

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 Alaska

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems  
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## ABSTRACT

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

This report describes laws and regulatory programs in Alaska. 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 Alaska. Attention is given

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

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

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

## CHAPTER 2

### REGULATION OF PUBLIC UTILITIES IN ALASKA

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

The primary law providing for the regulation of utilities in Alaska is the Public Utilities Commission Act.<sup>1/</sup> The Public Utilities Commission ("Commission") is a subagency of the Department of Commerce and Economic Development ("Department"). The Department has general authority to enforce state laws regulating public utilities.<sup>2/</sup>

Other legislation relating to public utilities includes the Electric and Telephone Cooperative Act,<sup>3/</sup> the Alaska Power Authority Act,<sup>4/</sup> and the Regional Electric Authorities Act.<sup>5/</sup> Although these acts deal with the creation of special private or public corporations or entities, an electric utility operated under one of these statutes would be generally subject to the same regulatory law as other electric utilities operating under the Public Utilities Commission Act.

The Commission (formerly called the Public Service Commission) was created in 1959. It is made up of five members appointed by the governor and confirmed by the legislature.<sup>6/</sup> One of the members is designated by the governor as chairman of the Commission.<sup>7/</sup> Members serve six-year terms with the exception of the chairman who serves a four-year term.<sup>8/</sup> Members must be qualified as

follows: one must be an attorney, one must be an engineer, one must be a graduate of an accredited university with a major in finance, accounting, or business administration, and two must be "consumers."<sup>9/</sup>

The role of local governments in regulating public utilities subject to Commission jurisdiction is limited to the imposition of reasonable fees and conditions<sup>10/</sup> for the use of streets and other public property. The statute expressly provides that the Commission's authority is superior to any conflicting exercise of authority by a municipality:

The commission's jurisdiction and authority extend to public utilities operating within a city or borough, whether home rule or otherwise. In the event of a conflict between a certificate, order, decision or regulation of the commission and a charter, permit, franchise, ordinance, rule or regulation of such a local governmental entity, the certificate, order, decision or regulation of the commission shall prevail. <sup>11/</sup>

## II. JURISDICTION OF THE COMMISSION

The jurisdiction of the Commission extends to all public utilities, which are defined to include every corporation (whether public, cooperative or otherwise), company or association of individuals that owns, operates, manages or controls any plant, pipeline or system for any of the following purposes:

(A) furnishing, by generation, transmission or distribution, electrical service to the public for compensation;

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(C) furnishing water, steam or sewer service to the public for compensation;

(D) furnishing by transmission or distribution of natural or manufactured gas to the Alaska public for compensation;

(E) furnishing for distribution or by distribution petroleum or petroleum products to the Alaska public for compensation when the consumer has no alternative in his choice of supplier of a comparable product and service at an equal or lesser price  
... 12/

The Commission has also asserted jurisdiction 13/ over the sale of heat energy. When the heat is a by-product of the production and sale of electricity, the Commission deems the sale of such heat energy as within the scope of the certificate of public convenience and necessity authorizing the furnishing of electric service. However, when a utility dedicates a plant solely to the production and sale of heat energy in the form of steam or hot water, a separate certificate must be obtained covering that service. 14/ The Commission does not regulate common carriers, motor carriers, railroads, trucks, or buses. The following definitions provide further clarification:

The term "service" is defined in the statute to mean:

. . . every commodity, product, use, facility, convenience or other form of service which is offered for and provided by a public utility for the convenience and necessity of the public; . . . 15/

The term "public" and "general public" are defined to mean:

. . . (A) any group of 10 or more customers that purchase the service or commodity furnished by a public utility as defined in (2) of this section; and

(B) any utility purchasing the product or service or paying for the transmission of electric energy, natural or manufactured gas, or petroleum products which are re-sold to a group included in (A) of this paragraph or which are used to produce the service or commodity sold to the public by the utility. 16/

The construction of the term "public" does not appear to have been an issue in any court or administrative decisions.

In 1970, an Alaskan statute <sup>17/</sup> exempting municipally-owned and operated utilities from Commission jurisdiction was repealed and the statute was amended to provide that a public utility owned and operated by a political subdivision of the state was exempt from the Commission's regulation if and only if none of its utilities was in competition with any other utility:

Public utilities owned and operated by a political subdivision of the state and none of whose utilities, excepting the furnishing of collection and disposal service of garbage, refuse, trash or other waste material, is in competition with any other utility, are exempt from the provisions of this chapter, other than the provisions of §§221-281 of this chapter [requiring issuance of a certificate of public convenience and necessity], unless the owner and operator elects to be subject to all provisions of this chapter. 18/

Prior to this amendment, Alaskan courts had held that the Commission's issuance to an electric utility of a certificate

of public convenience and necessity providing for a service area that encompassed a city within its territory did not preclude the city from furnishing electricity within its own city limits or within contiguous or adjacent districts in competition with the certificated utility.<sup>19/</sup> Under the new statute, all publicly owned utilities are subject to the Commission's authority to grant certificates of public convenience and necessity and hence to designation of their service areas even if not otherwise subject to Commission jurisdiction.<sup>20/</sup> In practice, then, the Commission has the authority to prevent direct competition between investor-owned and publicly-owned utilities. REA cooperatives are also subject to regulation by the Commission.<sup>21/</sup>

Because a public utility must serve ten or more customers in order to be subject to the jurisdiction of the Commission, the production or distribution of energy for private use is not subject to regulation by the Commission.<sup>22/</sup> An institution such as a firm or a university might, under some circumstances, be considered a single customer for purposes of determining Commission jurisdiction.<sup>23/</sup>

The statutes do not consider specifically the issue of production of energy for the use of tenants. In order to come within the definition of public utility,<sup>24/</sup> however, a utility must serve ten or more customers. In addition, an electric utility that does not gross \$25,000 or more annually is exempt from Commission regulation unless 25 percent of the subscribers petition the Commission for



regulation.<sup>25/</sup> There is no comparable provision relating to other types of utilities. A utility which serves only its tenants but would otherwise be subject to Commission regulation might be exempted at the discretion of the Commission.<sup>26/</sup>

### III. POWERS OF THE COMMISSION

In addition to its general supervisory authority over public utilities, the Commission is authorized specifically to (1) regulate rates charged by public utilities; (2) establish reasonable standards of service; and (3) prescribe a system of accounts to be kept by public utilities.<sup>27/</sup> Rates for sales to the public and rates for sales to a utility for re-sale to the public are regulated.<sup>28/</sup> If the capital of a public utility corporation is impaired, the Commission may order the utility to cease paying dividends on its common stock until the impairment is removed.<sup>29/</sup> In addition, the Commission is empowered to determine appropriate depreciation rates.<sup>30/</sup>

Mergers or consolidations are subject to jurisdiction only insofar as they involve transfer of a certificate. A party acquiring a certificate must meet the normal standards of being "fit, willing and able" to provide service.<sup>31/</sup> Transactions between affiliated interests involving purchasing or payment arrangements are subject to supervision of the Commission which "may order the public utility to

take the corrective action the Commission may require to achieve effective development and regulation of public utility services."<sup>32/</sup> Agreements or arrangements between two utilities for the joint use and interconnection of utility facilities are subject to Commission jurisdiction.<sup>33/</sup> Sales or leases of property are regulated only if they suggest unreasonable management practices.<sup>34/</sup>

As discussed in Chapter 3, infra, the Commission is not responsible for determining issues relating to the siting of new utility plant, constructing new plant, or expanding existing plant if the utility involved is already certificated to provide service to the area.<sup>35/</sup> Extension of service to new customers requires approval only when a service area described in a certificate must be amended.<sup>36/</sup>

Discontinuance, suspension, or abandonment of service requires prior approval.<sup>37/</sup> Standards of service are subject to rules, regulations, and orders of the Commission.<sup>38/</sup>

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

Before a public utility may operate and receive compensation for providing a utility service, it must obtain from the Commission a certificate declaring that public convenience and necessity require or will require the utility's service. If the utility provides more than one type of service, a separate certificate must be obtained

for each service.<sup>39/</sup> As discussed above, the construction of new facilities or the extension or replacement of existing facilities does not require Commission approval provided the facilities will be located in a service area for which the utility has previously been certificated. There are no exceptions to the certification requirement for expanding service into contiguous areas or for extending into areas not served by any utility where such extensions are outside the assigned service area.

Although the statute does not direct the Commission to issue only exclusive certificates, the statutes and regulations governing the granting of certificates include provisions authorizing the Commission to take "appropriate action" to eliminate "competition not in the public interest" and "undesirable duplication."

This appropriate action may include, but is not limited to, ordering the competing utilities to enter into a contract which, among other things would:

- (1) delineate the service area boundaries of each in those areas of competition;
- (2) eliminate existing duplication and paralleling to the fullest reasonable extent;
- (3) preclude future duplication and paralleling;
- (4) provide for the exchange of customers and facilities for the purposes of providing better public service and of eliminating duplication and paralleling; and
- (5) provide such other mutually equitable arrangements as would be in the public interest. <sup>40/</sup>

To administer this statutory responsibility, the Commission has adopted rules which prohibit an electric utility operating in competition with another electric utility in the same area from constructing facilities or establishing a service connection for a customer in a disputed service area without Commission approval. The rules go on to provide:

(b) The commission will grant approval to provide a service connection for a customer located within a disputed area if

(1) the utility requesting approval receives the concurrence of the competing utility and submits to the commission a signed 'Waiver of Objection' on a form provided by the commission; or

(2) a determination is made by the commission, after hearing, that one or the other of the utilities is the appropriate one to provide the service. 41/

While the statute evidences a clear policy against uninhibited competition and undesirable duplication of facilities, the Commission has stated that no certificate should be considered to grant a monopoly within any given area. In resolving a dispute between a existing nonregulated municipally-owned and operated telephone company in Fairbanks and a new regulated telephone public utility regarding which utility should serve a community located within the certificated service area of the municipally-owned utility, the Commission said the existing utility would not automatically be permitted to provide service to the exclusion of a new utility if the new utility could provide a more feasible service without

wasteful duplication.<sup>42/</sup> The Commission went on to say that the existing utility's status as first-in-field was at best one element to consider in evaluation of all elements.

Among other things, the Commission stated that the financial strength of each utility is important. In addition, the rate structures of the utilities were to be considered as they significantly affected the public interest. Furthermore, ongoing regulatory supervision of the utility services was in the public interest, and, while not paramount, was a factor to consider in deciding whether a regulated utility or a non-regulated municipal utility should be authorized to serve a disputed area. Having considered all such factors, the Commission authorized the new utility to serve the disputed community despite the existence of a prior certificate.

The fact that the Commission permitted a newcomer to invade a service area certificated to another utility in the Fairbanks case does not mean competition will be readily approved by the Commission. To date, the Commission has not certificated two electric utilities to operate within the same service area. Furthermore, the Commission is likely to seek to avoid prejudice to an existing utility.<sup>43/</sup>

The procedure for obtaining a certificate and the criteria for issuance of a certificate are briefly described in the statute. The application for a certificate is to be in the form and contain the information required

by the Commission regulations.<sup>44/</sup> The application form requires information including a description of the area to be served; a description of the applicant; copies of franchises or permits obtained from other agencies and a statement as to other franchises and permits required; a description of the services to be provided and the customers served; statements of financial condition; proposed rates and tariffs; and a statement as to why the proposed operation is required by the public convenience and necessity including a consideration of the adequacy of existing facilities to meet public needs.<sup>45/</sup>

The criteria to be used in issuing a certificate are set forth in the statute:

No certificate may be issued unless the commission finds that the applicant is fit, willing and able to provide the utility services applied for and that the services are required for the convenience and necessity of the public. The commission may issue a certificate granting an application in whole or in part and attach to the grant of it the terms and conditions it considers necessary to protect and promote the public interest including the condition that the applicant may or shall serve an area or provide a necessary service not contemplated by the applicant. The commission may, for good cause, deny an application with or without prejudice.<sup>46/</sup>

All applications for a certificate must be docketed and considered in a formal proceeding.<sup>47/</sup> Notice and a public hearing are required, but there are no time limits.<sup>48/</sup>

No other agency need formally concur in the granting of a certificate.

A certificate may not be sold, leased or transferred to another utility without prior approval of the Commission.<sup>49/</sup>

To abandon a service for which a utility has been certificated, the utility must file an application with the Commission. If, after notice and hearing, the Commission finds that the public convenience and necessity no longer require the service, then the Commission may authorize abandonment. Such an authorized abandonment is subject to reexamination by the Commission, and, if circumstances so warrant, the utility may be ordered to resume services.<sup>50/</sup>

#### V. APPEALS OF COMMISSION DECISIONS

All final orders of the Commission are subject to judicial review in accordance with the Alaska Administrative Procedure Act.<sup>51/</sup> The final order may be appealed to the superior court for judicial review by filing a notice of appeal in accordance with the rules of court. The notice of appeal must be filed within thirty days after the last day on which reconsideration can be ordered. The right to appeal is not affected by failure to seek reconsideration before the agency.<sup>52/</sup>

The appeal will be heard by the superior court sitting without a jury. The court may augment the Commission's record in whole or in part, or hold a hearing de novo. The court's inquiry includes whether the Commission has proceeded

without jurisdiction, whether there was a fair hearing and whether there was a prejudicial abuse of discretion. The court may enter judgment setting aside, modifying, remanding or affirming the order. Further appeal may be taken to the Alaska Supreme Court. <sup>53/</sup>



FOOTNOTES

1. Alaska Stat. §§42.05.010-.721 (1976).
2. Id. §44.33.020.
3. Id. §§10.25.010-10.25.650 (1968).
4. Id. §§44.56.010-44.56.240 (1976).
5. Id. §§18.57.010-18.57.110 (Supp. 1977).
6. Id. §42.05.020(a) (1976).
7. Id. §42.05.020(b).
8. Id. §42.05.030(a).
9. Id. §42.05.040.
10. Id. §§29.48.050(a) (1972), 42.05.251 (1976).
11. Id. §42.05.641 (1976).
12. Id. §42.05.701(2).
13. In the Matter of the Promulgation of Policy re the Sale of Waste Heat by Electric Utilities, General Order No. 5, dated March 30, 1978, U-78-32.
14. Ibid.
15. Alaska Stat. §42.05.701(3) (1976).
16. Id. §42.05.701(5).
17. Id. §42.05.640 (1966).
18. Id. §42.05.711(b) (1976). See Alaska Public Utilities Commission v. Municipality of Anchorage, 555 P.2d 262, 265 (Alaska 1976), for the legislative history.
19. Homer Elec. Assn. v. City of Kenai, 423 P.2d 285 (Alaska 1967); Chugach Elec. Assn. v. City of Anchorage, 426 P.2d 1001 (Alaska 1967).
20. Alaska Stat. §§42.05.221(a)-42.05.711(b) (1976).
21. 1964 Op. Alaska Att'y Gen., No. 1.
22. Alaska Stat. §42.05.701(5) (1976).
23. Ibid.

24. Alaska Stat. §42.05.701(5) (1976).
25. Alaska Stat. §42.05.711(e) (1976).
26. Mr. R. Stoller, Asst. Attorney General, Staff Counsel to the Commission, Telephone conversation, 6/23/78.
27. Alaska Stat. §42.05.141 (1976).
28. Id. §§42.05.361-42.05.441.
29. Id. §42.05.521.
30. Id. §42.05.471.
31. Id. §42.05.281.
32. Id. §42.05.511.
33. Id. §§42.05.311-42.05.321.
34. Id. §42.05.511(a), (b); Mr. R. Stoller, Asst. Attorney General, Staff Counsel to the Commission, Telephone conversation, 6/23/78.
35. Mr. R. Stoller, Asst. Attorney General, Staff Counsel to the Commission, Telephone conversation, 6/23/78.
36. Ibid.
37. Alaska Stat. §42.05.261.
38. Id. §42.05.291.
39. Id. §42.05.221(a).
40. Id. §42.05.221(d) (Emphasis added).
41. 3 Alaska Admin. Code 52.120 (1977). In determining which of two utilities is the most appropriate one to provide service, the rules provide:

(c) The criteria to be weighed by the staff examiner in making his decision shall include but are not limited to

(1) the cost to the utility to provide the service connection;

(2) the cost to be assessed by the applicant utility to the customer;

(3) the proximity of the service connection point to each of the competing utilities' electric distribution facilities;

(4) the geographical proximity of the service connection to the area generally served by each competing utility.

42. Re City of Fairbanks, U-16-62, U-76-88, Order No. 3, May 3, 1977.
43. Mr. R. Stoller, Asst. Attorney General, Staff Counsel to the Commission, Telephone conversation, 6/23/78.
44. Alas. Stat. §42.05.231 (1976).
45. APUC Form PU 101 (Revised 4-72).
46. Alaska Stat. §42.05.241 (1976).
47. 3 Alaska Admin. Code 48.070 (1973).
48. 3 Alaska Admin. Code 48.630 (1975).
49. Alaska Stat. §42.05.281 (1976).
50. Id. §42.05.261.
51. Id. §42.05.551(a).
52. Id. §44.62.560.
- (53. Id. §44.62.570.

## CHAPTER 3.

### SITING OF ENERGY FACILITIES IN ALASKA

Alaska has no statute or regulation specifically addressing the issue of power plant siting. Several agencies and governmental units have jurisdiction over various aspects of energy facility siting within the state.

#### I. STATE AGENCIES

##### A. Department of Commerce and Economic Development

The Department of Commerce and Economic Development has general authority to enforce state laws regulating public utilities.<sup>1/</sup> Within the Department is a power development section responsible for formulating a plan for the orderly development of the state's power resources.<sup>2/</sup> Most of the Department's authority over power plants is vested in the Public Utilities Commission ("Commission").

##### 1. Public Utilities Commission

The make-up and regulatory authority of the Commission, which is a subagency of the Department of Commerce and Economic Development,<sup>3/</sup> is fully discussed in Chapter 2. The Commission's principal authority over plant siting is contained in its power to grant or deny a certificate of public convenience and necessity.<sup>4/</sup> As discussed in Chapter 2, plant siting is a matter for the Commission only when it involves a new utility company, an expanded service area

for an established utility, or an additional service not offered previously. The Commission has no statutory responsibility towards plant siting per se when it involves extension of an existing plant or construction of a new plant within the present service area of an already certified utility.<sup>5/</sup>

## 2. Alaska Pipeline Commission

Also a subagency of the Department of Commerce and Economic Development, the Pipeline Commission may have an impact on the siting of an energy facility requiring natural gas lines. "The commission . . . shall require permits for the construction, enlargement in size or operating capacity, extnesion, operation or abandonment of any oil or gas pipeline facility."<sup>6/</sup> The statutes provide the following definitions:

(9) "pipeline" or "pipeline facility" means all the facilities of a total system of pipe (whether owned or operated by a pipeline carrier under a contract, agreement, or lease) in this state used by a pipeline carrier for transportation, for hire and as a common carrier, of oil, gas, coal, or other mineral slurry for delivery, storage, or further transportation, and including all pipe, pump and compressor stations, station equipment, and all other facilities used or necessary for an integral line of pipe to effectuate the transportation from point to point, excluding, however, gas processing plants, treaters and separators;

(10) "pipeline carrier" means the owner, including corporations organized under the laws of the United States or of any state, of any pipeline, as the term is defined in this section, or any interest in it, or any person, including corporations organized under the laws of the United States or of any state, authorized to construct or extend pipeline facilities under §240(a) of this chapter. <sup>7/</sup>

B. Department of Environmental Conservation

Because Alaska has no central siting authority, a multitude of permits from different state agencies would be required to locate a power plant. In recognition of this problem, Alaska has consolidated the permit application procedure within the Department of Environmental Conservation ("DEC"). By submitting a master application to the DEC, a project developer may present his proposal to most state and local government agencies simultaneously.<sup>8/</sup>

(a) A person proposing a project which requires the issuance of one or more permits may submit a master application to the department requesting the issuance of all permits and documents necessary before the construction and operation of the project in the state. The master application shall be on a form established by the department and shall contain sufficient information as to the location and the nature of the project, including discharge of wastes and use of or interference with natural resources of the state.

(b) Upon receipt of a properly completed master application, the department shall immediately forward a copy of the application to all heads of executive departments of the state and the chief elected official of all municipalities in which a portion of the project is proposed to be constructed, together with the date by which the agency shall respond to the master application.

(c) Each agency notified shall respond in writing to the department by the specified date, not exceeding 15 days from receipt, as determined by the department, advising

(1) whether the agency has an interest in the master application;

(2) if the response to (1) of this subsection is affirmative, the permit program under the agency's jurisdiction to which the project described in the master application is pertinent,

and

(3) whether, in relation to the master application, a public hearing as provided in . . . this chapter would be in the public interest.

(d) Each notified agency which (1) responds within the specified date that it does not have an interest in the master application; or (2) does not respond as required within the specified date, may not subsequently require a permit of the applicant for the project described in the master application unless the master application contained false, misleading, or deceptive information, or other information or lack of information which would reasonably lead an agency to misjudge its interest in the master application.

(e) The department shall submit application forms relating to permit programs identified in affirmative responses under (c) of this section to the applicant with a direction to complete and return them to the department within a reasonable time as specified by the department.

(f) When the applications, properly completed, have been returned to the department, each of the applications shall be transmitted to the appropriate state agency for the performance of its responsibilities of decision making in accordance with the procedures of this chapter. 9/

Public notice in a newspaper of general circulation is required within each municipality or judicial district in which the project is proposed to be constructed. 10/ Unless responses from state agencies unanimously indicate that a public hearing concerning a master application is not necessary in the public interest, then such a hearing must be held 11/ within thirty days of the official newspaper notice.

Representatives of each affected state agency must be present at the public hearing. 12/ Federal and local government

agencies may be represented at the hearings at their option. 13/

(a) Upon completion of the public hearing the chairman, after consultation with the state agency representatives, shall establish the date by which all state agencies shall forward their final decisions on applications before them to the department. The date established shall be within the following 90-day period after the public hearing.

\* \* \*

(c) Each final decision shall state the basis for the conclusion together with a final order denying the application for a permit or granting it, subject to a condition of approval as the deciding agency may have the power to impose. An agency which denies an application shall, with its final decision denying the application, provide a written summary suggesting alternate means of completing the project, or, if no alternative is feasible, the agency shall provide a written summary of its reasons for that conclusion.

(d) As soon as all final decisions are received by the department under . . . this section, the department shall incorporate them, without modification, into one document and transmit it to the applicant either personally or by registered mail. 14/

The role of local governments in this process is explained in more detail below.

Persons aggrieved by a final decision issued by a state agency must file appeals with the Commissioner of Environmental Conservation within thirty days. 15/ "'Person" [for purposes of this provision] means an individual, municipal, public, or private corporation, or other entity, and includes a state agency and a local government." 16/ Appeals are heard jointly by the commissioners of each agency that rendered a decision by which the appellant is aggrieved. 17/ Each commissioner decides only that portion of the appeal



that involves his agency.<sup>18/</sup> Judicial review by a superior court may be requested in accordance with the Administrative Procedure Act.<sup>19/</sup>

Most of the permits that might be required by an energy facility are conveniently listed in the statutes:

- (A) Waste water disposal permit - Alaska Stat. §46.03.100; 18 Alaska Admin. Code 72;
- (B) Solid waste management permit - Alaska Stat. §46.03.100; 18 Alaska Admin. Code 60;
- (C) Air emissions permit - Alaska Stat. §46.03.150; 18 Alaska Admin. Code 75;
- \* \* \*
- (E) Surface oiling permit - Alaska Stat. §46.03.740; 18 Alaska Admin. Code 75;
- \* \* \*
- (G) Anadromous fish protection permit - Alaska Stat. §16.05.870; 5 Alaska Admin. Code 95.100.
- (H) Critical habitat area permit - Alaska Stat. §§16.20.250, 16.20.260;
- (I) State game refuge land permit - Alaska Stat. §§16.20.050, 16.20.060;
- \* \* \*
- (K) Utility permit - Alaska Stat. §19.25.010;
- \* \* \*
- (M) State park incompatible use permit - Alaska Stat. §41.20.020; 11 Alaska Admin. Code 18.010;
- (N) Access roads permit - Alaska Stat. §41.20.020; 11 Alaska Admin. Code 18.020;
- \* \* \*

- (R) Right-of-way and easement permits - Alaska Stat. §38.05.330; 11 Alaska Admin. Code 58.200;
- (S) Special land use permit [required for certain projects on public land] - Alaska Stat. §38.05.035; 11 Alaska Admin. Code 58.210;
- (T) Tidelands permit - Alaska Stat. §38.05.320; 11 Alaska Admin. Code 62.710;
- (U) Tidelands right-of-way or easement permit - Alaska Stat. §38.05.320; 11 Alaska Admin. Code 62.810;
- \* \* \*
- (W) Permit to appropriate water - Alaska Stat. §46.15.040; 11 Alaska Admin. Code 72.050;
- \* \* \*
- (GG) Miscellaneous state land use permit [required for certain projects on public land] - Alaska Stat. §38.05.035; 11 Alaska Admin. Code 96.010. 20/

Permits A, B, C, and E from the list above are granted by the DEC. Fuel storage by an energy facility may subject it to further regulation by the DEC. No person may operate an oil terminal facility within the state which has the capacity for storing 25,000 barrels or more <sup>21/</sup> unless he holds a certificate of risk avoidance. <sup>22/</sup> "Oil terminal facility" is defined as:

An onshore or offshore facility of any kind and related appurtenances, including but not limited to a deepwater port, located in, on, or under the surface of any land or water of the state, including tide or submerged land, which is used or capable of being used for the purpose of transferring, processing or refining, or storing crude oil, refined petroleum products, or their by-products . . . . 23/

III. LOCAL GOVERNMENT

Permits requested in a master application filed with DEC may not be issued without prior certification from the appropriate local government that the project complies with zoning ordinances and associated comprehensive plans administered by the local government.<sup>24/</sup> The zoning and planning statutes do not deal specifically with utility installations.<sup>25/</sup>

FOOTNOTES

1. Alaska Stat. §44.33.020 (Michie 1976).
2. Id., §44.33.040.
3. Id., §42.05.010.
4. See, Id., §42.05.221 (description of a certificate and conditions of its issuance).
5. Mr. R. Stoller, Asst. Attorney General, Staff Counsel to the Commission, Telephone conversation, June 23, 1978.
6. Alaska Stat. §42.06.140 (Michie 1976).
7. Id., §42.06.630(9), (10) (Supp. 1978).
8. Id., §46.35.030 (Michie 1977).
9. Ibid.
10. Id. §46.35.050 (Michie 1977).
11. Ibid.
12. Id. §46.35.060.
13. Ibid.
14. Id. §46.35.070(a), (c), (d).
15. Id., §46.35.090(a).
16. Id., §46.35.200(5).
17. Id., §46.35.090(d).
18. Ibid.
19. Id. §§44.62.560, 44.62.570 (Michie 1976).
20. Id. §46.35.200 (1977).
21. Id. §30.25.040.
22. Id., §30.25.060(2).
23. Id., §30.25.350(11).
24. Id., §46.35.130. See, note 12 at Chapter 2, supra.
25. Id., §§29.33.070 to 29.33.245; 29.43.040.

## CHAPTER 4

### LAW GOVERNING FRANCHISES IN ALASKA

#### I. AUTHORITY TO GRANT FRANCHISES

The Alaska statutes provide that:

The assembly acting for an area outside cities and the council acting for the area within a city may grant franchises, including exclusive franchise privileges, for the construction, operation and maintenance of bus transportation systems and public utilities not regulated under AS 42.05 [the Alaska Public Utilities Act] and may permit the use of streets and other public places under regulations prescribed by ordinance.

1/

All public utilities, except non-competing municipally owned utilities, electric and telephone utilities grossing less than \$25,000 annually and utilities serving less than ten customers, are regulated by the Public Utilities Commission (Commission), 2/ and, therefore, the power of municipalities and organized boroughs to grant franchises pursuant to this statute is, in practice, of little importance. 3/

With respect to public utilities regulated by the Commission, the Alaska statutes provide that:

Public utilities . . . have the right to use the streets and other public places, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the assembly or council requires. A dispute as to whether fees, terms, conditions, or exceptions are reasonable shall be decided by the Alaska Public Utilities Commission. 4/

A similar provision found in the chapter governing regulation

of public utilities by the Commission states that:

Public utilities have the right to a permit to use public streets, alleys and other public ways of a city or borough, whether home rule or otherwise, upon payment of a reasonable permit fee and on reasonable terms and conditions and with reasonable exceptions the city or borough requires. A dispute as to whether fees, terms, conditions or exceptions are reasonable shall be decided by the commission. The commission may require a utility to add the amount of any permit fee paid as a pro rata surcharge to its bills for service rendered at locations within the boundaries of any city or borough which requires payment of a permit fee. 5/

Thus, the authority of local governments to control the use of streets and other public places by Commission-regulated public utilities is strictly limited. Such utilities may be required to pay a reasonable fee and comply with reasonable conditions, but they apparently cannot be foreclosed from erecting facilities along public ways. This interpretation was confirmed by a spokesperson for the Commission.<sup>6/</sup> In addition, the ultimate responsibility of determining the reasonableness of any fees or conditions imposed by local governments rests with the Commission.

## II. PROCEDURES FOR GRANTING FRANCHISES

To the extent that local governments can grant franchises, this authority must be exercised by means of ordinance. However, no specific procedure is provided for enacting a franchise ordinance and no reported judicial decisions have elaborated on the procedure to be followed.

In addition, the statute provides that:

No franchise is valid until it has been submitted to the qualified voters of the city or borough area outside cities in which it applies, and at least 55 per cent of the votes cast are in favor of the franchise. 7/

At least 30 days' notice of the franchise referendum must be given and the notice must specify the purpose of the referendum. The ordinance granting the franchise must specifically provide for its submission to the electorate for ratification and the results of the referendum must be included in the minutes of the council or assembly. 8/

No specific procedure is provided by which fees, terms and conditions governing the use of streets by Commission-regulated public utilities are to be adopted.

Action must be taken by the council or assembly, but the statute does not specify a required form for such action. 9/

The fact that the statute clearly distinguishes between franchise grants and the imposition of fees, terms and conditions on regulated public utilities indicates that there is no requirement that such fees, terms and conditions be submitted to the electorate for approval. No other statutes or judicial decisions further define the procedures to be followed with respect to Commission-regulated utilities.

### III. CHARACTERISTICS OF A FRANCHISE

#### A. Duration and Termination

There is no statutory limit on the duration of a franchise. Neither have any judicial decisions interpreting local franchising authority established a limit on the

duration of a franchise.

B. Exclusivity

Local governments are specifically authorized to grant exclusive franchises. <sup>10/</sup>

C. Other Characteristics

There is no statutory provision requiring that franchisees pay a franchise tax. However, local governments are authorized specifically to require public utilities which are regulated by the Commission to pay a reasonable fee for their use of the streets and other public places. <sup>11/</sup>



FOOTNOTES

1. Alaska Stat. §29.48.050(a)(1972).
2. Id. §§42.05.701-711 (Michie 1976); See Chapter 2 for a more complete discussion of the Commission's jurisdiction.
3. Mr. J. L. Jensen, Executive Director, Commission, Telephone conversation, 6/22/78.
4. Alaska Stat. §29.48.050(c)(1972).
5. Id. §42.05.251(1976).
6. Mr. R. Stoller, Assistant Attorney General and Staff Counsel to the Commission, Telephone conversation, 7/27/78.
7. Alaska Stat. §29.48.050(b)(1972).
8. Ibid.
9. Id. §29.48.050(c).
10. Id. §29.48.050(a)(1972).
11. Id. §29.48.050(c).