DOE/CS/20289-32

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 New Mexico

DUANE A. FEURER
CLIFFORD L. WEAVER
KEVIN C. GALLAGHER
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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 New Mexico. 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 New Mexico. Attention is

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN NEW MEXICO

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the New Mexico Public Service Commission (Commission). The Commission is composed of three members appointed by the governor with the advice and consent of the senate.[1/] Commission members, who are to be"competent persons and qualified electors of [New Mexico],"[2/] are appointed for six year terms. They must be free from any pecuniary or employment interests incompatible with the duties of the Commission.[3/]

The Commission possesses the exclusive power to regulate public utilities.[4/] The Commission, however, exercises no authority over utilities owned by municipal corporations or H class counties[5/] (counties under fifty-four square miles in area)[6/] unless the general electorate of the municipality or county elects to bring such utilities within the jurisdiction of the Commission.[7/]

Municipalities may establish by contract, rates between the municipality and investor-owned utilities. Such contracts are limited to 25 years in duaration and are subject to Commission approval.[8/] There is no specific procedure for review of local decisions regarding municipally-owned utilities.

II. JURISDICTION OF THE PUBLIC SERVICE COMMISSION

The Commission is given "general and exclusive power and jurisdiction to regulate and supervise every public utility," in accordance with the Public Utility Act.[9] "Public utility" is defined as:

> (1) any plant, property or facility for the generation, transmission, or distribution, sale or furnishing to or for the public of electricity for light, heat, for power or for other uses; (2) any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas . . . for light, heat or power, or for other uses . . . or . . . (4) any plant, property, or facility for the production, transmission, conveyance, delivery or furnishing to or for the public of steam for heat or power or other uses. [10]

The Commission has statutory authority over "persons" which, for the purposes of regulation by the Commission, includes individuals, firms, partnerships, companies, rural electric co-operatives, corporations and lessees, trustees or receivers appointed by any court whatsoever but does not include any municipality or H class county.[11]

As mentioned, a municipality or H class county may elect to come within the jurisdiction of the Commission. The voters of a municipality or H class county must file a petition with the local governing body signed by 25% of the number of legal votes cast in that municipality for governor at the last preceding general election. The municipality will then hold an election to determine whether the municipal utility is to be regulated by the Commission. A majority

vote is required.[12]

There is no specific statutory requirement that a utility receive compensation for its services in order to be within the Commission's jurisdiction. Sales directly to the public are clearly within the Commission's jurisdiction.[13] Indirect sales of gas, water or electricity are also subject to Commission regulation but only to the extent necessary to enable the Commission to determine that "the cost to the utility of such gas, water or electricity at the place where major distribution to the public begins shall be reasonable and that the methods of delivery thereof shall be adequate."[14]

In order for a utility to fall within the Commission's jurisdiction, its services must be provided to or for the public. Whiel persons furnishing the service or commodity only to themselves, their employees or tenants, when that service or commodity is not to be resold to or used by others, are specifically exempted from the Commission's jurisdiction,[15] no statutory provision defines the term "public."

Prior to the inclusion of rural electric co-operatives in the statutory definition of "public utility," the Supreme Court of New Mexico held that a co-operative was not a "public utility" because it served only its members. In Socorro Electric Co-op., Inc. v. Public Service Co.,[16] the court stated that the test of whether or not an entity is a "public utility" is whether it is engaged in the business of supplying service to the public as a class or to a limited

portion of the public as distinguished from holding itself out as serving only particular individuals.

The court noted that the number of customers served is not relevant.

In a second case applying the principle discussed in Socorro, the court held that a corporation which purchased natural gas from a local producer and resold that natural gas to a single industrial customer was not a public utility. The contract with the natural gas supplier provided that the gas was to be resold only for industrial use and not to the public generally.[17/] In a recent case, the court held that the developer of a subdivision who was supplying water to owners of lots in the subdivision was a "public utility" because his customers were neither tenants nor employees. The subdivision contained one hundred lots. Fifty lots had been purchased from the developer and residential dwellings had been constructed on twenty-seven of the lots. The developer was held to be serving a limited protion of the public. The test employed by the court was whether there were sales to a sufficient number of members of the public to clothe the operation with a public interest.[18/]

III. POWERS OF THE COMMISSION

The Commission is given "general and exclusive power and jurisdiction to regulate and supervise every public utility . . . ."[19/] In addition, the Commission may "do all things necessary and convenient in the exercise of its powers

and jurisdiction . . . ."[20] This general grant of authority provides the Commission with a broad statutory base from which to regulate most activities of public utilities.

In addition to its general regulatory powers, the Commission has been granted numerous specific powers with respect to public utilities. The Commission is specifically given power to regulate rates for sales to the public[21] and rates for sales for resale to the public;[22] it must approve the issuance of most securities;[23] it may prescribe a uniform system of accounts;[24] and it must approve mergers and consolidations,[25] agreements or arrangements with other utilities,[26] and sales or leases of property.[27] In addition, the Commission must approve the construction of a new plant;[28] the expansion of an existing plant;[29] the extension of service to new customers not in the original service area;[30] and the abandonment of service;[31] it is also given authority to set standards of service.[32]

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

A. Generally

No public utility may "begin construction or operation of any public utility plant or system or any extension thereof" without first obtainint a certificate or public convenience and necessity from the Commission.[33] No certificate is needed in the case of service extensions into areas already served by the utility or into areas contiguous to its service area but not already receiving similar services from another

utility.[34/] There are no exemptions for non-contiguous areas.

B. Competition

There are no statutory provisions specifically providing for the issuance of exclusive certificates by the Commission. In issuing certificates, however, the Commission is to avoid "unnecessary duplication and economic waste."[35/] The Commission has, on at least one occasion, certificated several electric utilities to serve a single area.[36/]

C. Certificating Procedures

In order to obtain a certificate of public convenience and necessity, the applicant, if it is a corporation, must file its articles of incorporation with the Commission. An applicant must give reasonable notice of its application and must establish that it has received the consent and franchise ffrom the municipality in which construction and operation is proposed.[37/] The Commission must hold a hearing and may deny or grant the application or grant a certificate containing any necessary restrictions.[38/]

The only statutory criteria established with respect to the grant or denial of a certificate is that the proposed service be required by the public convenience or necessity. In addition, the Commission is to avoid "unnecessary duplication and economic waste."[39/] No judicial or Commission decisions have expanded on these statutory criteria.

D. Service Area Disputes

Any public utility which believes that construction or operation of any other utility facility will interfere with

its operations may complain to the Commission.[40] If the Commission finds probable cause for the complaint, it must hold a public hearing after notice to all interested parties.[41] The Commission is to resolve service area disputes so as to avoid unnecessary duplication and economic waste.[42]

E. Abandonment of Service

In order to abandon any portion of its service to the public, a utility must make written application to the Commission for a "certificate that the present or future public convenience or necessity permits of such abandonment." The Commission is to hold a public hearing and give due consideration to the relative cost and value of the service proposed to be abandoned prior to approving the abandonment.[43]

V. APPEALS OF REGULATORY DECISIONS

Any party to any proceeding may, within 30 days after entry of the order or decision, apply for a rehearing of the matters determined by the order or decision of the Commission. The Commission has 20 days to grant or deny the application.[44] A request for a rehearing is not a prerequisite to obtaining judicial review, however. An appeal from any Commission action may be filed by any party to the proceeding in the district court of the county in which the complaint or controversy before the Commission had its origin. The appeal must be filed 30 days after the final order or, if an application for rehearing has been filed, 30 days after denial of the rehearing.[45]

The district court sits without a jury,[46] and may

consider no new evidence in reviewing the Commission's order.[47] The court may only affirm or vacate the order; it may not modify the order. Appeals may be taken from the district court directly to the New Mexico Supreme Court.[48]

FOOTNOTES

1. N. M. Stat. Ann. §§62-5-1, 62-5-3 (Michie 1978).
2. Id. §68-4-1 (Smith 1961).
3. Id. §§62-5-3, 62-5-5.
4. Id. §62-6-4.
5. Ibid.
6. Id. §4-44-3.
7. Id. §62-6-5.
8. Id. §62-6-15.
9. Id. §62-6-4.
10. Id. §62-3-3(F).
11. Id. §62-3-3(D).
12. Id. §62-6-5.
13. Id. §62-3-3(F).
14. Id. §62-6-4(B).
15. Id. §62-3-4.
16. 66 N. M. 343, 348 P.2d 88 (1959).
17. Llano, Inc. v. Southern Union Gas Co., 75 N.M. 7, 399 P.2d 646 (1965).
18. Griffith v. New Mexico Public Service Commission, 86 N.M. 113, 520 P.2d 269 (1974).
19. N.M. Stat. Ann. §62-6-4 (Michie 1978).
20. Ibid.
21. Id. §§62-8-1, 62-8-5, 62-8-7.
22. Id. §62-6-4(B).
23. Id. §§62-6-6 to 62-6-14.
24. Id. §62-6-16.
25. Id. §§62-6-12 to 62-6-13.

26. Id. §62-6-12.

27. Id. §62-6-12.

28. Id. §62-9-3.

29. Id. §62-9-1.

30. Id. §62-9-1.

31. Id. §62-9-5.

32. Id. §62-6-19.

33. Id. §62-9-1.

34. Ibid.

35. Id. §62-9-1.

36. See, New Mexico Electric Service Company v. Lea County Electric Cooperative, 76 N.M. 434, 415 P.2d 556 (1966). (The service areas of two rural electric cooperatives and an investor-owned utility overlapped).

37. N. M. Stat. Ann. §62-9-6 (Michie 1978).

38. Ibid.

39. Id. §62-9-1.

40. Id. §62-9-1.

41. Id. §§62-10-1, 62-10-5.

42. Id. §62-9-1.

43. Id. §62-9-5.

44. Id. §62-10-16.

45. Id. §62-11-1.

46. Id. §62-11-5.

47. Id. §62-11-3.

48. Id. §62-11-7.

CHAPTER 3

SITING OF ENERGY FACILITIES IN NEW MEXICO

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

Power plant siting in New Mexico is controlled by the New Mexico Public Service Commission pursuant to the Public Utilities chapters of the New Mexico statutes.[1/] The siting jurisdiction of the Commission covers new plants, facilities and transmission lines for the generation and transmission of electricity for sale to the public, with specified minimum generating or transmission capacities. Other utility facilities are not covered in the statutes.[2/]

Although the commission's jurisdiction is exclusive, it is precluded from approving a site if it violates a state, county or municipal land use regulation, unless the Commission finds such regulations unreasonably restrictive and determines that compliance with them is not in the interest of public convenience and necessity.[3/] In such case, the Commission gives the interested agency an opportunity to reply, but the judgment of the Commission is "conclusive on all questions of siting, land use, aesthetics and any other state or local requirements affecting the siting, subject to an appeal to the court."[4/] The Commission may not approve a site if the proposed facility would violate applicable state and air pollution standards.[5/]

An interim committee to review the Commission has been established by the legislature. Although many changes have been discussed, none has yet been made.[6/]

II. SCOPE OF THE COMMISSION'S SITING JURISDICTION

The scope of the Commission's siting jurisdiction is limited to new plants designed for, or capable of, generating 300,000 kilowatts or more of electricity for sale to the public within or without the state, whether or not owned or operated by a person which is a public utility subject to regulation by the Commission.[7/] The Commission's siting jurisdiction with respect to transmission lines extends to any "electric transmission line and associated facilities designed for or capable of, operations at a nominal voltage of 230 kilovolts or more, to be constructed in connection with and to transmit electricity from a new plant for which approval is required."[8/]

Prior to construction of such facilities, any "person" must apply to the Commission for site approval.[9/] "Persons" is defined to include individuals, firms, partnerships, companies, rural electric co-operatives, corporations and lessees, trustees or receivers appointed by any court.[10/]

New construction is covered by the statute,[11/] but additions to or modifications of an existing plant are exempted.[12/] Any construction in progress as of June 18, 1971 is also exempted.[13/]

The Commission also has the power to promulgate

rules and regulations, but those adopted so far are only procedural in nature.[14/] As of August, 1978, there have been no cases reported that further define the Commission's siting jurisdiction.

III. CERTIFICATION PROCESS

The siting statute provides that an applicant which is not a public utility must file with the Commission a written application for site approval "setting forth the facts involved."[15/] No proposal of alternative sites is required. The Commission is required to hold a public hearing and give "notice as the commission may prescribe."[16/]

If the applicant is a public utility regulated by the Commission, the application must be made in connection with an application for a certificate of public convenience and necessity as provided by statute.[17/] No time limits for the approval process are provided by the statute.

The procedure for obtaining a rehearing of a Commission decision or appealing such a decision is discussed in Chapter 2, Section V.

IV. CERTIFICATION STANDARDS

A. Factors And Criteria To Be Considered And Applied

The statute provides very broad standards for the Commission to consider in approving or denying applications. The Commission is directed by the legislative purpose provisions of the statute to consider any "adverse effect upon the environment and upon the quality of life of the people of

the state."[18] In addition the Commission is required to apply all applicable air and water pollution control standards and regulations established by agencies of the state having jurisdiction over particular pollutants,[19] and all state, county or municipal land use restrictions.[20] The land use restrictions applicable may be waived by the Commission if found "unreasonably restrictive" and compliance therewith is found "not in the interest of public convenience and necessity."[21]

No rules or regulations have been adopted to further define these standards.[22] Since the statute's enactment in 1971, no cases or decisions have been reported which clarify or develop any siting standards.

V. LOCATION AND PLANNING DEVELOPMENTS GENERALLY

For small generating and transmission facilities not subject to the Commission's siting jurisdiction, separate approval may be required from other state and local agencies.

A. Environmental Improvement Board

The Environmental Improvement Board is responsible for environmental management and consumer protection.[23] The Board promulgates rules and standards in many areas of pollution control. Those most likely to affect an energy facility include: water supply; liquid waste, solid waste sanitation and refuse disposal; air quality management as provided in the Air Quality Control Act;[24] noise control; and nuisance

abatement.[25]

B. Local Zoning Regulations

A single set of statutory sections enables both municipalities and counties to zone.[26] County zoning regulations do not, however, apply within incorporated areas.[27] There are provisions authorizing a municipality to exercise zoning powers extraterritorially, by agreement with the county.[28] All zoning regulations are to be adopted pursuant to a comprehensive plan,[29] and must be designed to further rather traditional zoning goals, including restrictions on building height, population density and the preservation of open spaces.[30] No provisions deal specifically with public utilities or energy facilities.

FOOTNOTES

1. N.M. Stat. Ann. §68-7-1.2(A) (Smith Supp. 1973).
2. Id. §68-7-1.2(A).
3. Id. §68-7-1.2(H).
4. Ibid.
5. Id. §68-7-1.2(F).
6. Mr. Patric T. Orty, Assistant Counsel to the Commission Telephone conversation, 8/4/78.
7. N.M. Stat. Ann. §68-7-1.2(B) (Smith Supp. 1973).
8. Ibid.
9. Ibid.
10. Id. §68-3-2(D).
11. Id., §68-7-1.2(A).
12. Id., §68-7-1.2(E).
13. Ibid.
14. Id. §68-5-1 (Smith 1961).
15. Id. §68-7-1.2(D) (Smith Supp. 1973).
16. Ibid.
17. Id., §68-7-1.2(C). For a discussion of this procedure see Chapter 2.
18. Id. §68-7-1.2(A).
19. Id. §68-7-1.2(F).
20. Id. §68-7-1.2(F), (H).
21. Id. §68-7-1.2(H).
22. Mr. Patric T. Orty, Assistant Counsel to the Commission, Telephone conversation 6/28/78.
23. N.M. Stat. Ann. §12-12-11A.
24. Id. 12-9-1 to 12-9-11.
25. Id. §12-12-11(A) (2, 3, 4, 6, 7).

26. Id. §§3-21-1 to 3-21-26 (Michie 1978).

27. Id. §3-21-2(A).

28. Id. §§3-21-2 to 3-21-5.

29. Id. §3-21-5.

30. Id. §3-21-1.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN NEW MEXICO

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

The New Mexico Constitution makes no express grant of franchising authority. However, it does limit franchising authority by prohibiting the granting, by the legislature, or any municipality of exclusive franchises.[1/]

Express franchising authority is granted by statute in the municipal code.[2/] A municipality is empowered to grant, by ordinance, "a franchise to any person, firm or corporation for the construction and operation of a public utility."[3/] In addition, the commissioners of each county are empowered to permit a public utility to use the public highways and the streets and alleys of unincorporated towns for their pipes, poles or wires.[4/] A grant of a right-of-way in the streets of a municipality for the "erection, construction, maintenance or operation of a public utility" by the county commissioners, prior to the incorporation of a municipality, must later be recognized by a municipality. If the person has erected, constructed or commenced the construction of the utility, then the governing body of the municipality must, without a vote by the electorate:

1. authorize completion of the system,
2. authorize the continued operation and maintenance of the system,
3. recognize the rights acquired by the

person erecting the system, and

4. grant such person a franchise for the maximum term allowed by law, upon terms fair, just and equitable to all parties. 5/

In City of Las Cruces v. Rio Grande Gas Co., 6/ the court determined that if a gas company had commenced erection or construction of a natural gas utility system pursuant to authorization by the county commissioners to use the public way prior to the time the area was annexed by the City of Las Cruces, then the city was required to recognize the company's right to use the streets, alleys and public ways of the annexed area for the purpose of providing gas utility service.

The statute authorizes municipalities to grant franchises to "public utilities." However, neither New Mexico statutes nor court decisions define "public utilities." The only definition of "public utility" in the statutes is in the Public Utilities Act. Under that Act, a "public utility" includes every person that owns, operates, leases or controls any plant, property or facility for furnishing to or for the public electricity, gas, water or steam. 7/ For a more complete treatment of this definition, see Chapter 2. This definition is not made expressly applicable to the municipal code and no cases reveal whether the definition should be applied to limit the scope of the franchise power created by the municipal code.

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

The decision of the court in City of Roswell seems to preclude any finding of implied authority for a municipality to grant a franchise. Although the statutes give municipalities broad regulatory powers over the streets,[8] including the right to regulate their use and the use of structures under them and to regulate their opening or repair, these powers do not include the authority to grant franchises. As the court in City of Roswell concluded, title to the streets and alleys of a municipality is vested in the state, which may directly grant the right to use them or may delegate that authority to the municipality. A municipality has no authority to grant franchises for such a purpose until the power is delegated to it by the state.

III. PROCEDURE FOR GRANTING FRANCHISES

The procedure to be followed for the granting of a franchise to any public utility is provided by statute.[9] The franchise is to be granted by ordinance. Ordinances are to be passed by a majority roll call vote and are to be approved by the mayor within three days.[10] Two weeks prior to consideration by the governing body, any proposed ordinance must be published.[11] It must also be published after it has passed,[12] and does not to become effective until at least 30 days after its adoption, during which time the ordinance is to be twice published in full, not less than 7 days apart.[13] If during that 30 day period, a petition signed by adult residents of the municipality equal in number to 20% of the

number voting in the last regular municipal election objecting to the granting of the franchise is presented to the governing body of the municipality, then the question of the granting of the franchise must be submitted to a vote of the qualified electors.[14/]

If a majority of the electors voting favor the granting of the franchise, then the ordinance becomes effective. If a majority votes against granting the franchise, then the ordinance is repealed.[15/] No written acceptance by the applicant is required before the franchise is effective.

There is no requirement that a certificate of public convenience and necessity be obtained prior to the grant of a franchise. However, proof of the grant of a valid franchise must be shown prior to the grant of a certificate.[16/]

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The only criteria for granting a franchise is that it be granted to a "public utility,"[17/] (see Part I for definition). There are no requirements for competitive bids, the obtaining of a certificate of public convenience and necessity or the assurance that certain standards being met.

V. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The statutes limit the grant of a franchise by both municipalities and counties to not more than 25 years.[18/] There are no provisions in the statutes for longer franchises. Prior to the imposition of the statutory time limits in 1965, the New Mexico courts upheld the validity of 99 year fran-

chises which had been granted by county commissioners.[19] However, the statute now expressly limits the duration of a franchise to 25 years.[20]

If a franchise expires, the city has the right to force the removal of a public utility's lines from the streets.[21]

B. Exclusivity

The New Mexico Constitution expressly prohibits the grant of an exclusive franchise or privilege.

> [N]o exclusive right, franchise, privilege or immunity shall be granted by the legislature or any municipality. [22]

C. Necessity of a Franchise

A public utility may be precluded from operating in a particular area unless it succeeds in obtaining a municipal franchise; the statutes require proof of a franchise before applying for a certificate of public convenience and necessity.[23]

FOOTNOTES

1. N. M. Const. art. 4, §26.

2. In City of Roswell v. Mountain States Tel. & Tel. Co., 78 F.2d 379 (10th Cir. 1935), the court held that under New Mexico law a municipality has no authority to grant a franchise for use of its streets until such power is delegated to it by the state.

3. N. M. Stat. Ann. §3-42-1(A)(1978).

4. Id. §62-1-3.

5. Id. §3-42-2.

6. City of Las Cruces v. Rio Grande Gas Co., 431 P. 2d 492 (S. Ct. N. M. 1967).

7. N. M. Stat. Ann. §62-3-3(F)(1978).

8. Id. §3-49-1.

9. Id. §3-42-1.

10. Id. §3-7-4.

11. Id. §3017-3(A).

12. Id. §3-17-5.

13. Id. §3-42-1(A, B).

14. Id. §3-42-1(C).

15. Id. §3-24-2(E).

16. Id. §62-9-1.

17. Id. §3-42-1(A).

18. Id. §§3-42-1(F), 62-1-3.

19. Mountain States Telephone & Telegraph Co. v. Town of Belen, 56 N. M. 415, 244 P. 2d 1112 (1952), Agua Pura Co. v. Mayor and Board of Aldermen of City of Las Vegas, 10 N. M. 6, 60 P. 208 (1900).

20. N. M. Stat. Ann. §62-1-3 (1978).

21. Banker's Trust Co. v. City of Raton, 258 U.S. 326, 425 S. Ct. 340, 66 L.Ed. 642 (1922).

22. N. M. Const. art 4, §26.

23. N. M. Stat. Ann. §62-9-1 (1978).