

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 New York

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
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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 New York. 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 New York. 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 authorized 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 NEW YORK

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the New York Public Service Commission (Commission). The Commission is composed of five members appointed by the governor with the advice and consent of the senate.^{1/} Commissioners are appointed for six-year terms.^{2/} The governor may, at the request of the Commission, appoint two additional commissioners if necessary for the proper disposition of Commission business. The additional commissioners serve six-year terms; however, no new additional commissioners will be appointed at the end of the term except upon the special request of the Commission.^{3/} Commissioners may not have any pecuniary or financial interest in any public utility.^{4/}

Local governing bodies are authorized to "exercise such power, jurisdiction and authority in enforcing the laws of the state and the orders, rules and regulations of the commission as may be prescribed by statute or by the commission" with respect to public utilities.^{5/} A Commission spokesman confirmed that no statutes have been passed pursuant to this provision and the Commission has not ceded any of its regulatory powers to local governments. With the exception of the granting of franchises and permits to use public ways, local governments exercise no regulatory powers over public utilities.^{6/}

II. JURISDICTION OF THE COMMISSION

The jurisdiction of the Commission extends:

b. To the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) and electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same.

c. To the manufacture, holding, distribution, transmission, sale or furnishing of steam for heat or power, to steam plants and to the persons or corporations owning, leasing or operating the same.^{7/}

A "gas plant" is defined to include all "real estate, fixtures, and personal property" used in connection with the "manufacture, conveying, transportation, distribution, sale or furnishing" of gas.^{8/} An "electric plant" includes all "real estate, fixtures and personal property" used in connection with the "generation, transmission, distribution, sale or furnishing" of electricity.^{9/} A "steam plant" includes all "real estate, fixtures and personal property" used in connection with the "generation, transmission, distribution, sale or furnishing" of steam.^{10/} Thus, the Commission possesses regulatory authority over all facilities and functions involved in furnishing the jurisdictional services.

The Commission has statutory authority over "persons and corporations." With respect to the Commission's regulatory authority, the term "corporation" includes corporations, companies, associations, joint stock associations,

partnerships and persons.^{11/} This definition is broad enough to allow the Commission to extend its authority to all conventional forms of utility ownership. Municipally-owned utilities are subject to the Commission's jurisdiction.^{12/} Rural electric cooperatives, however, are not subject to the Commission's regulatory authority.^{13/}

There is no specific statutory requirement that a utility receive compensation for its services in order to subject it to the Commission's jurisdiction. Neither is there any specific statutory provision either including or excluding indirect sales from the Commission's jurisdiction. A Commission spokesman stated that the Commission has no policy with respect to indirect sales. He stated that the Commission could, if it so chose, regulate indirect sales. This decision will be made, however, on a case-by-case basis.^{14/}

While there is no specific statutory requirement that a utility provide service to the public or dedicate its facilities to public use in order to come within the Commission's jurisdiction, the Commission has indicated that some degree of service to the public is required before it will exercise regulatory authority over a utility.^{15/} The Commission has held, however, that a sale of services to a single customer is sufficient to bring a company within the Commission's jurisdiction.^{16/}

Companies producing and distributing electricity, gas or steam solely on private property for the producer's

own use or for the use of his tenants are specifically excluded from the Commission's jurisdiction.^{17/} Operation solely on private property, however, does not exempt a company from the Commission's jurisdiction if service is provided to customers other than tenants.^{18/} A company using public land to provide gas, electricity or steam for its own use or the use of its tenants is subject to Commission regulation. The Commission has indicated, however, that it will review the facts in these situations in order to determine whether there is a need to exercise its jurisdiction. If it finds no such need, it may "deem" the operation as not coming within the purview of the New York Public Service Law.^{19/}

III. POWERS OF THE COMMISSION

The Commission is charged with the general supervision of gas, electric, steam and water utilities.^{20/} In addition, the Commission has been granted numerous specific powers with respect to these utilities. For example, the Commission may regulate rates of service,^{21/} and may prescribe a system of accounts to be kept by these utilities.^{22/} It must approve initiation and extensions of service,^{23/} the construction of new facilities,^{24/} and the transfer of any franchise or other property.^{25/} In addition, the Commission must approve the issuance of securities;^{26/} mergers and consolidations;^{27/} affiliated interest transactions;^{28/} and sales or leases of property.^{29/} It may regulate capitalization.^{30/}

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

A. Generally

No gas, steam or electric corporation may begin construction of any facility or exercise any franchise without first obtaining the approval of the Commission.^{31/} The statutory provisions have been interpreted as requiring the Commission's approval only at the time of initial construction. All later additions and extensions to facilities within the utility's franchise area come within the initial authorization and no further approval is necessary.^{32/} Although municipally-owned utilities generally are subject to the Commission's jurisdiction, a municipality need not obtain a certificate of authority from the Commission before constructing gas or electric facilities within its own boundaries.^{33/}

B. Competition

There are no specific provisions relating to the Commission's authority, or lack thereof, to grant exclusive certificates. The state courts have stated that when competing forms of energy (i.e., gas v. electric) are involved, a strong public policy exists in favor of free competition. This public policy is of the "first magnitude."^{34/}

The Commission, however, has stated that the primary purpose of its certificating power is to prevent ruinous competition between different public service corporations and to insure that the utility authorized to serve the area is fit, willing and able to provide adequate service.^{35/}

Therefore, where similar services are being rendered in all or part of the area sought to be served by the applicant, the Commission, before authorizing additional service, will consider (1) the adequacy of the existing service to meet reasonable demand, (2) the ability of the applicant to provide reasonably adequate service, and (3) the degree of competition desirable or required by the public interest.^{36/}

C. Certificating Procedure

To obtain Commission approval to construct a facility or exercise a franchise, a corporate applicant must file a copy of its articles of incorporation and evidence that it has received the necessary authority from municipal authorities.^{37/} In addition, the application must include (1) a description of the area to be served and its population, (2) the date on which construction will begin, (3) a description of the facility and its estimated cost, (4) the manner in which the plant is to be financed, (5) the rates to be charged, (6) a detailed estimate of revenues and expenses for the first three years, (7) an estimate, based on an actual survey, of the number of customers to be served during the first three years, and (8) any facts tending to establish that the applicant is entitled to exercise the rights and that approval of the application is in the public interest.^{38/} The Commission shall approve the application if, after a hearing, it determines that the proposed construction or operations are "necessary

or convenient for the public service."^{39/} No Commission or judicial decisions have examined the factors that are considered in determining what operations are necessary and convenient for the public service.

Public utilities also must obtain Commission approval before transferring any franchise or other property.^{40/} An application for such approval should include (1) a description of the property to be transferred, (2) evidence of any necessary municipal consent, (3) a copy of the proposed contract, (4) the original cost of the property to be transferred, (5) an estimate of accrued depreciation of the property, and (6) cost of the property to be carried by the transferor.^{41/} The transfer will be approved if, after a hearing, the Commission is satisfied that the transferee is capable of rendering adequate service and that the transaction is in the public interest.^{42/}

No utility may abandon all or any part of its service without first obtaining the consent of the Commission.^{43/} No statutory criteria have been established governing abandonment of service nor have the Commission or state courts established such criteria.

D. Service Area Disputes

There is no specific statutory provision governing the resolution of service area disputes by the Commission. A Commission spokesman, however, stated that, while the Commission has been granted no specific authority to hear general complaints against public utilities, it does accept all

varieties of complaints regarding any actions taken by a public utility. The Commission would resolve any service area dispute upon complaint by any interested party.^{44/} The Commission requires no particular form of complaint. In general, a complaint should include the name of the party complained of, the act or omission complained of and the relief sought.^{45/} The Commission will conduct any investigation it deems necessary and may hold a public hearing before issuing any order necessary to resolve the dispute.^{46/}

V. APPEALS OF REGULATORY DECISIONS

Any interested party may apply to the Commission for rehearing on any order made by the Commission. Application must be made within thirty days after service of the order.^{47/} The Commission must either grant or deny the application within thirty days of the filing of the application.^{48/} No party may seek judicial review of a Commission order without first applying for rehearing.^{49/} Within four months of issuance of an order on rehearing or an order denying an application for rehearing, an interested party may seek review of the Commission's order in the Supreme Court for Albany County.^{50/}

The only issues which may be raised on appeal are:

1. whether the body or officer failed to perform a duty enjoined for it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence. 51/

FOOTNOTES

1. N.Y. Pub. Serv. Law §4(1) (Lawyer's Co-op Supp. 1978).
2. Id., §4(3).
3. Id., §4(2).
4. Id., §9.
5. Id., §§77, 89, 89-o(1976).
6. Mr. Charles Gibson, Dept. Counsel, Commission, Telephone conversation 3/5/79.
7. N.Y. Pub. Serv. Law §5 (Lawyer's Co-op Supp. 1978).
8. Id., §2(10) (1976).
9. Id., §2(12).
10. Id., §2(21).
11. Id.; §§2(11) (Lawyer's Co-op Supp. 1978), (13) (Lawyer's Co-op Supp. 1976), (22) (Lawyer's Co-op Supp. 1976).
12. N.Y. Gen'l Muni. Law §364 (1976).
13. N.Y.R.E.C. Law §67.
14. Mr. Charles Gibson, Dept. Counsel, Commission, Telephone conversation, 3/5/79.
15. Re Orange & Rockland Electric Co., 49 P.U.R. (N.S.) 275, 279 (N.Y.P.S.C. 1943).
16. Re Central Hudson Gas & Electric Co., 30 P.U.R. (N.S.) 257, 260 (N.Y.P.S.C. 1939).
17. N.Y. Pub. Serv. Law §§2 (11) (Lawyer's Co-op Supp. 1978), 13 (Lawyer's Co-op Supp. 1976), 22 (Lawyer's Co-op Supp. 1976).
18. Re Orange & Rockland Electric Co., 49 P.U.R. (N.S.) 275, 279 (N.Y.P.S.C.); Re Hudson Gas & Electric Co., 30 P.U.R. (N.S.) 257 (N.Y.P.S.C. 1930).
19. Re Hooper Energy Corporation, Case No. 27299 (N.Y.P.S.C. Feb. 1, 1978).

20. N.Y. Pub. Serv. Law §§66(1)(1976), 80(1)(1976), 89-c(1)(Lawyer's Co-op Supp. 1978).
21. Id., §§66(12), 80(10), 89-c(10)(Supp. 1978).
22. Id., §§66(4), 80(3), 89-c(3)(1976).
23. Id., §§68(1976), 81(1976), 89-e(Supp. 1978).
24. Ibid.
25. Id., §§70(Supp. 1978), 83 (1976), 89-h(1976).
26. Id., §§69(Supp. 1978), 82 (1976), 89-f (1976).
27. Id., §108(1976).
28. Id., §§106, 110.
29. Id., §§70(Supp. 1978), 83 (1976), 89-h(1976).
30. Id., §§69-a, 82-a(1976), 89-g(1976).
31. Id., §§68, 81.
32. Re Long Island Lighting Co., 71 P.U.R. 3d 369, 375 (N.Y.P.S.C. 1967).
33. N.Y. Gen'l Muni. Law §364 (1976).
34. Columbia Gas of New York, Inc. v. New York State Electric & Gas Corp., 28 N.Y. 2d 117, 320 N.Y.S. 2d 57, 268 N.E. 2d 790 (Ct. of App. 1971).
35. Re Long Island Lighting Co., 71 P.U.R. 3d 369 (N.Y.P.S.C. 1967).
36. 16 N.Y.C.R.R. §21(g)(1961).
37. N.Y. Pub. Serv. Law §§68, 81 (1976).
38. 16 N.Y.C.R.R. §21.3 (1961).
39. N.Y. Pub. Serv. Law §§68, 81 (1976).
40. Id., §§70(Supp. 1978), 83 (1976), 89-h(1976).
41. N.Y.C.R.R. §31.1 (1961).
42. Id., §31.2.

43. Re Schenectady Railway Company, 80 P.U.R. (N.S.)
186, 187 (N.Y.P.S.C. 1949).
44. Mr. Charles Gibson, Dept. Counsel, Commission, Tele-
phone conversation, 3/5/79.
45. 16 N.Y.C.R.R. §11.1 (1961).
46. Id., §11.2.
47. N.Y. Pub. Serv. Law §22 (1976).
48. Ibid.
49. N.Y.C.P.L.R. §7801 (1978).
50. Id., §§217, 506(b), 7804.
51. Id., §7803.

CHAPTER 3

SITING OF ENERGY FACILITIES IN NEW YORK

I. AGENCIES WHICH ADMINISTER SITING LAWS

The New York Siting of Major Steam Electric Generating Facilities Act^{1/} (Facility Siting Act) governs the siting of steam electric generating facilities with generating capacities of 50,000 kilowatts or more. The Facilities Siting Act is administered by the Board on Electric Generation Siting and the Environment (Siting Board) in the Department of Public Service. The chairmanship of the Board is filled by the Chairman of the Public Service Commission. Membership of the Siting Board includes the Commissioner of Environmental Conservation, Commissioner of the State Energy Office, Commissioner of Commerce, and an ad hoc member appointed by the Governor who is a resident of the judicial district in which the facility is primarily proposed to be located, and who serves until a final determination has been made as to that facility.^{2/}

The Facility Siting Act was first enacted and effective July 1, 1972 and contained a built-in termination date of January 1, 1979. On August 4, 1978, a new Facility Siting Act was adopted effective immediately, with built-in termination date of January 1, 1984. The new version is for the most part substantively the same as the original enactment. The new version, however, raises the application fee from \$25,000 to \$150,000.^{3/} In addition, the new version incorporates procedures for issuing National Pollutant Discharge Elimination System

(NPDES) permits.^{4/} The new version also shortens the time in which the Chairman must set a date for a hearing after receipt of the application from 210 days to 60 days,^{5/} requires final decisions within 24 months, establishes a prehearing procedure to expedite the proceeding, expressly requires that hearings be conducted "expeditiously," and imposes a requirement that the Siting Board consider applications for rehearings within three months after the 30 day deadline for filing such applications.^{6/} This abbreviation in the timetable for decisions may be in response to criticism the Siting Board has received for lengthy delays in reaching decisions.^{7/} Finally, the new version adds two new necessary parties for certification proceedings, the State Energy Office and the Department of Agriculture and Markets.^{8/}

The New York Siting of Major Utility Transmission Facilities Act^{9/} (Transmission Siting Act) gives the Public Service Commission (Commission) jurisdiction over the siting of "major utility transmission facilities," which include electric and gas transmission lines above certain minimum capacities and lengths.^{10/}

The only other state agency that might play a significant role in siting decisions is the Department of Environmental Conservation (DEC), which has jurisdiction over water use, protection of state lands, forests, fish and wildlife, marine and coastal resources, and air and water pollution.^{11/} Local governing bodies also have authority to regulate and restrict the use of land through zoning provisions.

Because separate approvals by DEC and local governing bodies are preempted with respect to facilities subject to the Facility Siting Act and Transmission Siting Act, they are discussed in Part V, below.

It should be noted that New York has enacted a NEPA-type statute, the Environmental Quality Review Act,^{12/} which requires the preparation of environmental impact statements and the consideration of environmental issues by state agencies in connection with any "action they propose or approve which may have a significant impact on the environment."^{13/}

II. JURISDICTION OF SITING AGENCIES

A. Siting Board

No person may commence the preparation of a site for, or begin the construction of, a major steam electric generating facility without first obtaining a certificate of environmental compatibility and public need authorizing the construction of the facility in accordance with the Facility Siting Act.^{14/}

"Person" is defined as "any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate."^{15/} "Major steam generating facility means a steam electric generating facility with a generating capacity of 50,000 kilowatts or more."^{16/}

Although there is a grandfather clause exempting

facilities for which applications were made under other provisions, or construction was begun, prior to January 1, 1979,^{17/} all such facilities would be subject to the essentially similar provisions of the original version of the Siting Act, which contained a similar grandfather clause applicable to facilities for which applications had been submitted under any other provisions prior to July 1, 1972. The Facility Siting Act also excludes normal repairs, replacements, modifications, and improvements which do not result in an increase in capacity of the facility of more than 50,000 kilowatts.^{18/} Finally, the Facility Siting Act excludes facilities: (i) constructed on lands dedicated to industrial uses, (ii) the output of which will be used for industrial purposes, on the premises, and (iii) the generating capacity which does not exceed 200,000 kilowatts.^{19/} An applicant may waive these exclusions from jurisdiction.^{20/}

Although the Facility Siting Act provides liberally for participation by interested agencies and persons in certifying proceedings and requires that the Siting Board conform to applicable state laws and regulations, and conform to the applicable local laws and regulations except where the Board finds them "overly restrictive," the Act preempts other state and local agencies from exercising any separate approval authority.^{21/} This does not apply to a municipality which has not received notice of the filing of the application.^{22/}

However, the Facility Siting Act provides in a separate section that the issuance of a certificate does not exempt the applicant from complying "with state law and regulations thereunder subsequently adopted or municipal laws and regulations thereunder not inconsistent with the provisions of such certificate."^{23/}

The Siting Board is authorized to promulgate rules, and has done so extensively.^{24/}

Following any rehearing and any judicial review, the Siting Board's jurisdiction over an application ends, and the Commission is required to monitor, enforce and administer compliance with any terms and conditions set forth in the Board's order.^{25/}

B. Public Service Commission

While the Facility Siting Act governs the siting of major steam electric generating facilities, the approval of major utility transmission facility sites is the responsibility of the Commission under the Transmission Siting Act. The provisions of the Transmission Siting Act essentially mirror those of the Facility Siting Act. Under the Transmission Siting Act, no person may commence the preparation of a site for the construction of a major utility transmission facility without first obtaining a certificate of environmental compatibility and public need from the Commission. "Person" is defined, as in the Facility Siting Act, to mean any "individual, corporation, public benefit corporation, political subdivision, governmental

agency, municipality, partnership, co-operative association, trust or estate."^{26/} "Major utility transmission facility"

means:

(a) an electric transmission line of a design capacity of one hundred twenty-five kilovolts or more and extending a distance of one mile or more, or of [less than one hundred twenty-five kilovolts] extending a distance of more than ten miles, including associated equipment, but shall not include any such transmission line located wholly underground in a city with a population in excess of one hundred twenty-five thousand or a primary transmission line approved by the federal power commission in connection with a hydro-electric facility; and (b) a fuel gas transmission facility extending a distance of one thousand feet or more to be used to transport fuel gas at pressures in excess of one hundred twenty-five pounds per square inch, but shall not include any such transmission facility located wholly underground in a city.^{27/}

The Siting Act contains sunset provisions, as noted in Part I, above. The grandfather and other exemptions in the Transmission Siting Act are similar to those in the Facility Siting Act. Excluded are facilities for which applications were submitted under other provisions prior to July 1, 1970. Also excluded are facilities approved by a municipality or public benefit corporation which has sold bonds or bond anti-cipation notes on or before July 1, 1970, the proceeds of which are to be used to pay for the facilities. As in the Facility Siting Act, these exclusions may be waived.^{28/}

The Transmission Siting Act also preempts separate approvals by other state and local agencies, but liberally allows for participation and requires compliance with all

applicable state laws and regulations, and compliance with all local laws and regulations except those that the Commission finds "unreasonably restrictive." Separate approvals are not precluded for municipalities which did not receive notice of the application.^{29/} Unlike the Facility Siting Act, the Transmission Siting Act contains no provision expressly stating that certificates are subject to later state and local enactments.

The Commission has authority to make rules and has promulgated rules which expand on procedures and standards for approval.^{30/}

A provision identical to the provision allowing the Board to override "unreasonably restrictive" local provisions, but giving the Commission that power with respect to transmission siting approvals, was found not to contravene the home rule act in County of Orange v. Public Service Commission.^{31/}

III. PROCEDURES FOR CERTIFICATION AND REVIEW

A. Facilities Siting Act

The new version of the Facilities Siting Act contains pre-application procedures which provide for a preliminary determination between the applicant, staff, and Department of Environmental Conservation as to what studies or program of studies must be conducted in connection with the application.^{32/}

Applications must contain the following information and materials:

(a) a description of the site and a description of the facility to be built thereon, including available site information, including maps and description, present and proposed development, source and volume of water required for plant operation and cooling, and as appropriate, geological, aesthetic, ecological, tsunami, seismic, biological, water supply, population and load center data;

(b) a description of any reasonable alternate location or locations for, and alternate practical sources of power to, the proposed facility; a description of the comparative advantages and disadvantages of each such location and source; and a statement of the reasons why the primary proposed location and source is best suited to promote the public health and welfare, including the recreational and other concurrent uses which the site may serve;

(c) studies which have been made of the expected environmental impact and safety of the facility . . . ;

(d) estimated cost information . . . ;

(e) a statement explaining the need for the facility including (i) reasons that the facility is necessary or desirable for the public welfare and is not incompatible with health and safety; (ii) the load demands which the facility is designed to meet; (iii) how the facility will contribute to systems reliability, safety and efficiency; and (iv) that the facility conforms to the current long range electric forecasts of the energy planning board;33/

* * *

The applicant must, under the new version, also submit information necessary to obtain a NPDES permit pursuant to the Federal Water Pollution Control Act amendments of 1977 (FWPCA).^{34/}

All of these requirements are expanded, and technical criteria are provided by the Rules of Procedure, Chapter I, Subchapter E.

The Rules are also somewhat more expansive than the statute in requiring service of applications on interested agencies and parties. The Rules require that an application be accompanied by proof of service of two copies of the application upon:

(1) each municipality in which any portion of the facility would be located as primarily proposed or alternatively listed;

(2) the Commissioner of Environmental Conservation;

(3) the Commissioner of Health;

(4) the Commissioner of Commerce;

(5) the Director of the Office of Planning Services;

(6) the Attorney General, to the attention of the assistant Attorney General in charge of the Environmental Protection Bureau;

(7) each member of the New York State Legislature in whose district any part of the facility as primarily proposed or alternatively listed would be located;

(8) in the event any portion of the facility as primarily proposed or alternatively listed would be located within its jurisdiction, the Hudson River Valley Commission;

(9) in the event any portion of the facility as primarily proposed or alternatively listed would be located within its jurisdiction, the St. Lawrence-Eastern Ontario Commission;

(10) in the event any portion of the facility as primarily proposed or alternatively listed would be located within its jurisdiction, the Adirondack Park Agency;

(11) the Atomic Energy Council;

(12) the Office of the State Geologist;

(13) the Office of Parks and Recreation;
and

(14) in the event any portion of the facility as primarily proposed or alternatively listed is subject to its jurisdiction, any other State, any multistate, or any Federal agency having authority to approve, in whole or in part, the location, construction, or operation of the proposed facility.^{35/}

In addition, notice must be published once in a newspaper of general circulation in the area.^{36/}

The Facilities Siting Act requires that the following parties be included in the certification proceeding:

(a) the applicant;

(b) the department of environmental conservation, which shall in any such proceeding present expert testimony and information concerning the potential environmental impact of the proposed facility, and any alternate facility or energy source on the environment and whether and how such facility would comply with applicable state and municipal environmental protection laws, standards, rules and regulations;

(c) the department of commerce;

(d) the department of health;

(e) the department of agriculture and markets;

(f) the state energy office;

(g) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the Hudson river valley commission;

(h) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the St. Lawrence-Eastern Ontario commission;

(i) where the facility or any portion thereof or of any alternate is to be located within the Adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the Adirondack park agency;

(j) a municipality entitled to receive a copy of the application under [§142(2)(a)], if it has filed with the board a notice of intent to be a party, within forty-five days after the date given in the published notice as the date for the filing of the application; any municipality entitled to be a party herein and seeking to enforce any local ordinance, law, resolution or other action or regulation otherwise applicable shall present evidence in support thereof or shall be barred from the enforcement thereof;

(k) any individual resident in a municipality entitled to receive a copy of the application under [§142(2)(a)], if he has filed with the board a notice of intent to be a party, within forty-five days after the date given in the published notice as the date for filing of the application;

(l) any non-profit corporation or association, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups or to promote the orderly development of any area in which the facility is to be located, if it has filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application;

(m) any other municipality or resident of such municipality located within a five mile radius of such proposed facility, if it or he has filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application;

(n) any other municipality or resident of such municipality which the board in its direction finds to have an interest in the proceeding because of the potential environmental effects on such municipality or person, if the

municipality or person has filed with the board a notice of intent to become a party, within forty-five days after the date given in the published notice as the date for filing of the application, together with an explanation of the potential environmental effects on such municipality or person; and

(o) such other person or entities as the board may at any time deem appropriate, who may participate in all subsequent stages of the proceeding.^{37/}

A municipality that has failed to file the requisite notice of intent, as required above, may nevertheless be made a party by the Siting Board for good cause shown.^{38/}

Within 60 days of receiving an application, the Chairman of the Siting Board must determine whether the application contains all required information, proofs of service and fees (\$150,000 under the new version). If the application is complete, the Board must, within the 60-day period, also set a date for a public hearing.^{39/} A pre-hearing conference is held in the interim to expedite the hearing, specify issues, obtain stipulations, and deal with other matters deemed proper by the hearing examiner.^{40/} The hearing is required to be conducted in "an expeditious manner."^{41/} Proceedings on applications are normally to be completed within 24 months after the Chairman initially determines that the application is complete.^{42/}

After the hearing, the presiding hearing examiner makes a recommendation to the Siting Board, and an associate hearing examiner may also submit a separate report. The Board makes a final decision upon the record and briefs by parties.

The Board may certify the application as filed, or with such terms, conditions, limitations or modifications as it deems appropriate.^{43/} The hearing examiner's determination that the applicant's proposal is preferable to alternatives, however, is binding upon the Board, "except for good cause shown."^{44/} The Board must issue an opinion with its decision including the reasons for overriding any otherwise applicable local ordinance or regulations.^{45/}

A rehearing must be sought before judicial review may be obtained.^{46/} Any party "aggrieved" by the Board's decision may apply for a rehearing within 30 days after issuance of the decision. The Board must normally determine whether to allow the rehearing within three months after the deadline for applying for a rehearing. Judicial review may be sought by filing a petition within 30 days after the Board's final decision on the application for rehearing, in the county in which the facility is proposed to be located.^{47/} The court's review is ordinarily limited to the administrative record, objections raised in the rehearing application, and briefs to the court. Judicial review is to be "as expeditious as possible and with lawful precedence over all other matters."^{48/} The grounds for, and scope of, review are limited to whether the decision and opinion of the Siting Board are:

- (a) in conformity with the constitution of the state and the United States;

(b) supported by substantial evidence in the record and matters of judicial notice properly considered and applied in the opinion;

(c) within the board's statutory jurisdiction or authority;

(d) made in accordance with procedures set forth in this article or established by rule or regulation pursuant to this article;

(e) arbitrary, capricious or an abuse of discretion.49/

There are no reported judicial decisions interpreting the procedural provisions of the Facilities Siting Act.

B. Transmission Siting Act

An application for a certificate under the Transmission Siting Act must include the following information:

(a) the location of the site or right-of-way;

(b) a description of the transmission facility to be built thereon;

(c) a summary of any studies which have been made of the environmental impact of the project, and a description of such studies;

(d) a statement explaining the need for the facility;

(e) a description of any reasonable alternate location or locations for the proposed facility, a description of the comparative merits and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility; and

(f) such other information as the applicant may consider relevant or the commission may by regulation require.50/

The Rules establish somewhat more extensive notice requirements than the statute. The application must be accompanied by proof of service of a copy on:

(1) each municipality in which any portion of the facility is to be located, both as primarily and alternatively proposed;

(2) the Commissioner of Environmental Conservation;

(3) the Commissioner of Commerce;

(4) the Commissioner of Transportation;

(5) the Director of the Office of Planning Coordination;

(6) each member of the New York State Legislature through whose district any part of the facility, as primarily or alternatively proposed, would pass;

(7) in the event any portion of the proposed facility is located within its jurisdiction, the Hudson River Valley Commission; and

(8) in the event any portion of the proposed facility is located within its jurisdiction, the St. Lawrence-Ontario Commission; and

(9) in the event any portion of the proposed facility is located within its geographical jurisdiction, any other State agency having authority over the location of any portion of the proposed facility.^{51/}

Notice published in a newspaper of general circulation in the area is also required.^{52/}

Parties to the certification proceeding must include:

(a) the applicant;

(b) the department of environmental conservation;

- (c) the department of commerce;
- (d) the secretary of state;
- (e) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the Hudson river valley commission;
- (f) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the St. Lawrence-Eastern Ontario commission;
- (g) where the facility or any portion thereof or any alternate is to be located within the Adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the Adirondack park agency;
- (h) a municipality entitled to receive notice under [§122(2)(a)], if it has filed with the commission a notice of intent to be a party, within thirty days after the date given in the notice as the date for filing of the application;
- (i) any individual resident in a municipality entitled to receive notice under [§122(2)(a)], if he has filed with the commission a notice of intent to be a party, within thirty days after the date given in the published notice as the date for filing of the application;
- (j) any domestic non-profit corporation or association, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial interests, to represent commercial and industrial groups or to promote the orderly development of the areas in which the facility is to be located, if it has filed with the commission a notice of intent to become a party, within thirty days after the date given in the published notice as the date for filing of the application;
- (k) such other persons or entities as the commission may at any time deem appropriate.53/

The Commission must also designate such members of its staff "as may be desirable to represent the public interest."^{54/}

The Commission may permit a municipality which has failed to file the requisite notice of intent to become a party "upon good cause shown."^{55/}

If the application contains the required information and proofs of service, the Commission must set a hearing date not less than 60 nor more than 90 days after receiving the application.^{56/} The Commission renders a decision on the record either granting or denying the application as filed, or upon such terms, conditions, limitations or modifications as it deems proper.^{57/} The Commission must issue an opinion if it denies the application, or if it overrides an otherwise applicable local standard or requirement; otherwise, the Commission may in its discretion issue an opinion.^{58/}

A rehearing must be sought before judicial review may be obtained. Procedures for rehearing and judicial review are substantially identical to those discussed above in connection with decisions rendered under the Facilities Siting Act.^{59/}

A New York court has held that the Commission has authority to certify a wholly new route for transmission lines proposed by its staff rather than the route proposed by the applicant.^{60/}

IV. STANDARDS IN GRANTING CERTIFICATES

A. Facility Siting Act

The standards for granting a certificate under the Facility Siting Act are quite extensive, which may help explain the lengthy delays in approving applications under the Act thus far. The Facility Siting Act provides that the Siting Board may not grant a certificate for the construction or operation of a major steam electric generating facility, either as proposed or as modified by the Board, unless it first finds and determines:

(a) the public need for the facility and the basis thereof;

(b) the nature of the probable environmental impact, including a specification of the predictable adverse effect on the normal environment and ecology, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air and water quality, fish and other marine life and wildlife;

(c) that the facility (i) represents the minimum adverse environmental impact, considering the state of available technology, the nature and economics of the various alternatives, the interests of the state with respect to aesthetics, preservation of historic sites, forest and parks, fish and wildlife, viable agricultural lands, and other pertinent considerations, (ii) is compatible with public health and safety and (iii) will not discharge any effluent that will be in contravention of the standards adopted by the department of environmental conservation, or in case no classification has been made of the receiving waters associated with the facility, will not discharge any effluent that will be unduly injurious to the propagation and protection of fish and wildlife, the industrial development of the state, and public health and public enjoyment of the receiving waters;

(d) that the facility is designed to operate in compliance with applicable state and local laws and regulations issued thereunder concerning, among other matters, the environment, public health and safety, all of which shall be binding upon the applicant, except that the board may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standards or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology or the needs of or costs to consumers whether located inside or outside of such municipality. The board shall provide the municipality an opportunity to present evidence in support of such ordinance, law, resolution, regulation, or other local action issued thereunder. For the purposes of this article an agreement between the applicant and a municipality in which the proposed facility is to be located, entered into on or before May first, nineteen hundred seventy-six, relating to the location of facilities within the municipality shall be deemed to be and have the force and effect of a local law;

(e) that the facility is consistent with long-range planning objectives for electric power supply in the state, including an economic and reliable electric system; and for protection of the environment;

(f) that the facility will serve the public interest, convenience and necessity, provided, however, that a determination of necessity for a facility made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law for which an application for a certificate has been filed prior to July first, nineteen hundred seventy-eight shall be conclusive on the board; and

(g) that the facility is in the public interest, considering the environmental impact of the facility, the total cost to society as a whole, the possible available sites or alternative available sources of energy, as the case may be, both within the state and elsewhere and the immediacy and totality of the needs of the people of the state for the facility within the context of the need for public utility services and for protection of the environment.61/

The Rules elaborate on these requirements and impose technical criteria.^{62/}

The Siting Board must also determine whether to issue a NPDES permit under the Federal Water Control Act, based upon the record, with respect to the construction and operation of the water intake and discharge systems of the facility.^{63/}

There are no reported decisions interpreting the siting standards in the Facility Siting Act.

B. Transmission Siting Act

The PSC may not grant a certificate unless it finds and determines:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;
- (c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;
- (d) in the case of an electric transmission line, (1) what part, if any, of the line shall be located underground; (2) that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability;
- (e) in the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;
- (f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which

shall be binding upon the commission, except that the commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors or cost or economics, or of the needs of consumers whether located inside or outside of such municipality;

(g) that the facility will serve the public interest, convenience, and necessity, provided, however, that a determination of necessity for a facility made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law shall be conclusive on the commission.^{64/}

The Commission Rules elaborate on the standards and impose technical criteria.^{65/}

If the Commission determines that the location of all or a part of the proposed transmission facility should be modified, it may condition certification on such modification, but only if persons residing in the affected municipalities receive notice.^{66/}

It has been held that the Commission may impose as a condition of certification to the construction of a 65-mile long electric transmission line, that the proposed line be consolidated with existing facilities and that certain existing facilities be placed underground. This did not constitute an unconstitutional taking of property requiring just compensation, but simply a condition for certification.^{67/}

V. PLANNING OF DEVELOPMENTS GENERALLY

For the siting of power plants and transmission lines not meeting the size requirements or exclusions set forth in the Public Service Law chapters for certification by respectively the Siting Board and the Commission, approval may be required from other agencies, primarily the Department of Environmental Conservation and local agencies. This, of course, is not required where the applicant for a major steam generating facility otherwise excluded from Board certification by Section 141(4) of the statute waives the exclusion, as discussed in Part II, above.

A. Department of Environmental Conservation

The DEC is the chief environmental protection agency in New York. The DEC protects and regulates the use of state lands and forests, fish and wildlife, marine and coastal resources, and water resources, and promulgates and enforces standards for water pollution and air pollution control.^{68/}

The DEC's authority includes granting licenses for the use of state water and water sites for the development of water power for the production, sale and distribution of heat, light or power to the public.^{69/} Its jurisdiction over water pollution includes setting standards and requiring permits for discharges, including permits for thermal discharges into the waters of the state in connection with the construction or operation of steam-electric generating facilities (no minimum size requirement).^{70/}

The DEC's air pollution control authority includes the power to set and enforce standards, but does not specifically include the establishment of permitting procedures.^{71/}

B. Local Zoning

Cities,^{72/} towns,^{73/} and villages^{74/} in New York have essentially the same broad zoning powers. They may regulate and limit the height, bulk and location of buildings, density of buildings and populations, and regulate and restrict the location of "trades and industries," and to these ends may divide the city, town or village into districts. The regulations are, among other things, to secure safety from fire, lessen congestion, and facilitate the adequate provision of transportation, sewerage, schools, parks and other public requirements. No provisions of the City or Town Laws deal with public utilities. The Village Law requires that if a comprehensive master plan is prepared, it must show, among other things, existing and proposed routes of public utilities, and the Village Law also normally prohibits the construction of a "public municipal street utility" in any street which has not yet become a public street and been placed on the official map or plan.^{75/}

Counties in New York have no direct zoning authority. However, the governing bodies of counties or governing bodies within regions and metropolitan areas may establish county, regional or metropolitan planning boards to recommend compre-

hensive zoning plans to the governing bodies of the cities, villages and towns located within such areas, and these plans may consider existing and proposed public utilities.^{76/}

Furthermore, such county, regional or metropolitan planning boards are authorized to veto or make recommendations with respect to all zoning regulations, amendments, special permits or variations, proposed by local governing bodies within the county, region or metropolitan area. Such veto or recommendations may be overridden by the vote of a majority plus one of the members of the local governing body.^{77/}

1. N.Y. Pub. Serv. Law §§140-149a (McKinney Supp. 1978-79).
2. Id., §140(4).
3. Id., §142(6).
4. Id., §§142(7), 146(3).
5. Id., §143(1).
6. Id., §§143, 145, 148(1).
7. See, Electrical Week, p. 5, November 28, 1977.
8. N.Y. Pub. Serv. Law §144(1) (McKinney Supp. 1978-79).
9. Id., §120.
10. Id., §120(2)(a).
11. N.Y. Envir. Conserv. Law §3-0301 (McKinney 1973).
12. Id., §8-0101 et seq. (McKinney Supp. 1978-79).
13. Id., §8-0109.
14. N.Y. Pub. Serv. Law §§140(6), 141(1) (McKinney Supp. 1978-79).
15. Id., §140(3).
16. Id., §140(2).
17. Id., §141(a).
18. Id., §141(4)(c).
19. Id., §141(4)(d).
20. Id., §141(5).
21. Id., §149-a.
22. Ibid.
23. Id., §141(1).
24. Department of Public Service, Rules of Procedures, Chapter I, Subchapter E.
25. N.Y. Pub. Serv. Law §146(2) (McKinney Supp. 1978-79).

26. Id., §120(3).
27. Id., §120(2).
28. Id., §121(4).
29. Id., §130.
30. Department of Public Service, Rules of Procedure, Chapter I, Subchapter G.
31. 344 N.Y.S.2d 434 (App. Div. 1972).
32. N.Y. Pub. Serv. Law §141-a (McKinney Supp. 1978-79).
33. Id., §142(1).
34. Id., §142(7).
35. Rules of Procedure, Tit. 16, Chapter I, §705.
36. Id., §705(c).
37. N.Y. Pub. Serv. Law §144(1) (McKinney Supp. 1978-79).
38. Id., §144(4).
39. Id., §143(1).
40. Id., §143(2).
41. Id., §145(1).
42. Id., §143(4).
43. Id., §146(2).
44. Id., §§145, 146(1).
45. Id., §147.
46. Id., §148(1).
47. Ibid.
48. Ibid.
49. Id., §148(2).
50. Id., §122(1).

51. Rules of Procedure, Chapter I §85.10(a).
52. Id., §85.10(c).
53. N.Y. Pub. Serv. Law §124(1) (McKinney Supp. 1978-79).
54. Id., §124(2).
55. Id., §124(4).
56. Id., §123(1).
57. Id., §126(1).
58. Id., §§126(1), 127.
59. Id., §128.
60. County of Orange v. Public Service Comm'n, 353 N.Y.S.2d 916 (App. Div. 1974).
61. N.Y. Pub. Serv. Law §146(2) (McKinney Supp. 1978-79).
62. Department of Public Service, Rules of Procedure, Chapter I, Subchapter E.
63. N.Y. Pub. Serv. Law §146(3) (McKinney Supp. 1978-79).
64. Id., §126(1).
65. Department of Public Service, Rules of Procedure, Chapter I, Subchapter E.
66. N.Y. Pub. Serv. Law §126(2) (McKinney Supp. 1978-79).
67. Niagara Mohawk Power Corp. v. Public Service Comm'n, 388 N.Y.S.2d 155 (App. Div. 1976).
68. N.Y. Envir. Conserv. Law, art. 9-19 (McKinney 1973).
69. Id., art. 15, §§1701-1759.
70. Id., §17-0701(3)(b).
71. Id., art. 19.
72. N.Y. Gen. City Law §20(24), (25) (McKinney 1968).
73. N.Y. Town Law §§261-284 (McKinney 1965).
74. N.Y. Village Law §§7-700 to 7-742 (McKinney 1973).

75. N.Y. Village Law §§7-722, 7-736 (McKinney 1973).
76. N.Y. Gen. Mun. Law §239-3(5) (McKinney 1974).
77. Id., §239-m.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN NEW YORK

I. AUTHORITY TO GRANT FRANCHISES

There is no constitutional grant of franchising authority to local governments in New York. However, several statutory provisions expressly empower local governments to grant franchises or consents to use streets, highways, and public places. Cities, towns and villages are all authorized to grant franchises to use streets, highways or other public places.^{1/} These provisions do not limit the local governments with respect to the types of entities which may receive franchises or the uses which may be allowed under a franchise. In addition, electric and gas corporations are specifically required to obtain the consent of municipal authorities before they may lay, erect, or construct wires, poles, pipes, or fixtures in, on, over or under streets, avenues and public places in cities, towns and villages.^{2/} The "consent" referred to in this statutory provision has been construed by the courts to mean a franchise.^{3/}

The State Superintendent of Public Works is authorized to regulate the use of all state highways. This power is superior to any local franchising powers.^{4/} The county superintendent of highways may regulate the use of highways. This power, too, is superior to any local franchising authority.^{5/}

Local governments have been granted home rule powers authorizing them to "adopt and amend local laws not inconsistent with the provisions of the constitution or not inconsistent with any general law relating to its property affairs or government" ^{6/} This provision appears to provide additional authority for local governments to grant franchises for the use of streets, highways or other public property. Although no reported judicial decisions have discussed the extent to which these home rule powers may authorize franchise grants, support for this proposition can be found in a provision of the home rule law requiring that any local law which changes a public utility franchise be subject to a popular referendum. ^{7/}

Special powers to grant franchises to use the streets may be conferred at the time of incorporation under the terms of the municipal charter or by special act creating the municipality. ^{8/}

That a municipality has only an easement in the street will not affect its power to franchise. However, it has been held that where the easement is acquired by the municipality for limited uses, granting additional uses will require compensation to the fee owner. ^{9/} In a case involving a city which had condemned an easement for highway purposes, the court held that the easement could not be used for electricity lines and poles unless additional compensation was

paid to the fee owner.^{10/}

The transmission of electricity through lines of another previously franchised business is not subject to municipal franchising authority.^{11/} This conclusion was reached in City of New York v. Comtel on the grounds that the city's authority over the "occupation and use" of the streets included only physical, tangible occupations or uses. Use by a second company of electric lines already franchised was not such a "physical use."

II. PROCEDURES FOR GRANTING FRANCHISES

The legislative body of any city is empowered to determine by ordinance the manner in which the powers granted to cities shall be exercised.^{12/} A specific statutory procedure is provided for the sale of franchises pursuant to any special or local law which in any way restricts the otherwise general grant of franchising authority found in §20(10). This procedure requires authorization by a vote of three-fourths of the members of the city council. The franchise must be sold to the highest bidder at a public auction held after notice published in a local newspaper at least once a week for three weeks. The sale must then be approved by the city board of estimates and the mayor.^{13/} If 10% of the city's voters so request, the sale of the franchise must be approved at a public referendum. No franchise granted pursuant to this procedure may be for a term of more than fifty years.^{14/}

Towns and villages may grant franchises only after public hearing and notice by publication in a local newspaper at least ten days before the meeting at which the franchise grant is considered.^{15/} Village franchises for light or water are subject to permissive referendum if the village operates a competing light or water system.^{16/} A village franchise is not operative until a copy has been executed and filed with the clerk.^{17/}

Although not specifically so provided, franchises presumably will be granted by ordinance. No standard procedure is provided for the enactment of ordinances by cities. In a village, an ordinance must be introduced at a regular or special meeting of the board of trustees by a member of the board. Upon a majority vote of the board, the village clerk shall publish notice that a public hearing will be held for the purpose of considering the proposed ordinance. The ordinance must be adopted by a majority vote after the public hearing.^{18/} The ordinance shall take effect upon publication.^{19/}

Ordinances may be enacted in towns by the town board after a public hearing.^{20/} The ordinance shall take effect ten days after publication and posting.^{21/}

Written acceptance of a franchise is not required unless made an express condition of the franchise.^{22/} A franchise may be granted before a certificate of public convenience and necessity is obtained from the Public Service Commission. However, approval by the Commission is required

for the exercise of a franchise granted to an electric or gas plant subject to the Commission's jurisdiction.

III. CRITERIA USED IN EVALUATING FRANCHISE REQUESTS

The statutory authority to grant franchises is not limited to franchises for public utility purposes, nor to those holding themselves out as ready and willing to serve all members of the public. Nor have such limitations arisen through judicial interpretation of the various grants of franchise authority.

Towns may grant franchises only "for any specific purpose authorized by law."^{23/} Research revealed no helpful judicial interpretations of this requirement.

Additional criteria for granting franchises may be required by the municipal charter, or may be attached as conditions to the grant.^{24/}

IV. CHARACTERISTICS OF A FRANCHISE

Perpetual franchises are valid, and a franchise is construed to be perpetual absent an express term of duration.^{25/} However, a franchise granted pursuant to the special procedures provided for franchise grants by a city under a local law altering the general statutory grant of franchising authority, is limited to a duration of 50 years.^{26/}

Abandonment or non-use are grounds for termination by the municipality. If a franchise is terminated on these grounds, a franchisee who had previously obtained a certificate from the Public Service Commission may be enjoined to remove

its properties.^{27/}

Once accepted by the franchisee, the franchise becomes an irrevocable contract, rather than a mere license.^{28/} Acceptance need not be formal, unless expressly required as a condition to the grant. For example, in Colonial Motor Coach Corp. v. City of Oswego,^{29/} the court found that an implied acceptance had occurred when the franchisee had, in reliance on the grant, instituted proceedings to obtain a certificate of public convenience and necessity. Even where there had been no acceptance, a municipality's actions may give rise to an estoppel to revoke the franchise.^{30/}

The municipality can, pursuant to an exercise of its police powers, require a franchisee to relocate its pipes, lines, and other equipment without compensation. This is not true, however, if the municipality is acting in a proprietary capacity.^{31/}

The state constitution prohibits grants of exclusive franchises by the legislature by private or local bill.^{32/} The issue of whether municipalities may grant exclusive franchises has not been resolved conclusively. Dicta in one case suggests that exclusive franchises are against public policy.^{33/} In another case, the court stated that franchises would be presumed not exclusive.^{34/}

There are no limitations on the type of utility service for which a franchise may be granted by cities, towns and villages.

There is no mandatory municipal franchise tax and no specific statutory authority for the assessment of a franchise fee. However, in City of Jamestown v. Home Telephone Co.,^{35/} because the city's charter granted authority to prevent the erection of telephone and telegraph poles and lines, the court held that the city could properly require a franchise fee as a condition to granting the right to erect poles and lines. By analogy, this rule should apply also where a municipality has general franchising authority under which it may prevent the erection of poles and lines.

The Public Service Commission may not authorize a utility to operate within a municipality unless the municipality has first granted a franchise.^{36/}

FOOTNOTES

1. N.Y. Gen. City Law §§20(10) (McKinney 1968); N.Y. Town Law §64(7) (McKinney 1965); N.Y. Village Law §4-412(6) (McKinney 1973).
2. N.Y. Trans. Corp. Law §11(3) (McKinney Supp. 1978-79).
3. Ghee v. Northern Gas Co., 53 N.E. 692 (N.Y. 1898); Tilton v. City of Utica, 60 N.Y.S.2d 249 (Sup. Ct. 1946).
4. N.Y. High. Law §52 (McKinney 1962).
5. Id. §136.
6. N.Y. Muni. Home Rule Law §10(1)(i) (McKinney 1969).
7. Id. §23(2)(i).
8. See, City of New York v. Comtel, Inc., 293 N.Y.S. 2d 599 (Sup. Ct. 1968), aff'd 294 N.Y.S. 2d 981 (App. Div. 1968) aff'd 252 N.E. 2d 285 (1969); In re International Railway Co., 274 N.Y.S. 5 (App. Div. 1934).
9. Thompson v. Orange & Rockland Electric Co., 173 N.E. 224 (N.Y. 1930), rev'd on other grounds, 173 N.E. 889 (N.Y. 1930).
10. See, also, Linquti v. Consolidated Edison Co., 137 N.Y.S. 2d 52 (Sup. Ct. 1955).
11. City of New York v. Comtel, Inc., 293 N.Y.S. 2d 599 (Sup. Ct. 1968), aff'd 294 N.Y.S. 2d 981 (App. Div. 1968), aff'd 252 N.E. 2d 285 (N.Y. 1969).
12. N.Y. Gen. City Law §23(2) (McKinney 1968).
13. Id. §23(2)(b).
14. Ibid.
15. N.Y. Village Law §4-412(6) (McKinney 1973); N.Y. Town Law §64(7) (McKinney 1965).
16. N.Y. Village Law §4-412(6) (McKinney 1973).
17. Id. §4-406.
18. Id. §20-2000 (McKinney Supp. 1978-79).
19. Id. §20-2004.

20. N.Y. Town Law §130.
21. Id. §133.
22. Colonial Motor Coach Corp. v. City of Oswego, 215 N.Y.S. 159 (Sup. Ct. 1926).
23. N.Y. Town Law §64(7) (McKinney 1965).
24. City of New York v. Comtel, Inc., 293 N.Y.S. 2d 599 (Sup. Ct. 1968), aff'd 294 N.Y.S. 2d 981 (App. Div. 1968), aff'd 252 N.E. 2d 285 (1969), City of Jamestown v. Home Telephone Co., 109 N.Y.S. 297 (App. Div. 1908).
25. Brauer v. Iroquois Gas Corp., 381 N.Y.S. 2d 166 (Sup. Ct. 1975).
26. N.Y. Gen. City Law §23(2)(b) (McKinney 1968).
27. People ex rel. Village of Chateaugay v. Public Service Comm'n, 174 N.E. 637 (N.Y. 1931); New York Electric Lines Co. v. Gaynor, 113 N.E. 519 (N.Y. 1916).
28. Brauer v. Iroquois Gas Corp., 381 N.Y.S. 2d 166 (Sup. Ct. 1975). Tilton v. City of Utica, 60 N.Y.S. 2d 249 (Sup. Ct. 1946). Greenberg v. City of New York, 274 N.Y.S. 4 (Sup. Ct. 1934).
29. Colonial Motor Coach Corp. v. City of Oswego, 215 N.Y.S. 159 (Sup. Ct. 1926).
30. Greenberg v. City of New York, 274 N.Y.S. 4 (Sup. Ct. 1934).
31. Consolidated Edison Co. v. Lindsay, 248 N.E. 2d 150 (N.Y. 1969).
32. N.Y. Const., art. 3 §17 (McKinney).
33. Village of East Rochester v. Rochester Gas & Electric Corp., 46 N.E. 2d 334 (N.Y. 1943), aff'd subnom, Despatch Shops, Inc., v. Village of East Rochester, 54 N.E. 2d 343 (N.Y. 1944), cert. denied, 323 U.S. 713 (1944).
34. Jamaica Water Supply Co. v. City of New York, 236 N.Y.S. 2d 816 (Sup. Ct. 1962).
35. City of Jamestown v. Home Telephone Co., 109 N.Y.S. 297 (App. Div. 1908).
36. N.Y. Pub. Serv. Law §68 (McKinney 1955).

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