DOE/CS/20289-47

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 Virginia

DUANE A. FEURER
CLIFFORD L. WEAVER
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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
under Contract No. DE-AC02-78CS20289

ABSTRACT

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

This report describes laws and regulatory programs in Virginia. Subsequent reports will (1) describe public utility rate regulatory procedures and practices as they might affect an ICES, (2) analyze each of the aforementioned regulatory programs to identify impediments to the development of ICES and (3) recommend potential changes in legislation and regulatory practices and procedures to overcome such impediments.

CHAPTER 1

INTRODUCTION

One response to current concerns about the adequacy of the nation's energy supplies is to make more efficient use of existing energy sources. The United States Department of Energy (DOE) has funded research, development and demonstration programs to determine the feasibility of applying proven cogeneration technologies in decentralized energy systems, known as Integrated Community Energy Systems (ICES), to provide heating, cooling and electrical services to entire "communities" in an energy conserving and economic manner.

The relevant "community" which will be appropriate for ICES development will typically consist of a combination of current energy "wasters" -- i.e., installations with large energy conversion facilities which now exhaust usable amounts of waste heat or mechanical energy -- and current energy users -- i.e., commercial or residential structures which currently obtain electricity and gas from a traditional central utility and convert part of it on customer premises to space heating and cooling purposes.

In most current applications, energy conversion facilities burn fuels such as coal, oil or natural gas to produce a single energy stream, such as process steam or electricity, for various industrial processes or for sale to other parties. However, the technology exists to produce

more than one energy stream from most energy conversion processes so that the input of a given amount of fuel could lead to the production and use of far more usable energy than is presently produced. This technology is the foundation of the ICES concept. Current examples of the technology can be found on university campuses, industrial or hospital complexes and other developments where a central power plant provides not only electricity but also thermal energy to the relevant community.

It is generally assumed by DOE that ICES will be designed to produce sufficient thermal energy to meet all the demands of the relevant community. With a given level of thermal energy output, an ICES generation facility will be capable of producing a level of electricity which may or may not coincide with the demand for electricity in the community at that time. Thus, an ICES will also be interconnected with the existing electric utility grid. Through an interconnection, the ICES will be able to purchase electricity when its community's need for electricity exceeds the amount can be produced from the level of operations needed to meet the community's thermal needs. In addition, when operations to meet thermal needs result in generation of more electricity than necessary for the ICES community, the ICES will be able to sell excess electricity through the interconnection with the grid.

ICES may take a variety of forms, from a single owner-user such as massive industrial complex or university campus where all energy generated is used by the owner without sales to other customers, to a large residential community in which a central power plant produces heat and electricity which is sold at retail to residents of the community. Since successful operation of an ICES presupposes that the ICES will be able to use or sell all energy produced, it can be anticipated that all ICES will at some point seek to sell energy to customers or to the electric utility grid from which the electricity will be sold to customers. By their very nature ICES are likely to be public utilities under the laws of many, or even all, states.

The Chicago law firm of Ross, Hardies, O'Keefe, Babcock & Parsons has undertaken a contract with the Department of Energy to identify impediments to the implementation of the ICES concept found in existing institutional structures established to regulate the construction and operation of traditional public utilities which would normally be the suppliers to a community of the type of energy produced by an ICES.

These structures have been developed in light of policy decisions which have determined that the most effective means of providing utility services to the public is by means of regulated monopolies serving areas large enough to permit economies of scale while avoiding wasteful

duplication of production and delivery facilities. These existing institutional structures have led to an energy delivery system characterized by the construction and operation of large central power plants, in many cases some distance from the principal population centers being served.

In contrast, effective implementation of ICES depends to some extent upon the concept of small scale operations supplying a limited market in an area which may already be served by one or more traditional suppliers of similar utility services. ICES may in many instances involve both existing regulated utilities and a variety of non-utility energy producers and consumers who have not traditionally been subject to public utility type regulation. It will also require a variety of non-traditional relationships between existing regulated utilities and non-regulated energy producers and consumers.

Ross, Hardies, O'Keefe, Babcock & Parsons is being assisted in this study by Deloitte Haskins & Sells, independent public accountants, Hittman Associates, Inc., engineering consultants, and Professor Edmund Kitch, Professor of Law at the University of Chicago Law School.

The purpose of this report is to generally describe the existing programs of public utility regulation, energy facility siting and municipal franchising likely to relate to the development and operation of an ICES, and the construction of ICES facilities in Virginia. Attention is given

to the problems of the entry of an ICES into a market for energy which has traditionally been characterized by a form of regulated monopoly where only one utility has been 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 VIRGINIA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the State Corporation Commission (Commission). The Commission is comprised of three members elected by a joint vote of the two houses of the general assembly. Commissioners serve six-year terms.[1/] They must be free from any employment or pecuniary interests in any company subject to the supervision and regulation of the Commission.[2/]

The Commission is charged with the primary responsibility of supervising and regulating public utilities. However, local governments retain the power to grant franchises and otherwise regulate the use of streets and other public property.[3/] In addition, municipally-owned utilities are not within the jurisdiction of the Commission to the extent that they operate within corporate limits.[4/]

II. JURISDICTION OF THE COMMISSION

Certain of the Commission's powers extend to all "public service corporations"; other powers extend only to "public utilities." "Public service corporation" is defined to include "gas, pipeline, electric light, heat, power and

water supply companies, . . . and shall exclude all municipal corporations [and] other political subdivisions. . . ."[5/]

"Public utility" is defined to include:

> . . . every corporation (other than a municipality), company, individual, or association of individuals or cooperative, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment within the State . . . for the production, transmission, delivery, or furnishing of heat, chilled air, chilled water, light, power, or water, . . . either directly or indirectly to or for the public. [6/]

The specific activities and facilities subject to the Commission's control are identified within this definition. The Commission may regulate the "production, transmission, delivery or furnishing" of the jurisdictional services. Its supervisory authority extends to "any plant or equipment or any part of a plant or equipment" used in connection with the jurisdictional operations.

The Commission has statutory authority over corporations, companies, individuals, or associations of individuals or cooperatives.[7/] Thus, the Commission's jurisdiction is broad enough to extend to most conventional forms of utility ownership. Municipalities are excluded specifically from the definitions of both public service corporation[8/] and public utility.[9/]

The Commission's jurisdiction is not dependent upon a sale or furnishing of service for compensation. The Commission's regulatory powers extend specifically to services

provided directly or indirectly to the public.[10] Thus, the Commission does possess the power to regulate wholesale sales of energy.

The Commission's jurisdiction is dependent upon a furnishing of service "to or for the public."[11] There is no statutory definition of "public" and neither the Commission nor the Virginia courts have discussed this requirement in any reported cases. The provision defining "public utility" as used in the sections dealing with certificates of public convenience and necessity does, however, clarify this term somewhat. A company:

> (A) which furnishes electric service together with heating and cooling services, generated at a central plant installed on the premises to be served, to the tenants of a building or buildings located on a single tract of land undivided by any publicly maintained highway, street or road at the time of installation of the central plant, and
>
> (B) which does not charge separately or by meter for electric energy used by any tenant except as part of a rental charge. [12]

need not obtain a certificate of public convenience and necessity before initiating service. However, such companies are subject to the Commission's jurisdiction with respect to rates, standards of service and state operation in the event of emergency if it serves one hundred or more lessees.[13]

Thus, a company satisfying the requirements of this statutory provision and serving fewer than one hundred

tenants is completely exempt from the Commission's jurisdiction. Any such company serving one hundred or more tenants need not obtain a certificate before constructing facilities or initiating service, but is subject to the Commission's general regulatory authority over public utilities.

A company generating electric energy exclusively for its own consumption is also specifically exempted from the Commission's certificating authority.[14/] While such an operation is not otherwise specifically excepted from the Commission's regulatory authority, generation for private use is not likely to be considered "to or for the public." Electric cooperatives are included specifically within the Commission's jurisdiction.[15/]

III. POWERS OF THE COMMISSION

The Commission is charged with the supervision, regulation and control of public service companies "in all matters relating to the performance of their public duties and their charges therefor. . . ."[16/] In addition to this general supervisory authority, the Commission has been granted numerous specific powers.

For example, the Commission must approve the issuance of securities by public service corporations,[17/] certain affiliated interest transactions,[18/] and certain agreements

between or arrangements among public utilities.[19/] It has authority to regulate rates charged by public utilities[20/] and to prescribe a system of accounts to be kept by public utilities.[21/] In addition, the Commission must approve the construction of certain new utility facilities[22/] and the initiation and extension of service,[23/] and may prescribe standards of service.[24/]

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

A. Generally

No public utility may acquire or construct any utility facility without first obtaining a certificate of convenience and necessity from the Commission.[25/] In addition, a public utility must obtain a separate certificate of public convenience and necessity before initiating or extending any utility service.[26/] No certificate is needed, however, for ordinary extensions or improvements within the territory in which the utility is authorized to operate.[27/] Furthermore, no certificate need be obtained before constructing facilities or initiating service, by:

> (2) Any company generating and distributing electric energy exclusively for its own consumption.
> (3) Any company (A) which furnishes electric service together with heating and cooling services, generated at a central plant installed on the premises to be served, to the tenants of a building or buildings located on a single tract of land undivided by any publicly maintained highway, street or road at the time of installation of the central plant, and (B) which does not charge separately or by meter for electric energy used by any tenant except as part of a

> rental charge. . . . Any company excluded by this paragraph (3) from the definition of "public utility" for the purposes of this chapter nevertheless shall, within thirty days following the issuance of a building permit, notify the State Corporation Commission in writing of the ownership, capacity and location of such central plant, and it shall be subject, with regard to the quality of electric service furnished, to the provisions of chapters 10 and 17 [relating to regulation of rates, standards of service and government operation of utilities, during emergencies] of this title and regulations thereunder and be deemed a public utility for such purposes, if such company furnishes such service to one hundred or more lessees. 28/

B. Competition

The Virginia statutes demonstrate a clear policy against competition among utilities. The Commission may not grant a certificate of public convenience and necessity authorizing a utility to operate in an area already receiving service from a certificate holder unless it determines that the service being rendered is inadequate to meet the requirements of the public convenience and necessity. 29/ If the Commission determines that the service is inadequate, the certificate holder will be given a reasonable time to remedy the inadequacy before a second certificate will be granted. 30/ In addition, no municipally owned electric utility may offer service in an area outside its own boundaries that has been allotted to a public utility unless the utility serving the area consents or the Commission determines that the service being provided is inadequate. 31/ Similarly, no public electric

utility may extend service into a municipality being served by a municipally-owned utility unless the municipality consents to the extension or the Commission determines that the service being provided by the municipally-owned utility is inadequate.[32/]

C. Certificating Procedure

No specific procedure is provided for obtaining a certificate of public convenience and necessity. A public utility seeking such a certificate must file an application with the Commission. The Commission may issue the certificate if, after formal or informal hearing and after due notice to all interested parties, it determines that the proposed construction or service is required by the public convenience and necessity.[33/] No other criteria are established by statute and neither the Commission nor the courts have articulated more specific criteria to be considered in granting or denying a certificate.

In 1972, a new section was added to the public service company statutes, which requires that the Commission consider environmental factors whenever approving the construction of any electrical utility facility.[34/] This section has been interpreted and applied by the Commission as authorization to act as a siting agency when approving construction of electrical energy facilities. This siting

aspect of the Commission's functions if further discussed in Chapter 3.

D. Service Area Disputes

Except as noted in Paragraph B above, Virginia statutes make no special provision for the resolution of service area disputes. However, they do establish a general procedure for hearing complaints. Any person aggrieved by any action of a public service corporation may file a complaint with the Commission.[35/] If the grievance is established before the Commission sitting as a court of record, the Commission may enter any order necessary to resolve the dispute.[36/] All hearings must be public.[37/]

V. APPEALS OF COMMISSION DECISIONS

Any party aggrieved by a decision of the Commission may appeal directly to the state supreme court.[38/] The petition for appeal must be filed within four months from the entry of the final order of the Commission.[39/] The court bases its review on the record before the Commission and may overturn the Commission's order only if the Commission exceeded its constitutional or statutory authority or the decision amounts to an unreasonable exercise of the Commission's authority, is based on a mistake of law, or is contrary to the evidence or without evidence to support it.[40/]

FOOTNOTES

1. Va. Code § 12.1-6 (Michie 1978).

2. Id., § 12.1-10.

3. Id., § 56-14 (Michie 1974).

4. Id., §§ 56-1 (Michie 1974), 56-232 (Michie Supp. 1978), 56-265.4:1 (Michie Supp. 1978).

5. Id., § 56-1 (Michie 1974).

6. Id., § 56-232 (Michie Supp. 1978).

7. Ibid.

8. Id., § 56-1 (Michie 1974).

9. Id., § 56-232 (Michie Supp. 1978).

10. Ibid.

11. Ibid.

12. Id., § 56-265.4:1 (Michie Supp. 1978).

13. Id., § 56-265.1(b)(3) (Michie 1974).

14. Id., § 56-265.1(b)(2).

15. Id., § 56-227.

16. Id., § 56-35.

17. Id., § 56-56.

18. Id., § 56-77.

19. Id., § 56-89.

20. Id., § 56-235 (Michie Supp. 1978).

21. Id., §§ 56-249 (Michie 1974).

22. Id., §§ 56-234.3 (Michie Supp. 1978), 56-265.2 (Michie 1974). See Chapter 3, infra.

23. Id., § 56-265.3 (Michie 1974).

24. Id., § 56-234 (Michie Supp. 1978).

25. Id., § 56-265.2 (Michie 1974).

26. Id., § 56-265.3.

27. Id., § 56-265.2.

28. Id., § 56-265.1(b).

29. Id., § 56-265.4.

30. Ibid.

31. Id., § 56-265.4:1 (Michie Supp. 1978).

32. Ibid.

33. Id., §§ 56-265.2, 56-265.3 (Michie 1974).

34. Id., § 56-46.1 (Michie Supp. 1978).

35. Id., § 56-5 (Michie 1974).

36. Ibid.

37. Id., § 12.1-26.

38. Id., § 12.1-39.

39. Ibid.

40. See Alexandria Water Co. v. City Council of Alexandria, 177 S.E. 454 (Va. 1934); Aetna Insurance Co. v. Commonwealth, 169 S.E. 859 (Va. 1933).

CHAPTER 3

SITING OF ENERGY FACILITIES IN VIRGINIA

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

Rather than enacting a comprehensive energy facilities siting act, Virginia, in 1972, added a siting section to the public service company statutes administered by the State Corporation Commission (the "Commission").[1/] The new section requires that the Commission consider scenic and environmental factors whenever approving the construction of electrical energy facilities. The Commission issues certificates of public convenience and necessity in approving such construction. The Commission's jurisdiction to issue such certificates, as well as the Commission's membership, and other powers and procedures are discussed in Chapter 2, while its siting function is discussed in the following Part II of this Chapter.

With respect to transmission lines, but not with respect to generating facilities, Commission approvals "shall be deemed to satisfy the requirements of [local comprehensive plans and local zoning ordinances]."[2/] Local governmental units and interested persons can nevertheless participate in Commission hearings in connection with the approval of the construction of transmission lines, and local governmental units can request that the Commission consider their local comprehensive plans as well as any reports of state agencies concerned with environmental protection.[3/]

The Commission need not follow the views of other agencies, and other agencies are not pre-empted from requiring

separate approvals.[4/] The jurisdiction and powers of other state agencies are discussed in Part III, below.

II. STATE CORPORATION COMMISSION

The new siting section is largely self-explanatory and brief enough to set forth in its entirety. It is as follows:

> Commission to consider environmental factors in approving construction of electrical utility facilities; approval required for construction of certain electrical transmission lines; notice and hearings. -- Whenever under any provision of law whatsoever, applicable to the Commission, the Commission is required to approve the construction of any electrical utility facility, it shall give consideration to the effect of that facility on the environment and establish such conditions as may be desirable or necessary to minimize adverse environmental impact. In such proceedings it shall receive and give consideration to all reports that relate to the proposed facility by State agencies concerned with environmental protection; and, if requested by any county or municipality in which the facility is proposed to be built, to local comprehensive plans that have been adopted pursuant to article 4 (§15.1-446 et seq.) of chapter 11 of Title 15.1 of the Code of Virginia.
>
> No electrical transmission line of two hundred kilovolts or more shall be constructed unless the State Corporation Commission shall, after at least thirty days' advance notice by publication in a newspaper or newspapers of general circulation in the counties and municipalities through which the line is proposed to be built, and written notice to the governing body of each such county and municipality, approve such line. As a condition to such approval the Commission shall determine that the corridor or route the line is to follow will reasonably minimize adverse impact on the scenic and environmental assets of the area concerned. If, prior to such approval, any interested party shall request a public hearing the Commission shall, as soon

> as reasonably practicable after such request, hold such hearing or hearings at such place as may be designated by the Commission. This section shall apply to such transmission lines for which rights-of-way acquisitions have not been completed as of April eight, nineteen hundred seventy-two. In any such hearing the public service company shall provide adequate evidence that existing rights-of-way cannot adequately serve the needs of said company. For purposes of this section, "interested parties" shall include the governing bodies of any counties or municipalities through which the line is proposed to be built, and persons residing or owning property in each such county or municipalities and "environmental" shall be deemed to include in meaning "historic."
>
> Approval of a transmission line pursuant to this section shall be deemed to satisfy the requirements of §15.1-456 [local comprehensive plans] and local zoning ordinances with respect to such transmission lines. 5/

A. Facilities Subject To Siting Criteria

The Commission issued a Memorandum To All Electric Utilities ("Memorandum") on July 14, 1972, which clarifies what facilities are subject to the new siting section, and expands the procedures and criteria for applying for approval under that section. The Memorandum states that certificates will be required for the construction of electric utility facilities in the following instances:

1. Within a utility's service area:
   a. For transmission lines of 200 kilovolts or more as described in §56-46.1 and for substations associated with such lines.
   b. For generating units of 10,000 kilowatts

or more construction of which has not commenced on the date of this memorandum.

2. All facilities outside of the utility's service area. 6/

B. Procedures

1. Applications

The Commission's Memorandum requires that all applications for certificates respecting the construction of facilities subject to the Memorandum include, but not necessarily be limited to, the following information:

1. The necessity for the project.

2. Information concerning alternate locations which have been considered.

3. Design data of the facility including approximate size, material and appearance.

4. In the case of transmission lines, information should be submitted concerning the width of right-of-way, width of clearing, method of clearing, method of disposal of trees and brush, proposed ground cover and maintenance of the right-of-way after the line is constructed.

5. In the case of power plants, detailed information should be submitted concerning emissions into the atmosphere or water, waste heat disposal, and consumptive use of water.

6. A list of the state agencies which may reasonably be expected to have an interest in the proposed construction. 7/

The Memorandum also requires that two copies of a map be submitted showing the location or route of the proposed construction.

2. Notice and Hearing

With respect to notifying other state agencies, the Memorandum states:

> It is suggested that copies of applications for transmission lines of 200 kv and over or for power plants to be sent to all State agencies having concern with environmental matters which may be affected by the proposed construction. 8/

With respect to providing local notice and participation, the Memorandum repeats the statutory requirement that certification of transmission lines and generating stations must be preceded by at least 30 days notice by publication once a week for 2 consecutive weeks in newspapers of general circulation. The Memorandum further provides that "any interested party including residents or property owners in each county or municipality through which the transmission line is proposed to be built may request a public hearing." 9/

In Citizens for the Preservation of Floyd County, Inc. v. Appalachian Power Co., the Supreme Court of Virginia held that the statute does not require the Commission to seek out and solicit views of other agencies, but only to "receive" information that may be offered by other agencies and to give it due consideration. 10/

C. Criteria For Approval

The Commission's Memorandum expands the statutory criteria for approval of transmission lines, but not for approval of generating plants. With respect to transmission lines, the Memorandum states:

> Approval is conditioned on the Commission's determination that the route the line is to

> follow will reasonably minimize adverse impact on the scenic, environmental and historic assets of the area concerned . . . . Certification is contingent upon proof by the utility that existing rights-of-way do not adequately serve the needs of the utility . . . . It is further recommended that transmission lines be constructed to the extent practicable in accordance with the guidelines set forth by the Federal Power Commission in Appendix A, Docket No. R-365, Order No. 414, issued November 27, 1970. 11/

In the Appalachian Power case, noted above, the court sustained the Commission's approval of a 765-kilovolt transmission line. Overriding objections by a local citizens' group, the court held that the Commission had developed adequate environmental criteria by adopting the transmission line guidelines promulgated by the FPC. The court also held that the Commission had, consistent with the requirements of the statute, made a reasonable appraisal of site alternatives, including the possibilities of smaller capacity lines and of paralleling existing rights-of-way. Finally, the court held that there was sufficient evidence to support the Commission's finding that the adverse environmental impact of the line would be minimal.

III. LOCATION AND PLANNING OF DEVELOPMENTS GENERALLY

A. Council On The Environment

The Council, in the office of the Governor, is responsible for implementing the Virginia Environmental Quality Act. The purpose of that act is to promote wise use of the State's " . . . air, water, land and other natural resources and to protect them from pollution, impairment or destruction so as to

improve the quality of its environment . . . to initiate, implement, improve and coordinate environmental plans, programs, and functions of the State."[12/] Although the Council does not have independent permitting jurisdiction, it may serve as a coordinating agency where multiple state permits are required. A single unified application for a project requiring a State permit or certificate from more than one State environmental regulatory agency may be submitted to the Administrator of the Council, and a single hearing may be held.[13/] The hearing is to be held within 60 days after the application is complete. Although each participating state agency retains jurisdiction to render a separate decision, these decisions must be rendered within 30 days after the hearing, unless the deciding agency grants itself an extension; such extensions may not exceed 30 days.[14/]

B. State Water Control Board

A certificate is required by the Board for the discharge of various types of wastes or deleterious substances into waters or for the alteration of the physical, chemical or biological properties of State waters.[15/] An exception to the Board's jurisdiction over State waters is the authority of the State Corporation Commission to establish flow release schedules when a dam is required.

C. Air Pollution Control Board

The Board may issue orders that require owners to construct facilities according to approved specifications to meet air quality standards.[17/] The Board has power to perscribe permit fees for major stationary air pollution sources.[18/]

D. Marine Resources Commission

A permit is required from the Commission for use of subaqueous beds to "build, dump, or otherwise trespass upon or over or encroach upon or take or use any materials from the beds of the bays and ocean, rivers, streams, creeks . . . ."[19/] The Marine Commission has taken an advisory role in siting power plants on river banks within its jurisdiction.[20/] However, the Commission has power to review and to modify, remand or reverse the decisions of the wetlands boards, discussed below.[21/]

E. Commission of Game and Inland Fisheries

Although no permit is required from this agency, it may act "as it may deem advisable for the conservation, protection, replenishment, propagation of and increasing the supply of game birds, game animals and fish and other wildlife of the State.[22/] It may serve in an advisory capacity and thus influence a siting decision.

F. Commission of Outdoor Recreation

As it is the purpose of the Commission to plan and provide for acquiring, maintaining, improving, protecting and conserving areas adapted to developing a comprehensive system of outdoor recreational facilities, the Commission may be influential in a State Corporation Commission decision relating to siting.[23/] If a river is so designated, then authority of the General Assembly is required to construct, operate or maintain a dam or structure impeding the river's flow.[25/]

G. Local Wetlands Boards

Counties, cities and towns that have enacted wetlands ordinances require permits for use or development of wetlands within their particular jurisdiction.[26/] Wetlands Boards consist of five local residents appointed by the local governing body for 5-year terms.[27/] Decisions by the Wetlands Boards are subject to review by the Maine Resources Commission, discussed above.

H. Local Zoning Boards

The local governing bodies of counties and municipalities may regulate, restrict, permit, prohibit and determine the uses of land, buildings and other structures through zoning ordinances. No zoning provisions deal expressly with public utilities.

I. Local Planning Commission

Where a local comprehensive plan has been approved and adopted by the local governing body, approval of the local planning commission is required for the construction of public utility facilities whether publically or privately owned. Such approval is governed by the determination that the facility is substantially in accord with the commission's comprehensive plan.[29/] A majority vote of the local governing body can override the plan commission.[30/]

J. Division of State Planning and Community Affairs

The Division of State Planning and Community Affairs is responsible for developing standards and recommending means to control the use of land around "critical environmental areas."[31/] As such, it may serve in an advisory capacity in the Commission's decision making process.

FOOTNOTES

1. Va. Code Ann. §56-46.1 (Supp. 1978).

2. Ibid.

3. Ibid; Citizens For The Preservation of Floyd County, Inc., v. Appalachian Power Co., 248 S.E. 2d 797 (Va. 1978).

4. Va. Code Ann. §56-46.1 (Supp. 1978).

5. Ibid.

6. Memorandum To All Electric Utilities, p. 2.

7. Id., pp. 3-4.

8. Id., p. 5.

9. Id., p. 4.

10. Citizens For The Preservation Of Floyd County, Inc. v. Appalachian Power Co., 248 S.E.2d 797 (Va. 1978).

11. Memorandum, pp. 4-5.

12. Va. Code §10-184.2.

13. Id., §10-184.2.

14. Ibid.

15. Va. Code §62.1-44.5 (Supp. 1978).

16. Letter from A. P. Miller, Attorney General, to A. H. Paessler, Executive Secretary, State Water Control Board, February 5, 1971.

17. Va. Code §§10-17.18:1, 10-17.21 (Michie 1978).

18. Id., §10-17.30:1.

19. Id., §62.1-3 (Supp. 1978).

20. Willrich, "The Energy-Environment Conflict: Siting Electric Power Facilities," 58 Va. Law Rev. 257 (1972).

21. Id.,§62.1-13.13.

22. Id., §29-11 (Michie 1973).

23. Id., §10-21.4 (Michie 1978).

24. Id., §10-169.

25. Id., §10-174.

26. Id., §62,1-13.5 (Supp. 1978).

27. Id., §62.1-13.6

28. Id., §15.1-486.

29. Id., §15.1-456.

30. Ibid.

31. Id., §§10-192, 10-193 (Michie 1978).

CHAPTER 4

FRANCHISING PUBLIC UTILITIES IN VIRGINIA

I. AUTHORITY TO GRANT FRANCHISES

The Virginia Constitution prohibits any "gas, water, steam or electric heating, electric light or power . . . [or] any corporation, association, person, or partnership engaged in these or like enterprises" from using the streets, alleys or public grounds of any city or town without the consent of the municipal authorities.[1/] This constitutional provision has been effectuated through an identically worded statutory provision[2/] and restated in the statutory provisions relating to the regulation of public service companies.[3/] Pursuant to these provisions, franchising power is granted to all cities and towns. Any person or entity providing any of the enumerated services or involved in any "like enterprise" may be granted a franchise. There is no requirement that the franchisee be a public utility or otherwise be providing service to or for the public.

County boards of supervisors have been vested with the same powers that may be exercised by the councils of cities and towns.[4/] Thus, counties are authorized to grant franchises for the use of county roads and grounds.

II. PROCEDURES FOR GRANTING FRANCHISES

A specific statutory procedure is provided for granting franchises for terms in excess of five years. After

the terms of a proposed franchise ordinance have been approved by the mayor, or passed over the mayor's veto, the ordinance must be published in a local newspaper once a week for four consecutive weeks.[5/] The advertisement must invite written bids for the franchise.[6/] The franchise is to be awarded to the highest bidder, although the council may choose to accept a lower bid if acceptance of a lower bid is in the public interest.[7/] If no satisfactory bid is received, the council may award the franchise to any person or corporation which makes application for the franchise.[8/] The franchisee is to bear the expense of advertising the proposed franchise ordinance.[9/]

Although public service corporations are required to obtain a certificate of public convenience and necessity before furnishing service in the state,[10/] there is no express requirement that a potential franchisee obtain such a certificate before being granted a franchise.

III. CRITERIA TO BE USED IN EVALUATING FRANCHISE REQUESTS

As mentioned, franchises must be awarded to the highest bidder unless the council determines that the public interest would be served by granting the franchise to some other bidder.[11/] A franchisee need not be a public utility or provide service to or for the public. A potential franchisee need not obtain a certificate of public convenience and necessity from the Corporation Commission prior to being granted a franchise; however, a public service corporation

may not offer service without having obtained such a certificate.[12] No additional criteria to be used in evaluating franchise requests are provided by statute or case law.

IV. CHARACTERISTICS OF A FRANCHISE

Franchises may not be granted for terms in excess of forty years.[13] While no conditions which will result in the automatic surrender of the franchise have been established by statute or case law, franchises should contain forfeiture provisions to assure "efficiency of public service at reasonable rates and the maintenance of the property in good order throughout the term of the grant."[14] However, despite the apparently compulsory language of this provision, a Virginia court has held that a franchise is not invalid if it does not contain a forfeiture provision.[15]

A franchise may provide that any facilities constructed pursuant to the franchise may become the property of the city or town upon termination of the grant. Compensation to the franchisee, if any, is also to be established in the franchise.[16] Any person occupying streets or other public property except pursuant to a valid franchise, is guilty of a misdemeanor and subject to a daily fine.[17] A statutory provision also provides for a declaration that the property is a public nuisance and must be removed.[18] This statutory provision provides cities and towns with a method of forcing the removal of facilities upon expiration or termination of a franchise.

Neither the statutes nor reported judicial decisions have expressly permitted or prohibited exclusive franchises. However, in one instance, a city granted an exclusive franchise to a company to lay and maintain gas pipes for a term of fifteen years.[19] While the court was not called upon to rule specifically on the question of the validity of an exclusive franchise, it gave no indication that this factor was relevant to the validity or invalidity of the franchise.

A municipality can preclude the operation of a utility authorized by the Corporation Commission to provide service by refusing to grant a franchise.[20] This is only true, however, when a certificated utility attempts to make its initial entry into the city. A municipality cannot force the removal of facilities of a certificated utility after annexing the area which it is serving regardless of the absence of a franchise. From the annexing city or the expiration of any franchise under which the utility operated in the previously unincorporated area.[21]

The statutory grant of franchising authority does not limit the type of utility services which can be franchised. Neither abandonment of the franchise nor a mandatory franchise tax is provided for by statute.

FOOTNOTES

1. Va. Const. art. 7, §8.
2. Va. Code §15.1-375 (Michie 1973).
3. Id., §56-14 (Michie 1974).
4. Id., §15.1-522 (Michie Supp. 1978).
5. Id., §15.1-308 (Michie 1973).
6. Id., §15.1-309.
7. Id., §15.1-310.
8. Id., §15.1-311.
9. Id., §15.1-309.
10. Id., §56-265.3 (Michie 1974).
11. Id., §15.1-310 (Michie 1973).
12. Id., §56-265.3 (Michie 1974).
13. Id., §15.1-307 (Michie 1973), Va. Const. art. 7, §9.
14. Va. Code §15.1-307 (Michie 1973).
15. Town of Victoria v. Victoria Ice, Light & Power Co., 134 Va. 124, 114 S.E. 89 (1922).
16. Va. Code §15.1-307 (Michie 1973).
17. Id., §15.1-316.
18. Ibid.
19. Commonwealth v. Portsmouth Gas Co., 132 Va. 480, 112 S.E. 792 (1922).
20. Town of Culpepper v. Virginia Electric and Power Co., 215 Va. 189, 207 S.E.2d 864 (1974).
21. Id., 207 S.E.2d at 867.