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

PRELIMINARY BACKGROUND REPORT

MASTER

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

DUANE A. FEURER
CLIFFORD L. WEAVER
KEVIN C. GALLAGHER
DAVID HEJNA
KEVIN J. RIELLEY

January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

DE-AC02-78CS20289

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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 Pennsylvania. 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 Pennsylvania. 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 PENNSYLVANIA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is generally vested in the Pennsylvania Public Utility Commission ("Commission"). The Commission is comprised of five members appointed by the Governor with the advice and consent of two-thirds of the senate. Commission members are appointed for 10 year terms.[1/] They must be free from any employment which is incompatible with the duties of the Commission,[2/] and are subject to a statutory code of ethics.[3/]

The Commission is charged with responsibility for enforcing the Public Utility Law.[4/] Within the purview of its powers, the authority of the Commission supersedes that of local governments. The Commission, for example, may grant exemptions from local zoning requirements,[5/] and has approving authority over privileges or franchises granted by municipalities to public utilities.[6/] The Commission, however, has no authority over municipally owned utilities operating within municipal boundaries.[7/]

II. JURISDICTION OF REGULATORY AGENCY

A. Services and Functions Subject to Commission Regulation

The jurisdiction of the Commission extends to all "public utilities," which are defined to include:

> [P]ersons or corporations now or hereafter owning or operating in this commonwealth equipment or facilities for: producing, generating, transmitting, distributing, or furnishing natural or artificial gas, electricity or steam for the production of light, heat or power to or for the public for compensation; diverting, developing, pumping, impounding, or furnishing water to or for the public for compensation; . . . [and] transporting or conveying . . . materials for refrigeration . . . or other fluid substance[s], by pipeline or conduit, for the public for compensation. 8/

The provision of chilled water for air conditioning would appear to fall within the terms of the statute since it can be viewed as conveying "materials for refrigeration" by pipeline.

The specific activities subject to the Commission's control are identified separately for each service under its jurisdiction. The Commission may regulate the "producing, generating, transmitting, distribution or furnishing" activities of steam and electric services, the "diverting, developing, pumping, impounding, distributing or furnishing" activities of water services and the "transporting or conveying" operations of services supplying refrigeration

materials. The performance of any of these activities in conjunction with supplying the jurisdictional utility service subjects all the related activities of a public utility to the jurisdiction of the Commission as well. The Commission, for example, has general authority to prescribe standards of service.[9/] Service in this sense is defined to include "any and all acts done, rendered or performed and any and all things furnished or supplied and any and all facilities used, furnished, or supplied by public utilities . . . in the performance of their duties."[10/] In order to insure the adequacy of such services, the Commission can require that all reasonable modifications and improvements be made to the facilities mentioned by a public utility.[11/] Such facilities can include:

> [A]ll the plant and equipment of a public utility, including all tangible and intangible real and personal property without limitation, and any and all means and instrumentalities in any manner owned, operated, leased, licensed, used, controlled, furnished, or supplied for, by, or in connection with the business of any public utility. [12/]

The Commission has limited jurisdiction over electrical cooperatives under the provisions of the Retail Electric Supplier Unincorporated Area Certified Territory Act ("Unincorporated Territory Act").[13/] The Unincorporated Territory Act applies to both public utilities and coopera-

tives supplying electricity to consumers for ultimate consumption. It does not apply to municipal corporations or to wholesale suppliers of electricity.[14/] It divides the areas lying outside the corporate limits of cities and boroughs into certified territories within which electrical suppliers are to provide retail service on an exclusive basis.[15/] The boundaries of the certified territories assigned under this Act are established by drawing lines substantially equidistant between the distribution lines of the nearest competitors in all directions.[16/] The Commission has jurisdiction to establish different boundaries for suppliers whose transmission lines are inextricably intertwined.[17/] The Commission may also adjust boundaries upon petition by the interested suppliers,[18/] and has jurisdiction to enforce compliance with the provisions of the Unincorporated Territory Act.[19/]

B. Jurisdictional Criteria

The Commission has statutory authority only over "persons and corporations."[20/] These terms are defined to exclude municipal corporations[21/] and therefore the Commission lacks jurisdiction over utilities that are owned by municipalities and operated within their corporate limits. A certificate of public convenience is required, however, before a municipality can "acquire, construct, or begin to

operate any plant, equipment or other facilities for the rendering or furnishing to the public of any public utility service beyond its corporate limits."[22/] The Commission similarly has jurisdiction to regulate the rates,[23/] of municipal utilities operating beyond their corporate boundaries.

The Pennsylvania statutes provide that: "Any bona fide cooperative association which furnishes service only to its stockholders or members on a nonprofit basis is also exempt from general Commission jurisdiction."[24/] This exemption applies principally to entities incorporated under the Electric Cooperative Corporation Act.[25/] Such electric cooperatives must operate on a nonprofit basis,[26/] but they are exempt from regulation by the Commission even if they provide service to the members of other cooperatives.[27/]

The Commission has jurisdiction only over utility services provided "for compensation."[28/] Various statutory provisions indicate that this requirement is satisfied by the receipt of any compensation; the distinction between direct and indirect sales is immaterial. The rates subject to regulation by the Commission, for example, include "every individual or joint fare, toll charge, rental or other compensation whatsoever of any public utility . . . whether in currency, legal tender or evidence thereof, in kind, in

services, or in any other medium or manner whatsoever and whether received directly or indirectly and any rules, regulations, practices, classifications or contracts affecting any such compensation, charge, fare, toll or rental."[29/] The Commission is required to insure that all such rates are reasonable.[30/] Additionally, whenever a public utility does not itself produce or generate that which it distributes, transmits or furnishes to the public for compensation, but obtains the same from another source, the Commission is authorized to investigate the cost of such production or generation in any investigation of the reasonableness of the rates of such public utility.[31/] Services purchased from a public utility be a non-public utility cannot be resold to consumers for an amount greater than the public utility would charge its own residential customers. This, however, does not apply to resale by an electric cooperative or a municipal authority.[32/]

Commission jurisdiction is based upon service "to or for the public," and does not extend to a person or corporation "who or which furnishes service only to himself or itself."[33/] A public utility must, by statute, provide service to some entity besides itself, but the number of people served is not determinative. The primary distinction appears to be that a public utility must hold itself out as

ready to serve the public generally, whereas other business can choose whom they will serve or refuse to serve. In Commonwealth v. Lafferty, the court held that a contract carrier was not a public utility, and therefore was not entitled to tax relief available to utilities, stating that "a public utility holds itself out to the public generally and may not refuse any legitimate demand for service, while a private business independently determines whom it will serve."[34/]

The public to be served must comprise an indefinite class. It cannot be a well-defined and limited group. Drexelbrook Assoc. v. Pennsylvania Pub. Utility Commission,[35/] for example, involved the planned sale of public utility distribution facilities to a business which owned and managed a large apartment complex. The apartment operator proposed to take over the furnishing of gas, water and electricity to more than 1,200 residential units and 9 retail stores within the development. It would profit by buying from the public utilities at wholesale and reselling to its tenants at the higher retail rates. The Commission reasoned that the apartment operator would become a public utility if it completed the transaction and barred the sale because certification for the provision of public utility services had not been sought. The Supreme Court reversed on appeal and

ordered that the sale be approved. It held that the apartment operator would not become a public utility because service would be based on the landlord-tenant relationship. Service to the tenants would not be "to or for the public" because "such persons clearly constitute[d] a defined, privileged and limited group, and the proposed service to them would be private in nature."[36/] These authorities provide a basis for arguing that a utility supplying only a limited clientele on a contractual basis should not be subject to Commission jurisdiction.

III. POWERS OF REGULATORY AGENCY

A. General Authority to Regulate Public Utilities

The Commission possesses "general administrative power and authority to supervise and regulate all public utilities" and it is authorized to promulgate "such regulations . . . as may be necessary or proper in the exercise of its powers."[37/] In addition, the express enumeration of the powers of the Commission in the Public Utility Law are not to exclude any power which the Commission would otherwise have under any of the provisions of the Public Utility Law.[38/] This suggests that the powers granted to the Commission should be liberally construed. It, therefore, has a broad statutory basis upon which to exercise control over virtually all of

the activities of public utilities. Judicial decisions, moreover, have consistently held that the regulation of public utilities in Pennsylvania is a matter of state-wide concern and that the authority of the Commission is exclusive. In Borough of Lansdale v. Philadelphia Electric Co., for example, the court held that the Commission, rather than borough officials, had exclusive jurisdiction to determine who would supply service in a recently annexed area, stating that:

> . . .[I]nitial jurisdiction in matters concerning the relationship between public utilities and the public is in the [Commission], not in the courts. It has been so held involving rates, service, rules of service, extension and expansion, hazard to public safety due to the use of utility facilities, installation of utility facilities, obtaining, altering, dissolving, abandoning, selling, or transferring any right, power, privilege, service, franchise or property, and rights to serve particular territory 39/

This, too, suggests that the powers of the Commission should be broadly interpreted.

B. Specific Authority to Regulate Public Utilities

The Commission has a number of specific grants of authority over the operations of public utilities. One of the most important of these is the power to fix just and reasonable rates.[40/] Another is that of establishing standards for the abandonment of service.[41/] In order to insure the adequacy of service, the Commission can require:

> [All] such repairs, changes, alterations, extensions, substitutions, or improvements in facilities as shall be reasonable, necessary and proper for the safety, accommodation and convenience of the public. 42/

The Commission also has authority to control the exercise of eminent domain powers for public utility purposes.[43/] and to approve the execution of contracts between a public utility and any other person, corporation or municipality that will affect the public interest.[44/] The Commission may hear complaints regarding:

> [A]ny act or thing done or omitted to be done by any public utility in violation . . . of any law which the Commission had jurisdiction to administer or of any regulation or order of the Commission. 45/

Additionally, the Commission has authority to prescribe a uniform system of accounts;[46/] to require a variety of reports;[47/] to fix the rates of depreciation for the property of public utilities;[48/] to regulate the sale, lease or transfer of public utility property for other ordinary business purposes;[49/] to approve transactions with affiliated interests;[50/] to control the issuance of securities;[51/] and to control mergers and consolidations among public utilities.[52/]

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

A. Generally

A public utility cannot "begin to offer, render, furnish or supply service" in Pennsylvania without first securing a certificate of public convenience from the Commission. Such a certificate must include a description of the nature of the service and of the territory in which it is to be provided.[53/] Additional certification is required before a public utility can begin to offer service of a different nature or to a different territory than that for which it is already authorized.[54/] A certificate of public convenience is also required before a public utility can exercise any power of eminent domain.[55/] Furthermore, the Commission has certificating authority over the construction or acquisition of facilities to be used by a municipality in providing utility service beyond its corporate limits.

The authority of the Commission to control new construction by the grant or denial of a certificate is indirect except in the case of a municipal corporation furnishing service beyond its borders. A public utility does not require certification for construction projects that do not involve the condemnation of land. Nor is certification required for the extension of services within an existing certificated territory. Construction can be blocked by

the denial of a certificate, therefore, only when a public utility seeks to initiate a new or different service, to extend service beyond its certificated territory, or to condemn property. Additional power to control construction, however, is implicit in the authority of the Commission to assure adequate services and facilities.[56/]

B. Competition

A limitation upon the certificating authority of the Commission is posed by the Unincorporated Territory Act. That Act is "complete in itself and shall be controlling."[57/] As previously mentioned, it purports to divide all the unincorporated areas of the state among existing retail suppliers of electricity.[58/] The term "retail electric suppliers" excludes municipalities.[59/] Within their respective territories, each supplier as "certified" under the Act shall "be obligated, and shall have the exclusive right, to furnish retail electric service to all electric-consuming facilities."[60/] There is no requirement that a retail supplier obtain a certificate of public convenience before extending service into unincorporated areas for which it has not been granted a certificate under the Public Utility Law when exercising the rights granted by this Act. This is in apparent conflict with the requirements of the Public Utility Law already noted, although the Commission also has general authority to enforce the provisions of the

Unincorporated Territory Act. However, the Unincorporated Territory Act represents a clear legislative policy in favor of exclusive territorial rights for electrical suppliers.

The Commission has consistently minimized competition among fixed utility services by granting exclusive territorial rights. In Re Peoples Natural Gas Co. the Commission certified the larger of two gas utilities seeking to extend service to the same area stating that its purpose was to serve the public interest rather than protect small gas companies, and that it would not "willingly authorize two gas utilities to serve in the same area."[61/] Similarly, in Koppers Co., Inc. v. North Penn. Gas Co., although the Commission lacked authority to prevent competition among two gas utilities that possessed territorial rights under charters antedating its own creation, it refused to order a duplication of services, stating that "such utilities should of their own accord conduct their public service operations so as to avoid competitive situations of any nature," and that its own policy was "opposed to unnecessary competition within the same territory by non-carrier public utilities, not only for the benefit and protection of the public, but also of the utilities involved."[62/] It has allowed competition only among the common carriers subject to its jurisdiction.

For example in Application of Commonwealth Telephone Co.,[63] the Commission authorized a large telephone utility to begin furnishing mobile radio-telephone service in an area already served by a smaller company on the basis that competition among message services would serve the public interest.[64]

In Sayre v. Pennsylvania Pub. Util. Comm'n.,[65] the court dealt with competition between common carriers. It affirmed Commission certification of a horse transportation service in an area that already had a similar service, stating that:

> whether there shall be competition in any given field and to what extent is largely a matter of policy and an administrative question that has wisely been committed by the legislature to the sound judgment and discretion of the Commission. [66]

In Painter v. Pennsylvania Public Utilities Commission,[67] on the other hand, the court was faced with competition between two water companies. It affirmed the Commission order granting the right to serve the contested area to an existing company rather than a proposed new company. It reiterated that the extent of competition to be allowed was within the Commission's discretion but held, nevertheless, that "competition within the same territory by non-carrier public utility, such as water companies, is deleterious and not in the public interest save in rare instances."[68] Also in Dublin Water Co. v.

Pennsylvania Pub. Util. Comm'n.,[69] the Commission was held to have properly refused to certify the extension of services by a water company that would have involved competition with another water company exercising "grandfather" rights in the same area under its corporate charter. Thus, it is within the Commission's discretion to allow competition among fixed utility services but the Commission clearly views competition among utilities with disfavor.

C. Certificating Procedures

The statutory procedure for obtaining a certificate of public convenience requires that an application be made in writing to the Commission and that it must be in the form and contain the information required by regulation. The Commission may hold such hearings and conduct such investigations as it "may deem necessary or proper" in evaluating an application.[70] The grant of a certificate is contingent upon a Commission finding that it is "necessary or proper for the service, accommodation, convenience or safety of the public." The Commission may impose whatever conditions it deems "just and reasonable" when granting a certificate of public convenience,[71] and it must include a description of the nature of the service to be provided and of the territory in which it is to be offered.[72]

There is no statutory procedure for the transfer of certificates from one public utility to another. Since the certificates granted to fixed utilities are exclusive, such a transfer would involve the extension of services by the transferee to a new territory and would require Commission approval in the form of additional certification of the transferee. Moreover, the sale or transfer by a public utility of any "tangible or intangible property used or useful in the public service" also requires Commission certification.[73/]

D. Service Area Disputes

The resolution of service area disputes by the Commission is apparently governed by the general procedure established for hearing complaints.[74/] This procedure is available to all interested parties and may be utilized for a wide variety of purposes.

> Any person, corporation, or municipal corporation having an interest in the subject matter, or any public utility concerned, may complain in writing, setting forth any act or thing done or omitted to be done by any public utility in violation . . . of any law . . . or of any regulation or order of the Commission. [75/]

The Commission may dismiss a complaint if it decides that a hearing would not be in the public interest.[76/] Otherwise, the Commission must hold a public hearing,[77/] and may conduct whatever investigation is necessary to resolve the complaint.[78/]

At the conclusion of the hearing, the Commission "shall make and file its findings and order, with its opinion, if any."[79/]

V. APPEALS OF REGULATORY DECISIONS

The right to appeal from the decision of an administrative agency is found in the Pennsylvania Constitution. The Constitution provides that there shall be a right of appeal "from an administrative agency to a court of record or to an appellate court."[80/]

The provision of the Public Utility Law dealing with appeals[81/] was repealed in 1976. Accordingly, appeals are now governed by the Administrative Agency Law, which provides that "where the applicable acts of assembly are silent on the question of judicial review, any person aggrieved by such an adjudication, who has a direct interest in such adjudication may nevertheless appeal the same in the manner provided by this act."[82/] Further procedural requirements for an appeal under the Administrative Agency Law have, in turn, been largely supplanted by the applicable rules of appellate procedure.

The actual process of taking an appeal is, therefore, a patchwork from several sources. Only a person with a "direct interest" in the order complained of may appeal.[83/]

Jurisdiction over appeals from the Commission is vested in the Commonwealth Court, which hears appeals only from "final orders."[84/] The requirement of a "final order" suggests that all administrative remedies must be exhausted prior to appeal.[85/] Rehearing before the Commission must, therefore, be sought within 15 days after service of its order.[86/] Appeal to the Commonwealth Court can be taken within 30 days after the Commission either refuses to amend its order or denies the petition for rehearing.[87/] Review is based on the record. No question that was not raised in the original proceeding before the Commission will be heard by the court unless it involves:

1. The validity of a statute;

2. The jurisdiction of the Commission over the subject matter of the adjudication; or

3. Matters that could not have been raised before the Commission by the exercise of due diligence. [88/]

A Commission order will not be set aside by the Court unless it involves a violation of constitutional rights, is based on an error of law or lacks substantial supporting evidence.[89/]

FOOTNOTES

CHAPTER 2 - PENNSYLVANIA

1. Pa. Stat. Ann. tit. 66, §452(a). (Purdon 1959).
2. Id. §454. (Purdon Supp. 1978).
3. Id. §454.1.
4. Id. §§1101 to 1562.
5. Id. tit. 53 §10619. (Purdon 1972).
6. Id. tit. 66 §1360. (Purdon 1959).
7. Id. §§1102(9) (Purdon 1959), 1122(g) 1171 (Purdon Supp. 1978), see generally, Streif, Procedures Before the Pa. Public Utilities Commission, 15 Duq. L. Rev. 645 (1977).
8. Id. §1102(17) (Purdon Supp. 1978).
9. Id. §1182 (Purdon 1959).
10. Id. §1102(10).
11. Id. §1183.
12. Id. §1102(10).
13. Id. tit. 15, §§3277 to 3287. (Purdon Supp. 1978).
14. Id. §3278.
15. Id. §3279, 3280, 3281.
16. Id. §3280(b).
17. Id. §3280(d).
18. Id. §3280(f).
19. Id. §3284.
20. Id. tit. 66, §1102(17).

21. Id. §§1102(9), 1102(16). (Purdon 1959).

22. Id. §1122(g). (Purdon Supp. 1978).

23. Id. §1171.

24. Id. §1102(17).

25. Id. tit. 15, §§12401 to 12438. (Purdon 1967).

26. Id. §12416.

27. Id. §§12404(6), 12432.

28. Id. tit. 66, §1101(17). (Purdon Supp. 1978).

29. Id. §1102(19). (Purdon 1959).

30. Id. §§1141, 1149.

31. Id. §1149.

32. Id. §1751. (Purdon Supp. 1978).

33. Id. §1102(17).

34. Commonwealth v. Lafferty, 426 Pa. 541, 233 A.2d 256, 260 (1967).

35. Drexelbrook Assoc. v. Pennsylvania Pub. Utility Comm'n., 418 Pa. 430, 212 A.2d 237 (1965).

36. Drexelbrook Assoc. v. Pennsylvania Pub. Utility Comm'n., 418 Pa. 430, 212 A.2d at 240 (1968). See, also, Camp Wohelo v. The Novitiate of St. Isaac Jogues, 26 P.U.R.3d 287 (1958) (college which supplied water on a non-profit basis to the homes located along its water line, but denied service to others, was not a public utility); Schall v. Glenburn Community Club, 94 P.U.R. (N.S.) 393 (1951) (a neighborhood association that maintained a well and allowed anyone desiring service to connect with its waterworks for a service fee and a flat monthly charge, designed to cover operating expenses, was not a public utility); Pennsylvania Pub. Util. Comm'n. v. Ebensburg Coal Co., 51 P.U.R. (N.S.) 192 (1943) (a coal company that generated electricity primarily for its own use, but sold its surplus to a nearby public utility, was not itself a public utility).

37. Pa. Stat. Ann. tit. 66, §1341. (Purdon 1959).

38. Id. §1342.

39. Borough of Lansdale v. Philadelphia Electric Co., 403 Pa. 647, 170 A.2d 565, 567 (1961).

40. Pa. Stat. Ann. tit. 66, §1149. (Purdon 1959).

41. Id. §1122(b). (Purdon Supp. 1978).

42. Id. §1183. (Purdon 1959).

43. Id. tit. 15 §1322(c), tit. 66 §1124. (Purdon Supp. 1978).

44. Id. tit. 66 §§1351, 1360. (Purdon 1959).

45. Id. §1391. (Purdon Supp. 1978).

46. Id. §1211.

47. Id. §1345.

48. Id. §1213. (Purdon Supp. 1978).

49. Ibid.

50. Id. §1271.1.

51. Id. §§1241 to 1244. (Purdon 1959).

52. Id. §1122(e)-(f). (Purdon Supp. 1978).

53. Id. §1121.

54. Id. §1122(a).

55. Id. §1124.

56. Id. §1183. (Purdon 1959).

57. Id. § tit. 15 §3287. (Purdon Supp. 1978).

58. Id. §§3279, 3280.

59. Id. §3278.

60. Id. §3281.

61. In Re Peoples Gas Co., 44 Pa. Pub. Util. Comm'n. 221, 228 (1969).

62. Kippers Co., Inc. v. North Penn. Gas Co., 42 Pa. Pub. Util. Comm'n. 730, 733-34 (1966).

63. Application at Commonwealth Telephone Co., 47 Pa. Pub. Util. Comm'n. 747 (1944).

64. See, also, Application of John N. Thomas, 47 Pa. Pub. Util. Comm'n. 164 (1973) (the Commission certified a county-wide bus service promoting tours of local Mennonite sites, although an existing service already provided tours of Amish sites and was capable of expansion, because a need for the service existed, and competition was only one factor bearing upon the public interest); Application of Ellwanger Truck Service, Inc., 44 Pa. Pub. Util. Comm'n. 158, 165 (1969) (the Commission granted to a common carrier the right to begin shipping household goods and furniture in an area already served by moving companies because there was sufficient business, stating that "the primary consideration of the Commission is not to establish a monopoly or to guarantee the security of investment in public service companies but, first and foremost, to serve the best interests of the public generally").

65. Sayre v. Pennsylvania Pub. Util. Comm'n., 161 Pa. Super. Ct. 182, 54 A.2d 95 (1947).

66. Id. 54 A.2d at 96.

67. Painter v. Pennsylvania Public Utilities Commission, 194 Pa. Super. Ct. 548, 169 A.2d 113 (1961).

68. Id. 169 A.2d at 115.

69. Dublin Water Co. v. Pennsylvania Pub. Util. Comm'n., 206 Pa. Super. Ct. 180, 213 A.2d 139 (1965).

70. Pa. Stat. Ann. tit. 66 §1123(b). (Purdon 1959).

71. Id. §1123(a).

72. Id. §1121. (Purdon Supp. 1978).

73. Id. §1122(d).

74. Id. §1391 to 1397.

75. Id. 66, §1391.

76. Id. §1393(a). (Purdon 1959).

77. Id. §§1393(b), 1394.

78. Id. §1398.

79. Id. §1395.

80. Pa. Const. art. 5 §9.

81. Pa. Stat. Ann. tit. 66 §§1431 to 1435. (Purdon 1959).

82. Id. tit. 71, §1710.47. (Purdon Supp. 1978).

83. Ibid.

84. Id. §211.403.

85. This is confirmed by Streiff, Procedures of the Pennsylvania Public Utility Commission, 15 Dug. L. Rev. 645, 666 (1977).

86. Pa. Stat. Ann. tit. 66 §1396. (Purdon 1959).

87. Pa. R. App. P. 1512 (1977).

88. Pa. R. App. 1551 (1977).

89. E.g., Commonwealth Dep't. of Environmental Resources v. Commonwealth, Pub. Util. Comm'n., 18 Pa. Commw. Ct. 558, 335 A.2d 860 (1975), aff'd. men, 473 Pa. 378, 374 A.2d 693 (1977). Further review is at the discretion of the Supreme Court. Pa. R. App. P. 1114 (1977).

CHAPTER 3

SITING OF ENERGY FACILITIES IN PENNSYLVANIA

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

There is no legislation in Pennsylvania dealing specifically with the siting of energy generating facilities. The Public Utility Commission ("Commission") is given broad regulatory powers over public utilities including the power to issue certificates of public convenience and necessity,[1/] and pursuant to these powers has recently promulgated regulations governing the siting of electric transmission lines.[2/] It has been held that local governments in Pennsylvania are without jurisdiction to enact zoning regulations dealing with transmission lines, or any other facilities not constituting "buildings," when such facilities are subject to the jurisdiction of the Commission.[3/] Control over the siting of energy facilities is also exercised by the Department of Environmental Resources, Department of Transportation and local government units.[4/]

An amendment to the Pennsylvania Constitution in 1971 which guaranteed to the people the right to environmental quality and the preservation of natural resources,[5/] has been construed to require greater emphasis on environmental factors by state agencies and local government units whenever such agencies and government units exercise any statutory powers they have with respect to developments and construction. This amendment does not increase or grant new

jurisdiction to any agency or government unit, but does add to the weight to be given to any environmental factors to be considered by such agencies and governmental units in exercising their respective powers.

Court decisions in Pennsylvania have established a three-prong test for measuring compliance with the constitutional provision:

(1) Was compliance with all applicable statutes and regulations relevant to the protection of the Commonwealth's public natural resources;

(2) Was there reasonable effort to reduce the environmental incursion to a minimum; and

(3) Does the resulting environmental harm outweigh the benefits to be derived from the project such that it would be an abuse of discretion to continue.6/

In a subsequent case, the court specified that this test is to be applied in the first instance by the state agency having jurisdiction, and in the event of appeal, by the reviewing court.7/

Where an agency does not have statutory jurisdiction over planning matters, the constitutional mandate is inapplicable and serves neither to require nor authorize the agency to consider environmental factors. For example, in Community College of Delaware County v. Fox,8/ the Department of Environmental Resources had approved the grant of a permit for the construction of a sewage pipe with a large reserve capacity. Local landowners protested that the availability of the reserve capacity would accelerate development and would likely lead to erosion, siltation and other pollution effects. The Environmental Hearing Board

vacated the permit, finding that the Department had failed, under the constitutional amendment, to adequately consider the desired pace of development in the area. A local community college, which had been allocated 10% of the capacity of the proposed sewage facility, appealed the denial of the permit. The court reversed the decision of the Environmental Hearing Board and allowed construction of the pipeline, holding that the constitutional amendment did not apply to the Department's approval of the permit in the present case. The Department's statutory jurisdiction with respect to such permits was only to insure that the proposed system would comply with local zoning regulations and state water standards. Because the Department had no statutory planning function, it had no jurisdictional basis to consider environmental factors, and the constitutional amendment was not to be construed as a grant of such jurisdiction. Environmental considerations, pursuant to the constitutional amendment were, however, viewed by the court as properly within the jursidiction of local governmental planning units.

Where an agency or governmental unit has planning jurisdiction, and is therefore subject to the constitutional amendment and the tests for compliance established by the courts, the constitutional amendment broadly requires the maintenance of "clean air, pure water and ... the preservation of the natural, scenic, historic and esthetic values of the environment."[9/] However, the provision is not to be construed

to prevent normal developmental activity.[10/]

II. LOCATION AND PLANNING OF DEVELOPMENTS GENERALLY

A. Public Utility Commission

1. Generally

The Commission has no express, comprehensive jurisdiction over the siting of energy facilities. However, it exercises jurisdiction with respect to the siting of transmission lines, and also has authority to grant exemptions to public utilities from local zoning regulations. In addition, the Commission has broad powers with respect to the supervision and regulation of public utilities which may afford limited siting jurisdiction over proposals for utility facilities. These regulatory powers and the statutory definition of "public utilities" subject to the Commission's jurisdiction are discussed in Chapter 2.[11/] Briefly, exemptions are available for cooperative associations supplying services only to their own members, and municipally-owned utilities operating within their municipal boundaries.

The Commission has recently promulgated regulations governing the siting of transmission lines by public utilities subject to the Commission's jurisdiction.[12/] "Transmission lines" are defined in the regulations as overhead electric supply lines:

> with a design voltage greater than 35,000 volts, which will not be located entirely on existing rights-of-way, which will not be located entirely within public roads, and which will not be located entirely within the property of the sole customer

to be served by the line except where the size, character, design or configuration will substantially alter the right-of-way.13/

High voltage (HV) transmission lines are defined similarly, except with voltage designs of 200,000 volts or greater. After January 1, 1980, lines having voltage designs of 100,000 volts or greater will be subject to the Commission's siting authority.

2. Application Procedures

For all transmission lines, public utilities are required to submit an annual report describing existing lines and all proposed lines for which construction is scheduled to begin within five years.14/ For all HV transmission lines, an application for construction and location must be submitted to and approved by the Commission before construction may be commenced.15/ The application for an HV line approval must include among other things the need for the proposed HV line; safety considerations; and studies which had been made as to the projected environmental impact; a description of the efforts of the applicant to locate and identify any archaeologic, geologic, historic, scenic or wilderness areas of significance within two miles of the proposed right-of-way; all reasonable alternative routes; a list of the local, state and federal governmental agencies which have requirements which must be met; the estimated cost of construction and the projected date of completion. Also required for an application for HV transmission line

approval are various exhibits including: a depiction of the proposed route on aerial photographs and topographic maps and a system map which shows the location and voltage of all existing transmission lines and substations of the applicant and the location and voltage of the proposed HV line and associated substations.[16/]

3. Notice and Hearing

A copy of the application must be served on the chief executive officer, governing body, and body charged with land use planning in each city, borough, town, township and county in which any portion of the HV line is proposed to be located. A copy also must be sent to the president of each public utility in whose service area any portion of the HV line is to be located, and to the Secretary of the Department of Environmental Resources. Notice of filing is required to be sent to the Secretary of Transportation, the Chairman of the Historical and Museum Commission, and all other local, state and federal agencies which regulate the construction or maintenance of the proposed HV line.[17/] Public notice is also required.

A hearing is held on the application, preceeded by public notice and notice to each party who was entitled to be served with notice of the filing of the application. All such parties entitled to notice may participate, and other interested parties and persons may request to intervene.[18/]

In approving any proposed HV line, the Commission is required to find:

(1) that there is a need for it;

(2) that it will not create an unreasonable risk of danger to the health and safety of the public;

(3) that it is in compliance with all applicable statutes and regulations providing for the protection of the natural resources of this Commonwealth; and

(4) that it will have minimum adverse environmental impact, considering the electric power needs of the public, the state of available technology and the available alternatives.19/

The Commission may grant or deny the application in whole or in part, or with such conditions and modifications as the Commission deems appropriate.

An applicant may petition for waiver of the regulations for a proposed HV line the construction of which was commenced prior to the effective date of the siting regulation's publication dated, April 20, 1978.

The Commission's new regulations also require that any negotiation for the acquisition of a transmission line right-of-way by a public utility be preceeded by notice disclosing that if negotiations fail, the utility has the right to condemn the property pursuant to the power of eminent domain, subject to Commission approval.20/ The Commission issues certificates of public convenience and necessity for such condemnations.21/ The burden of supporting the application is on the applicant. However, once a protestant or intervenor raises a potential adverse impact on the public convenience and necessity, including an adverse impact on the environment, the courts have held that a duty

arises for the Commission to consider environmental factors pursuant to the constitutional amendment.[22/]

In addition to its siting jurisdiction over transmission lines, the Commission has authority to grant variances from most municipal zoning regulations to public utilities for proposed energy facility buildings.[23/] With respect to transmission lines and non-"building" facilities, municipalities have no zoning jurisdiction whatsoever.[24/]

B. Department of Environmental Resources

The Department of Environmental Resources (DER) also has authority to influence the siting of energy facilities. It is empowered to manage and control the use of all state forest lands.[25/] This includes express authority to control the construction of transmission lines within the state forests,[26/] and to lease, with the approval of the governor, such lands for the underground storage of natural gas.[27/] DER also grants permits for the construction of dams and any appropriation of water "changing or diminishing the course, current or cross-section of any stream or body of water."[28/] In particular, it is unlawful to construct a dam "for the main purpose of storing, cooling, diverting, and using or any of them, water for steam raising or steam condensation, or both, in the generation of electric energy for use in public service" without a permit from DER.[29/]

Permits from the Department of Environmental Resources are also required with respect to sources of air and water pollution. No "stationary air contamination

source" may be constructed or any air pollution control equipment installed, without DER approval.[30/] "Air contaminants" are defined broadly to include "smoke, dust, fumes, gas, odor, mist, vapor, pollen or any combination thereof."[31/] Authority over air pollution control consistent with DER regulations may also be exercised by municipalities.[32/]

It is similarly unlawful to discharge "industrial wastes" into any Pennsylvania waters without first obtaining a permit from DER.[33/] "Industrial waste" is defined to include "any liquid, gaseous, radioactive, solid or other substance ... resulting from any manufacturing or industry ... whether or not generally characterized as waste."[34/] Any discharge of industrial wastes creating a danger of pollution, defined to encompass changes in temperature, is further declared to be a public nuisance.[35/]

C. Department of Transportion

The Department of Transportion (DOT) has general authority to regulate construction within the right-of-way comprising the state highway system. No "gas pipe, water pipe, electric conduits or other piping [may] be laid upon, over, under or in, nor shall any telephone, telegraph or electric light or power poles, or other structures be erected upon, over or in any portion of a state highway, nor shall any opening be made therein, except under such conditions, restrictions, and regulations ... as may be prescribed and required by the Department."[36/] The power of DOT to control the location of utility facilities under this

provision, however, appears primarily intended to safeguard the use of the highways for transportation purposes and it should not be regarded as a grant of comprehensive siting jurisdiction. In Wodack v. Bell Telephone Co. of Pennsylvania,[37] for example, the State Highway Department (a predecessor to DOT) granted the telephone company permission to occupy a public road subject to the consent of the township in which it was located. Although the consent of the township was never actually obtained, the court refused to enjoin construction of the telephone line. The court held that under its power of "general supervision" over state highways, the Department could properly regulate the methods to be employed and the location to be selected by the company in the erection of its line so that the line would not "incommode the public use."[38] The Department could not, however, withhold its consent nor could it authorize the township to do so.

The power to issue permits under this provision may be delegated to local authorities.[39] Failure to obtain such a permit entails only a small fine (not more than $25.00) and the cost of repairing the highway.

D. Local Governments

Public utilities are largely free from control by local governments. Municipalities are authorized to enact zoning regulations governing public utility "buildings." However, the Public Utility Commission may grant variances from such zoning regulations for facilities proposed by

public utility companies.[40] Municipalities have no zoning authority with respect to non-"buildings," e.g. transmission lines.[41] The Commission appears to exercise its power with respect to local zoning only to meet utility goals and not generally to second guess local land use decisions that do not adversely impact on utility goals. In Kitchen v. Bell Telephone Co.,[42] the Commission granted a certificate for the construction of a regional toll center, over protests of local landowners that it would cause an adverse impact on the surrounding area. The Commission rules that since the proposal complied with local zoning restrictions, it was not the Commission's function to consider the impact of the surrounding area.

FOOTNOTES

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1. Pa. Stat. Ann. tit. 66 (Purdon 1959).

2. 52 Pa. Code Ch. 57.

3. Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105, A.2d 287 (1954).

4. See, generally, Schmidt, Laws Which Regulate Land Use in Pennsylvania, (pts. 1-2), 46 Pa. B.A.Q. 417 (1975) (Pt. 1), 47 Pa. B.A.Q. 52 (1976) (Pt. 2).

5. Pa. Cons. art. 1, §27.

6. Payne v. Kassab, 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973), aff'd, 14 Pa. Commw. Ct. 491, 323 A.2d 407 (1974), aff'd, 468 Pa. 226, 361 A. 2d 263 (1976).

7. Commonwealth, Dept. of Environmental Resources v. Commonwealth, Pub. Util. Comm'n., 18 Pa. Commw. Ct. 558, 335 A.2d 860 (1975), aff'd. mem., 473 Pa. 378, 374 A.2d 693 (1977).

8. Community College of Delaware County v. Fox, 20 Pa. Commw. Ct. 335, 342 A.2d 486 (1975).

9. Pa. Const. art. 1, §27.

10. Payne v. Kassab, 11 Pa. Commw. Ct. 14, 312 A.2d 86 (1973), aff'd., 14 Pa. Commw. Ct. 491, 323 A.2d 407 (1974); aff'd., 468 Pa. Commw. Ct. 226, 361 A.2d 263 (1976).

11. See Chapter 2, text at footnote 56.

12. 52 Pa. Code Ch. 57.

13. Id. §57.2.

14. Id. §57.48.

15. Id. §57.71.

16. Id. §57.72.

17. Id. §57.74.

18. Id. §57.75.

19. Id. §57.76(a).

20. Id. §57.18.

21. Pa. Stat. Ann. tit. 66, §§1121, 1122(a) (Purdon Supp. 1978).

22. Commonwealth, Dept. of Environmental Resources v. Commonwealth, Public Util. Comm'n., 18 Pa. Commw. Ct. 558, 335 A.2d 860(1975), aff'd. mem., 473 Pa. 378, 374 A.2d 693 (1977).

23. Pa. Stat. Ann. tit. 53, §10619; tit. 16, §5220 et seq. (Purdon Supp. 1978).

24. Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954); Commonwealth v. Delaware & Hudson Co., 19 Pa. Commw. Ct. 59, 339 A.2d 155 (1975).

25. Pa. Stat. Ann. tit. 71, §510-2 (Purdon Supp. 1978).

26. Id. §§510-3(3).

27. Id. §510-8(1)(d)-(g).

29. Pa. Stat. Ann. 32 §594 (Purdon Supp. 1978). See generally, Weston & Gray, Legal Control of Consumptive Water Use in Pennsylvania Power Plants, 80 Dick. L. Review. 353 (1976).

30. Pa. Stat. Ann. tit. 35, §4006.1 (Purdon Supp. 1978).

31. Id. §4003(4).

32. Id. §4012.

33. Id. §691.307.

34. Id. §691.1.

35. Id. §691.3.

36. Pa. Stat. Ann. tit. 36, §670-441 (Purdon Supp. 1978). See also, Pa. Stat. Ann. tit. 36, §§670-515, 670-525, 670-547, 1758-208 (similar provisions regarding the use of state highways within municipal boundaries).

37. Wodack v. Bell Telephone Co. of Pennsylvania, 62 Pa. Super. Ct. 375 (1916).

38. Id. 62 Super Ct. at 377.

39. Pa. Stat. Ann. tit. 53, §1991 (Purdon Supp. 1978).

40. Pa. Stat. Ann. tit. 53, §10619; ti. 16, §5220 et seq. (Purdon Supp. 1978).

41. Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954); Commonwealth v. Delaware & Hudson Co., 19 Pa. Commw. Ct. 59, 339 A.2d 155 (1975); Pa. Stat. Ann. tit. 53, §10619, tit. 16, §5220 et seq, (Purdon Supp. 1978).

42. Kitchen v. Bell Telephone Co, 46 Pa. Pub. Util. Comm'n., 499 (1973).

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN PENNSYLVANIA

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

A. Municipal Authority to Grant Franchises

Until the late 19th Century, utility companies in Pennsylvania were incorporated and granted franchises by means of special legislative charters. By the end of the century, however, a number of general statutes were passed providing for the incorporation of various kinds of public utilities and making their use of the public streets contingent upon securing municipal consent.[1/] At the present time public utilities may be incorporated under two different statutory schemes. They may be incorporated, according to the nature of the service they provide, under the Corporation Act of 1874[2/] or they may be voluntarily incorporated pursuant to the Business Corporation Law.[3/]

The Business Corporation Law was enacted in 1933, long after the establishment in 1913 of first agency with state wide jurisdiction to regulate public utilities. Incorporation under its terms is a matter of choice for public utilities. "Public utility" is defined to include those corporations subject to regulation by the Public Utility Commission.[4/] A new public utility company can elect to be governed by the Business Corporation Law merely by filing articles of incorporation under its provisions.[5/] An existing

company can come under the law by filing a certificate with the Department of State.[6/] None of the provisions of the Business Corporation Law require a public utility to secure municipal consent in order to make use of the public streets.

The privilege of using the streets under the other statutory scheme, the Corporation Act of 1874, was at one time worded in terms requiring municipal consent; however, several early cases indicate that the "municipal consent" requirement was never intended as a grant of municipal franchising authority. In Central Dist. & Priority Telegraph Co. v. Borough of Homer City,[7/] for example, the court was called upon to assess the rights of a utility that had operated a telephone line along one of the borough streets for more than 15 years without the approval of the municipal authorities. The company sought the permission of the borough for the first time when it decided to expand its facilities. After three months of inaction, it began construction of its extensions nevertheless. Borough officials threatened to arrest the laborers, and the company appealed to the judicial system. The borough was denied any right to challenge the maintenance of the original line because of its long acquiescence. The right of the company to install lines on additional streets was conditioned upon securing municipal consent, but the court held that such consent could be withheld only for considerations affecting the public

welfare and stated that "[a]ny arbitrary or capricious withholding of its consent by borough authorities would not be justified."[8/]

The municipal consent requirements of the Corporation Act of 1874 were repealed in 1968 insofar as they were inconsistent with sections of Title 15 of the Pennsylvania Statutes.[9/] Title 15 applies to all public utilities engaged in the "production, generation, manufacture, transmission, storage, distribution or furnishing of natural or artificial gas, electricity, steam, air conditioning or refrigeration service, or any combination thereof, to or for the public."[10/] It provides that:

> a public utility corporation shall, in addition to any other similar power conferred by any other act, have the right to enter upon and occupy streets, highways, waters and other public ways and places for one or more of the principal purposes specified. . .and ancillary purposes reasonably necessary or appropriate for the accomplishment of such principal purposes, including the placement, maintenance and removal of aerial, surface, and subsurface public utility facilities thereon or therein. Before entering on any street, highway, or public way, the public utility corporation shall obtain such permits as may be required by law and shall comply with the lawful and reasonable regulations of the government authority having responsibility for the maintenance thereof.[11/]

This provision has not yet been construed by the courts. In light of the previous discussion, however, it seems to confer a largely unrestricted right on public utilities to make use of the public streets. The powers of municipalities

under the Corporation Act of 1874 apparently related only to the power to make reasonable police regulations. These powers were partially repealed by the Title 15 provision, which is not worded in terms of municipal consent. The requirement of obtaining "permits" is conjoined with that requiring compliance with the "reasonable regulations" of the authorities charged with the maintenance of the roads to be occupied. This suggests that municipal regulation of the use of the streets by public utilities is limited to reasonable steps intended to safeguard the public's right of passage.

The limitation of municipal authority is reinforced by the remaining provisions dealing with the granting of permits by local governments. Under the general municipal law, "the proper corporate authorities . . . shall have the right to issue permits determining the manner in which public service corporations or individuals shall place, on or under or over such municipal streets or alleys, railway tracks, pipes, conduits, telegraph lines or other devices used in the furtherance of business."[12/] This language appears to limit municipal permit granting authority to the enforcement of reasonable safety precautions. It does not suggest that municipal governments can deny public utilities the use of the streets. This provision was also modified insofar as it was consistent with Title 15, indicating that municipal authority is indeed limited.[13/]

B. Public Service Commission

The role fulfilled by the municipal consent requirements of the Corporation Act of 1874 has been largely replaced by the grants of regulatory power to the Commission. This is indicated by Title 15, which grants a largely unrestricted right to use the streets only to those corporations subject to Commission regulation. (The grant of a similarly unrestricted right to electric cooperatives, which are exempt from Commission control, is explained by the fact that they are intended to operate basically in rural areas. 14/) It is also indicated by the availability of alternative procedures for the incorporation of public utilities. The fact that such companies can escape the municipal consent requirements by incorporating under the Business Corporation Law is of small moment as the adequacy of their services and facilities is insured by the Commission. The Commission, moreover, is empowered to

> vary, reform or revise, upon a fair, reasonable and equitable basis, any obligations, terms or conditions of any contract heretofore or hereafter entered into between any public utility and any person, corporation or municipal corporation, which embrace or concern a public right, benefit, privilege, duty or franchise, or the grant thereof, or are otherwise affected or concerned with the public interest and the general well being of the commonwealth. 15/

The strict limits on the authority of municipalities, express or implied, to prohibit or unreasonably limit the use of their streets by public utilities is but one aspect of an

apparently consistent judicial position in Pennsylvania holding that the Commission has exclusive regulatory jurisdiction over the services and facilities of public utilities, and that such jurisdiction would be incompatible with the unchecked exercise of municipal authority. In Duquesne Light Co. v. Upper St. Clair Township,[16/] for example, the electric transmission lines of an electric utility were held to be exempt from local zoning restrictions. The court reasoning stressed that local authorities were ill-equipped to understand the needs of the public beyond their jurisdictions. Moreover, local zoning restrictions could block necessary rights of way and make it impossible for a public utility to perform its statutory duty of providing adequate and efficient service. Local zoning powers, therefore, could not be exercised in conflict with the exclusive jurisdiction of the Commission. In County of Chester v. Philadelphia Electric Co.,[17/] the court similarly refused to enforce a local building permit requirement against a utility constructing a natural gas pipeline, because local regulation would lead to state wide confusion.[18/]

In light of this consistent judicial attitude, any attempted assertion of local authority to forbid the use of the streets, which might impede the efficient provision of utility services, is unlikely to be given judicial sanction without a stronger statutory basis than exists at the present

time.[19] However, municipalities still have the power to determine manner of placement of utility facilities within their streets.[20]

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

The state Constitution provides that "municipalities shall have the right and power to frame and adopt home rule charters" and that "a municipality which has a home rule charter may exercise any power or perform any function not denied by this constitution, by its home rule charter, or by the General Assembly at any time."[21] The Home Rule Charter and Optional Plans Law (Home Rule Act),[22] was enacted in 1972 to give effect to this constitutional provision. It reiterates that home rule cities may exercise all powers not denied to them by the state legislature and adds that "all grants of municipal power to municipalities governed by a home rule charter under this act . . . shall be liberally construed in favor of the municipality.[23] Home rule municipalities are also authorized to "adopt, amend, and repeal such ordinances and resolutions as may be required for the good government thereof."[24] The Home Rule Act, however, has not yet been construed as a source of implicit franchising power. If such power is ultimately found by the courts, it is unlikely that it will be applied to the use of the streets by public utilities in light of judicial decisions that public utility service is a matter of state wide concern and

that exclusive jurisdiction over service and facilities is vested in the Public Utility Commission. Moreover, the rights of public utilities to make use of the public streets under Title 15 of the Pennsylvania Statute remain paramount because home rule municipalities cannot "exercise powers contrary to or in limitation or enlargement of powers granted by acts of the General Assembly which are applicable in every part of the commonwealth."[25/]

Municipalities, however, have been held to possess implicit franchising authority over the use of their streets by non-public utilities. This power has been derived from general municipal power to regulate the streets and to enact necessary ordinances. In Borough of Scottsdale v. Nat'l. Cable Television Corp.,[26/] a cable television company raised its rates without the approval of the borough. Permission to make use of the streets had been granted by an ordinance which also provided that charges were not to be increased without the approval of the municipal authorities. Since the borough had statutory authority to regulate its streets and to adopt all ordinances necessary for the proper management of its affairs, the court reasoned that it also had inherent power to control the use of its streets. The borough could regulate the rates charged by the cable television company as a condition imposed upon the grant to use the streets. The affirmance by the Supreme Court noted that cable television

was not a public utility service and regarded as "conceded that Pennsylvania municipalities do have the power and authority to grant permission for the use of public ways."[27/]

All classes of municipalities in Pennsylvania have considerable power to regulate their streets. Cities, for example, have "exclusive control and direction of the opening, widening, narrowing, vacating and changing grades of all streets, alleys and highways within the limits of such city."[28/] Boroughs and first-class townships are empowered to "regulate the streets."[29/] First-class townships may also regulate the streets,[30/] while second class townships may prohibit "the erection or construction of any obstruction to the convenient use of the roads."[31/] All such municipalities may grant permits for the installation of transmission lines and the laying of pipelines[32/] and possess power to enact ordinances necessary for good government or the proper management of their affairs.[33/] In addition, they share a common need to regulate the activities of those entities exempt from Commission jurisdiction. It appears, therefore, that all classes of municipalities have implicit authority to franchise the use of their streets by nonpublic utilities.

The dedication of land for use as a street in Pennsylvania generally confers only an easement upon the public. Title to the land is retained by the abutting owners. The public easement, however, has been construed as

sufficiently comprehensive to allow the use of the streets for all manner of public services without infringing upon the rights of the abutting owners. In Pittsburg Nat'l. Bank v. Equitable Gas Co.,[34/] for example, the court dealt with the laying of a natural gas pipeline within the right-of-way of a road that had been a rural route when first dedicated to public use but had since been incorporated within municipal boundaries. It rejected the rule that the public held only a limited right of passage in rural roads. The public right in all roads and streets, whether urban or rural, was held sufficient to allow the laying of pipelines for any public service. The plaintiff, as abutting owner, was not entitled to compensation because the natural gas pipeline did not impose an additional burden on the servient land.

Municipalities, however, may only grant rights in their streets that involve a public purpose. The private rights of the abutting owners, who retain title to the land are superior to any other private rights. In 46 South 52d St. Corp. v. Manlen,[35/] the court held that the operation of a newsstand on a public sidewalk was not justified as a public purpose, stating that "a purely private use of the public highway with no reasonable benefit to the public generally may not only be prevented by the municipality, but is not even permissible."[36/] Similarly, in Hinder v. Samuel, it was held that the sale of food by vendors operating on the public streets was not a public function, and held that

"a property owner or lessee may object and decline to have his property used for the business enterprise of other people."

III. PROCEDURES FOR GRANTING FRANCHISES

Municipal franchising authority in Pennsylvania is derived from more general grants of municipal power. As a result, there are no statutory procedures governing the granting of franchises as such for most classes of municipalities.

The only applicable statute concerns the granting of franchises by cities of the third class. It provides that "no franchises or consent to occupy the public streets . . . shall be given or granted to any person or persons, railroad, railway, gas, water, light, telephone or telegraph company, or to any public utility corporation, except by ordinance, and no ordinance for such purpose shall go into effect before 30 days after it has been filed with the Public Utility Commission."[37] This provision was held to govern the grant of a franchise to a cable television company in City of Farrell v. Altoona CATV Corp.,[38] although the grantee was not among the specifically enumerated companies to which the statute applied. The reasoning of the court suggests that municipal franchises must in all cases be granted by ordinance. It stressed, for example, that "nothing less than the most solemn enactment required by law is permitted as evidencing the consent of the city to the occupancy of the public streets."[39]

Different statutory provisions govern the passage of ordinances by the various classes of municipalities. These provisions tend to have certain elements in common. Generally, they provide that ordinances must be published at least once in a newspaper of general circulation. An ordinance will not usually take effect until it is recorded by the city clerk in a book which is permanently open for public inspection. The various statutes frequently provide that the mayor must sign a proposed ordinance within ten days or return it to the city council with his objections to it. The city council can usually override a mayoral veto by a two-thirds majority vote. However, in third class cities, an ordinance must be signed by the mayor or else it does not take effect.[40/]

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

A certificate of public convenience is not a prerequisite to obtaining a franchise. The major requirement of a grantee of a municipal franchise is that the grantee serve a purpose that is not entirely private in nature. The imposition of additional criteria in evaluating a franchise request appears to be within the discretion of the local authorities. Maximum rates were set, for example, in Borough of Scottsdale v. Nat'l. Cable Television Corp.[41/] However, neither the judiciary nor the legislature provide clear guidelines for evaluating a franchise request.

V. CHARACTERISTICS OF A FRANCHISE

The Pennsylvania constitution[42/] forbids the passage of "any law" making "irrevocable any grant of special privileges or immunities." This provision has not been construed by the courts with regard to municipal franchises. Its inclusion among the Article I "declaration of rights" and the use of the general phrase "any law," however, suggest that it applies to municipal ordinances and precludes the granting of perpetual franchises.

There is also authority suggesting that municipalities cannot grant exclusive franchises in the absence of express legislation authorizing them to do so. In Emerson v. Commonwealth,[43/] for example, the court indicated animosity toward even legislative grants of exclusive privileges. There, one utility was granted an exclusive right under its articles of incorporation to "supply heat to the public from gas within the City of Pittsburgh." A second utility was incorporated for the purpose of "supplying heat to the public within the City of Pittsburgh by means of natural gas conveyed from such adjoining counties as may be convenient." The court held that the franchises involved were not for the same purpose and, thus, were not in conflict. The first franchise conferred the exclusive right to supply any type of gas produced within the city, whereas the second applied only to natural gas from outside the city. The court stated further that "exclusive franchises which affect great public interests

must be strictly construed against the grantee and in the interest of the public."44/

FOOTNOTES

1. See, e.g., Potts v. Quaker City Elevated R.R. Co., 161 Pa. 396, 402, 29 A. 108 (1894).

2. Pa. Stat. Ann. tit. 15, §§3001 to 4377 (Purdon 1959).

3. Id. §§1001 to 2203.

4. Id. §§1002 (14), 1004(B)(2).

5. Id. §1004(C)(1).

6. Id. §1004(C)(2).

7. Central Dist. & Priority Telegraph Co. v. Borough of Homer City, 242 Pa. 597, 89 A. 681 (1914).

8. Id. 89 A. at 683, See, also, Farmers' Mutual Telephone Co. v. Middleboro Borough, 25 Pa. Dist. 256 (C.P. 1915) (court issued a writ of mandamus ordering a borough to grant a permit for the erection of telephone lines along its streets.) (Decisions to the contrary generally involve the lying of railroad tracks and were based on a constitutional provision, repealed in 1967, which required local consent for the construction of street railways. Pa. Const. art. 17, §9 (1974)).

9. Pa. Stat. Ann. tit. 15, §§2204 (Purdon Supp. 1978).

10. Id. §1322(A)(3).

11. Id. §1322(E), See also, Pa. Stat. Ann. tit. 15, §12404(11) (Purdon Supp. 1978) (similar grant of authority to nonprofit electric cooperatives to use highways for acquisition and maintenance of lines).

12. Pa. Stat. Ann. tit. 53, §1991 (Purdon 1974).

13. See e.g., Wodock v. Bell Tel. Co. of Pa., 62 Pa. Super. Ct. 375 (1916) (state agency with general supervisory power over highways could not authorize township authority to deny their consent to the use of the streets by a public utility.)

14. Pa. Stat. Ann. tit. 15, §12403 (Purdon 1974).

15. Id. tit. 66, §1360 (Purdon 1959).

16. Duquesne Light Co. v. Upper St. Clair Township, 377 Pa. 323, 105 A.2d 287 (1954).

17. County of Chester v. Philadelphia Electric Co., 420 Pa. 422, 218 A.2d 331 (1966).

18. See, also, Duquesne Light Co. v. Borough of Monroeville, 449 Pa. 573, 298 A.2d 252 (1972). (The court implied that the Commission had veto power over the exercise by a local government of its statutory authority to require a public utility to place its wires beneath the ground, since it had ultimate power to determine the particulars of implementation, including the feasibility of the project.)

19. Confirmed by Ms. E. Coggins, Chief Counsel for the Department of Community Affairs, telephone conversation 8/25/78, that municipalities cannot refuse their consent to the use of the streets by public utilities.

20. Pa. Stat. Ann. tit. 53, §1991 (Purdon Supp. 1978).

21. Pa. Const., art. 9, §2.

22. Pa. Stat. Ann. tit. 53, §1-101 to 1-1309 (Purdon 1974).

23. Id. §1-301.

24. Id. §1-304.

25. Id. §1-302(b). See generally French, Home Rule in Pa., 81 Dick. L. Rev. 265 (1977) (valuable introduction to the Home Rule Act).

26. Borough of Scottsdale v. Nat'l Cable Television Corp., 28 Pa. Commw. Ct. 387, 368 A.2d 1323 (1977), aff'd., 381 A.2d 859 (Sup. Ct. 1977).

27. Id. 381 A.2d at 860, See Borough of Munhall v. Dynamic Cablevision, 31 Pa. Commw. Ct. 575, 377 A.2d 853, 854 (1977) (" . . . by unavailable implication, the power to regulate includes the power to grant or deny the right to use public ways by entities providing [cable television] services. . .").

28. Pa. Stat. Ann. tit. 53, §1671 (Purdon 1974).

29. Id. §46202(17).

30. Id. §56557.

31. Id. §65726.

32. Id. §1991, 57084, 66156.

33. Id. §§1-304, 13133, 13371, 23158, 37403(60), 46202(74), 56552, 65762.

34. Pittsburgh Nat'l Bank v. Equitable Gas Co., 421 Pa. 468, 220 A.2d 12 (1966).

35. 46 South 52nd St. Corp. v. Manlen, 398 Pa. 304, 157 A.2d 381, 387 (1960).

36. Hinder v. Samuel, 158 Pa. Super. Ct. 539, 45 A.2d 370, 372 (1946).

37. Pa. Stat. Ann. tit. 53, §36057 (Purdon 1957).

38. City of Farrell v. Altoona CATV Corp., 419 Pa. 391, 214 A.2d 231 (1965).

39. Id. 214 A.2d at 232.

40. Pa. Stat. Ann. tit. 53, §36010 (Purdon 1957).

41. E.g., Borough of Scottdale v. Nat'l. Cable Television, 381 A.2d 859 (Pa. Sup. Ct. 1977).

42. Pa. Const., art. 1, §17.

43. Emerson v. Commonwealth, 108 Pa. 111 (1885).

44. Id. 108 Pa. at 124. See, Pa. Stat. Ann. tit. 15, §3223 (Purdon Supp. 1978) (Exclusive franchises of gas companies incorporated under the Corporation Act of 1874 revoked). But see, Borough of Munhall v. Dynamic Cablevision, Inc., 31 Pa. Commw. Ct. 575, 377 A.2d 853 (1977) (defendant cable television company sought to escape the rate restrictions imposed under a municipal franchise by arguing that it was exclusive and, therefore, void; the court affirmed the applicability of the franchise, and sidestepped the issue of exclusivity, holding that the defendant did not have standing to challenge a privilege that might be unlawfully favorable to it.)