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

PRELIMINARY BACKGROUND REPORT

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

MASTER

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January, 1980

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UNITED STATES DEPARTMENT OF ENERGY

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

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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 Missouri. 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 Missouri. 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 auth-implementation 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 MISSOURI

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities in Missouri is vested in the Public Service Commission ("Commission"). The Commission is composed of five members who are appointed by the Governor with the advice and consent of the senate.[1/] Commissioners are appointed for a term of six years.[2/] Commissioners must be free from any employment or pecuniary interests incompatible with the duties of the Commission.[3/]

The Commission is charged with the general supervision of public utilities.[4/] The Public Service Commission Law,[5/] passed in 1913, makes no provision for the regulation of public utilities by municipalities. However, one statute provides, with respect to third class cities, that:

> The council may, by ordinance, regulate and fix reasonable maximum rates and charges for the rental and use of telephones and telephone service within such city, and the price and quality of water, gas, gasoline, petroleum, electric lights and other means of lighting furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the candle power of the gas and electric lights furnished the city and private consumers. The council may, by ordinance, regulate and fix reasonable maximum rates, charges and prices of steam heat or other means of heating furnished by any person, firm or corporation operating under any franchise granted by the city, and may prescribe the pressure to be main-

> tained, on its mains, by any steam heating company, person or firm operating the same. 6/

This statute, enacted in 1893 and last amended in 1905, has not been expressly repealed but appears irreconcilable with the statutory grants of regulatory power to the Commission; while no case has so held, it would appear to have been repealed by implication upon the later adoption of the Public Service Commission Law.

All indications are that the Commission does exercise exclusive authority with respect to the power granted it to regulate public utilities. For example, in Home Telephone Co., Inc.,[7/] the Commission refused to issue a certificate of convenience to the petitioning telephone company on the grounds that the franchise granted by the municipality to be served provided that the telephone system was to be operated "under the direction of the board of alderman." The Commission noted that:

> Under the provisions of the Public Service Commission Act this Commission is given jurisdiction over telephone corporations and over erection, operation and maintenance of telephone plants. The condition imposed by the city is, therefore, in derogation of the powers and duties conferred upon this Commission and if complied with would render this Commission wholly incapable of performing the duties imposed upon it by the Public Service Commission Act. 8/

In addition, a spokesman for the Commission recently confirmed that, in practice, third class cities do not exercise any regulatory authority pursuant to the statute regarding third-class cities while the Commission exercises exclusive authority with respect to its statutory powers.[9/]

Municipalities do, however, retain the power to authorize the erection and maintenance of poles, wires and other fixtures necessary for the operation of public utilities. 10/ See Chapter 4 for a detailed discussion of franchising procedures. The Commission, while empowered to issue certificates of public convenience and necessity, does not possess the power to adjudicate the validity of the franchise granted by the municipality. 11/

II. JURISDICTION OF THE COMMISSION

"Public utility" is defined as:

> every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this chapter. 12/

The jurisdiction of the Commission extends, among other things:

> ****
>
> To the manufacture, sale or distribution of gas, natural and artificial, and electricity for light, heat and power, within the state, and to persons or corporations owning, leasing, operating or controlling the same; and to gas and electric plants, and to persons or corporations owning, leasing, operating or controlling the same;
>
> ****
>
> To all water corporations, and to the land, property, dams, water supplies, or power stations thereof and the operation of same within this state; provided, that nothing contained in this section shall be construed as conferring jurisdiction upon the public service commission over the service or rates of any municipally owned water plant or

system in any city of this state except where such service or rates are for water to be furnished or used beyond the corporate limits of such municipality;

****

To all public utility corporations and persons whatsoever subject to the provisions of this chapter as herein defined; . . .

****

To such other and further extent, and to all such other and additional matters and things, and in such further respects as may herein appear, either expressly or impliedly. 13/

The specific activities subject to the Commission's control are identified for each service under its jurisdiction in the Act's jurisdictional[14/] and definitional[15/] provisions. The Commission may regulate "the manufacture, sale or distribution of . . . electricity for light, heat and power,"[16/] and persons or entities owning facilities or equipment for "the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power."[17/] In addition, the Commission may regulate heating companies defined as persons or entities "manufacturing and distributing and selling, for distribution, or distributing hot or cold water, steam or currents of hot or cold air or for motive power, heating, cooking, or for any public use or service."[18/] In conjunction with its regulation of these activities, the Commission must approve the construction of new facilities.[19/]

The Commission has statutory authority over persons and corporations involved in the above-described activities. The specific "corporations" which are regulated by the Commission are defined to include "every corporation, company, association,

joint stock company or association, partnership or person."[20/] No distinction is made in this definitional statute between utilities owned by private investors or cooperatives. While no specific statutory language excludes public utilities owned by a municipality, the Missouri Supreme Court has held that the title of the Act creating the Commission was not sufficiently broad to allow extension of its regulatory powers to municipally-owned public utilities.[21/]

With respect to rural electric cooperatives, the Missouri statutes provide that:

> The jurisdiction, supervision, powers and duties of the public service commission shall extend to every such co-operative so far as concerns the construction, maintenance and operation of the physical equipment of such co-operative along, upon, under or across the public thoroughfares or upon, under or across the publicly owned lands, and to the extent of providing for the safety of the public and the elimination or lessening of induction or electrical interference, but only to the extent provided in this section, and nothing herein contained shall be construed as conferring upon such commission jurisdiction over the service, rates, financing, accounting or management of any such co-operative. [22/]

Thus, rural electrical cooperatives, organized pursuant to Chapter 394 of the Missouri Code, are subject to very little regulation by the Commission. For example, a rural electric cooperative need not obtain a certificate of public convenience and necessity prior to constructing an electric line.[23/]

The definitions of the activities, persons and entities over which the Commission has jurisdiction refer to "sales" and "selling" of the regulated services. There are no

statutory provisions which provide any basis for distinguishing between direct and indirect sales. However, the fact that rates subject to regulation by the Commission include:

> every individual or joint rate, fare, toll, charge, reconsigning charges, switching charge, rental or other compensation of any corporation, person or public utility 24/

supports a conclusion that the Commission's authority extends to both direct and indirect sales.

The Commission's jurisdiction is based on service to the public. Gas corporations and heating companies, by definition, must operate their facilities for "public use" in order to fall under the Commission's jurisdiction.[25/] Additionally, electric corporations must, by definition, own, operate, control or manage an electric plant other than "through private property . . . for its own use or the use of its tenants and [not] for sale to others."[26/] Thus, if an entity supplies electricity only for itself or for its tenants and operates only on or through private property, it is not subject to Commission regulation. Judicial decisions have expanded this statutory "private use" exemption by engrafting a general "public use" requirement as found in the definitions of gas corporations and heating companies.[27/] Therefore, while a member of the Commission staff stated that the production, generation, or storage of energy for private use is exempt from regulation,[28/] the point at which private use becomes public use is not well-defined.

The concept of public use was discussed in <u>State ex</u>

rel. Danciger & Co. v. Public Service Commission.[29] In this case, a brewery installed electrical generating equipment to power its own machinery and, finding there was surplus electricity, organized a company to sell current to customers in the vicinity. Ten residences, between twenty and thirty business houses, and thirty or thirty-two municipal street lamps, all within three blocks of the brewery, received electricity. The customers were required to pay for erection of the poles and lines used to supply them with electric power. No written contracts were involved and the company had no franchise from the city.[30]

A complaint was brought before the Commission by a printing plant after its service was cut off, allegedly without justification or prior notice.[31] The Commission ordered that service be restored. In reversing the Commission's order, the Missouri Supreme Court held that a provider of electrical power was subject to regulation by the Commission only if it provides this service for public use. The court so held despite the absence of any specific language to this effect in the definition of electric plant and electrical corporation.[32] The court stated that:

> There is in this case no explicit professing of public service, or undertaking to furnish lights or power to the whole public, or even to all persons in that restricted portion thereof who reside within three blocks of the Company's plant. . . . [33]

Because of the limited number of customers serviced by the brewery's electrical resources, it could not be considered an electrical corporation and public utility within the juris-

diction of the Commission. Therefore, the Commission's order requiring the brewery to restore service to the complainant was held void.[34]

The preceding case may be contrasted to State ex rel. Cirese v. Public Service Commission.[35] In Cirese the owner of several apartment buildings located on adjoining blocks installed an electric generating plant to serve some of his tenants. Over a five-year period he installed four more generating units, the last unit more than doubling his production capacity. Upon installation of this last unit, he offered service to and acquired thirteen customers who were not tenants in his buildings. Evidence established that the defendant had solicited customers through the use of handbills and had submitted an article about his electric service to a local newspaper. In addition, the defendant employed a billing system apparently copied from the complaining electric utility.[36]

After a complaint by the electric utility serving the area, the Commission ordered the defendant to cease supplying electricity to customers other than his tenants. This order was affirmed by the circuit court. The appellate court, distinguishing this case from Danciger, also affirmed the Commission's order. The court noted that the decision in Danciger had rested on that court's finding that the brewery had not held itself out as providing service available to the public. In contrast, the court noted that:

> The record in this case is replete with evidence of the personal solicitation of business from places of business and from private homes, and the public solicitation

> of business, indiscriminately, from any and all sources, through a newspaper article, through handbills, and through the indiscriminate distribution of customers' bills heretofore described. 37/

The court also emphasized that the defendants had doubled the capacity of their plant at a time when they had sufficient production to supply the needs of its tenants and buildings and had acquired large numbers of meters and large quantities of poles and wire.[38/] The court held that these factors were sufficient to support a finding "that they held themselves out as willing to sell to all comers who desired service in the immediate vicinity of their plant. . . ."[39/]

The General Counsel to the Commission has also issued opinions with respect to the extent of service necessary to bring the provider of the services within the scope of the Commission's authority. For example, the owner of a mobile home park who furnished liquid propane gas to his tenants was held to be a public utility subject to the jurisdiction of the Commission.[40/] However, a company which manufactured electricity for its own use and that of one consumer and tenant was not held to be a public utility subject to Commission regulation,[41/] and a corporation which supplied heating, air conditioning, and electricity to its own tenants only was held not a public utility within the meaning of the Public Service Commission Law.[42/]

These judicial and administrative opinions indicate that the number of customers served is not determinative in deciding who is a public utility (with the exception of sewer corporations which must, by definition, serve at least twenty-

five outlets).[43/] This determination seems to turn on the factors giving rise to the supplier's ability to serve outside customers, the methods used to solicit outside customers and the supplier's willingness to serve all outside customers requesting service.

III. POWERS OF THE COMMISSION

The Commission is charged with the "general supervision of all gas corporations, electrical corporations, water corporations and sewer corporations. . . ."[44/] The powers of the Commission over the above utilities have been extended to heating companies.[45/] In addition to this general supervisory power and other powers specifically enumerated, the Commission is vested with "all powers necessary and proper to enable it to carry out fully and effectually" all of its functions.[46/] These provisions give the Commission a broad statutory basis from which to exercise control over most activities of public utilities.

In addition to this broad power, the Commission has a number of specific grants of authority over the operations of public utilities. Foremost of these is the power to rule upon the reasonableness of, and fix, if necessary, rates of service.[47/] In conjunction with this rate-making power, the Commission is authorized to prescribe a system of accounts,[48/] and require corporations to carry a proper depreciation account in accordance with Commission rules.[49/]

Gas, electrical, water and sewer corporations and heating companies must obtain Commission approval before exer-

cising any rights or privileges under a franchise granted by a municipality. In addition, the Commission has jurisdiction over matters involving the extension of service to new customers.[50/] Transfers or encumbrances of franchises or facilities must be approved by the Commission.[51/] It has been held, however, that an electrical utility is not required to obtain additional certification to construct each extension or addition to transmission lines or facilities within its allocated territory.[52/] The Commission may determine appropriate standards of service,[53/] and must authorize the abandonment of service by a public utility.[54/] Additionally, the Commission has regulatory authority over capitalization of public utilities,[55/] the issuance of securities,[56/] and affiliated interest transactions,[57/] and must approve mergers and consolidations,[58/] and corporate reorganizations.[59/]

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

A. Generally

Gas, electrical, water and sewer corporations and heating companies cannot "exercise any right or privilege under any franchise . . . without first [obtaining] the permission and approval of the [C]ommission."[60/] A Commission staff member stated that the certificate of public convenience and necessity will specify the geographic area in which the utility is authorized to serve customers. Extensions of service within the utility's service area require no additional approval.[61/] Although unauthorized extensions of service into geographic areas not included in a utility's certificate generally are

forbidden, the Commission has indicated that it will tolerate such an extension into a contiguous area not already being served by a utility. For example, in Cuivre River Electric Cooperative v. Missouri Edison Co.,[62/] the defendant electric company was authorized to build facilities to serve industrial and residential customers over a wide area. A new subdivision was built contiguous to the defendant's service area and the developer requested service from the defendant. The defendant extended 2-1/2 miles of line to serve this subdivision without obtaining the Commission's approval. The Commission dismissed the complaint by a second utility company reasoning that, while the extension was unauthorized, it would, under these circumstances, extend the defendant's certification without further hearing.

The Commission also must approve the construction of any gas, electric or heating plants or sewer or water systems.[63/] This provision does not differentiate between initial construction of plants, construction of new plants, construction of replacement plants or extensions of existing plants. However, the statute is silent with respect to the necessity of approval for construction of extensions to existing facilities. An exception exists with respect to the necessity of obtaining Commission approval for the construction of additional transmission lines or facilities by an electrical corporation within its allocated territory.[64/]

B. Competition

There is no statutory provision allowing the Commission to grant an exclusive certificate to prevent other utilities

from providing service in the same geographical area, nor is there any statutory prohibition against more than one utility providing similar services in the same service area. However, a Commission staff member noted that the Commission's policy was to avoid overlap between service areas.[65/]

The Commission is authorized to approve the operations of a public utility when it appears that the operation will be "necessary or convenient for the public service."[66/] One commentator has termed Missouri's approach to be one of "regulated monopoly."[67/] The Missouri courts' attitude to competition among public utilities has been expressed as follows:

> The Public Service Commission Law was intended to prevent overcrowding of the field in any city or area and thus "restrain cut-throat competition upon the theory that it is destructive, and that the ultimate result is that the public must pay for that destruction." . . . The question of whether regulated monopoly or regulated competition will best serve the public convenience and necessity in a particular area at any time is for the commission to decide, subject to the qualification that the commission must not act arbitrarily or unreasonably, which matter is reserved to be passed upon by the courts. 68/

Thus, while competition among utilities is not prohibited, monopoly appears to be the preferred method of providing necessary services.

In some instances, however, the state has authorized more than one utility to operate in the same service area or permitted one utility to "invade" another's territory. For example, in one case an established electrical corporation was

unable to meet a prospective competitor's proposed lower rates. Because it felt the public interest was best served by providing the lowest rates possible, the Commission issued a certificate to the newcomer even though the older company was already furnishing power in the locality. The Commission's order was affirmed on appeal.[69/] In a second case, the Commission authorized an electric company to enter an area already served by another electric utility to serve a pipeline pumping station.[70/] The court described the somewhat isolated pumping station as a "new field," noting that no electrical utility could serve the pumping station from existing facilities and found no threat of "destructive competition" present, particularly in light of the fact that one nearby company had initially refused a request for service to the pumping station.[71/] Again rejecting the notion that a utility should be permitted a monopoly if it fails to furnish adequate service, the Commission, in still another case, allowed individual telephone customers to make connections to a rival telephone exchange offering fuller service than the local company.[72/] Thus, while the Commission may allow competition among utilities in a given area, competition is not favored and seems to be allowed only when the public interest is not being adequately served by one utility company.

C. Certificating Procedure

The statutory procedure for obtaining a certificate of public necessity and convenience requires that the petitioning company file with the Commission a certified copy of its charter

and a verified statement by the president or secretary of the petitioner evidencing that it has received the necessary consent of the municipality to be served.[73/] The Commission may grant the certificate "after due hearing" if it determines that the service to be provided "is necessary or convenient for the public service."[74/] The Commission may impose any conditions it deems necessary and reasonable with respect to the granting of the certificate.[75/]

Beyond the finding that the service is "necessary or convenient for the public service," there are no statutory provisions establishing criteria to be considered in granting a certificate. The Commission, however, has indicated that the following factors are to be considered: the service (if any) already being rendered in the area; "the responsibility of the applicant"; and "whether or not the applicant's purpose is primarily to serve the public as a utility or to serve private interest."[76/] In this proceeding the Commission denied the applicant's request for a certificate because "there was evidence to the effect that the applicant proposes to enter the field in question for private gain and speculation."[77/] In another certification case the Commission discussed the concept of "suitability."[78/] "We should examine a concrete proposal and ascertain whether it is reasonably adapted to serve permanently the public need we have found to exist. This involves the financial feasibility of the project generally and also the probable stability and soundness of the particular securities to be offered to the public for sale."[79/]

A franchise may not be transferred without first

obtaining the approval of the Commission.[80] However, there are no statutory provisions dealing with the procedure to be followed by a utility seeking approval of such a transfer.

D. Service Area Disputes

No special mechanism for resolving service area disputes is provided by statute. Thus the general procedure governing filing of and hearings on complaints would be applicable.[81] This procedure is available to a wide variety of parties and may be utilized for a wide variety of purposes.

> Complaint may be made . . . by the public counsel or any corporation or person, chamber of commerce, board of trade, or any civic, commercial, mercantile, traffic, agricultural or manufacturing association or organization, or any body politic or municipal corporation, by petition or complaint in writing, setting forth any act or thing done or omitted to be done by any corporation, person or public utility, in violation, or claimed to be in violation, of any provision of law, or any rule or order or decision of this commission. . . .[82]

A public hearing on the complaint will be held at such time as the Commission believes the issues are adequately defined by the pleadings.[83] Orders issued by the Commission at the conclusion of the hearing must be served on every person or corporation affected by the order.[84]

The Commission's power extends only to jurisdictional utilities. For example, the Commission has no jurisdiction over the operations of a municipally-owned utility.[85] In addition, the Commission has no authority to resolve service area disputes involving utilities whose franchises pre-date the Commission's formation.[86]

E. Abandonment of Service

No utility may abandon serving any area without first obtaining the approval of the Commission.[87/] No specific procedure has been established for obtaining this approval. While there are no statutory provisions setting criteria for approving an abandonment of service, the rule seems to be that abandonment will be approved only upon a showing "that the public would not be injured."[88/]

V. APPEALS OF REGULATORY DECISIONS

No order or decision of the Commission may be appealed to any court unless the appellant has applied to the Commission for a rehearing.[89/] Application for review of any Commission action by the circuit court must be made within thirty days of a final ruling by the Commission.[90/] Appeal from the judgment of the circuit court may be had pursuant to the rules generally applicable to appeals in civil cases.[91/] "No new or additional evidence may be introduced upon the hearing in the circuit court. . . ."[92/] Reviewing courts may not conduct a *trial de novo*.

FOOTNOTES

1. Mo. Ann. Stat. § 386.050 (Vernon 1952).

2. Ibid.

3. Id. § 386.110 (West Supp. 1979).

4. Id. §§ 386.320 (Vernon 1952), 393.140 (West Supp. 1979).

5. Id. §386.10, et seq.

6. Id. § 77.490 (Vernon 1952).

7. Home Telephone Co., Inc., 16 P.U.R. (N.S.) 413 (Mo. P.S.C. 1936).

8. Id. 16 P.U.R. (N.S.) at 418.

9. Mr. T. Hughes, General Counsel for the Commission, Telephone conversation, July 21, 1978.

10. Mo. Ann. Stat. § 71.520 (Vernon 1952).

11. State ex rel. Electric Co. of Missouri v. Atkinson, 275 Mo. 325, 204 S.W. 897, 898 (1918). Similarly, the Commission has no authority over municipally-owned utilities. City of Columbia v. Public Utilities Commission, 329 Mo. 38, 43 S.W. 2d 813 (1931).

12. Mo. Stat. Ann. § 386.020 (25) (West Supp. 1979).

13. Id. § 386.250.

14. Id. § 386.250.

15. Id. § 386.020.

16. Id. § 386.250(5).

17. Id. § 386.020(12), (13).

18. Id. § 386.020(28).

19. Id. § 393.170(1).

20. Id. § 386.020.

21. City of Columbia v. Public Utilities Commission, 329 Mo. 38, 43 S.W. 2d 813 (1931).

22. Mo. Ann. Stat. §394.160 (Vernon 1952).

23. Op. Gen. Counsel No. 68-12, Mo. P.S.C. 5/2/69.

24. Mo. Ann. Stat. § 386.020(27)(West Supp. 1979).

25. Id. §§ 386.020(11),(28).

26. Id. § 386.020(13).

27. State ex rel. Danciger & Co. v. Public Service Commission, 275 Mo. 483, 205 S.W. 37 (1918).

28. Mr. T. Hughes, General Counsel for the Commission, Telephone conversation 7/21/78.

29. State ex rel. Danciger & Co. v. Public Service Commission, 275 Mo. 483, 205 S.W. 37, (1918).

30. Id. 205 S.W. at 37-38.

31. Id. 205 S.W. at 38.

32. Id. 205 S.W. at 40.

33. Id.

34. Id. 205 S.W. at 42.

35. State ex rel. Cirese v. Public Service Commission, 178 S.W. 2d 788 (Mo. App. 1944).

36. Id. 178 S.W. 2d at 789.

37. Id. 178 S.W. 2d at 790.

38. Id. 178 S.W. 2d at 791.

39. Id.; See also, Carpenter v. Johnston, 80 P.U.R. (N.S.) 274 (Mo. P.S.C. 1949)(Individuals who drilled a well on a lot owned by them and laid pipe to eleven neighboring lots, obtained an easement to maintain these pipes and supplied water to all within the subdivision who requested service [eleven houses] was held to be a public utility subject to regulation by Commission); Mayor and City Council of Parkville v. Park College, 10 P.U.R. (N.S.) 133 (Mo. P.S.C. 1935)(College which sold its excess supply of water to a surrounding municipality and any residents who requested water service was a water corporation subject to regulation by the Commission); State ex rel. Lohman & Farmers Mutual Telephone Co. v. Brown, 323 Mo. 818, 19 S.W. 2d 1048 (1929)(A mutual telephone company operated an exchange to serve about 200 telephones owned and maintained by the customers and a commercial line to another city which was made available to the public generally for a fee. The court held that the company was a public utility only with respect to its operation of the commercial line which was "dedicated to public use.").

40. Op. Gen. Counsel No. 7302, (Mo. P.S.C. 8/9/73).

41. Id. No. 68-5, (Mo. P.S.C. 1/23/68).

42. _Id._ No. 68-27, (Mo. P.S.C. 5/27/68).

43. Mo. Ann. Stat. § 386.020(29)(West Supp. 1979).

44. _Id._ § 393.140 (West Supp. 1979).

45. _Id._ § 393.290.

46. _Id._ § 386.040 (Vernon 1952).

47. _Id._ §§ 336.140(5), 393.150(West Supp. 1979).

48. _Id._ § 393.140(4).

49. _Id._ § 393.240 (Vernon 1952).

50. _See, State ex rel. Doniphan Telephone Co. v. Public Service Commission_, 369 S.W. 2d 572 (Mo. 1963).

51. Mo. Ann. Stat. §§ 393.190(1); 393.170(1); 393.200 (West Supp. 1979).

52. _State ex rel. Harline v. Public Service Commission_, 343 S.W. 2d 177 (Mo. App. 1960).

53. Mo. Ann. Stat. §§ 393.130(1), 393.140(3)(West Supp. 1979).

54. _Home Telephone Co._, 18 P.U.R. (N.S.) 448, 458 (Mo. P.S.C. 1937).

55. Mo. Ann. Stat. § 386.320 (Vernon 1952).

56. _Id._ § 393.180 (West Supp. 1979).

57. _Id._ § 393.190(2).

58. _Id._ § 393.190(1).

59. _Id._ § 393.250.

60. _Id._ §§ 393.170(2); 393.290 (West Supp. 1979).

61. Mr. T. Hughes, General Counsel, for the Commission, Telephone conversation 7/21/78.

62. _Cuivre River Electrical Cooperative v. Missouri Edison Co._, 16 P.U.R. 3d 484 (Mo. P.S.C. 1956).

63. Mo. Ann. Stat. § 393.170(1)(West Supp. 1979).

64. _State ex rel. Harline v. Public Service Commission_, 343 S.W. 2d 177 (Mo. App. 1960).

65. Mr. T. Hughes, General Counsel, for the Commission, Telephone conversation 7/21/78.

66. Mo. Ann. Stat. § 393.170(3)(West Supp. 1979).

67. Priest, 1 Principles of Public Utility Regulation 367 (1969).

68. *State ex rel. City of Sikeston v. Public Service Commission*, 336 Mo. 985, 82 S.W. 2d 105, 110 (1935).

69. *State ex rel. Electric Co. of Missouri v. Atkinson*, 275 Mo. 325, 204 S.W. 897 (1918).

70. *State ex rel. Kansas City Power & Light Co. v. Public Service Commission*, 335 Mo. 1248, 76 S.W. 2d 343 (1934).

71. *Id.* 76 S.W. 2d at 353-54.

72. *Buerge Telephone Exchange*, 7 P.U.R. (N.S.) 381 (Mo. P.S.C. 1934).

73. Mo. Ann. Stat. § 393.170(2)(West Supp. 1979).

74. *Id.* § 393.170(3).

75. *Ibid*.

76. *Home Telephone Co.*, 18 P.U.R. (N.S.) 448, (Mo. P.S.C. 1937).

77. *Id.* 18 P.U.R. (N.S.) at 456.

78. *Achtenberg*, 8 P.U.R. (N.S.) 397, (Mo. P.S.C. 1934).

79. *Id.* 8 P.U.R. (N.S.) at 410.

80. Mo. Ann. Stat. § 393.190(1)(West Supp. 1979).

81. *Id.* § 386.390, *et seq.*

82. *Id.* § 386.390(1).

83. 4 C.S.R. 240-2.110.

84. Mo. Ann. Stat. § 386.490(1)(Vernon 1952).

85. Op. Gen. Counsel No. 67-13, (Mo. P.S.C. 12/14/67).

86. *State ex rel. City of Sikeston v. Public Service Corporation*, 336 Mo. 985, 82 S.W. 2d 105, 109 (1935).

87. *Home Telephone Co., Inc.*, 18 P.U.R. (N.S.) 448, 458 (Mo. P.S.C. 1937).

88. *Southwest Missouri R. Co. v. Public Service Commission*, 281 Mo. 52, 219 S.W. 380, 384 (1920).

89. Mo. Ann. Stat. § 386.500(2)(West Supp. 1979).

90. *Id.* § 386.540(1).

91. *Ibid.*

92. *Id.* § 386.510.

93. *State ex rel. Chicago Great Western R. Co. v. Public Service Commission*, 330 Mo. 729, 51 S.W. 2d 73, 76 (1932)(dicta).

CHAPTER 3

SITING OF ENERGY FACILITIES IN MISSOURI

Missouri has no comprehensive statute or regulations specifically addressing the issue of energy facilities siting. Several agencies and governmental units have jurisdiction over aspects of energy facilities siting within the state.

I. PLANNING AUTHORITIES

A. Department of Community Affairs

The Department of Community Affairs (Department) is the official state planning agency for the purpose of providing planning assistance to counties, municipalities, metropolitan planning areas, and regional planning commissions.[1/] The Department is responsible for drafting a comprehensive state plan including "[o]rderly land-use arrangements for residential, commercial, industrial and public and other purposes."[2/] Powers of the Department, however, are confined to assistance and coordination and do not include authority to prohibit specific developments.[3/]

B. Regional Planning Commissions

Regional planning commissions are responsible for adopting comprehensive plans for the development of their regions.[4/] "The comprehensive plan . . . may include . . . the general location and extent of . . . public utilities whether privately or publicly owned."[5/] The functions of a regional planning commission are solely advisory with respect to the local governments within the region.[6/]

C. Counties

Counties in Missouri are classified into four classes by valuation of real and personal assets therein, and may or may not be organized under a charter form of government.[7/] The extent to which a county government may exercise zoning, planning and subdivision approval authority depends on its class and whether it is chartered. Class one chartered counties have the greatest powers. Counties having assessed valuation of $400 million or more are automatically class one, and counties having valuations of $300 million or more for five successive years are class one unless a majority of electors vote to remain class two.[8/] The county court in all class one charter counties regulates and restricts, in the unincorporated portions of the county:

> the height, number of stories and size of buildings, the percentage of lots that may be occupied, the size of yards, courts, and other open spaces, the density of population, the location and use of buildings, structures and land for trade, industry, residence or other purposes 9/

The county court in class one charter counties, and the master plan adopted by a noncharter class one county planning commission may not interfere with public utility services, developments or public improvements "as may have been, or may hereafter be, specifically authorized or permitted by a certificate of public convenience and necessity, or order issued by the [Public Service Commission], or by permit of the county court after public hearing in the manner provided by statute."[10/] A similar provision has been

applied in a like manner to class two and three counties.[11/]

Planning and zoning in class two and three counties is substantially similar to that in noncharter class one counties, except that:

> [I]n the case of any public improvement sponsored or proposed to be made by any municipality or other political or civil subdivision of the state, or public board, commission or other public officials, the disapproval or recommendations of the county planning commission may be overruled by a two-thirds vote . . . of the governing body of such municipality, or other political or civil subdivision, or public board, commission or official 12/

D. Municipalities

Missouri municipalities may affect the siting of energy facilities through use of general zoning and planning authority.

> [T]he legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, the location and use of buildings, structures and land for trade, industry, residence or other purposes. 13/

However, in one case the court invalidated a zoning ordinance prohibiting aboveground construction of large high-voltage transmission lines on the ground that it invaded the jurisdiction of the Commission and exceeded the municipality's legitimate police power.[14/] After this decision the municipality then denied the electric company's subsequent application for a special permit to construct the proposed 7-mile line. When the case again reached the Missouri Supreme Court, the justices

found that the municipality's application of its local zoning ordinances was still unreasonable and ordered the construction permit be granted.15/

The Crestwood cases referred to above involved a privately owned electric company which had previously been granted a franchise to operate in the challenged municipality. The court pointed out that a municipality may demand compliance with strict regulations, conditions and ordinances when it considers initially whether to grant a franchise. If the utility accepts the strict conditions, it can then be required to comply under its franchise. However, where it seeks to impose new conditions not contained in the franchise, it cannot rely on the franchise to sustain the enforceability of the conditions.16/ The cases thus suggest that a municipality may exercise greater control over utility facility siting under its franchising power than under its general police and zoning power.17/ The franchising power is considered in Chapter 4 of this report.

II. ENVIRONMENTAL AND CONSERVATION AGENCIES

A. Air Conservation Commission

The principal air pollution control agency for Missouri is the Air Conservation Commission (ACC). The ACC is a subagency of the Department of Public Health and Welfare.18/ It is unlawful for any person to commence construction of any air contaminant source in the state without a permit issued by the ACC.19/ "Person" means:

[A]ny individual, partnership, copartnership,

> firm, company, or public or private corporation, association, joint stock company, trust, estate, political subdivision, or any agency, board, department, or bureau of the state or federal government, or any other legal entity whatever which is recognized by law as the subject of rights and duties. 20/

Each application for a construction permit must be accompanied by site information, plans, descriptions, specifications and drawings showing the design of the source, the nature and amount of emissions, and the manner in which it will be a power plant will be issued if the ACC determines that the proposed source will prevent the attainment or maintenance of ambient air quality standards, or violate any regulation specified in the statutes. 21/ The ACC may deny a permit "if the source will appreciably affect the air quality standards or if the air quality standards are being substantially exceeded." 22/

Local governmental units of the state may assume jurisdiction for the granting of air pollution permits. Any city or county in Missouri is empowered, notwithstanding any limitation or provision of law to the contrary, to enact and enforce ordinances or resolutions with respect to air pollution control. Additionally, any constitutional or special charter county or city may apply to the ACC for a certificate of authority to operate its own permit and variance procedure within the boundaries of such county or city. 23/ Permits or variances issued by a city or county with a certificate of authority may be approved or disapproved by the executive secretary of the ACC. 24/ In the event of disapproval, a ACC

hearing must be held to affirm, reverse, modify, or amend the permit or variance.[25/]

B. Clean Water Commission

The Clean Water Commission (CWC), a subagency of the Department of Natural Resources, is charged with developing comprehensive plans and programs for the prevention and control of new or existing water pollution in the state.[26/] "It shall be unlawful for any person to build, erect, alter, replace, operate, use or maintain any water contaminant or holds a permit from the [CWC]."[27/] Operating permits are required in addition to construction permits.[28/]

C. Water Resources Board

The state Water Resources Board has the task of developing "a gradual, long-range, comprehensive state wide program for the conservation, management, and use of water resources in the state."[29/] The Board is responsible for allocating and distributing water under state ownership.[30/]

D. Water Conservancy Districts

The Board of trustees of a water conservancy district is responsible for making "regulations for the administration of the district and for the adjustment, connection or coordination of waterworks or works, facilities or operations to or with the waters, improvements, works, operations or facilities of the district."[31/]

FOOTNOTES

1. Mo. Ann. Stat. §251.170 (Vernon Supp. 1978).

2. Id. §§251.180, 251 4.190.

3. Id. §251.190.

4. Id. §251.320.

5. Ibid.

6. Id. §251.300.

7. Id. ch. 64.

8. Id. §48.020.

9. Id. §64.090(1)(Vernon Supp. 1978).

10. Id. §§64.090, 64.235 (1966).

11. Cf. Union Electric Co. v. Saale, 377 S.W.2d 427,430 (Mo. 1964).

12. Mo. Ann. Stat. §§64.570, 64.820(1966).

13. Id. §89.020 (1971).

14. Union Electric Co. v. City of Crestwood, 499 S.W. 2d 480 (Mo. 1973).

15. Union Electric Co. v. City of Crestwood, 562 S.W. 2d 344 (Mo. 1978).

16. Union Electric Co. v. City of Crestwood, 499 S.W. 2d 480, 484 (Mo. 1973).

17. See State ex rel. McAllister v. Cupples Station Light, Heat & Power Co., 283 Mo. 115, 223 S.W. 75 (1920) (upholding the validity of an ordinance requiring underground cables in certain locations for any franchises thereafter granted.)

18. Id. §203.040(1)(Vernon Supp. 1978).

19. Id. §203.075(1).

20. Id. §203.020(13).

21. 10 Code of State Regulations 10-3.020 (1977).

22. Mo. Ann. Stat. §203.075 (3)(Vernon Supp. 1978).

23. Id. §203.140.

24. *Ibid*.

25. *Ibid*.

26. *Id.* §§204.021 (1), 204.021(2).

27. *Id.* §204.051(2); 10 Code of State Regulations 20-6.010 (1977).

28. *Ibid*.

29. Mo. Ann. Stat. §256.200 (Vernon Supp. 1978).

30. *Id.* §256.310.

31. *Id.* §257.240 (1963).

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN MISSOURI

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

Municipal authority for the issuance of franchises or licenses to use the streets is provided for in the Missouri statutes:

> Any city, town or village in this state may by ordinance, authorize any person, or any company organized for the purpose of supplying light, heat, power, water, gas or sewage-disposal facilities, and incorporated under the laws of this state, to set and maintain its poles, piers, abutments, wires and other fixtures, and to excavate for, install, and maintain water mains, sewage-disposal lines, and necessary equipment for the operation and maintenance of electric light plants, heating plants, power plants, waterworks plants, gas plants and sewage-disposal plants, and to maintain and operate the same along, across or under any of the public roads, streets, alleys, or public places within such city, town or village, for a period of twenty years or less, subject to such rules, regulations and conditions as shall be expressed in such ordinance. 1/

The statutes also provide that cities:

> may prohibit and prevent all encroachments into and upon the sidewalks, street, avenues, alleys and other public places of the city . . . [and] may also regulate the . . . erecting of . . . electric light poles, and the making of excavations through and under the sidewalks or in any public street, avenue, alley or other public place within the city. 2/

This first statute quoted above has been construed to mean that municipal authorities have the authority to grant as well as refuse to grant the right to use the streets for wires and poles, and that even if a utility holding a franchise owns the land under which it desires to maintain wires, or

has the permission of adjacent landowners, it may not place wires under such land without municipal consent.[3/]

In addition to the services specifically listed in the statute, municipalities may be able to grant franchises for other services not expressly mentioned. Past cases have held that a city has implied authority to grant certain franchises based on its general power to regulate the public use of the streets. For example, it was held that a city had power to grant an electric franchise in the year 1886 even though neither the city charter nor the state franchising statute of the time provided for such a franchise.[4/] The court in this case quoted dicta from an earlier case in which it was said that "the general power to regulate the use of streets is not confined to public uses known and common at the time of the dedication, but extends to new uses as they spring into existence."[5/] More recently, in Cablevision, Inc. v. City of Sedalia,[6/] it was held that although Section 77.520 of the Missouri statutes authorizes third class cities to control the use of their streets for the erection of telephone, telegraph and electric light poles, such authorization does not preclude municipalities from granting the same privilege to a cable television system under the municipality's broad power to regulate the streets

The charters of certain Missouri municipalities may also enable them to extend the list of public services which may be franchised. In one case the court found that

while a city market was not a public utility within the meaning of the Public Service Commission Law, it was a public service and in that sense a public utility within the meaning of the city charter for purposes of authorizing the city to issue bonds on its credit.[7/] Relying on this precedent, a federal court determined that a community antenna television (CATV) system was within the definition of public utility contained in the Springfield, Missouri city charter.[8/] The city charter included "public communication systems" as public utilities. Hence, the court, concluded that because Missouri home rule cities were empowered to grant public franchises or privileges in their streets,[9/] any permission given to a CATV system to use its streets amounted to a franchise.[10/]

Home rule cities in Missouri are by statute given powers to impose regulations on franchise holders beyond those contained in the franchises. The Missouri statute provides that:

> It shall be lawful for any such city [constitutional charter, or "home rule" city] in such charter, or by amendment thereof, to provide for regulating and controlling the exercise by any person or corporation of any public franchise or privilege in any of the streets or public places of such city, whether such franchises or privileges have been granted by said city, or by or under the state of Missouri, or any other authority. [11/]

With regard to what constitutes a "reasonable regulation," Union Elec. Co. v. City of Crestwood[12/] held that a municipality had no authority to enact a zoning ordinance requiring all future lines to be underground because this invaded

the area of regulation vested in the Public Service Commission (Commission) and also because the zoning ordinance eliminated rights granted under the franchise, since no such condition had been attached at the time of the franchise. But in Union Elec. Co. v. Land Clearance for Redevelopment Authority, 13/ a condition in the franchise grant which reserved for the city the right to direct relocation of electric distribution facilities was upheld, the court ruling that the utility had accepted this condition as part of the franchise and could not complain of the condition at a later date.

Permission granted by a county court under a Missouri statute to a public utility to use the public roads or highways of the county has been termed a "county franchise." 14/ Where a water company attempted to extend its service beyond the area specifically designated by the county in its grant, it was held that the Commission could not authorize such expanded service for lack of the required local consent. 15/ The statute cited provides that:

> No person or persons, association, companies or corporations shall erect poles for the suspension of electric light, or power wires, or lay and maintain pipes, conductors, mains and conduits for any purpose whatever, through, on, under or across the public roads or highways of any county of this state, without first having obtained the assent of the county court of such county therefor; and no poles shall be erected or such pipes, conductors, mains and conduits be laid or maintained, except under such reasonable rules and regulations as may be prescribed and promulgated by the county highway engineer, with the approval of the county court. 16/

II. PROCEDURES FOR GRANTING FRANCHISES

Procedures for granting municipal franchises vary somewhat between classes of cities. In all cases a grant of a franchise must be by ordinance of the local legislative body.[17] Third class cities with a commission form of government must file ordinances granting franchises with the county clerk for public inspection at least one week before the final passage thereof.[18] Franchises must then be approved by a majority of the city's electors voting at a general or special election.[19] Third class cities with a city manager form of government must provide newspaper publication and a public hearing for any proposed grant of a franchise to be valid.[20] No public hearing is required if a franchise is to be granted by a third class city to a utility regulated by the Commission.[21] All franchises must also be ratified by a majority of the city's voters.[22]

There appear to be no special procedures for passage of a franchising ordinance in other third class cities, in constitutional charter or special charter cities, or in villages. Some charters may provide that franchise ordinances must be submitted to a vote of the electorate and approved by a majority vote.[23] Some kind of public reading is required for passage of ordinances in villages, in fourth class cities, and in third class cities having the regular form of city government.[24] These municipalities also require a majority vote of the governing body and require the ordinance to be signed by the presiding officer.[25] Procedures for

passage of ordinances in constitutional charter and special charter cities are not prescribed by statute and are apparently specified in their charters.[26/] The statutes are silent regarding any requirement of free and open competition, payments to local government, or filing of written acceptance by a grantee.

A certificate of public convenience and necessity is not a prerequisite for being granted a franchise. Rather, the converse is true.[27/] However, a certificate is required for the exercise of a franchise.[28/] A certificate of public convenience and necessity does not give a utility the right to operate after the franchise has expired.[29/]

Entirely separate and apart from the foregoing procedures is a process by which a municipality may contract with a Missouri corporation for the purposes of supplying a town with gas, electricity, or water for its streets, lanes, alleys, squares, and public places.[30/] Such contracts may not exceed a term of twenty years and must be ratified by a two-thirds majority of the voters.[31/]

A Commission case held that this statutory requirement for two-thirds majority approval by the electorate applies to contracts between municipalities and public utilities and does not apply to municipal grants of franchises.[32/] A decision of the state supreme court approved this holding.[33/] Otherwise, there seems to be no significant case decisions that further define procedural requirements for the granting of franchises.

III. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The statutory authority for granting franchises does not expressly state that such franchises are limited to "public utility" purposes or for "service to the public." The statute simply empowers municipalities to authorize the placement of plants and appliances along public ways by "any person, or any company organized for the purpose of supplying light, heat, power, water, gas or sewage-disposal facilities, and incorporated under the laws of this state."[34/] Judicial decisions have interpreted this authority as limited to grants for the public benefit. In one case it was held that a city's power to regulate the use of its streets extended to public uses and public purposes only and did not authorize an ordinance permitting a private corporation to build a railroad track and run trains across the streets of the city for the transaction of its brewery business.[35/] There are no specific standards that the services provided by the franchisee must meet.

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

Prior to enactment of the present franchising statute in 1929, there was no maximum duration for which a franchise might be granted by a municipality. A municipality that enacted an ordinance in 1883 permitting a water company to construct a waterworks system in the town, subject only to the municipality's option at five-year intervals to purchase the system at fair value, was held to have granted

a franchise in perpetuity.[36/]

Current law limits most municipal franchises to "a period of twenty years or less, subject to such rules, regulations, and conditions as shall be expressed in such ordinances."[37/] An exception is the power of third class cities (which represent a sizable fraction of Missouri cities) to grant a thirty-year franchise for establishing a heating system:

> All cities of the third class in this state are hereby authorized and empowered by ordinance, duly passed by the council of such cities and approved by the mayor thereof, to grant to any person or persons or corporation formed under the laws of this state the privilege and franchise for a period of thirty years, to use the streets, alleys and other public places of such cities, for the purpose of laying pipes, conduits or other heating apparatus thereon and therein, and connecting same with the heating plant of such person or persons or corporation, and furnish heat to the inhabitants of the city at a reasonable rate to be agreed upon by the person or persons or corporations furnishing the heat and the person using the same. Such plant to heat the city may be by means of hot water, steam, hot air or electricity, or in any other mode that may be advisable; provided, that the person or persons or corporation, to which the franchise or privilege is granted, shall commence operation under its franchise or right within two years after the granting of such franchise or right, or the same shall be forfeited; and provided further, that there shall be no extension or renewal of such franchise or privilege by the city council of such city, except by the consent of a majority of the qualified voters of the city voting at an election held for that purpose. [38/]

This rather ambiguous 1903 statute fails to answer the following significant questions. Must such a heating system be capable of serving the entire city or is it sufficient if it serve a smaller area? Would furnishing

heat to only commercial, industrial, or government buildings be considered to be supplying "the inhabitants?" Does the statute suggest that the "reasonable rate to be agreed upon" by the supplier and the customer may be a private transaction subject to little, if any public regulation? No case law answers have been provided to these questions.

A second exception to the twenty-year limit on grants are "county franchises," discussed briefly above. The grant to an electric company of a franchise for operation along the roads and highways of a county is apparently a grant in perpetuity.[39/]

As to the issue of what conditions might result in automatic surrender of a franchise, the law is explicit with regard to thirty-year heating franchises in third class cities. Failure to commence operation within two years after the granting of such a franchise will result in forfeiture of the privilege.[40/] There are no other statutory references to forfeiture or surrender of a franchise. Case law, however, supports the general proposition that a failure to provide services for a sufficient period of time can terminate a franchise. Where a street railway, required by ordinance to run cars sixteen hours per day, completely failed to run any cars during a three-year period, such nonuse resulted in forfeiture of the franchise.[41/] A franchise granted to an electric company was held to carry an implied condition of furnishing service such that a twenty-two year failure to supply electricity was cause

for the grantee to forfeit his rights.[42/] The court further held that neither an intention to resume at some indefinite future time nor present ability to resume would avoid the forfeiture.[43/] However, in State on Inf. of McKittrick ex. rel City of Trenton v. Missouri Public Service Corp.,[44/] the court refused to find a forfeiture and refused to oust a utility. In that case the franchise granted the utility the power to furnish both gas and electricity within the municipality. The court ruled that the fact that the utility failed to construct an electric plant did not result in forfeiture since the franchise grant required operation of either an electric or gas plant, and not both, and the utility had dutifully constructed a gas plant. The court further stated the general rule that forfeitures are not favored.[45/] In State ex rel McAlister v. Wipples Station Light, Heat & Power Co.,[46/] the court stated that it would hesitate to declare an ouster of a utility with a franchise to use the municipal streets where to do so would destroy large investments of the utility and no public urgency is apparent.[47/]

Absent a forfeiture, a franchise grant lasts until expiration of the time stated in the grant unless the utility consents to a purchase by the municipality or voluntarily withdraws.[48/] If a franchise expires or is terminated with or without cause, the grantee may be forced to remove its facilities and to cease providing service.[49/]

In McKittrick v. Missouri Utilities Co.,[50/]

the court held that although the state highway department has jurisdiction over the highways insofar as public travel is concerned, a municipality is authorized to require an electric company whose franchise has expired to cease using the city streets even though such streets belonged to the state highway system. A certificate of public convenience and necessity will not by itself authorize an electric utility to continue to use the streets on the expiration of a franchise.[51/] A new utility which possesses a certificate of public convenience and necessity must still obtain a franchise before beginning to operate in a municipality.[52/]

B. Exclusivity

According to the Missouri state constitution, "The general assembly shall not pass any local or special law . . . granting to any corporation, association or individual, any special or exclusive right, privilege or immunity . . . ."[53/] There do not appear to be any cases squarely holding a municipal grant of an exclusive franchise to be void on constitutional grounds. However, it has been stated that the courts are loath "to construe ordinances so as to restrict competition by excluding companies from particular districts since monopolies are hateful to the law."[54/] In State v. Springfield City Water Co.,[55/] the court hinted that although a grant to a waterworks company of the "exclusive right and privilege" to lay and maintain pipes in the streets may have been void, this

fact did not affect the remainder of the ordinance. Additionally, attempts by municipalities to grant exclusive franchises have been held invalid because the legislature was found not to have expressly authorized a municipality to make such an exclusive grant. Where neither municipal charter nor any statute expressly gives a municipality the power to convey an exclusive privilege, it has been said that no such legislative grant of power can arise by implication. Such analysis was employed in holding void an exclusive franchise for a river ferry.[56/]

One noteworthy qualification to the apparent prohibition of exclusive franchises appears in Kansas City Power & Light Co. v. Town of Carrollton.[57/] Although the town did not have authority to grant an exclusive franchise, it could, at least for a reasonable length of time, agree not to compete by acquiring its own municipal power plant except by condemnation of the grantee's facilities.[58/] The twenty-year franchise at issue in the case was apparently considered a reasonable length of time.[59/]

C. Other Characteristics

The statute requires no mandatory franchise tax that must be paid to the municipality. Payment of a gross income tax and filing of acceptance may be required by an ordinance granting a franchise.[60/] As discussed, a municipality may preclude the operation of a utility certified by the Commission if it does not renew an expired franchise. Exceptions to this rule may occur in unusual circumstances.

Thus, in State ex inf. Shartel ex rel. City of Sikeston v. Missouri Utilities Co.,[61] a municipality that continued to collect property taxes and a license tax on an electric utility's right to do business and performed other acts of apparent consent or acquiescence for nine years after expiration of the company's franchise was held to be precluded by laches and estoppel from denying the authority of the company to engage in the electrical business.

With regard to removal of wires, it has been held that although a municipality has a technical right to require removal of wires which were placed under a street without municipal authority, equity will enjoin the removal of such wires when the presence of such wires causes the municipality no damage or inconvenience.[62]

FOOTNOTES

1. Mo. Ann. Stat. §71.520 (1952).

2. Id. §§77.520, 79.410.

3. Holland Realty and Power Co. of St. Louis, 282 Mo. 180, 221 S.W. 51 (1920).

4. State on inf. of Mckittrick ex rel City of Trenton v. Missouri Public Service Corporation, 351 Mo. 961, 174 S.W. 2d 871 (1943), cert. denied, 321 U.S. 793 (1944).

5. State ex rel. St. Louis Underground Service Co. v. Murphy, 134 Mo. 548, 31 S.W. 784,787 (1895).

6. Cable Television, Inc. v. City of Sedalia, 518 S.W. 2d 48 (Mo. 1974).

7. Woodmansee v. Kansas City, 346 Mo. 919, 144 S.W. 2d 137, 139 (banc 1940).

8. Springfield Television, Inc. v. City of Springfield, 462 F.2d 21, (8th Cir. 1972).

9. Mo. Ann. Stat. §82.230 (Vernon 1971).

10. Springfield Television, Inc. v. City of Springfield, 462 F.2d 21, (8th Cir. 1972).

11. Mo. Ann. Stat. §82.230 (1971).

12. Union Elec. Co. v. City of Crestwood, 499 S.W. 2d 480 (Mo. 1973).

13. Union Elec. Co. v. Land Clearance for Redevelopment Auth., 555 S.W. 2d 29 (Mo. 1977).

14. Mo. Ann. Stat. §229.100 (1952).

15. State ex rel. Public Water Supply District No. 2 of Jackson County v. Burton, 379 S.W. 2d 593 (Mo. 1964).

16. Mo. Ann. Stat. §229.100 (1952).

17. Mo. Stat. Ann. §71.520 (1952).

18. Id. §78.190 (Vernon Supp. 1978).

19. Ibid.

20. Id. §78.630.

21. Id. §78.630(5).

22. *Id.* §78.630.

23. See, e.g. *Springfield Television, Inc. v. Springfield*, 462 F.2d 21 (Mo. 8th Cir. 1972).

24. Mo. Ann. Stat. §§80.110, 79.130, 77.080 (1952).

25. *Ibid*.

26. The former categories of first and second class cities were eliminated by 1975 Mo. Laws, p. 167.7.

27. *Id.* §393.170(2)(Vernon Supp. 1978).

28. *Ibid*.

29. *State of inf. of McKittrick ex rel. City of California v. Missouri Public Utilities Co.*, 339 Mo. 385 96 S.W. 2d 607 (Mo. 1936).

30. Mo. Ann. Stat. §71.530 (1952).

31. *Ibid*.

32. *Mexico v. Missouri Power and Light Co.*, 1933A P.U.R. 1.

33. *McKittrick v. Springfield Water Co.*, 345 Mo. 6, 131 S.W. 2d 525 (Mo. banc 1939).

34. Mo. Ann. Stat. §71.520 (1952).

35. *Glaessner v. Anheuser-Busch Brewing Ass'n.*, 100 Mo. 508, 13 S.W. 707 (1890; see also *St. Louis Underground Service Co. v. Murphy*, 134 Mo. 548, 31 S.W. 784 (1895).

36. *State on inf. of McKittrick ex rel. City of Springfield v. Springfield City Water Co.*, 345 Mo. 6, 131 S.W. 2d 525 (1939).

37. Mo. Ann. Stat. §71.520 (1952).

38. *Id.* §77.210.

39. *Missouri Public Service Company v. Platte-Clay Electric Cooperative, Inc.*, 407 S.W. 2d 883, 889 (Mo. 1966) (dictum).

40. Mo. Ann. Stat. §77.210 (1952).

41. *State v. East Fifty St. Ry. Co.*, 140 Mo. 539, 41 S.W. 955 (1897).

42. *State v. West End Light & Power Co.*, 246 Mo. 618, 152 S.W. 67 (1912).

43. *Id.*

44. State on Inf. of McKittrick ex rel City of Trenton v. Missouri Public Service Corporation, 351 Mo. 961, 174 S.W. 2d 871 (Mo. banc. 1943), cert. denied, 321 U.S. 793.

45. Id. 174 S.W. 2d at 881.

46. State ex rel McAllister v. Whipples Station Light, Heat, and Power Co., 283 Mo. 115, 223 S.W. 75 (banc 1920).

47. Id. 223 S.W. at 83.

48. State v. PSC of Missouri, 336 Mo. 983, 82 S.W. 2d 105 (1935).

49. State v. Arkansas Missouri Power Co., 339 Mo. 15, 93 S.W. 2d 887 (banc 1936).

50. McKittrick v. Missouri Public Utilities Co., 339 Mo. 385, 96 S.W. 2d 607 (1936).

51. Id.

52. State v. Missouri Utilities Co., 331 Mo. 337, 53 S.W. 2d 394 (banc 1932); See also State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co., 337 Mo. 642, 85 S.W. 2d 618 (1935)(ouster of a telephone corporation on expiration of its franchise).

53. Mo. Const. art. 3, §40.

54. McAllister v. Wipples Station Light, Heat & Power Co., 283 Mo. 115, 223 S.W. 75 (banc 1920).

55. State v. Springfield City Water Co., 345 Mo. 6, 131 S.W. 2d 525 (banc 1939).

56. Carroll v. Campbell, 110 Mo. 557, 19 S.W. 809 (1892).

57. Kansas City Power & Light Co. v. Town of Carolltown 346 Mo. 802, 142 S.W. 2d 849 (1940).

58. Id. 142 S.W. 2d at 853-54.

59. Id. See also, State ex rel City of Mansfield v. Crain, 301 S.W. 2d 415 (Mo. App. 1957), in which the court stated that a municipality had a right to construct a power plant in competition with an electric company in the absence of a showing that the municipality had granted the utility an exclusive franchise.

60. State on inf. of Jones v. West End Light and Power Co., 246 Mo. 603, 152 S.W. 76 (1912).

61. State on Inf. of Shartel ex rel v. City of Sikeston v. Missouri Utilities Co., 331 Mo. 337, 53 S.W. 2d 394 (1932).

62. <u>Holland Realty & Power Co. v. St. Louis</u>, 282 Mo. 180, 221 S.W. 51 (1920).