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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 Ohio

MASTER

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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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Ross, Hardies, O'Keefe,
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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 Ohio. 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 Ohio. 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 OHIO

## I. STATE REGULATION OF PUBLIC UTILITIES

### A. Public Utilities Commission

The Public Utilities Commission (PUCO) is a body created by the Ohio State legislature to administer the provisions of the Ohio Public Utilities Act. It is composed of three commissioners appointed by the governor with the advice and consent of the senate. Once appointed, a commissioner serves for a six-year period.[1/]

### B. Jurisdiction of the Public Utilities Commission

The PUCO is "vested with the power and jurisdiction to supervise and regulate public utilities and railroads ...."[2/] The term "public utility" includes "every corporation, company, co-partnership, person or association, their lessees, trustees, or receivers," as defined in the Ohio Code.[3/]

Among the various services enumerated in the Code under the definition of "public utility" are the following:

(1) An electric light company;

(2) A gas company;

(3) A pipeline company transporting gas, oil or coal;

(4) A waterworks company;

(5) A heating or cooling company.

An electric light company includes any person in the business

of supplying electricity for light, heat or power purposes to consumers in Ohio.[4/] A heating or cooling company is defined to include any person engaged in the business of supplying water, steam or air through pipes or tubing to consumers in Ohio for heating or cooling purposes.

Although the statute states that the PUCO has jurisdiction over "public" utilities, the term "public" is not defined. Court cases have held, however, that the PUCO is without jurisdiction unless some "public" element is found. The courts are inclined to find that a company is a public utility unless clear evidence to the contrary is presented. This tendency is evident, for example, in an Ohio Supreme Court decision holding that a gas company serving nineteen industrial and twelve private customers was a public utility. The court reached its decision despite the fact that the company did not hold itself out to serve the public generally, stating that "a corporation that serves such a substantial part of the public as to make its rates, charges and methods of operation a matter of public concern, welfare and interest subjects itself to regulation by duly constituted governmental authority."[5/] Other factors which the court will consider when assessing whether a utility is of sufficient public conern to render it subject to regulation by the PUCO were announced in Southern Ohio Power Co. v. PUCO. By way of introduction in the syllabus, the court said that "[t]o constitute a 'public utility,' the

devotion to the public use must be of such character that the product and service is available to the public generally and indiscriminately, or there must be acceptance by the utility of public franchises or calling to its aid the police power of the state."[6/]

Neither the statute nor the cases explicitly require a sale, or the receipt of compensation for the utility to be subject to jurisdiction. Though the production, generation or storage of energy for private use is not explicitly exempt by statute, the courts may refuse to allow the PUCO to exercise jurisdiction if certain public elements, discussed above, are not present. Similarly, the production, generation or storage of energy for the use of tenants is not expressly exempt under Ohio law. There are no cases discussing whether such an arrangement is so lacking in the required public element to be implicitly exempted. Only those public utilities which operate on a not for profit basis (cooperatives) and those which are owned or operated by a municipal corporation are specifically excluded from the PUCO's jurisdiction.[7/]

C. Powers of the Public Utilities Commission

The powers vested in the PUCO are enumerated in the Ohio Code. These powers include control over:

(1) Abandonment of service;

(2) Agreements with other utilities;

(3) Capitalization;

(4) Issuance of securities;

(5) Mergers;

(6) Sale or lease of property;

(7) Standards of service;

(8) System of accounts; and

(9) Transfer of franchise or property.[8/]

Additional powers, too numerous and specific to mention, are listed throughout the chapter.

Regulatory control over the construction, expansion and siting of plants is vested in the Power Siting Commission. The siting law is more fully discussed in Chapter 3.

The Ohio Code establishes the PUCO's authority to fix rates charged by a public utility.[9/] The PUCO's rate-making authority, however, is reduced to the extent that municipalities assume the responsibility to establish rates for public utilities operating within their boundaries. In the absence of municipal action to set rates, the PUCO must so act. In addition, the PUCO may review, at a public hearing, the reasonableness of municipally set rates in the following circumstances:

(1) The public utility has filed a written complaint with the PUCO.

(2) The public utility has on file with the PUCO an application to establish rates at the time the municipality enacts an ordinance establishing rates.

(3) Upon the filing of a written complaint by not less

than 3% of the qualified electors of the municipality.10/

II. LOCAL REGULATION

The power to regulate public utilities is shared by the PUCO and municipal governments. The municipal regulatory authority is derived from the Ohio Constitution, statutory provisions and municipal franchising authority.

The Ohio Constitution allows a municipality to contract with a public utility for the provision of services to the city and its inhabitants.11/ An adjunct to this power is the right to impose, as part of the contract, such conditions and regulations as the municipality deems proper. Because the power to contract is constitutionally derived, it is not subject to review by state agencies. As a result the PUCO may not review or alter any regulation incorporated into a contract between a municipal corporation and a public utility.12/

The Ohio Code has expressly authorized municipalities to regulate the rates of public utilities within the area of the municipality.13/ "Public utility," as defined for local control over rates, includes all of the various utility operations listed as subject to PUCO jurisdiction in Chapter 49 of the Ohio Code. Within the municipality's boundaries, its control over rates is exclusive. When the local government fails to exercise this power, the PUCO is responsible for establishing reasonable rates.14/ However,

the municipal ordinance establishing such rates is subject to review as to reasonableness by the PUCO upon complaint by either the public utility or by the citizens of the municipality.[15/]

The Ohio Code also empowers municipal corporations to "[r]egulate the construction and repair of wires, poles, plants and all equipment to be used for the generation and application of electricity."[16/]

This local control over the construction of equipment of public utilities is accomplished through the municipality's franchising power discussed more fully in Chapter 4. Implicit in the franchising authority is the power to prescribe certain conditions and regulations which must be followed by a utility to obtain and maintain such a franchise. A member of the staff of the PUCO has said that any control exerted in such a manner would not be reviewable by the PUCO.[17/]

## III. AUTHORITY TO PROVIDE SERVICE IN A DESIGNATED AREA

The State of Ohio does not require all public utilities to obtain certificates of public convenience and necessity prior to commencing operations in a given area. Only motor transportation companies and telephone utilities are required to obtain certificates. Other utilities are not required to obtain a certificate[18/] from the PUCO prior to commencing operations in a given area. However, the Power Siting Commission, which has as a member the chairman

of the PUCO, is authorized to consider the "public interest, convenience and necessity" before issuing a certificate to construct an electric generating plant of 50 megawatts or more, an electric transmission line of 125 kilowatts or more or gas transmission lines with a capacity of more than 125 pounds per square inch of pressure.[19] Furthermore, an Ohio statute expressly prohibits the unnecessary duplication of electric facilities.[20]

The Ohio Code provides that whenever a public utility proposes to furnish or furnishes electric energy to a consumer already being served by another public utility, the latter public utility may complain to the PUCO.[21] The statute further provides that "upon finding that the complaining public utility has been furnishing or will furnish" adequate service and "that the public utility complained against will duplicate facilities of the complainant," the Commission "shall order the public utility complained against not to furnish electric energy to such consumer."[22] No court cases have been found construing or interpreting "adequate electrical service." The prohibition of unnecessary duplication of electrical facilities extends to all jurisdictional utilities operating for profit as well as those operating not for profit.[23] However, municipally owned or operated public utilities are not subject to this prohibition.[24]

An extension of service would also be subject to statutes restricting duplication of service. While a

certificate of public convenience and necessity would not be required to extend a facility, all siting requirements would have to be met as discussed in Chapter 3. Furthermore, the Ohio Code authorizes a municipality to compel a public utility to extend its services to any person, firm or corporation within the city limits if such is deemed reasonable and necessary in the interest of the public.[25/]

There is, then, no state statute which prohibits per se more than one utility from providing similar service in the same area. The complaint procedure discussed above is available to a public utility furnishing electric energy when another public utility seeks to furnish such service, but this proceeding must be initiated by the public utility. Under this provision, the PUCO is authorized to prohibit duplication, if it finds that such would be unnecessary. A member of the legal staff of the PUCO has acknowledged, however, that no telephone company has been allowed to enter an area already being served by another telephone utility. Conversely, transportation companies have been allowed to compete in a given area. Electric companies have also been allowed to serve in the same area, although such cases have involved a municipal utility and a jurisdictional utility. No cases have occurred in which a gas company has attempted to duplicate service in a particular area.[26/]

Approval by the PUCO is required to abandon existing facilities.[27/] Upon application and hearing, the PUCO

will allow abandonment if such is reasonable "having due regard for the welfare of the public and the cost of operating the service or facility."[28] Case law has indicated that profitability is subordinate to the paramount concern of public need or demand.[29]

IV. APPEALS OF REGULATORY DECISIONS

Any party appearing before the PUCO may petition for a rehearing after an order has been entered.[30] The petitioner is required to file an application within thirty days after entry of the PUCO's order and to give due notice of the filing to all parties who have appeared in the proceeding.[31] Admission of new evidence is discretionary, although no new evidence will be allowed which, with reasonable diligence, could have been offered at the original hearing.[32] The filing of a petition for a rehearing is a prerequisite to an appeal to the courts. Furthermore, only those matters set forth in an application for a rehearing may be urged or relied upon in the courts.[33]

An appeal, which must be filed within sixty days after the denial of the petition or the issue of an order for rehearing, is taken directly to the Supreme Court of Ohio by a petition in error.[34] The Supreme Court will review only the record as certified by the PUCO and will reverse, vacate or modify a finding or order only it it appears from the record that such finding or order is manifestly against the weight of the evidence, is unreasonable or is unlawful.[35]

## FOOTNOTES

## CHAPTER 2 - OHIO

1. Ohio Rev. Code, §4901.03-4901.07, 4902-02 (1976).
2. Id. $4905.04.
3. Id. §4905.03.
4. Id. §4905.03.
5. Industrial Gas Co. v. PUCO, 135 Ohio 408, 21 N.E.2d 166, 168 (1939).
6. Southern Ohio Power Co. v. PUCO, 143 N.E. 700 110 Ohio St. 246 (1924).
7. Ohio Rev. Code §4905.02 (1976).
8. Id. §§4905.06, 4905.62.
9. Id. §4904.15.
10. Id. §4909.
11. Ohio Const., art. 18, §47.
12. Mr. Ken Christman, Legal Staff of the PUCO, Telephone conversation, June 29, 1978.
13. Ohio Rev. Code §§715.27, 4909.34 (1976).
14. Id. §4909.35.
15. See text at footnote 9.
16. Ohio Rev. Code §715.27.
17. Mr. Ken Christman, Legal Staff of the PUCO, Telephone conversation June 29, 1978.
18. Ohio Rev. Code, §4921, 10 (1976).
19. Id. §4906.CA. See Chapter 3.

20. Id. §4905.261.

21. Id. §4905.261.

22. Id. §4905.261.

23. Id. §4905.261.

24. Piqua v. Public Utilities Commission, 40 Ohio 2d 87, 320 N.E.2d 661 (1974).

25. Ohio Rev. Code §4905.39 (1976).

26. Mr. Ken Christman, Legal Staff of the PUCO, Telephone conversation, June 29, 1978.

27. Ohio Rev. Code §4905.20 (1976).

28. Id. §4905.21.

29. Millersburg v. PUCO, 137 Ohio 75, 27 N.E.2d 2 (1950); Detroit, Toledo & Ironton Rd. Co. v. PUCO, 161 Ohio 317, 119 N.E.2d (1954).

30. Ohio Rev. Code §4903.10 (1976).

31. Id. §4903.10.

32. Id. §4903.10.

33. See, generally, Ohio Rev. Code §4903.10, Conneaut Tel. v. PUCO, 10 Ohio 2d 269, 227 N.E.2d 409 (1967); Travis v. PUCO, 123 Ohio 355, 75 N.E. 586 (1931).

34. Ohio Rev. Code §§4903.11, 4903.12 (1976).

35. Id. §4903.13, Ohio Bell Tel. v. PUCO, 301 U.S. 292 (1937); H & K Motor Trans. Inc. v. PUCO, 135 Ohio 145, 19 N.E.2d 956 (1939).

# CHAPTER 3

# SITING OF ENERGY FACILITIES IN OHIO

## I. PUBLIC AGENCIES VESTED WITH SITING JURISDICTION

### A. Power Siting Commission

The Ohio legislature has adopted a comprehensive siting statute administered by the Power Siting Commission (PSC).[1/] The statute was enacted to establish a one-stop siting procedure with all authority vested in a heterogeneous agency.[2/]

Although the act preempts the power of other agencies, such agencies are represented on the PSC governing board. The statute provides that the PSC shall be composed of the chairman of the PUCO, the directors of environmental protection, health, economic and community development, natural resources, and energy, and a representative of the public who is an engineer and is appointed by the governor.[3/] Each member participates in the approval process and the affirmative vote of at least four members is required for any site approval. In addition to the aforementioned members, the statute requires that the PSC "include four legislative members who may participate fully in all the Commission's

deliberations and activities except that they shall serve as nonvoting members."[4/] A secretary, appointed by and serving at the pleasure of the PSC is also provided for in the statute.[5/] The secretary keeps books, conducts investigations and performs other duties assigned by the PSC.

## II. SCOPE OF SITING JURISDICTION

The jurisdiction of the PSC extends to any electrical generating plant, and associated facilities, designed for or capable of operation at a capacity of fifty megawatts or more; an electric transmission line and associated facilities of a design capacity of 125 kilovolts or more; or a gas or natural gas transmission line, and associated facilities, designed for or capable of transporting gas or natural gas at pressure in excess of 125 pounds per square inch.[6/] No specific provision is made for distribution or storage facilities. However, it should be noted that the term "associated facilities" could be construed to include distribution and storage facilities, though no cases have been found which extend the statute in this manner.

There are no restrictions on the PSC's jurisdiction based on the ownership of a designated facility. The statute purports to cover all entities whether owned by "an individual, corporation, business trust, association,

estate, trust or partnership or any officer, board, commission, department, division or bureau of the state or a political subdivision of the state, or any other entity."[7] Cooperative associations would also be covered by the definition.[8]

Recently, a lower Ohio court held municipally-owned projects to be exempt from the act, although on its face, the act does apply to municipally-owned projects. The court reasoned in City of Columbus v. Power Siting Commission[9] that the act was inconsistent with a specific grant of siting authority to municipalities in the Ohio Constitution to "acquire, construct, own, lease and operate within or without [their] corporate limits any public utility."[10] The court emphasized in dictum that it would be good policy to require that the municipality comply with state environmental standards and environmental permit requirements yet felt constrained by the Constitution to grant the municipality a total exemption from the Siting Act. Officials at the PSC have stated that the ruling will be appealed and there are indications the appeal may be at least partially successful.[11]

After the City of Columbus case was decided, the Supreme Court of Ohio held in a similar case brought by the same plaintiff, City of Columbus v. Teater[12] that the

constitutional grant of authority to municipalities to construct and operate public utilities does not preclude the state from exercising its police powers in matters of state-wide importance. In this case, the Ohio Department of Natural Resources sought to prevent the municipality from constructing certain utility facilities through its power to designate "wild and scenic" rivers. The court ruled that under these circumstances, the case must be decided by balancing the interests of the state against the interests of the community.

The siting statute provides that no person, as defined above, shall "commence to construct" a major utility facility without first having obtained a proper certificate.[13/] "Commence to construct" is defined as "any clearing of land, excavation or other action that would adversely affect the natural environment of the site. . . ."[14/] Thus, preparation for new construction, if it does not adversely affect the environment (i.e. surveying), is not within the scope of the PSC's jurisdiction. Similarly, the replacement of an existing facility with a like facility does not constitute construction within the PSC's jurisdiction.[15/] The extension of facilities existing at the effective date of the act is also exempt from jurisdiction unless the extension involves a "substantial addition," as defined in the rules and regulations of the PSC.[16/]

A grandfather clause exempts facilities for which construction was commenced within two years after the effective date of the act, which would have been October 23, 1974.[17] No certificate is required for any facility which was operating or was under construction prior to the aforementioned date.[18]

The jurisdiction of the PSC extends only to matters involving siting issues. The issuance of a siting permit, however, may be conditioned upon any term or restriction set forth by the PSC. The Ohio Environmental Protection Agency has continuing monitoring jurisdiction over the facility with respect to water pollution, air pollution and solid waste disposal.[19] Regulatory controls such as service standards and rate-making are vested in the PUCO.

The Code gives the PSC the authority to promulgate both procedural and substantive rules.[20] Pursuant to this authority, the PSC has adopted numerous rules and regulations covering primarily procedural matters. The rules do not more specifically define the extent of the PSC's jurisdiction.

The PSC may consider and evaluate the opinions of other state and local agencies when considering an application for site certification. Because the PSC is composed of directors of designated agencies, state authorities will have a direct voice in the decision-making process.[21]

The PSC has the discretion to either accept or reject the advice of other state and local agencies, provided, however, that the provisions of the Water Control Act,[22] the Solid Waste Disposal Act,[23] and the Air Pollution Control Act,[24] are met. Any approval requirements under these Acts must be followed before a site may be authorized.[25]

A recent case may serve to illustrate the extent of the PSC's jurisdiction.[26] The PSC had certified a site for the Cleveland Electric Illuminating Company which had prepared a tower design incompatable with Chester Township's present and future land use plans. The township argued that the legislature had "vested [municipal corporations] with the primary responsibility for regulating the size and design of new structures" and, hence the PSC must defer to local judgments.[27] The Supreme Court of Ohio held, however, that the siting statute preempts local control with respect to planning and tower design.[28]

Note that this case, in which the municipality's authority was merely statutory, is to be distinguished from City of Columbus v. PUCO previously discussed, in which the municipality prevailed because its authority was derived from the Ohio Constitution.[29]

## III. CERTIFICATION PROCESS

### A. Applicant's Obligations

A party applying for site certification must submit:

(1) A description of the proposed location and of the facility to be built thereon;

(2) An environmental impact statement;

(3) A statement explaining the need for the facility;

(4) A statement of the reasons why the proposed location is best suited for the facility;

(5) A statement indicating how the facility fits into the applicant's ten year forecast contained in a report required to be submitted annually to the Commission. This report is to describe "major utility facilities" which will be required to supply system demands during the forecast period.[30/]

Additional matters, specific to the types of facilities proposed, are set forth in Chapters 13 and 15 of the rules and regulations of the PSC. Applications for electric generating plants and overhead electric transmission lines must include information on at least four alternatives.[31/] Applications for underground electric and gas transmission lines and associated facilities must contain information on at least two alternatives.[32/]

A copy of the application must be served "on the chief executive officer of each municipal corporation and county and the head of each public agency charged with the duty of protecting the environment or of planning land use in the area in which any portion of such facility is to be located."[33/]

Public notice must be given to all persons by publication of a summary of the application in newspapers circulated in the affected area.[34/] In addition, a copy of the application is to be placed in the main library of each relevant political subdivision for public inspection.[35/]

Additional requirements include proof of service required of notices to be given to the PSC,[36/] a letter of intent filed at least one year prior to the submission of an application for an electric generating plant or substantial addition thereto,[37/] and the payment of fees as determined by the rules and regulations of the PSC.[38/] The application and all supporting documents must be filed "not less than two years, except one year in the case of transmission lines, nor more than five years prior to the planned date of commencement of construction."[39/]

B. Agency's Obligations

Unlike the applicant, the PSC is not required to give extensive notice to designated parties. Rather, the PSC is only required to inform the applicant that his application is complete.[40/]

The PSC must hold a public hearing not less than sixty nor more than ninety days after the receipt of a completed application.[41/] Other agencies and persons may appear and give testimony at these hearings as provided by the Siting Act.[42/] It is at the hearing that the PSC may "consult" with other concerned agencies. However, the PSC is, generally, not under any duty to follow the recommendations of these agencies.

The rules and regulations of the PSC require that the administrative law judge presiding over the hearing[43/] file a written report of the hearing.[44/] Based on this hearing report, the PSC must issue an opinion stating its reasons for accepting or rejecting an application.[45/] The only other report which must be issued by the PSC is a report detailing any investigation of an application made by the PSC.[46/]

The rules and regulations of the PSC require that a final decision be given within a reasonable time after the filing of the hearing report. No reported cases have specifically defined this reasonable time requirement.

The rules and regulations of the PSC allow for a pre-application conference between the applicant and the PSC.[47/] The purpose of the conference is to obtain guidance concerning the suitability of a particiular site.

## IV. CERTIFICATION STANDARDS

The siting statute provides that the PSC, prior to granting a certificate, shall find and determine;

(1) The basis of the need for the facility;

(2) The nature of the probable environmental impact;

(3) That the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations;

(4) In case of an electric transmission line, that such facility is consistent with regional plans for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems; and that such facilities will serve the interests of electric system economy and reliability;

(5) That the facility will comply with the air pollution,[48] solid waste disposal[49] and water pollution[50] provisions of the Ohio Code;

(6) That the facility will serve the public interest, convenience and necessity.[51]

These are the only factors specifically enumerated in the statute to be employed by the PSC in evaluating an application. In addition, the PSC may utilize the recommendations of other state and local agencies in evaluating

applications. No additional criteria have been promulgated as rules by the PSC. Although agency decisions have applied the above factors, one member of the staff of the PSC has stated that such decisions neither clarify nor expound the standards. He intimated that the factors were purposely vague in order to include all environmental concerns.[52] The standards enumerated above[53] are to be applied uniformly to all facilities covered by the act.

V. APPELLATE PROCESS

The siting statute provides for rehearing and appeal of the PSC's decision.[54] A rehearing by the PSC is a mandatory prerequisite to a judicial appeal and must be requested within thirty days.[55] An appeal may subsequently be taken directly to the Ohio Supreme Court if requested within sixty days following the final decision on rehearing.[56] An appeal is based on the record as certified to the court by the administrative agency. The court is authorized to alter a decision if it appears that the decision was unlawful or unreasonable.[57] An order of the PSC must be manifestly against the weight of the evidence or so clearly unsupported by the record as to show misapprehension, mistake or willful disregard of duty to warrant reversal.[58]

VI. LOCATION AND PLANNING OF DEVELOPMENTS GENERALLY

As indicated by the definition of a major utility facility,[59] the PSC does not always have authority over siting.

When no such authority exists permission to construct an energy facility must be obtained from the individual regulatory agencies having responsibility for construction projects generally.

A. Ohio Environmental Protection Agency (OEPA)

The OEPA regulates air and water pollution within the state. The legislature has declared that a permit must be obtained from the OEPA prior to locating, installing, constructing or modifying any facility which the director finds may cause or contribute to air pollution.[60/] A permit must also be obtained to discharge any waste into the waters of the state.[61/] The OEPA also has siting jurisdiction over solid waste disposal facilities.[62/]

B. Department of Natural Resources (DNR)

The DNR has little direct regulatory control. It acts primarily in an advisory capacity to the OEPA and as an administrator or protector of government owned land. It has the power to prevent a state department, agency or political subdivision from building a highway, road or structure or altering the channel of any watercourse outside the limits of a municipal corporation without first obtaining approval from the director of natural resources.[63/]

C. Planning Authorities

The Ohio Code authorizes the establishment of county, regional and municipal planning commissions. The county and regional planning commissions function primarily as coordinators for the municipal planning agencies.[64/]

They may propose general plans which are enforceable if adopted by the municipal commissions.[65]

Municipal planning commissions on the other hand may establish enforceable plans which may include "the general location and extent of public utilities and terminals, whether publically or privately owned or operated, for water, light, sanitation, transportation, communication, power and other purposes."[66] Once a plan is adopted by the planning commission "no utility, whether publicly or privately owned" may be constructed or authorized in the municipal corporation unless the "location, character, and extent thereof is approved by the commission."[67] A denial of approval by the planning commission may be overridden by a two-thirds vote of the legislative body of the municipality.[68]

Under a separate grant of zoning authority, the planning commission may adopt a plan for dividing the municipality into districts and for regulating the uses of land within the districts, as well as imposing height, bulk, and location restrictions.[69] Such a plan becomes effective and enforceable upon adoption by the legislative body of the municipality.[70]

## FOOTNOTES

## CHAPTER 3 - OHIO

1. Ohio Rev. Code Ch. 4906 (1976)
2. Mr. James Ronk, Administrative Law Judge, PSC, Telephone conversations June 28, 1978.
3. Ohio Rev. Code §4906.02(A).
4. Id. §4906.02 (A)
5. Id. §4906.02(B)
6. Id. §4906.01.
7. Id. §4906.01(A).
8. Mr. James Ronk, Administrative Law Judge, PSC, Telephone conversations June 28, 1978.
9. City of Columbus v. Power Siting Commission, Case No. 76 CU-05-1856 (Ct. Com. Pleas (1968)).
10. Ohio Const. art. 18, §4.
11. Mr. James Ronk, Administrative Law Judge, PSC. Telephone conversations of June 28, 1978.
12. City of Columbus v. Teater, 53 Ohio St. 2d 253, 374 N.E.2d 154 (1978).
13. Ohio Rev. Code §4906.04 (1976).
14. Id. §4906.01(C).
15. Id. §4906.04.
16. Id. §4906.05.
17. Id. §4906.05.
18. Ibid.
19. Id. §4906.10.
20. Id. §4906.03(c).
21. Mr. James Ronk, Administrative Law Judge, PSC, Telephone conversations June 28, 1978.

22. Id. §6111.

23. Id. §3734.

24. Id. §3704.

25. Id. §4906.10.

26. Chester Township v. Power Siting Commission, 49 Ohio St. 2d 231, 361, N.E.2d 436 (1977).

27. Id., 49 Ohio St. 2d at 233 361 N.E.2d at 438.

28. Ohio Rev. Code §4906.13 (1976).

29. City of Columbus v. Power Siting Commission, Case No. 76 CU-05-1856 (Ct. Com. Pleas 1978).

30. Ohio Rev. Code §4906.06(A); Id. §4906.15.

31. Ohio Power Siting Commission Regs., Rule 5-03(A) (1974).

32. Ohio Power Siting Commission Regs., Rule 5-03(b) (1974).

33. Ohio Rev. Code §4906.06(B) (1976).

34. Id. §4906.06(C).

35. Ohio Power Siting Commission Regs., Rule 5-03(B)(2) (1974).

36. Ohio Rev. Code §4906.06(B), (c) (1976), PSC-5-08, Ohio Power Siting Commission Regs., Rule 5-08.

37. Ohio Power Siting Commission Regs., Rule 5-01 (1974).

38. Ohio Power Siting Commission Regs., Rule 5-11 (1974).

39. Ohio Rev. Code §4906.06(A) (1976).

40. Ohio Power Siting Commission Regs., Rule 1-15 (1974).

41. Ohio Rev. Code §4906.07(A) (1976).

42. Id. §4906.08.

43. Id. §4906.07.

44. Ohio Power Siting Commission Regs., Rule 7-17 (1974).

45. Ohio Rev. Code §4906.11 (1976).

46. Id. §4906.07(C).

47. Ohio Power Siting Commission Regs., Rule 5-12 (1974).

48. Id. §3704.

49. Id. §3734.

50. Id. §6111.

51. Id. §4906.10(A).

52. Mr. James Ronk, Administrative Law Judge, PSC, Telephone conversation June 28, 1978.

53. Ohio Rev. Code, §4906.10(A) (1976).

54. Id. §4906.12.

55. Id. §4903.10.

56. Id. §§4903.11, 4903.12.

57. Id. §4903.13.

58. Chester Township v. Power Siting Commission, 49 Ohio St. 2d 231, 361 N.E.2d 436 (1977).

59. See text at footnote 6.

60. Ohio Reg. Code §3704.03.

61. Id. §6111.04.

62. Id. §3734.02.

63. Id. §1501.17.

64. Id. §713.23.

65. Id. §713.25.

66. Id. §713.02.

67. Id. §713.07.

68. Ibid.

69. Id. §713.06.

70. Id. §§713.06 to 713.15.

# CHAPTER 4

# FRANCHISING OF PUBLIC UTILITIES IN OHIO

## I. AUTHORITY TO GRANT FRANCHISES

It is generally accepted that local authorities in Ohio have the power to grant franchises to all enterprises using the public way. This power has been established primarily through court decisions; no direct provision conferring such general authority is to be found either in the constitution or in the statutes of Ohio.

### A. Constitutional Authority to Grant Franchises

Article XVIII of the Ohio Constitution, pertaining exclusively to municipal corporations, states that "[m]unicipalities shall have authority to exercise all powers of local self-government ...."[1/] The constitution also grants municipalities the express power to acquire, construct, own, lease, operate or contract with any public utility to supply a product or service to its inhabitants.[2/] Arguably, the constitutional power to contract with a public utility could include the power to issue franchises and, indeed, some courts have interpreted the Ohio constitution in this manner. (See the discussion of cases, Section C, below.) However, the judiciary seems more inclined to rest their decisions on statutory provisions which are somewhat clearer and make no mention of a "public" requirement, in other words, a requirement

that a utility must hold itself out as ready and willing to serve any customer who requests service.

B. Statutory Authority to Grant Franchises

The Ohio statutes contain several provisions upon which Ohio courts have relied to imply a general franchising power in municipalities. The statutes fall into three main categories.

First, the Ohio Code[3/] explicitly gives municipalities the power to grant franchises "for supplying such municipal corporation and its inhabitants with steam or hot water or both, for heat or power purposes, or both." Secondly, the legislature has given municipalities the "special power to regulate the use of the streets."[4/] It is this section upon which courts most often rely when upholding a city's right to grant franchises. Lastly, it is required that an electric or gas company obtain the consent of the relevant municipal corporation prior to constructing or operating any plant or transmission line located within the municipality's jurisdiction.[5/]

C. Case Law Authority to Grant Franchises

An early case construing Article XVIII of the constitution said that a municipality may have the power to grant franchises if such power was reserved in the incorporating charter. In an introductory syllabus the court remarked:

> The granting of permission and the making of a contract to construct and operate a street railway

> is a matter that may be provided for in a charter adopted by the municipality under Article XVIII of the constitution.6/

Notwithstanding the court's reservation in the above case to interpret the constitution as directly creating a municipal franchising power, later cases, drawing support from the statutes discussed above, have squarely held that cities have such power.7/ A most revealing case8/ involved an ordinance passed by the village giving a franchise to a private cable-television company. Plaintiff objected, claiming that the village had exceeded its authority and that it could exercise only such powers as are granted by the Ohio legislature. After tracing the development of the franchising power, the court held that the franchise would be permitted under the home rule provision of Article XVIII unless it conflicted with state law. The court remarked that "[e]ven should plaintiff be correct that some statutory authority must affirmatively exist with reference to authority over street," such authority is to be found in the Ohio Code.9/ Thus, it appears that municipalities are vested with the authority to grant franchises and such authority is recognized by the courts.

Two exceptions to this municipal franchising authority should be noted. First, a municipality has no authority to regulate under its franchising powers a utility or service which does not erect its own transmittal system, but uses existing facilities of an already franchised

utility.[10] A cable TV system, for example, which used already existing telephone lines for transmittal could not be regulated by the municipality under its franchising authority.[11]

Second, the legislature has declared that local regulation may not restrict the construction, location, or use of a public utility facility if such facility:

> (1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivision adopting the local regulation; and
>
> (2) Is to be constructed in accordance with generally accepted safety standards; and
>
> (3) Does not unreasonably affect the welfare of the general public.[12]

Thus, if the aforementioned provisions are met, municipal consent (i.e. the grant of a franchise) is not required to operate in a city. These provisions do not, however, take all regulatory control away from municipalities. While a municipality may not prohibit the construction of electrical utility facilities which come within these provisions it may still impose reasonable conditions before giving its consent. If a proposed construction would so interfere with city planning as to affect the general welfare, the municipality could refuse to permit construction until its conditions were met. As the Ohio Supreme Court summarized the statute,[13] "it excludes from the control of (local) subdivisions intercity lines constructed

with regard to the proper safety standards which do not unreasonably affect the welfare of the general public."[14/]

The above statutory provision has been relied upon to invalidate a city's refusal to consent to a franchise. In one case[15/] an electric company wished to construct three overhead electric transmission lines over Painesville to provide electric service to consumers not living in Painesville. One of the lines would have been connected to serve an interstate line. Painesville passed an ordinance requiring municipal consent to the construction of overhead electric transmission lines and requiring that lines carrying over 33KV be placed underground. The court held that the ordinance was invalid. Although it acknowledged that the Ohio constitution grants municipalities "all powers of local self-government,"[16/] it held that the proposed construction was a matter of statewide and national importance and thus not a matter for local regulation. The court further held that the ordinance was an unreasonable regulation, not sufficiently related to the health, safety and welfare of the people of Painesville inasmuch as the statute required the proposed lines to be constructed in accordance with generally accepted safety standards.[17/]

If there is a difference of opinion as to whether a utility's proposed transmission lines will unreasonably affect the welfare of the general public the question will be resolved as the trier of fact decided it unless a review

of the record demonstrates that no reasonable mind could have reached the trier's conclusion.[18] In one case, it was held that the transmission lines proposed through a park would unreasonably affect the general welfare on the basis of expert testimony that the lines would be unsightly, limit park use, and result in deleterious ecological consequences.[19] Accordingly, the construction was enjoined.

## II. PROCEDURES FOR GRANTING FRANCHISES

The state legislature has not established specific procedures to be followed in granting franchises. Rather, it has outlined certain steps to be followed when adopting ordinances.[20] Local governments are bound by these procedures when passing an ordinance granting a franchise to a particular party.

The procedures to be followed require that the proposed ordinance be read fully and distinctly on three different days, although this reading may be dispensed with upon a 3/4 vote of the council. A vote of at least a majority of all the members of the legislature is then required for passage.[21] The ordinance must then be authenticated by the signature of the presiding officer and clerk, and then recorded. The mayor must approve any enactment by the legislature, although his veto may be overruled by a two-thirds vote.[22]

Ordinances must be published once a week for two consecutive weeks in the manner prescribed by the Ohio Code.[23] It should be noted that an ordinance passed pur-

suant to the constitutional provision authorizing municipalities to contract with public utilities will not take effect until thirty days after its date of passage, whereas a general ordinance takes effect ten days after the first publication.[24/] Also, an ordinance passed pursuant to the constitution may be required to be submitted to the voters in a referendum[25/] if within 30 days after the passage of a petition signed by 10% of the city's voters is filed requesting a referendum. A majority of the voters must approve the ordinance on the referendum.

There is no statutory requirement that the franchise must be accepted in order to be effective. Indeed, it has been held that where an ordinance granting a franchise was silent as to the manner of acceptance, formal acceptance was not necessary since the franchisee had manifested agreement by acts and conduct.[26/] Of course, the ordinance may specify that it must be accepted in writing to be effective. In such a case, mere conduct indicating acceptance will not suffice and no franchise will result without written acceptance.[27/] In another case, it has been held that when a franchisee filed its acceptance in writing of all of the terms of the franchise agreement, it became a public utility and was committed to serving the public. The court concluded that this was the case since Ohio law does not allow the granting of a franchise permitting the use of the public ways for a private purpose. This case was decided under the Ohio constitution which gives municipalities power over

"public utilities." If the case had been decided under statutory authority, it would not have been necessary to establish that the utility was a "public utility" in order to hold that it was subject to municipal regulation. (See discussion under part III, below.)[28/]

III. CRITERIA USED TO EVALUATE A FRANCHISE REQUEST

The power of a municipality to grant franchises, as provided by statute and declared by the courts, is broad and fairly unrestricted. Where the grant of a franchise is based on provisions of the Ohio statutes, no public purpose need exist. Indeed, one Ohio court has upheld a franchise given to a private company to lay lines for cable television along the public way on the grounds that it "found" no statutory authority prohibiting the granting [by a municipality] of a right to use a portion of its streets to a commercial enterprise of a nonpublic utility character.[29/] The court further stated that if some statutory authority must affirmatively exist, there was such authority, citing §723.01 which gives municipalities power to regulate use of their streets.[30/] However, where the grant of a franchise is based upon the constitutional power to contract with public utilities, the franchisee must be a public utility.[31/] The courts have held that a cooperative open to the general public is a public utility. The determinative characteristics of a public utility is service to, or readiness to serve, an indefinite public which has a legal right to demand and receive such service, but some businesses are so affected with a public interest that they will be subject

to regulation even though the public does not have a right to demand and receive service.[32] Thus, although the constitution only grants municipalities the power to contract with public utilities, the Ohio statutes permit a private party to obtain a franchise for a private purpose as shown by the case law. Thus, there seems to be no difference in the franchise granted to a private versus a public utility.

The municipalities are free to grant franchises without first requiring the party to obtain a certificate of public convenience and necessity or any other approval from the PUCO. Similarly, the franchise may go to any party with no requirement that it be awarded to the highest bidder.

In granting a franchise, a municipal corporation may impose conditions and standards (e.g. fees, service requirements, or safety provisions) on the franchisee. Thus, though the state legislature does not require that the franchisee meet any specified standards, the city may impose conditions. For example, a franchise granted upon condition that work shall be begun with a year is permissible[33] as is a requirement that a gas company pay an annual fee to the city to compensate it for necessary supervision.[34]

## IV. CHARACTERISTICS OF A FRANCHISE

### A. Duration and Termination

Franchises, granted to a hot water or steam heating company under the Ohio Code[35] are limited to periods not exceeding twenty-five years. All other franchises are not limited in their duration.

A United States Supreme Court decision held that a franchise granted by a municipality and authorizing the grantees to use the streets and alleys to maintain electric wires and apparatus for distribution of electricity was for an unlimited time and not subject to termination at will by the grantor.[36/] However, a more recent case decided by the Court of Appeals of Ohio has said that "where the contract between the municipality and the corporation is silent as to the duration of the franchise, the grant is not perpetual but indeterminate, 'existing only so long as the parties mutually agree thereto.'"[37/]

Once granted, a franchise will generally continue until its expiration date. No statutory provisions exist authorizing a municipality to prematurely extinguish a validly granted franchise. If a franchisee failed to adhere to restrictions imposed by the municipality and specified in the franchise, the municipality could take action to terminate the franchise.[38/] However, the courts will not find the "contractual grant" of a franchise has been forfeited for failure to meet a condition unless a forfeiture is clearly contemplated by the parties.[39/]

Once a franchise terminates, a contract at will is presumed to be formed that may be terminated by either party at any time.[40/] Upon termination, the municipality may force the franchisee to remove its facilities and to cease providing service. First, however, the municipality must

seek permission to oust the utility from the Public Utilities Commission.[41]

A specific statute mandates forfeiture of the charter of any gaslight company which neglects to furnish gas to its citizens and the municipality in accordance with the prices fixed by the legislature.[42] Upon such forfeitures, the legislative authority may erect, or by ordinance empower any person to erect, gas works for the supply of gas to the municipality and its citizens. A temporary failure to furnish gas is not a forfeiture unless it was through neglect or misconduct of the gas company.[43] It has been held that when a franchise has expired, or has been revoked, the franchisee may be compelled to remove its structure.[44] If the franchisee desires to remove its structures, it cannot be prevented from doing so by the municipality. However, if in so doing, the franchisee damages the streets, it must restore the street to its original condition, in the absence of a specific provision in the franchise contract exempting such restoration.[45]

B. Exclusivity

The Ohio legislature has been silent on the power to grant exclusive franchises with one exception; the law forbids municipalities from granting exclusive franchises to gas companies.[46] However, a 1935 case has held that "[t]he granting of an exclusive franchise to operate a public utility is invalid as against public policy."[47] Thus, it

appears that exclusive franchises may not be granted in Ohio to any utility.

C. Other

The broad franchising power of Ohio muncipalities does not limit the grant of franchises for the provision of any particular utility service. No provision has been made establishing a mandatory franchise tax. Most likely, the municipality could demand its own fee as a condition precedent to the grant of a franchise under its power to impose reasonable regulations.[48] Cases hold that a city may enact a fee in exchange for granting a franchise in order to pay for the cost of supervising the utility and restoring the streets to their former condition.[49]

The holder of a franchise is limited in its ability to abandon the franchise. If the franchisee is a public utility as defined in the Ohio Code,[50] abandonment is not allowed and the utility must petition the PUCO before terminating service.[51] The PUCO holds a hearing and will allow abandonment if it is reasonable "having due regard for the welfare of the public and the cost of operating the service or facility."[52]

No similar restrictions exist on the transfer of a franchise. In Ohio Public Service Co. v. State of Ohio, ex rel. Fritz,[54] the court held that the rights acquired under an ordinance authorizing the use of the streets for the distribution of electricity were assignable without further

consent of the municipality. However, it should be noted, that the legislature has declared that no franchise may be transferred (or granted) to a company not incorporated in Ohio.[54/]

## FOOTNOTES

## CHAPTER 4 - OHIO

1. Ohio Const. art. 18, §3.

2. Ohio Const. art. 18, §3.

3. Ohio Rev. Code §715.34 (1976).

4. Id. §723.01.

5. Id. §§4933.03, 4933.13 and 4933.16.

6 Billings et al v. Cleveland R. Co., 92 Ohio 478, 111 N.E. 155 (1915).

7. See e.g., City of Galion v. City of Galion, 154 Ohio 503, 96 N.E.2d 881 (1951) (city council had power, by virtue of Ohio Rev. Code §4933.15, 4933.13 and 723.01, to grant a ten-year franchise to a public service corporation to furnish electricity to two industries located in the city) and Ohio Power Co. v. Attica, 19 Ohio App. 2d 89, N.E.2d 111 (1969) (the court remarked that a franchise and contract given to an electric company was authorized by the constitution and by statute.)

8. DiBella v. Village of Ontario, 4 Ohio Misc. 120, 212 N.E.2d 679 (1965).

9. Id., 212 N.E.2d at 683, Ohio Rev. Code, §723.01.

10. Greater Gremont, Inc. v. City of Fremont, 302 F. Supp. 652 (N.D. Ohio 1968),

11. Id.

12. Ohio Rev. Code §4905.65.

13. Cleveland Electric Illuminating Co. v. Painesville, 15 Ohio St.2d 125, 239 N.E.2d 75, 79 (1965).

14. Id.

15. Cleveland Electric Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145 (1967).

16. Ohio Const., art. 19, §3.

17. Cleveland Electric Illuminating Co. v. Painesville, 10 Ohio App. 2d 85, 226 N.E.2d 145, 149 (1967).

18. Cleveland Electric Illuminating Co. v. Scapell, 44 Ohio App. 2d 13, 336 N.E.2d 637 (1975).

19. Id. 336 N.E.2d at 641.

20. Ohio Rev. Code §§731.17 to 731.27 (1976).

21. Id, §731.17.

22. Id, §731.27.

23. Id, §§731.20, 731.21.

24. Ohio Const., art. 18, §5.

25. Ohio Const., art. 18, §35.

26. State ex rel. Martin v. Ohio Elec. Power Co., 35 Ohio App. 481, 172 N.E. 615 (1929).

27. Village of Newcomerstown v. Consolidated Gas Co., 100 Ohio 494, 127 N.E. 414 (1919).

28. Ohio Power Co. v. Attica, 19 Ohio App. 2d 89, 250 N.E.2d 111 (1969).

29. DiBella v. Village of Ontario, 4 Ohio Misc. 120, 212 N.E. 2d 679, 683 (1965). See also Kraus v. Halle Bros. Co., 100 N.E.2d 103 (1951) (city council had power and authority to grant right to private department store to construct street tunnel and erect buildings over streets).

30. Id.

31. Ohio Power Co. v. Village of Attica, 19 Ohio App. 2d 89, 250 N.E.2d 11 (1969), aff'd., 23 Ohio St. 37, 261 N.E.2d 123 (1970).

32, Id. Public Utility is defined in Greater Fremont, Inc., v. City of Fremont, 302 F. Supp. 652 at 664 (N.D. Ohio 1968) where it was held that a particular cable television service was not a public utility.

33. State ex rel Silsby v. Boyce, 43 Ohio 46, 1 N.E. 217 (1885).

34. Columbus v. Columbus Gas Co., 76 Ohio St. 309, 81 N.E. 440 (1907).

35. Ohio Rev. Code §715.34 (1976).

36. Ohio Public Service Co. v. State of Ohio ex rel. Fritz, 274 U.S. 12 (1927).

37. Cassidy v. Ohio Public Service Co., 69 N.E.2d 648 (1946).

38. City of Mount Vernon v. Berman and Reed, 100 Ohio St. 1, 125 N.E. 116 (1919).

39. State v. Northern Ohio Traction & Light Co., 104 Ohio St. 245, 135 N.E. 528 (1922).

40. Village of Newcomerstown v. Consolidated Gas Co., 100 Ohio 494, 127 N.E. 414 (1919).

41. Ohio Rev. Code §4905.21 (1976).

42. Id. §743.31.

43. Ibid.

44. City of Mt. Vernon v. Berman & Reed, 100 Ohio St. 1, 125 N.E. 116 (1922).

45. Ibid.

46. Ohio Rev. Code §743.33.

47. Ohio Power Co. v. Craig, 50 Ohio App. 239, 197 N.E. 820, 822 (1935).

48. Ohio Rev. Code §§4933.13, 4905.54 (1976).

49. Columbus Citizens Tel. Co. v. Columbus, 88 Ohio St. 466, 104 N.E. 534 (1913).

50. Ohio Rev. Code §4905.02 (1976).

51. Id. §§4905.20, 4905.21.

52. Id. §4905.21.

53. Ohio Public Service Co. v. State of Ohio ex rel. Fritz, 274 U.S. 12 (1927).

54. Ohio Rev. Code §4905.62 (1976).