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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 Idaho

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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 Idaho. 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

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 Idaho. 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 implement the ICES concept and a series of recommendations for responding to those impediments. oriented 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 IDAHO

#### I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Idaho state legislature has created the Idaho Public Utilities Commission (Commission) and has given the Commission the "power and jurisdiction to supervise and regulate every public utility in the state. . . ." <sup>1/</sup> The Commission is comprised of three members appointed by the Governor with the approval of the Senate. Commissioners serve full time and are appointed for six year terms. No more than two of the members may be from the same political party. <sup>2/</sup>

Title 61 of the Idaho Code, which establishes the Commission and delineates its powers, vests all regulatory responsibility in the Commission to the exclusion of local government. However, as an incident to their franchising power, municipalities may impose reasonable regulations on the use of their streets. In Village of Lapwai v. Alligier, <sup>3/</sup> the Idaho Supreme Court held that the transfer of regulatory power over public utilities to the Commission did not diminish the powers and duties of municipalities to control and maintain their streets and alleys. Limited statutory authority also exists giving municipalities the "power to regulate the fares, rates, rentals, or charges made for the service rendered under any franchise granted in such city, except such as are subject to regulation by the public utilities commission." <sup>4/</sup> With the exception of this limited power, the

Commission is the sole agency having regulatory power over Idaho public utilities.<sup>4/</sup>

## II. JURISDICTION OF THE COMMISSION

The definition of "public utility" includes "every common carrier, pipeline corporation, gas corporation, electrical corporation, . . . and water corporation, . . . as those terms are defined in [this] chapter . . . ."<sup>5/</sup> Neither heating, cooling, steam nor sewer companies are expressly included in the above definition.

Section 61-119 of the Idaho Code defines an electrical corporation as "every corporation<sup>6/</sup> or person,<sup>7/</sup> their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant for compensation within this state. . . ." Electric plant is further defined to include "all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity for light, heat or power. . . ."<sup>8/</sup>

A "gas corporation" is defined to include any corporation or person owning, controlling, operating or managing any gas plant for compensation.<sup>9/</sup> A gas plant includes all real estate, fixtures, and personal property owned, controlled, operated or managed in connection with the production, generation, transmission, delivery or furnishing of gas for light, heat or power.<sup>10/</sup>

The Commission has been granted jurisdiction over production, generation, transmission and delivery functions of gas and electric corporations.<sup>11/</sup> It also has jurisdiction over the transmission, storage, distribution or delivery of crude oil or other fluid substances except water through a pipeline.<sup>12/</sup>

The Idaho statute, in defining pipeline, gas and electric corporations, requires that such plant be operated for compensation. Thus, there must be a sale or receipt of some form of compensation before the Commission may exert its jurisdiction.

The provision of the utility service directly to the public and indirectly through another person, who in turn, delivers the utility service to the public are both included in the definition of "public utility." The statute provides that:

. . . the term 'public utility' as used in this act shall cover cases both where the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, immediately, performs the services or delivers such commodity to or for the public or some portion thereof . . . . <sup>13/</sup>

Simply because the Commission can assert jurisdiction, however, does not mean it will always do so. An official at the Commission has pointed to an instance where a lumber company produced its own electricity and sold the excess to the local utility. The Commission did not assert jurisdiction because it felt that the transaction

did not have any significant or harmful effect on the public.<sup>14/</sup>

This circumstance illustrates the interpretive problem of the requirement, laid out in Idaho Code §61-129, that the utility service be provided directly or indirectly to or for the public. The statute has not provided any further explanation other than requiring that the service be performed or delivered directly or indirectly to the public.

Court cases have, however, attempted to interpret this requirement. In Humbar d Lumber Co. v. Public Utilities Commission,<sup>15/</sup> the court held that the Commission did not have jurisdiction over a lumber company operating a water system and selling its excess water to a nearby railroad for compensation. The court concluded that, though the lumber company sold water for compensation, it did not devote its water business, either wholly or partially, to the use of the public and did not hold itself out as ready, able, and willing to serve the public generally, or some portion thereof.

A specific exemption exists for any electric corporation "where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others. . . ."<sup>16/</sup>

A similar exception is created by statute for a gas corporation which produces or distributes gas through private property only, solely for the producer's own use or the use of his tenants.<sup>17/</sup>

Specific provisions in the statute also exempt municipal and cooperative utilities from regulation by the Commission. The definition of "corporation" as used in the utilities act, does not include a municipal corporation; gas, electrical, water, or telephone cooperatives; or any other public utility operated at cost and not for a profit.<sup>18/</sup>

### III. POWERS OF THE COMMISSION

The Public Utility Regulatory Act<sup>19/</sup> gives the Commission the "power and jurisdiction to supervise and regulate every public utility in the state and to do all things necessary to carry out the spirit and intent of the provisions of this act."<sup>20/</sup>

In addition to this broad delegation of authority, there are specific provisions giving the Commission the power to fix rates charged by a utility;<sup>21/</sup> to approve the issuance of securities;<sup>22/</sup> to prescribe a system of accounts<sup>23/</sup> and to fix the rate of depreciation;<sup>24/</sup> to regulate standards of service;<sup>25/</sup> to approve the sale, lease or transfer of any utility franchise or property;<sup>26/</sup> and to compel a utility to make such additions, extensions, repairs or improvements as are necessary to secure adequate service to the public.<sup>27/</sup>

These powers are specifically mentioned in the statute. Additional powers, however, may be implied from the general supervisory clause<sup>28/</sup> and the Commission's power to issue certificates of public convenience and necessity.<sup>29/</sup>

An official at the Commission has commented that the Commission exerts jurisdiction over the construction, siting, expansion,

extension and initiation of service when it approves or dis-approves an application for a certificate of public convenience and necessity. Mergers and consolidations are also within the Commission's jurisdiction according to the Commission official.<sup>30/</sup>

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

The Idaho legislature has declared that no gas, electrical or water corporation, shall begin the construction of a line, plant, or system; exercise any right or privilege; or obtain a franchise without first obtaining a certificate of public convenience and necessity from the Commission.<sup>31/</sup> The Commission also has authority over the sale and assignment of certificates and must approve any such transfer.<sup>32/</sup>

The requirement that a company obtain a certificate of public convenience and necessity applies only to jurisdictional utilities and, then, only to the construction or operation of new facilities. Because "power companies may, without such certificate, increase the capacity of their existing generating plant," the replacement of existing facilities would, a fortiori, not require certification.<sup>33/</sup>

An exception also exists for a company wishing to extend its existing facilities. The statute provides that a company need not secure a "certificate for an extension within any city or county, within which it shall have theretofore lawfully commenced operation, or for an extension into territory whether within or without a city or county, contiguous to its street, railroad, or line, plant or system, and not theretofore

served by a public utility of like character, or for an extension within or to territory already served by it necessary in the ordinary course of its business."<sup>34/</sup>

To obtain a certificate of public convenience and necessity, an application must be filed with the Commission. The statute identifies specific information which must be included in the application.<sup>35/</sup>

Subsequent to the filing of the application, the Commission must hold a hearing on the "financial ability and good faith of the applicant and [the] necessity of additional service in the community . . . ."<sup>36/</sup> Additional criteria to be considered by the Commission when evaluating an application include the adequacy of existing service,<sup>37/</sup> the benefit to the public of increased service,<sup>38/</sup> and the capital structure of the applicant.<sup>39/</sup>

The statute does not specify that certificates, when granted, are necessarily exclusive. Counsel for the Commission noted, however, that except for transportation companies and multiple electric companies serving large industrial customers in certain limited cases, the Commission has never authorized duplicate utility service in the same service area.<sup>40/</sup>

A more significant barrier to competition in the provision of electric service is the Electric Supplier Stabilization Act (Act)<sup>41/</sup> which prohibits the duplication of electric service in Idaho. This Act was adopted to

promote harmony among electric suppliers, prohibit the pirating of customers and discourage duplication of electric facilities. The Act prohibits an electric supplier from furnishing electric service to any customer presently or previously served by another supplier, unless the written consent of such other supplier is first obtained.<sup>42/</sup> If the present or previous electric supplier was not doing so lawfully or is unwilling or unable to provide adequate electric service, then the Act's prohibition does not apply.

The statute lists four rules, based on supplier location and consumer preference, for selecting an electric supplier in the event that more than one supplier is willing and able to provide adequate service to a new consumer.<sup>43/</sup>

Should one utility, in constructing or extending its lines, plant or system, interfere with the operation of the line, plant or system of any other public utility, the Commission may hold a hearing and resolve the dispute.<sup>44/</sup>

The power to resolve such disputes extends only to jurisdictional utilities. In Clearwater Power Co. v. Washington Water Power Co.,<sup>45/</sup> an electrical cooperative not otherwise subject to the Commission's jurisdiction, complained against a public utility for encroaching on its territory. The Idaho Supreme Court affirmed an order of the Commission dismissing the action for lack of jurisdiction.

The Idaho statutes contain no provision which

expressly requires a public utility to obtain Commission approval before abandoning its service. However, this power may be included in the broad power "to supervise and regulate every public utility in the state."<sup>46/</sup> The Supreme Court of Idaho suggested, in dicta, that it may be necessary for a public utility waterworks system to procure the consent of the Commission in order to discontinue service.<sup>47/</sup>

V. APPEALS OF REGULATORY DECISIONS

Chapter 61-6 of the Idaho Code establishes a procedure to be used in all matters before the Commission and outlines the procedure for appealing the Commission's decisions. Before an appeal can be perfected, a petition for rehearing must be filed within twenty days of a final order and must be acted upon by the Commission within the thirty days following filing.<sup>48/</sup>

Within thirty days after a decision on rehearing, or within thirty days after the application for rehearing has been denied, a party may appeal directly to the state supreme court.<sup>49/</sup> The review by the supreme court is based solely on the record as certified to the court by the Commission and no new or additional evidence may be introduced.<sup>50/</sup>

Statutory law narrowly limits the scope of review by the supreme court. On appeal, inquiry by the court "shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order appealed from violates any right of the appellant under the Constitution of the

United States or of the State of Idaho."<sup>51/</sup> The supreme court has interpreted this, however, to allow for a determination of whether the findings of fact of the Commission are supported by competent evidence.<sup>52/</sup>

FOOTNOTES

1. Idaho Code §61-501 (1976).
2. Id. §61-2.
3. 78 Idaho 124, 299 P.2d 475 (1956).
4. Idaho Code §50-330 (1967).
5. Id. §61-129 (1976).
6. Id. §61-104.
7. Id. §61-105.
8. Id. §61-118.
9. Id. §61-117.
10. Id. §61-116.
11. Id. §§61-117; 61-119.
12. Id. §61-114.
13. Id. §61-129.
14. Mr. Woody Richards, Counsel at the Commission, Telephone conversation, August 22, 1978.
15. Humbard Lumber Co. v. Public Utilities Commission, 1925 A. P.U.R. 225, 228 P. 271 (1925).
16. Id. §61-119.
17. Id. §6-117.
18. Id. §61-104.
19. Id. tit. 61.
20. Id. §61-501.
21. Id. §61-301.
22. Id. ch. 61-9.
23. Id. §61-524.
24. Id. §61-525.
25. Id. §71-520.

26. Id. §61-328.
27. Id. §61-508.
28. Id. §61-501.
29. Id. §§61-526; 530.
30. Mr. Woody Richards, Counsel at the Commission, Telephone conversation, August 22, 1978.
31. Idaho Code §§61-526; 527 (1976).
32. Id. §61-328.
33. Id. §61-526.
34. Id. §61-526.
35. Rules of Practice and Procedure, Idaho Pub. Utilities Comm., Rule 15.
36. Idaho Code §61-528 (1976).
37. In Re Swan Creek Electric Co., 1915 F. P.U.R. 323.
38. In Re Idaho Light and Power Co., 1915 A. P.U.R. 2.
39. In Re Wilcox, 1916 C. P.U.R. 35.
40. Mr. Woody Richards, Counsel for the Commission, Telephone conversation, August 22, 1978.
41. Idaho Code §§61-322; 334 (1976).
42. Id. §61-332B.
43. Id. §61-332C.
44. Id. §61-526.
45. Clearwater Power Co. v. Washington Water Power Co., 78 Idaho 150, 299 F.2d 484 (1956).
46. Idaho Code §61-501 (1976).
47. Village of Lapwai v. Alligier, 78 Idaho 124, 299 P.2d 475 (1956).
48. Idaho Code §61-626 (1976).
49. Id. §61-627. See, also, art. 5, §9 of the Idaho Constitution giving the supreme court original jurisdiction to review appeals from the public Utilities Commission.

50. Id. §61-629.

51. Id. §61-629.

52. State ex. rel. Taylor v. Union Pacific R. Co.,  
60 Idaho 185, 89 P.2d 1005 (1939).

## CHAPTER 3

### SITING OF ENERGY FACILITIES IN IDAHO

#### I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

At present, there is no siting statute in the state of Idaho. Bills have been introduced twice in the state legislature, but each time they failed to gain sufficient support for passage. <sup>1/</sup>

The state is not without control over the location and operation of power plants, however. A few state and local agencies do exert limited control over the siting of energy facilities. Other agencies are responsible for issuing various permits required for utility operation. Although the designated permits are required by law, it should be noted that an official at the Idaho Public Utilities Commission has indicated that the permitting agencies are grossly understaffed and rarely have taken legal action against a company that has failed to obtain the necessary permits.

#### II. SCOPE OF SITING JURISDICTION OF PUBLIC AGENCIES

##### A. Idaho Public Utilities Commission

The Idaho Public Utilities Commission probably exerts the most direct authority over the siting of power plants. There is no express grant of siting jurisdiction to the Commission, but there are provisions authorizing the Commission "to supervise and regulate every public

utility in the state," and to issue certificates of public convenience and necessity.<sup>3/</sup> It is primarily through its authority to issue certificates of public convenience and necessity that the Commission exerts siting jurisdiction.

A utility seeking to obtain a certificate of public convenience and necessity is required to submit, among other things, a full description of the proposed location and/or route of the anticipated construction.<sup>4/</sup> An official at the Commission has stated that an application will be approved or disapproved depending, in part, on the acceptability of a proposed site.<sup>5/</sup>

No company has objected to the exertion of this power and, consequently, no court cases have passed upon its propriety. Until altered by statutory enactment or judicial decision, it appears that the Commission will continue to exert such control over the placement of power plants and over the laying of transmission lines.

For a more extended discussion of utilities subject to the Commission's nonsiting powers, see Chapter 2.

B. Division of Budget, Policy Planning and Coordination

The governor's office includes a Division of Budget, Policy Planning and Coordination. The Division acts as a central agency coordinating the development of physical, economic and human resource programs and harmonizing

the planning activities of local, state, federal and private agencies.<sup>6/</sup> Although not a permitting agency, the Division may influence the policies of other agencies.

C. Department of Health and Welfare

The Environmental Protection Division of the Department of Health and Welfare administers statutory provisions relating to air, water and solid waste pollution control. These provisions, contained in Chapter 39-1 of the Idaho Code, primarily deal with the level of pollutants a source may emit. However, the only permit issued by the Department is for facilities which may pollute the air. Section 3 of the Idaho Air Pollution Control Regulations states that "No owner or operator shall commence construction or modification of any stationary source [of air contaminants]... without first obtaining a Permit to Construct from the Department." These permits are required for all facilities except:

- 1) Fuel burning equipment for indirect heating and for heating and reheating furnances using gas exclusively with a capacity of less than 50 million BTU per hour input;
- 2) Other fuel burning equipment for indirect heating with a capacity of less than one million BTU per hour input; and
- 3) Certain other facilities. 7/

An application for a permit must be signed by the applicant and must contain "site information, plans, description, specifications, and drawings showing the design of the source, the nature and amount of emissions, and the

manner in which it will be operated and controlled."<sup>8/</sup> The Department has sixty days to act upon the application and, if the application is denied, must set forth reasons for the denial.<sup>9/</sup>

The only requirement for issuance of a permit is a showing that the source will not violate any local, State or Federal Air Pollution Control Regulations.

D. Department of Water Resources

Because water is scarce in Idaho, the legislature has declared that the right to appropriate it for purposes other than domestic use must be secured by a permit from the Department of Water Resources.<sup>10/</sup> According to an official at the Department, the appropriation of water for use in a steam turbine would be considered a use requiring a permit.<sup>11/</sup> The permitting procedure is described in Chapters 491 through 493 of the Idaho Code.

E. Local Planning and Zoning

All statutory authority to regulate land use has been delegated to local government. In 1975, the legislature passed the Local Planning Act<sup>12/</sup> giving cities and counties, individually or jointly, the power to prepare comprehensive land use plans and to pass supporting zoning ordinances.

The city council or board of county commissioners for each political subdivision is empowered to administer the provisions of the Act. Alternatively, the local governing board may appoint a planning and zoning commission,

consisting of between three and twelve members and serving for no less than three nor more than six years, to act in its place. <sup>13/</sup>

The local governing board or duly appointed Commission is under a duty to develop a comprehensive plan including, among other things,

An analysis showing general plans for sewerage, drainage, power plant sites, utility transmission corridors, water supply, fire stations and fire fighting equipment, health and welfare facilities, libraries, solid waste disposal sites, schools, public safety facilities and related services. <sup>14/</sup>

Zoning districts may then be established by ordinance in accordance with the adopted plan. <sup>15/</sup>

It should also be noted that local governing boards are empowered to create local improvement districts with the responsibility of implementing all provisions of the Idaho Underground Conversion of Utilities Law. <sup>16/</sup>

The law evidences a state policy of abolishing all overhead electric transmission lines and replacing them with underground facilities.

FOOTNOTES

1. Mr. Woody Richards, Counsel at the Public Utilities Commission, Telephone conversation of August 23, 1978.
2. Ibid.
3. Idaho Code §§61-501; 61-526(1976).
4. Idaho Public Utilities Commission, Rule 15.1(c).
5. Mr. Woody Richards, Counsel at the Public Utilities Commission, Telephone conversation of August 23, 1978.
6. Idaho Code §67-1911 (Supp. 1978).
7. Idaho Air Pollution Control Regs. §3(D).
8. Id. §3(B).
9. Ibid.
10. Idaho Code §42-201(1977).
11. Ms. Josephine Beeman, Counsel at the DWR, Telephone conversation of August 29, 1978.
12. Idaho Code ch. 67-65(1973).
13. Id. §67-6504(Supp. 1978).
14. Id. §67-6508 (emphasis added).
15. Id. §67-6511.
16. Id. §50-2501.

## CHAPTER 4

### FRANCHISING OF PUBLIC UTILITIES IN IDAHO

#### I. AUTHORITY TO GRANT FRANCHISES

Idaho municipalities have the power to grant franchises to utility companies.

The statute provides:

All cities shall have power to permit, authorize, provide for and regulate the erection, maintenance and removal of utility transmission systems, and the laying and use of underground conduits or subways for the same in, under, upon or over the streets, alleys, public parks and public places of said city; and in, under, over and upon any lands owned or under the control of such city, whether they may be within or without the city limits. 2/

It should be noted that the franchising authority extends only to "provid[ing] for and regulat[ing] the erection, maintenance and removal of utility transmission systems . . . ." <sup>3/</sup> No reference is made in the statutes to franchising a general utility system or the operations of a utility business. Thus, municipal franchises are required only to use the public way but not to operate a utility business.

#### II. PROCEDURES FOR GRANTING FRANCHISES

The state legislature has established a simple procedure to be followed when granting franchises. A prospective franchise applicant must first apply to the Public Utilities Commission (Commission) for authorization that the public convenience and necessity require the

exercise of such a privilege.<sup>4/</sup> Having obtained a certificate of public convenience and necessity, the utility may then apply to the local governing body for the franchise.

All franchises are granted by ordinances passed by a majority vote of the city council.<sup>5/</sup> The ordinance may not be passed on the day of its introduction nor for thirty days thereafter.<sup>6/</sup> The legislature also requires that the ordinance be published in at least one issue of the official newspaper of the municipality before it may take effect.<sup>7/</sup>

A municipality may waive a specified manner of acceptance of a franchise and recognize another.<sup>8/</sup> In Couer d'Alene v. Spokane & I.E.R. Co., a railroad company was granted a franchise to construct, maintain and operate a railroad over a portion of the municipality's streets. The ordinance granting the franchise conditioned that the railroad company was to accept the franchise in writing within 30 days following the approval of the ordinance and that failure to so accept would render the franchise void. The Company did not accept the franchise in the manner specified, but began construction of tracks. The city filed suit to enjoin the company from maintaining the tracks. The trial court dismissed the city's complaint. In reversing the trial court's decision, the court, citing Smith v. Faris Kesl Const. Co. Ltd.,<sup>9/</sup> stated that:

The question of waiver is mainly a question of intention . . . . Waiver must

be manifested in some unequivocal manner and to operate as such it must in all cases be intentional. 10/

Additional procedures for granting franchises, other than those described above, have not been prescribed by the courts or by the legislature. There is no requirement of free and open competition or that a written acceptance must be filed by the grantee. All franchises are, as noted, granted by ordinance of the local legislative body and not by voter election. There is also no provision requiring any tax or payment to the local government. Indeed, one early case from the Commission looked upon the imposition of any franchise tax by local government with disfavor. In In Re Beaver River Power & Light Company, 11/ the Commission stated that a franchise provision requiring an electric company to pay a certain percentage of its gross receipts to a city would result in higher rates than would otherwise be necessary and, therefore, the public interest would not be served by allowing the company to compete with the utility presently serving the area.

### III. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The only requirement a utility must satisfy when applying for a franchise is to obtain a certificate of public convenience and necessity from the Commission. Local government, therefore, has wide discretion in choosing who shall receive permission to lay and maintain a utility transmission system across the public way.

No particular criteria are specified in the

statutes or in case law which guide a municipality in granting a franchise. There is no requirement that the franchisee be ready and willing to serve the public generally or that the franchise be awarded competitively to the highest bidder. Likewise, there is no requirement that the franchisee meet any specified standards, although, once operating, a franchise holder must maintain adequate service.<sup>12/</sup>

#### IV. CHARACTERISTICS OF A FRANCHISE

##### A. Duration and Termination

The Idaho statutes contain no provision limiting the period of time for which a franchise may be granted. Franchises may be granted for any period of time decided upon by the city council. According to an official at the Idaho Power Company, perpetual franchises have been granted by local governments.<sup>13/</sup>

In the absence of a specific time provision in a franchise, it is not clear what term, if any, will be imposed. Recent case law has not dealt with this issue. The only judicial commentary was by the United States Court of Appeals for the Ninth Circuit in 1903. Dealing with the validity of a franchise allegedly superseded by a subsequent franchise, the court remarked that a city ordinance granting a water company the right to use the public way was a grant of a license only, revocable at the will of the city, since it had no power to grant a perpetual franchise in the absence of express statutory authority.<sup>14/</sup>

Once a franchise expires or is terminated with or without cause, the franchisee can be forced to remove its facilities and cease operations. The power of a municipality to force removal was acknowledged in Village of Lapwai v. Alligier,<sup>15/</sup> where the village sought to enjoin the use of its streets and alleys by a public utility waterworks system and to require the removal of its installations. Though the utility was ordered to cease operations, the utility argued that the municipality could not order it to cease operations without approval from the Commission. Although recognizing that a public utility must obtain Commission approval before voluntarily abandoning service, the court rejected this contention pointing out that a municipality had complete control over its streets and alleys, and, therefore, was not required to procure the consent of the Commission as a condition of discontinuing a utility's service.<sup>16/</sup> The company was not required to remove its facilities, however, because they were underground and did not create an obstruction.

B. Exclusivity

The statute from which the municipal franchising power is derived neither expressly permits nor prohibits the grant of exclusive franchises. Arguably, an exclusive franchise could, be granted. However, Secretary and General Counsel for Idaho Power Company, has stated that thus far, no exclusive franchises have been granted.<sup>17/</sup>

C. Other Characteristics

The Idaho legislature has not addressed the abandonment of a franchise, but while a utility may not voluntarily abandon service without Commission approval, a municipality may require a utility to discontinue use of public streets upon expiration of a franchise.<sup>18/</sup> All regulatory control over public utilities also resides with the Commission, although cities may have the "power to regulate the fares, rates, rentals or charges made for the service rendered under any franchise" granted by the city if the franchisee is not subject to the jurisdiction of the Commission.<sup>19/</sup>

No court cases have dealt directly with the issue of whether a municipality may, by denying a franchise, preclude the operation of a utility authorized by the Commission to provide service.<sup>20/</sup> However, this power may be inferred from the fact that a municipality may force a utility to discontinue service upon expiration of its franchise. An official at the Idaho Power Company, has, however, opined that in such case the municipality would be powerless to preclude operations under a supremacy theory supporting the power of the state agency to authorize operation of a utility.<sup>21/</sup>

FOOTNOTES

1. Mr. Paul Jaurequi, Secretary and General Counsel of the Idaho Power Company, Telephone conversation, August 24, 1978.
2. Idaho Code §50-328 (1967).
3. Id. §50-328.
4. Id. §61-527. See Chapter 2 for a description of the procedure for obtaining such a certificate.
5. Id. §50-329 (1967).
6. Id. §50-329.
7. Id. §50-329.
8. Couer d'Alene v. Spokane & I.E.R. Co., 31 Idaho 160, 169 P. 930 (1917).
9. Smith v. Faris Kesl Const. Co., 27 Idaho 407, 150 P. 25 (1915).
10. Couer d'Alene v. Spokane & I.E.R. Co., 31 Idaho 160, 169 P. 930, 931 (1917).
11. In Re Beaver River Power & Light Co., 1915B P.U.R. 281.
12. Idaho Code §61-520 (1976).
13. Mr. Paul Jaurequi, Secretary and General Counsel for the Idaho Power Company, Telephone conversation, August 24, 1978.
14. Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 F. 232 (1903).
15. Village of Lapwai v. Alligier, 299 P.2d 475 (Idaho 1956).
16. Id.
17. Mr. Paul Jaurequi, Secretary and General Counsel for Idaho Power Company, Telephone conversation, August 24, 1978.
18. Village of Lapwai v. Alligier, 299 P.2d 475 (Idaho 1956).
19. Idaho Code §50-330 (1967).
20. In Village of Lapwai v. Alligier, 299 P.2d 475 (1956),

the court affirmed a municipality's power to compel a utility to cease operations; but, in that case, the Commission had not authorized operations.

21. Mr. Paul Jaurequi, Secretary and General Counsel at the Idaho Power Company, Telephone conversation, August 24, 1978.