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 West Virginia

MASTER

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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
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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 West Virginia. 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 West Virginia. Attention is

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN WEST VIRGINIA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the West Virginia Public Service Commission (Commission). The Commission is comprised of three members appointed by the governor with the advice and consent of the state senate. Commissioners are appointed for six year terms. They must be free from any pecuniary or employment interest in public utilities.[1/]

The Commission possesses the exclusive authority to regulate public utilities. While local governments retain the power to control the use of their streets and to grant franchises to public utilities, they cannot use this power to infringe on the exercise of regulatory power by the Commission. In Chesapeake & Potomac Tel. Co. v. City of Morgantown,[2/] the court held that a city could not order a telephone company to terminate its service for there was a "clear legislative policy, for the public good, to place the regulation of public utilities under State control;" the statutes conferring this power on the Commission were "paramount" to any rights granted to local government.[3/]

II. JURISDICTION OF THE COMMISSION

The jurisdiction of the Commission extends to all "public utilities," which are defined as "any person or

persons, or association of persons, however associated, whether incorporated or not, including municipalities engaged in any business . . . which is, or shall hereafter be held to be, a public service . . . ."[4] Some specific services which are considered public utilities are enumerated in a second statutory provision. These include entities involved in the:

> . . . generation and transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through a distributing utility; supplying water, gas or electricity, by municipalities or others . . . . [5]

The jurisdictional provision, when combined with the broad statutory definition of public utility, appears to provide the Commission with a broad base from which to regulate all facilities and activities of any operation which it holds to be a public utility.

The Commission has statutory authority over "persons, or associations of persons, however associated, whether incorporated or not, including municipalities . . . ."[6] Thus, the Commission's jurisdiction extends to all conventional forms of utility ownership.

In order to be classified as a public utility, a person must be "engaged in . . . business."[7] This would indicate that there must be a receipt of compensation in order to trigger the Commission's jurisdiction. The incomplete statutory enumeration of public utilities includes the "generation and transmission of electrical energy . . . through a distributing utility,"[8] so indirect sales of electricity

clearly are subject to Commission regulation. Although the statutes are silent with respect to indirect sales of other services, the broad definition of public utility does provide a sufficient foundation for regulation of such indirect sales if the service ultimately reaches the "public."

A public utility must be engaged in a business which is a "public service."[9/] There is no statutory definition of "public service," but the Commission and West Virginia courts have considered the meaning of this term. The Supreme Court of Appeals, in holding that a company which owned distribution lines through which gas sold to a municipal utility was delivered to the customers by the municipal utility was a public utility, elaborated on the meaning of "public service" and stated that the test is whether or not there is a:

> devoting of private property by the owner or person in control thereof to such a use that the public generally, or that part of the public which has been served and has accepted the service, has the right to demand the use or service, as long as it is continued, shall be conducted with reasonable efficiency and under proper charges. 10/

The court further reasoned that:

> Whenever any business or enterprise becomes so closely and intimately related to the public, or a substantial part thereof, dependent upon the proper conduct of such business, it becomes the subject for the exercise of the regulatory power of the state. 11/

In Wilhite v. Public Service Commission,[12/] the court held that a corporation that constructed its own pipeline to sell gas produced at its own wells to two industrial

customers, was not a public utility. The court distinguished service to only particular individuals from a holding out of the availability of the service to the general public. The court stated that:

> The mere fact that a product which is usually dispensed by or sold by a utility to the public is being furnished does not make every person, firm, or corporation selling such product a public utility. If such product is sold under private contract and the seller does not hold himself out to sell such product to the public or render some service to the public, he is not a public utility. 13/

The court reached this holding even though there were substantial sales to the two industrial customers and these customers had previously been served by a public utility.

In Wingrove v. Public Service Commission, 14/ however, the court held that sales begun on a selective basis could become so indiscriminate as to render the operation subject to regulation. In this case, a coal company originally had produced electricity for its own use and that of its tenants but had gradually accepted other customers who applied for service. Only about twenty non-tenant customers were being served, but no requests for service had ever been denied. While the express intention of the company was to be able to discontinue service at any time, its acceptance of all applications for service was held to be sufficient election of public service to bring the company within the Commission's jurisdiction.

While there are no specific statutory exemptions

for service provided only to tenants or to the producer itself, the courts' and Commission's interpretations of the "public service" requirement lead to the conclusion that such activities are not subject to Commission regulation. As held in Wilhite, private sales are not covered and logically, neither is energy production for one's own use. Sales of electricity to one's tenants by contract has been held not to be the providing of a public service. Holdred Collieries v. Boone City., Coal Corp.[15/] Similarly, in Linsky v. Nary,[16/] The Commission refused to assume jurisdiction over a development corporation which sold water to the tenants and lessees of its mobile home park.

III. POWERS OF THE COMMISSION

The Commission has general supervisory authority over all public utilities operating pursuant to a charter or franchise issued by a city, town, municipality or county court.[17/] In addition to this general authority, the Commission has been granted numerous specific powers. The Commission possesses the power to regulate rates,[18/] and prescribe a uniform system of accounts to be kept by public utilities.[19/] It must approve the construction of new facilities;[20/] applications for franchises from municipalities;[21/] abandonment of service;[22/] and may prescribe standards of service.[23/] In addition, the Commission must approve mergers and consolidations;[24/] affiliated interest transactions;[25/] arrangements with other utilities;[26/] sales or leases of

property;[27] and transfers of franchises.[28]

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

A. Generally

Although the term "public utility is defined to include any person or entity engaged in a business which is a public service, only certain public utilities must obtain a certificate of convenience and necessity before beginning construction of any plant, equipment, property or other facility for providing the services enumerated the statute.[29] These include electric and gas services but do not include steam or refrigeration. Thus, while providers of these services may be subject to the Commission's general regulatory authority, they are not subject to its certificating authority.

A certificate is also necessary before a public utility, person or corporation applies for or obtains a franchise from a municipality.[30] No certificate is needed, however, for "ordinary extensions of existing systems in the usual course of business" but those who extend systems into new territories must obtain a franchise.[31]

B. Competition

The policy of the state, as reflected in rulings by the courts and the Commission, is to avoid competition by public utilities in the same area. The statute itself provides only that the applicant must prove that "public convenience and necessity do exist."[32]

In United Fuel Gas Co. v. Public Service Comm.,[33]

the court refused to require one gas utility to extend service to customers in an area already served by another gas utility. The court based its decision on the detrimental impact this would have on the interests of the public; the additional investments to institute the duplicate service would raise customer rates unnecessarily.[34/] The Commission, although recognizing that competition generally was not in the public interest, has allowed a new public utility to intrude into the area of an old utility when the latter failed to serve those in the area who requested service.[35/]

C. Certificating Procedures

In order to obtain a certificate of public convenience and necessity, the utility must file an application with the Commission. This application should identify the area to be served, the nature of the service to be furnished, the franchising body, the existing utilities with which the new service will compete, and the estimated cost of the project.[36/] After notice to interested parties, a public hearing will be held to consider the application.[37/] The Commission may, for good cause shown, grant the certificate without formal notice and hearing.[38/] The certificate will be granted only if the Commission determines that the public convenience and necessity require the proposed construction or service.[39/] No Commission or judicial decisions have elaborated on this criterion.

D. Service Area Disputes

Service area disputes are resolved by the Commission pursuant to the general procedure for hearing complaints. Any person may complain to the Commission that any public utility is acting in contravention of any provision regulating public utilities.[40] If there appear to be reasonable grounds for the complaint, the Commission will conduct any necessary investigation, give notice to the utility complained of, and request a response from that utility. The complaint may then be resolved voluntarily by the accused utility or the Commission may take any action necessary.[41]

E. Abandonment of Service

No public utility may discontinue service without first obtaining the approval of the Commission.[42] No criteria have been enumerated with respect to approval by the Commission of abandonment requests.

V. APPEALS OF REGULATORY DECISIONS

If a party is not satisfied with an order of the Commission made after a hearing on its case, it may petition, within ten days of the final order, for a rehearing or re-argument.[43] The grounds for the claim that the matter was erroneously decided must be specified and all alleged errors stated.[44] An application for rehearing is not mandatory, however. The aggrieved party may petition the Supreme Court of Appeals, within thirty days following the entry of the order, to suspend the final order.[45]

The court is charged with the duty of deciding

the matter in controversy "as may seem to be just and right."[46] West Virginia courts have consistently held that the appeal is not a hearing de novo.

> "The principle is well established by the decisions of this Court that an order of the public service commission based upon its findings of facts will not be disturbed unless such finding is contrary to the evidence, or is without evidence to support it, or is arbitrary, or results from a misapplication of legal principles." [47]

A Commission order will also be overturned if the Commission "has exceeded the power which it could constitutionally exercise, has gone beyond its statutory powers or its action is based on a mistake of law."[48]

FOOTNOTES

1. W.Va. Code §24-1-3 (Michie 1976).
2. 144 W.Va. 149, 107 S.E.2d 489 (1959).
3. Id. 107 S.E.2d at 496.
4. W.Va. Code §24-1-1 (Michie 1976).
5. Id. §24-2-1.
6. Id. §24-1-1.
7. Ibid.
8. Id. §24-2-1.
9. Id. §24-1-1.
10. 154 W.Va. 146, 174 S.E.2d 331, 335 (1970).
11. Id. 174 S.E. 2d at 337.
12. 150 W.Va. 747, 149 S.E.2d 273 (1966).
13. Id. 149 S.E.2d at 282.
14. 74 W.Va. 190, 81 S.E. 734 (1914).
15. 97 W.Va. 109, 124 S.E. 493 (1924).
16. 11 PUR 4th 381 (1975).
17. W.Va. Code §24-2-5 (1976).
18. Id. §24-2-3.
19. Id. §24-2-8.
20. Id. §§24-2-11, 24-2-11a.
21. Id. §24-2-11.
22. Id. §24-3-1.
23. Id. 24-3-1.
24. Id. §24-2-12(d).

25. Id. §24-2-12(f).

26. Id. §24-2-12(a).

27. Id. §§24-2-12(b).

28. Ibid.

29. Id. §§24-2-1, 24-2-11.

30. Ibid.

31. Ibid.

32. Id. §24-2-11.

33. 103 W. Va. 306, 138 S.E. 388 (1927).

34. Id. 138 S.E. 2d at 391.

35. Re Harrison Rural Electrification Assn. Inc., 24 P.U.R. (N.S.) 7 (1938).

36. W. Va. P.S.C., Rules of Practice of Procedure 10(c) (1977).

37. Id. 12.

38. Id. 10(k).

39. W. Va. Code §24-2-11 (1976).

40. Id. §24-4-6.

41. Ibid.

42. Id. §24-3-1.

43. W. Va. P.S.C., Rules of Practice and Procedure 19(a) (1977).

44. Id. 19(c).

45. W. Va. Code §24-5-2(1976).

46. Ibid.

47. United Fuel Gas Co. v. Public Service Comm'n, 143 W. Va. 33 99 S.E. 2d 1, 8 (1957).

48. Anchor Coal Co. v. Public Service Comm'n, 123 W.Va. 493, 15 S.E. 2d 406, 411 (1941).

CHAPTER 3

SITING OF ENERGY FACILITIES IN WEST VIRGINIA

I. PUBLIC SERVICE COMMISSION

There is no comprehensive power plant siting statute in West Virginia. However, there is a siting provision concerning high voltage transmission lines.[1/] Any entity seeking to construct a power line with a capacity of two hundred thousand volts or more must obtain a certificate of public convenience and necessity from the Public Service Commission (Commission). The certificate is granted as approval of both the construction and location of the line.[2/] In granting the certificate, the Commission must balance the reasonable power needs of the region against any adverse environmental impact when it makes its determination.[3/] Public notice is required and interested parties may request a hearing on the matter.[4/] There is no requirement that the Commission consult with other agencies prior to granting a certificate.

II. PLANNING AUTHORITIES

Every municipality and county commission may create by ordinance a planning commission.[5/] Any municipal corporation with a population of 2,000 or more may assign the functions of this commission to its Department of Development.[6/] Each planning commission must develop and recommend to its corresponding governing body a comprehensive plan for the physical development of the territory within its jurisdiction.[7/] A county planning commission can recommend and the

county commission can adopt a comprehensive planning and zoning ordinance.[8] A comprehensive plan should include recommendations for development of the region and may include the general location and extent of publicly-owned utilities and "the uses of land for trade, industry, habitation, recreation, agriculture, forestry, soil and water conservation and other purposes."[9] There are no special provisions dealing with privately-owned public utilities.

Once the commission adopts the plan, it sends the plan to the governing body of the municipality or county.[10] The governing body then must adopt, amend or reject it.[11] After the comprehensive plan and an ordinance containing provisions for subdivision control have been adopted by a municipality:

> [A] structure shall not be located and an improvement location permit for a structure on platted or unplatted lands shall not be issued unless the structure and its location conform to the municipality's comprehensive plan and ordinance. [12]

Similar limits are placed on locating new structures on unincorporated lands within the jurisdiction of the county planning commission.

For any amendment to the plan to be valid, the planning commission must approve the amendment by resolution and the governing body of the municipality or the county commission must adopt it by ordinance.[13] The commissions have the power and duty to invoke any legal or equitable

remedy for the enforcement of the provisions of the ordinances.[14]

III. ENVIRONMENTAL AGENCIES

1. Water Pollution

The State Water Resources Board (Board) of the Division of Water Resources, Department of Natural Resources (Department), is authorized to regulate water pollution under the Water Pollution Control Act.[15] Its regulations represent a balancing of public health needs, protection of flora and fauna, and provision for adequate economic development.[16] Regulations issued by the Board in 1967 purusant to its grant of authority, generally limit the uses of streams and rivers in the state. The regulations vary from region to region and some streams are not certified for use as sources of coolant waters.

It is unlawful, unless a permit is first obtained from the Department, to allow the discharge of industrial wastes into state waters, to create an outlet for such discharges or to make an addition to an existing facility that would increase the volume of its discharges.[17] Water used for cooling is treated as an "industrial waste" by the Department.[18] The permits are valid for five years.[19] The Department can issue a permit if the chief of the Division of Water Resources finds that the proposed use will not cause water pollution or violate any of the pollution regulations promulgated by the Board.[20]

2. Air Pollution

West Virginia statutes provide that no "stationary source of air pollutants" can be constructed or modified without a permit from the state Air Pollution Control Commission.[21] The Air Pollution Control Commission has the power to define that term by regulation and has done so.[22]

FOOTNOTES

1. W. Va. Code §24-2-11a (Michie 1976).
2. Id. §24-2-11(a).
3. Id. 24-2-11(d).
4. Id. 24-2-11(c).
5. Id. §8-24-1.
6. Id. §8-12-3a.
7. Id. §8-24-16.
8. Ibid.
9. Ibid.
10. Id. §8-24-19.
11. Id. §9-24-21.
12. Id. §8-24-36.
13. Id. §8-24-23.
14. Id. §8-24-14.
15. Id. §20-5A-1 et seq., §20-5A-3(b)(2)(Michie Supp. 1978).
16. Id. §20-5A-1.
17. Id. §20-5A-5(b).
18. Mr. Wright, Assistant Director of the Division of Water Resources, Telephone conversation, 6/21/78.
19. W. Va. Code §20-5A-7(c)(Michie Supp. 1978).
20. Id. §20-5A-7(b).
21. Id. §16-20-11b(Michie 1972).
22. B.N.A. Environ. Rptr., State Air Laws Vol. 2, West Virginia Air Pollution Regulation XIII.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN WEST VIRGINIA

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

West Virginia law expressly grants, by statute, to every municipality and every county court (Commission) the authority to grant franchises.[1/] The statute places no limit upon the entities to which a franchise can be granted; it specifically provides that it can be granted to "any person" but does not define the term "person."[2/] Franchises to public utilities must be granted by an ordinance adopted by the governing body of the county or municipality.[3/] There is no constitutional provision granting franchising authority to local governments. Prior to 1901, the power to grant franchises was based on provisions in the charters of the individual municipalities and a general grant of authority to municipal corporations to keep the streets in good repair.[4/]

The specific question of whether a city can exclude a public utility by failing to grant an initial franchise has not been decided by West Virginia courts. However, the relevant statute indicates that a municipality's franchising authority is subservient to the state's authority to regulate public utilities.

> The failure or inability of any person to obtain from any municipality or county court a franchise for the rendering of a public service shall in no way affect the power and authority granted to, and the duties

> and obligations imposed upon, such person under the provisions of chapter twenty-four [Public Utility Act] . . . of this Code or by the public service commission. 5/

In Chesapeake & Potomac Tel. Co. v. City of Morgantown, 6/ the court held that a municipality could not compel the telephone company to remove its facilities from the streets of the municipality even though its franchise had expired. In reaching its decision the court recognized clear legislative policy to place the regulation of public utilities under state control.

> Such statutes are paramount to rights given by the city, by charter and by general statute, reasonably to regulate the use of its streets. 7/

The court went on to conclude that the municipality's franchising power must yield to the state's paramount power to regulate public utilities. Thus, it would appear that a municipality's refusal to grant an initial franchise to a public utility would not preclude that utility from providing service as required by the public utilities commission.

II. PROCEDURES FOR GRANTING A FRANCHISE

The statute prescribes a specific procedure which must be followed in order to grant a valid franchise. An application for a franchise must be filed at least thirty days prior to action on the franchising request by the governing body. 8/ Notice of such application must also be published in accordance with the requirements for legal publication under West Virginia law. 9/

An action of a governing body to grant a franchise must be by ordinance.[10] Specific procedures must be followed for the adoption of an ordinance by a governing body.[11] These procedural requirements include the reading of the proposed ordinance by title at not less than two meetings of the governing body,[12] and the prohibition of a material amendment to an ordinance at the same meeting at which it is finally adopted.[13]

This ordinance and franchise procedure applies to all public utility services. No distinction is made between various types of utility service.[14] The statute does not require open competition for the awarding of a franchise. There is no express provision governing payments to the local government for the franchise rights. In Chesapeake & Potomac Tel. Co. v. City of Morgantown,[15] the court held that municipalities could charge franchise holders reasonable fees to cover the regulation of the use of the public streets but could not use such fees as a means to tax the utilities holding franchises.

There is no provision requiring that the question of awarding a franchise be put to a vote of the citizens of the jurisdiction. Nor is there a requirement that a written acceptance of the franchise must be made by the public utility. The West Virginia public utilities law requires that a public utility must, before applying for a franchise, obtain a certificate of public convenience and necessity.[16] There

is no statutory provision or court decision which identifies specific criteria which must be satisfied in the granting of a franchise.

III. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The statute limits the duration of franchises granted after 1901 to fifty years.[17/] Municipalities and county commissions have no power to create perpetual franchises; no "franchise hereafter granted for any longer term than fifty years shall be of any force or validity."[18/] However, there may be some franchises which are perpetual and are still being used.

As discussed above, if a franchise terminates without successful negotiation for renewal, the municipality cannot force the utility to remove its facilities without the consent of the Public Service Commission.[19/]

B. Exclusivity

The franchise statute expressly gives to municipalities the authority to grant exclusive franchises.[20/] Thus, the court's objections to such franchises in Parkersburg Gas Co. v. Parkersburg,[21/] a case decided before the passage of the franchise statute, are no longer valid. However, there is a traditional hostility to exclusive franchises and no such franchises will be implied. In no case will an exclusive franchise in one field be implied to bar the granting of a franchise to a different type of utility. The court in

Parkersburg held that even if the gas company had an exclusive franchise to light the streets with gas, that would not preclude a franchise to light the streets with electricity.

FOOTNOTES

1. W. Va. Stat. §8-31-1(1977).
2. Ibid.
3. Id. §8-11-3.
4. W. Va. Code Ch. 47, §28 (Ed. 1884).
5. W. Va. Stat. §8-31-1(1977).
6. Chesapeake & Potomac Tel. Co. v. City of Morgantown, 144 W. Va. 149, 107 S.E. 2d 489 (1959).
7. 107 S.E. 2d at 496-7.
8. W. Va. Stat. §8-31-1(1977).
9. Id. §59-3-1.
10. Id. §8-11-3.
11. Id. §8-11-4.
12. Id. §8-11-4(a)(1).
13. Id. §8-11-4(a)(3).
14. Id. §8-11-3.
15. Chesapeake & Potomac Tel. Co. v. City of Morgantown, 143 W. Va. 800, 105 S.E. 2d 260 (1958).
16. W. Va. Stat. §24-2-11(1977).
17. Id. §8-31-1.
18. Ibid.
19. Chesapeake & Potomac Tel. Co. v. City of Morgantown, 144 W. Va. 149, 107 S.E. 2d 489 (1959).
20. W. Va. Code §8-31-1(1977).
21. Parkersburg Gas Co. v. Parkersburg, 30 W. Va. 435, 4 S.E. 650 (1887).