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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 Utah

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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
under Contract No. DE-AC02-78CS20289

ABSTRACT

This report is one of a series of preliminary reports describing the laws and regulatory programs of the United States and each of the 50 states affecting the siting and operation of energy generating facilities likely to be used in Integrated Community Energy Systems (ICES). Public utility regulatory statutes, energy facility siting programs, and municipal franchising authority are examined to identify how they may impact on the ability of an organization, whether or not it be a regulated utility, to construct and operate an ICES.

This report describes laws and regulatory programs in Utah. 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 Utah. 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 UTAH

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the Utah Public Service Commission (Commission). The Commission is comprised of three members appointed by the governor with the consent of the state senate. Commission members are appointed for six year terms and must be free from employment and pecuniary interests incompatible with the duties of the Commission.[1/]

The Commission is charged with the general supervision of public utilities,[2/] but its authority does not extend to municipally-owned utilities.[3/] Local governments are forbidden from exercising any regulatory powers over public utilities unless the utility is municipally-owned.[4/]

II. JURISDICTION OF THE COMMISSION

The Commission's jurisdiction extends to all "public utilities," which are defined to include:

> every gas corporation, electrical corporation [or] . . . heat corporation . . . where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state of Utah for domestic, commercial or industrial use. And whenever any . . . gas corporation, electrical corporation [or] . . . heat corporation performs a service for or delivers a commodity to the public; or in the case of a gas corporation or electrical corpora-

> tion selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use, for which any compensation or payment whatsoever is received, such . . . gas corporation, heat corporation . . . is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title. Except, as hereinafter provided, when any person or corporation performs any such service for or delivers any such commodity to any public utility herein defined, such person or corporation, and each thereof, is hereby declared to be a public utility and to be subject to the jurisdiction and regulation of the commission and to the provisions of this title. 5/

An "electrical corporation" is defined to include:

> every corporation, cooperative association, and person owning, controlling operating or managing any electric plant, or in anywise furnishing electric power for public service or to its consumers or members for domestic, commercial or industrial use, within this state. 6/

An electric plant includes all real estate, fixtures and personal property used in connection with the production, generation, transmission, delivery or furnishing of electricity for light, heat or power. 7/

A "heat corporation" is defined as "every corporation and person . . . owning, controlling, operating, or managing any heating plant for public service . . . ." 8/ A heating plant includes all real estate, fixtures, machinery, etc. used in connection with the production, generation, transmission, delivery or furnishing of heat. 9/

The specific activities subject to the Commission's jurisdiction are identified in the definitions of the services under its jurisdiction. The Commission may regulate the "production, generation, transmission, delivery or furnishing"

of electricity or artificial heat. The facilities subject to the Commission's jurisdiction are also identified in the definitions of the jurisdictional services. The definitions of electric and heating plants include all real or personal property, fixtures and machinery used in connection with the production, transmission, generation, delivery or furnishing of the jurisdictional services.

The Commission has statutory authority only over persons and corporations.[10/] These terms are defined to exclude municipalities,[11/] and therefore the Commission lacks jurisdiction over municipally-owned utilities.

"Public utility" is defined in such a manner that the receipt of compensation for a utility service is not essential to Commission jurisdiction. Commission jurisdiction can be based solely on the furnishing of a commodity to members or consumers. The relevant definitions provide no basis for a distinction between direct and indirect sales. The Commission is charged with regulating all rates.[12/] The Commission must authorize the purchase of surplus energy by a public utility from any entity which is not a public utility.[13/] These provisions demonstrate a legislative intent that the Commission exercise control over both direct and indirect sales. A Commission spokesman confirmed that the Commission does regulate both direct and indirect sales of energy to the public.[14/]

Commission jurisdiction is based generally on service, or delivery of a commodity to the public generally.[15/] In the case of gas or electrical corporations the sale or furnishing

of gas or electricity, for which any compensation is received, will definitely subject the corporation to Commission regulation. The statute does not define what constitutes the "public generally." The Utah Supreme Court considered the requirement that service be provided to the public generally in holding that a non-profit electric cooperative was not a public utility subject to Commission regulation.[16/] The court stated that the fact that the cooperative had sought widespread membership and had denied membership to no one who sought it was immaterial. The court reasoned that a utility became a public utility only if it held itself out as willing to serve the public indiscriminately rather than a definable group. The number of customers actually served was not held to be relevant in determining whether a utility was a public utility.

The definition of "electrical corporation" exempts from regulation the generation and distribution of electricity which is solely for the producer's use, or for the use of tenants. To qualify for the exemption the electricity must be generated on and distributed through private property alone, i.e. property not dedicated to public use.[17/] This exemption was construed narrowly by a federal Court of Appeals in a private antitrust action.[18/] This case involved a shopping center owner who constructed a generating plant on his property to supply energy to the center's tenants. The Court of Appeals found that the center provided its services to the public who patronized the shopping center as well as its

tenants and was thus not exempt from Commission regulation. In response to this decision, the Commission held that the shopping center owner was a public utility subject to its jurisdiction. On appeal, the Utah Supreme Court held that the federal court's holding was not final remanded the case to the Commission for a determination of whether the electricity was generated and distributed solely on private property and was used only by the shopping center owner and his tenants. If the facts required affirmative answers to these questions, the Commission was directed to hold that the center owner is not subject to Commission jurisdiction.[19/] The Commission held that the center owner was not a public utility subject to its jurisdiction.[20/]

III. POWERS OF THE COMMISSION

The Commission is vested with power and jurisdiction to supervise and regulate all of the business of every public utility in Utah.[21/] In addition, the Commission may "do all things . . . which are necessary or convenient" in the exercise of its powers.[22/] These general powers, when combined with its specific powers, provide the Commission with a broad base from which to regulate all activities of public utilities.

The Commission also has several specific grants of authority over the operations of public utilities. The Commission must approve most initiations or extensions of service,[23/] and may establish standards of service.[24/] It has authority to regulate rates,[25/] to establish a system of accounts to be used

by public utilities,[26] and to require public utilities to carry a proper depreciation account.[27] In addition, the Commission must approve the issuance of securities by electrical corporations,[28] and the construction of new facilities or extensions of existing facilities.[29]

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

A. Generally

A public utility is required to obtain a certificate of convenience and necessity before it may establish, or begin construction or operation of a line, plant or system.[30] "Construction" is not defined by statute. No certificate is necessary, however, for an extension of facilities by a public utility into areas already served by it and necessary in the ordinary course of business or for extensions by a utility into areas contiguous to its territory and not already being served by a utility offering the same service.[31]

B. Competition

A grandfather clause provision permits the Commission to grant an exclusive certificate to utilities that were serving customers prior to the enactment of Title 54.[32] In addition, the Commission's policy has been to grant exclusive service areas to public utilities in order to avoid potentially ruinous competition.[33] A Commission spokesman stated that the sole exception to the policy against competition has been in the area of common carriers.[34] The Commission has informally considered a proposal for a steam-extraction project that

would generate electricity, and would be situated in an area that is already receiving utility service. A spokesman for the Commission stated that it wishes to promote this type of development and would certify it despite the fact that it would engender competition.[35/]

C. Certificating Procedures

An applicant for a certificate of public convenience and necessity must file with the Commission evidence that it has obtained any necessary franchise or permit from the local body governing the area to be served.[36/] The Commission, after a hearing, may approve the application if it finds that the proposed construction or operation will serve the public convenience and necessity. The Commission may attach to the exercise of the rights granted by the certificate any necessary terms or conditions.[37/] A Commission spokesman indicated that beyond this statutory requirement, the Commission is very flexible with respect to the procedure to be followed in obtaining a certificate.[38/]

In addition to the general requirement that any new operations or construction be required by the public convenience and necessity, the only statutory criterion for the granting of a certificate pertains only to electrical corporations and states that the applicant's ratio of debt capital to equity capital be such that it, in the opinion of the Commission, renders the applicant financially stable.[39/] The Commission has considered the question of what constitutues an

acceptable debt to equity capital ratio, and has not set a rigid standard. In one case, the Commission indicated that an equity component of at least forty percent of a company's capital structure as sufficient evidence of financial stability. 40/ In another case, the Commission rejected an application for a certificate filed by a company which had 5.5 percent equity capital. 41/

Other criteria utilized by the Commission in granting a certificate have been summarized in its opinions as follows:

1. Whether there is a need, demand, or necessity by the general public for the proposed service in the area sought to be served;

2. Whether the proposed service is economically feasible, financially sound, efficient, stable and continuing;

3. Whether the application is physically and financially capable of providing the service proposed; and

4. Whether the effect of granting a certificate to the company would be detrimental to other existing suppliers. 42/

In addition, the Supreme Court of Utah has offered a definition of "necessity" in the context of a certificate application. "Necessity" is a public need without which the public would be inconvenienced or handicapped in the pursuit of business or pleasure. In ascertaining necessity, one should look to the future as well as the present, providing for probable growth of population, industry, and community development. If a new and enlarged service will enhance the public welfare to the extent that the patronage received will justify the expense of rendering it, the old service is not adequate. 43/

D. Service Area Disputes

Any public utility which claims to be injuriously interfered with by another public utility may complain to the Commission. The Commission, after a hearing, may issue any order and prescribe any terms and conditions which are reasonable with respect to the disputed operations or construction. 44/

E. Abandonment of Service

The Commission has authority under its general jurisdiction to approve petitions for abandonment. 45/ No specific procedure is provided for obtaining approval of an abandonment of service and no statutory criteria are provided for the approval of an abandonment.

Several Commission cases involving common carriers have cited language from a federal case in considering petitions to abandon public utility service.

> A public utility cannot, in the absence of contract, be compelled to continue to operate its utility at a loss . . . The corporation, although devoting its property to the use of the public, does not do so irrevocably or absolutely, but on condition that the public shall supply sufficient traffic on a reasonable rate basis to yield a fair return, and if at any time it develops with reasonable certainty that future operations must be at a loss, the corporation may surrender its franchise, discontinue operation, and dismantle and sell its physical properties. 46/

V. APPEALS OF REGULATORY DECISIONS

Before any court may hear an appeal of a Commission decision, an application must be made for a rehearing of the matter. The application for rehearing must be made prior to

the effective date of the order or decision appealed from, or if the order becomes effective prior to twenty days after its date, application can be made up to twenty days after the order or decision.[47/]

Within thirty days after the application for a rehearing is denied, or within thirty days after the rendition of a decision on rehearing, the applicant or any party aggrieved by such order may apply to the Supreme Court of Utah for a writ of certiorari. No other court in the state has jurisdiction to review a Commission decision.[48/] Appeals to the Supreme Court of Utah from Commission decisions are preferred on the Court's calender over all other civil cases.[49/]

Appeals are heard on the certified record of the Commission, and no new or additional evidence may be introduced. Judicial review is limited to a determination of whether the Commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any rights of the petitioner under the state and federal constitutions.[50/]

FOOTNOTES

1. Utah Code Ann. §54-1-1.5 (Smith 1974).

2. Id. §54-4-1.

3. Id. §54-2-1(3).

4. Utah Const. art 11, §5 (1974).

5. Utah Code Ann. §54-2-1(30)(Smith 1974).

6. Id. §54-2-1(20).

7. Id. §54-2-1(19).

8. Id. §54-2-1(16).

9. Id. §54-2-1(15).

10. Id. §§54-2-1(Smith 1974), 54-4-1(Smith Supp. 1977).

11. Id. §54-2-1(3).

12. Id. §54-7-12(1)(Smith Supp. 1977).

13. Id. §54-2-1(30)(Smith 1974).

14. Mr. Victor Gibb, Executive Secretary, Commission, Telephone conversation, 8/23/78.

15. Utah Code Ann. §54-2-1(Smith 1974).

16. Garkane Power Co. Inc. v. Public Service Comm., 98 Utah 466, 100 P.2d 571 (1940).

17. Utah Code Ann. §54-2-1(20)(Smith 1974).

18. Cottonwood Mall Shopping Ctr. Inc. v. Utah Power & Light Co., 440 F.2d 36 (1971).

19. Cottonwood Mall Shopping Ctr., Inc. v. Public Service Commission, 558 P.2d 1331 (Utah 1977).

20. Cottonwood Mall Shopping Ctr., Inc., Docket No. 7166 (Utah P.S.C. Apr. 5, 1977).

21. Utah Code Ann. §54-4-1(Smith Supp. 1977).

22. Id. §54-4-1.

23. Id. §54-4-25 (Smith 1974).

24. Id. §54-4-7.

25. Id. §54-7-12 (Smith Supp. 1977).

26. Id. §54-4-23 (Smith 1974).

27. Id. §54-4-24.

28. Id. §54-4-31 (Smith Supp. 1977).

29. Id. §54-4-25 (Smith 1974).

30. Id. §54-4-25 (1).

31. Ibid.

32. Id. §54-4-25(4).

33. Re Wells E. Streeper P.U.R. 1924 B. 393 (Utah P.S.C.).

34. Mr. Victor Gibb, Executive Secretary, Commission, Telephone conversation, 8/23/78.

35. Id.

36. Utah Code Ann. §54-4-25(3)(Smith 1974).

37. Ibid.

38. Mr. Victor Gibb, Executive Secretary, Commission, Telephone conversation, 8/23/78.

39. Id. §54-4-25(4).

40. Re Utah Power & Light Co., 76 P.U.R. 3d 1 (1968).

41. Re Dixie Rural Electric Company, 64 P.U.R. 3d 481 (1966).

42. Re Utah Power & Light Co., 76 P.U.R. 3d 1 (1968).

43. Mulcahy v. Public Service Commission, 101 Utah 245, 251 117 P.2d 298 (1972)(A certificate was issued to a trucking firm to operate between Salt Lake City and Ogden over challenges by two rail companies. The trucking firm offered pickups at intermediate points and other services that the rail companies did not offer).

44. Utah Code Ann. §54-4-25 (Smith 1974).

45. Re Emigration Canyon Railroad Co., P.U.R. 1917 F.464.

46. Phillips v. Nelson, 34 P.U.R. NS 378, 108 F.2d 725 (1939). See also Re Bamberger and Tooele Stage Lines, 4 P.U.R. 3d 377 (1954)(Both cases indicated, however, that substitute service should be considered in order to protect the interests of the customers of the utility seeking to abandon service).

47. Utah Code Ann. §54-7-15 (Smith 1974).

48. Id. §54-7-16.

49. Id. §54-7-18.

50. Id. §54-7-16.

CHAPTER 3

SITING OF ENERGY FACILITIES IN UTAH

The state of Utah has not enacted a comprehensive law governing the siting of energy facilities. Consequently, various state and local agencies may have separate approval authority over the siting of such facilities.

I. PLANNING AUTHORITIES

County and municipal governments in Utah are vested with general zoning powers, e.g. to regulate and restrict the height and size of buildings, density, location and use of structures and land for trade, industry, residence or other purposes.[1/] District regulations are to be in accordance with a master plan.[2/] Master plans may be adopted by local governing bodies which may include the planning of the general location and extent of public utilities and terminals, whether publicly or privately owned.

II. ENVIRONMENTAL AGENCIES

A. Bureau of Environmental Health

The Bureau of Environmental Health (Bureau) is primarily concerned with alleviating the health hazards of environmental pollution. Within the Bureau, the Committee on Water Pollution is responsible for controlling pollution of the state's waters. It is unlawful for any person, without first obtaining a permit from that committee, to construct or operate any establishment which would cause an increase in the discharge of wastes, or would alter the physical properties of any waters of the state.[3/]

The Bureau's Air Conservation Committee (Committee) has permitting authority with respect to air pollution. The Committee requires that notice be given by any person planning to construct a new installation which might reasonably be expected to be a source of air pollution. The Committee may review the plans and specifications of the proposed establishment. If it is determined from the plans that the proposed construction will not be in accord with the state's air pollution rules and regulations, an order prohibiting the construction is to be issued.[4/]

B. Department of Natural Resources

The Department of Natural Resources is comprised of several boards, which manage public lands and resources.[5/] These boards do not have the authority to issue permits for construction activities.

C. Energy Conservation Development Council

The Utah Energy Conservation and Development Council has advisory and policy-making functions relating to energy conservation and development. Among its duties, the Council is to develop criteria for consideration by state agencies in the granting of permits for "energy resource development projects."[6/] This term, however, is not defined in the Act.[7/]

III. UTAH STATE ENGINEER

A person who wishes to acquire the right to use any unappropriated public water in Utah must secure permission to do so from the State Engineer. An application to use un-

appropriated public water must state: the nature of the proposed use for the water; the quantity of water to be appropriated; the name and place of the stream or other source of the water and the nature of the diverting works; and the nature of the diverting channel.[8/] The State Engineer must approve an application if: (1) there is unappropriated water in the proposed source; (2) the proposed use will not impair existing rights, or interfere with the more beneficial use of the water; (3) the proposed plan is physically and economically feasible; and (4) the applicant has the financial ability to complete the plan and the application was filed in good faith.[9/]

FOOTNOTES

1. Utah Code Ann. §§10-9-1 et seq.; §§17-27-1 et seq. (1973 Allen Smith).

2. Id. §§10-9-3; 17-27-4.

3. Id. §73-14-5 (Smith Supp. 1977).

4. Id. §26-24-9 (Allen Smith 1976).

5. Id. §63-34-1 et seq. (Allen Smith 1978).

6. Id. §63-53-4.

7. Ibid.

8. Id. §73-3-2 (Smith Supp. 1977).

9. Id. §73-3-8.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN UTAH

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

Express authority to issue franchises is conferred upon local governments in the Utah Constitution. One article provides municipalities with the power to "grant local public utility franchises and within its powers regulate the exercise thereof."[1/] Another article states that: "no law shall be passed granting the right to construct and operate a street railroad, telegraph, telephone, or electric light plant within any city or incorporated town, without the consent of the local authorities who have control of the street or highway proposed to be occupied for such purposes."[2/] The scope and relationship of these two sections of the Utah Constitution has not been discussed in any judicial decision.

Additional grants of franchising authority are found in the Utah statutes. Municipalities in Utah are granted the power to:

> Construct, maintain, and operate water-works, sewer collection, sewer treatment systems, gas works, electric light works, telephone lines or public transportation systems, or authorize the construction, maintenance, and operation of the same by others, or purchase or lease such works or systems from any person or corporation . . . . [3/]

The Supreme Court of Utah has stated that it could find "no specific provision in the Constitution nor the statutes

dealing with franchises."[4] The Court went on to state that the power of a municipality to grant franchises must emanate, if at all, from the statutory provision quoted above. Further express franchising authority for specific services is provided by the following statutes:

> [All cities] may contract with and authorize any person, company or association to construct gas works, electric or other lighting works within the city, and give such persons, company or association the privilege of furnishing light for the public buildings, streets, sidewalks and alleys of the city for any length of time not exceeding three years. [5]

> [All cities] may provide for the lighting of streets and the erection of necessary appliances and lamp posts; may regulate the sale and use of gas, natural gas and electric or other lights and electric power within the city, and regulate the inspection of meters therefor; may prohibit or regulate the erection of telegraph, telephone or electric wire poles in the public grounds, streets or alleys, and the placing of wires thereon; and may require the removal from the public grounds, streets or alleys of any or all such poles, and the placing underground of any or all telegraph, telephone or electric wires. [6]

Cities are also given the power to "regulate and control the use of sidewalks and all structures thereunder or thereover,"[7] and the power to "prevent injury or obstruction to any street, sidewalk, avenue, alley, park or public ground."[8]

The relationship between the Public Utilities Commission and a municipality was discussed in Union Pac. Ry. Co. v. Public Service Comm'n.[9] That case held that the Public Utilities Act "even with its broad grant of power to the Commission to regulate and supervise public utilities,

did not repeal by implication the power granted to municipalities to control by franchise the special burdening of their streets."[10] The Commission has exclusive jurisdiction over rates and other matters, but municipalities have exclusive jurisdiction regarding the special use of their streets, giving them the power to grant franchises and to exercise continuing control over their franchises.[11]

II. PROCEDURES FOR GRANTING FRANCHISES

The Utah statutes do not contain any provisions which specify a procedure for granting public utility franchises. Such grants are made pursuant to the general statutory requirements for the valid adoption of a municipal ordinance.[12] No judicial decisions add to the general procedural requirements for adopting an ordinance. An example of the franchise ordinance procedure may be found in Union Pac. Ry. Co. v. Public Service Comm'n.[13]

The Utah statutes require a utility to present evidence of municipal consent to its operations before the Public Utilities Commission will issue a certificate of public convenience and necessity.[14] Procurement of a certificate is therefore not a prerequisite to obtaining a municipal franchise.

III. CRITERIA TO BE USED IN EVALUATING A FRANCHISE

The statutory authority to grant franchises does not expressly limit the grant of franchises to services which are offered to the public. The statutes, however,

(see Part I) list specific types of utility services which may be authorized to operate within a municipality. The statutes and judicial decisions are silent as to the conditions and qualifications of municipal franchises.

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The Utah statutes and cases do not impose general limits on the duration of a utility franchise. The statutes do place a limit of three years on franchises for the furnishing of gas or electric light for public buildings, streets, sidewalks, and alleys.[15/] The relevant section, however, does not deal with the duration of franchises for the provision of electricity for public consumption.

Perpetual franchises are prohibited by the Utah Constitution. Article I of the Constitution provides that no law shall be passed granting irrevocably any franchise, privilege or immunity.[16/] There is no authority in either the statutes or judicial decisions for the automatic surrender of a franchise.

B. Exclusivity

The statutes do not expressly permit or prohibit the grant of an exclusive franchise. The granting of exclusive franchises was forbidden in municipalities when Utah was a territory.[17/] More recently, however, in Burton v. Matanuska Valley Lines, the court stated that:

> [I]t is by no means clear what this language of the 1886 enactment was intended to pro-

> hibit . . . territorial legislatures from recognizing that public utilities are natural monopolies and providing for regulation of such utilities by means comparable to that commonly provided by state legislators, which often find that such public utilities may best be regulated by making them monopolies. 18/

The Utah Supreme Court has implied that a franchise which is exclusive by its terms would constitute an illegal monopoly. The Court did not state this conclusion expressly because the franchise in question was not expressly exclusive, and could not be construed as exclusive by unavoidable implication. 19/

C. Other Characteristics

The statutes do not make any provision for the abandonment of a franchise. The Commission has authorized the discontinuance of a street railway system before the operator's franchise had expired. The railway was unprofitable, had no prospects for improvement, and was to be replaced by a bus line. The Commission reasoned that it was empowered to issue such an order because the municipality which granted the unexpired franchise was a political subdivision of the state, and in granting the franchise was acting as an agent of the state. 20/

A municipality may revoke a franchise for failure to comply with an express condition of the franchise. 21/ There is express statutory authority for a municipality to require removal of the tracks of a railway franchise where such

franchise has been revoked.[22] There is no statute regarding the removal of facilities of other utilities upon expiration of a franchise.

In Mountain States Telephone & Tel. Co. v. Ogden City,[23] the ordinances granting franchises to telephone, gas, and electric utilities provided that the utilities were to pay 2% of their gross revenue derived from sales within the city limits to the city. Such payments were to be "in lieu of" other taxes and charges. It was held that the city had no power to enter into the "in lieu of" provisions of the franchise and that the city could not "barter away its power to raise revenue by taxation."[24] The court further held that it was reasonable and not discriminatory to levy an additional tax on these utilities, and not others, since they comprised "a distinct class of businesses within the public utility field."[25]

There is no provision in the statutes for the imposition of a mandatory franchise tax.

FOOTNOTES

1. Utah Const. art 11 §5(b).

2. Utah Const. art 12, §8.

3. Utah Code Ann. §10-8-14 (Smith 1973).

4. Mountain States Telephone & Tel. Co. v. Ogden City, 28 Utah 2d 190, 487 P.2d 849 (1971)(Plaintiffs challenged the validity of an ordinance imposing a business tax upon public utilities).

5. Utah Code Ann. §10-8-20 (Smith 1973).

6. Id. §10-8-21.

7. Id. §10-8-23.

8. Id. §10-8-24.

9. 103 Utah 186, 134 P.2d 469 (1943).

10. Id. 134 P.2d at 476.

11. Id.

12. Id. §§10-3-701 through 10-3-714 (Supp. 1978).

13. 103 Utah 186, 134 P.2d 469 (1943).

14. Utah Code Ann. §54-4-25(3)(Smith 1974).

15. Id. §10-8-20 (Smith 1973).

16. Utah Const. art. 1 §24.

17. Henderson v. Ogden City Ry. Co., 7 Utah 199, 26 P.286 (1891).

18. Burton v. Matanuska Valley Lines, 244 P.2d 647 (9th Cir. 1957).

19. Brummitt v. Waterworks Co., 33 Utah 285, 93 P. 828 (1908) (Water users challenged a city ordinance which raised the rates to be charged by the defendant water company. One contention was that the 50-year ordinance under which the company operated was an illegal monopoly).

20. Re Utah Light & Traction Co., P.U.R. 1927 A 310 (1927).

21. Union Pac. Ry. Co. v. Public Service Comm'n, 103 Utah 186, 134 P.2d 469 (1943).

22. Utah Code Ann. §10-8-82 (Smith 1973).

23. 26 Utah 2d 190, 487 P.2d 849 (1971).

24. Id. 487 P.2d at 850.

25. Id. 487 P.2d at 851.