DOE/CS/20289-25

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 Mississippi

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 Mississippi. 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 Mississippi. 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 MISSISSIPPI

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities in Mississippi is vested generally in the Public Service Commission (Commission).[1/] The Commission is composed of three members elected for four year terms from separate districts of the state.[2/] Within the purview of its powers, the authority of the Commission supersedes that of local governments. The Commission, for example, is invested with "exclusive original jurisdiction over the intrastate business and property of public utilities."[3/] It is also empowered to amend municipal franchises that contain provisions conflicting with its exclusive jurisdiction over the rates and standards of service of public utilities.[4/]

Local governments play a role in regulating public utilities only through the exercise of their zoning and franchising powers. They may also operate their own utilities which are totally exempt from Commission control, unless they provide services more than one mile beyond their corporate boundaries.[5/] Other than a procedure in which certain provisions in municipal franchises may be subject to modification by the Commission, there is no process by which the decisions of local governments respecting utilities are reviewed by the Commission. See Chapter 4 for a detailed discussion of franchising procedures.

II. JURISDICTION OF THE COMMISSION

The jurisdiction of the Commission extends to all public utilities, which are defined to include persons and corporations owning or operating in the state equipment or facilities for: (1) the generation, manufacture, transmission or distribution of electricity to the public for compensation; (2) the transmission, sale, sale for resale or distribution of natural or artificial gas to the public for compensation; and (3) the transmission, sale, or resale of water to the public for compensation.[6/] The Mississippi statutes do not expressly grant jurisdiction to the Commission over heat, cold or steam utility services. There are no judicial decisions which imply Commission jurisdiction over these services. Unless a basis for jurisdiction can be implied from the Commission's regulatory authority over electricity or water, heat, cold and steam services are not subject to Commission regulation.

The utility functions subject to Commission jurisdiction are identified separately for each of the different utility services. The generation, manufacture, transmission, or distribution of electrical services are public utility functions subject to regulation.[7/]

The Commission has jurisdiction over the transmission, sale, sale for resale, or distribution of gas. However, the statute expressly precludes Commission jurisdiction over

the production and gathering of natural gas, the sale of natural gas in the vicinity of the production field, and the distribution of liquified petroleum gas.[8/] The transmission, distribution, sale or resale of water are functions subject to Commission regulation.[9/]

The Commission has jurisdiction only over utility services that are provided "for compensation."[10/] Except as noted in the following paragraph, sales of electricity, gas or water directly to the ultimate consumer are all subject to Commission jurisdiction. Sales of natural or artificial gas for resale to the public are expressly subject to Commission jurisdiction. "Resales" of water to the public are also subject to Commission control.[11/] There is no similar statutory authority allowing the Commission to control indirect sales of electricity.

Commission jurisdiction is based upon utility service "to or for the public."[12/] This jurisdiction does not extend, however, to any person who furnishes services "only to himself, his employees, or tenants as an incident to such employee service or tenancy, provided that such services are not sold or resold to such tenants or employees on a metered or consumption basis."[13/] What constitutes the "public" has not been further defined by either statutes or case law. The only point that appears to be well-settled is that a public utility must provide service to more than

one customer. In Holder v. Mississippi Fuel Co.,[14] the court held that a gas company was not a public utility because the transmission of gas through its pipeline to only one customer was not "to the public." Other cases suggest that public utility status implies service on a non-discriminating basis to all those that apply. Cooperatively-owned electrical power associations that provide service only to members have been held to be public utilities because they must accept as members all those applicants who live within a reasonable distance of their distribution lines. In Capital Electric Power Ass'n. v. McGuffee,[15] the court held that an electric power association obligated to provide service to all those who applied for membership had many of the attributes of a public utility. In subsequent cases, the courts found that such associations were subject to the jurisdiction of the Commission. There are no other judicial decisions which clarify the meaning of "sales to the public."

The Commission is expressly denied any authority over public utilities owned or operated by municipalities "except as to extensions of utilities greater than one mile outside corporate boundaries."[16] In Mississippi Pub. Service Comm'n v. City of Jackson,[17] a statutory provision stating that the Commission could not regulate the rates charged by municipalities for utility services was held to apply only to the territory of the municipality and land within one mile

of the municipal boundaries. The Commission also lacks complete jurisdiction over cooperatively-owned gas and electric power associations. It cannot regulate the rates charged to cooperative members unless they are operating in a municipality where similar service is provided by at least one other utility.[18] Gas and electric power associations are regarded as public utilities and are subject to the jurisdiction of the Commission for other purposes. In Delta Electric Power Ass'n. v. Mississippi Power & Light Co.,[19] the court held that electric power associations are public utilities, and their certificated service areas are entitled to protection.

III. POWERS OF THE COMMISSION

The Commission is invested with "exclusive original jurisdiction over the intrastate business and property of public utilities."[20] Statements in judicial decisions by Mississippi courts indicate that this power is interpreted expansively.[21]

In addition to its broad authority to regulate public utilities, the Commission has numerous specific powers. The Commission has the power to establish just and reasonable rates;[22] has adopted a rule which allows public utilities to contract, subject to Commission approval, to supply electricity to a manufacturer for use in manufacturing without reference to the established rate schedules;[23] and is authorized to establish standards of service.[24] The Commis-

sion may "require every public utility to establish, construct, maintain, and operate any reasonable extension of its existing facilities,"[25] grant or deny a certificate of public convenience and necessity,[26] to control construction or the initiation of operations by a public utility and promulgate such rules as may be "reasonably necessary or appropriate."[27] Rules promulgated thus far include the Utility Rules of Practice and Procedure (including the basic rules governing applications for certification) and the Rules and Regulations governing Public Utility Service (establishing basic standards of service.) Other powers granted to the Commission include the authority to prescribe a uniform system of accounts;[28] to require a utility to submit whatever reports the Commission deems relevant;[29] to fix rates of depreciation for utility property;[30] and to control transfers of certificates of public convenience and necessity.[31]

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

A. Generally

A certificate of public convenience and necessity from the Commission is a prerequisite to the initiation of public utility operations in Mississippi. "No person shall construct, acquire, extend or operate equipment for manufacture, . . . generating, transmitting or distributing

natural or manufactured gas, or mixed gas, or electricity or water, for any intrastate sale to or for the public for compensation" without having first obtained such a certificate.[32/] The Commission, therefore, has authority to control the construction of utility facilities.

A certificate is not required for "extensions or additions within the corporate limits of a municipality being served by the holder of a certificate of convenience and necessity."[33/] Where two or more public utilities serve the same municipality, however, extensions must be limited to their respective certificated areas.[34/] Municipalities constructing or operating their own utility services are totally exempt from the Commission's certificating authority in their own territory and within one mile of their corporate limits.[35/] The Commission is also authorized to provide exemptions for extensions or additions outside of municipalities "under such general rules as will promote the prompt availability of such service to prospective users and at the same time prevent unnecessary and uneconomic duplication of such facilities."[36/] Pursuant to this authority, the Commission has exempted from the general certification requirements all extensions of rural electric transmission or distribution lines which:

> 1. Are less than one mile in length and will not result in the duplication of existing facilities (if written approval is obtained from the Commission and any affected utility); or

2. Are less than five miles in length, in an area for which a certificate of convenience and necessity has already been granted, and will not result in the duplication of existing facilities. 37/

B. Competition

Courts in Mississippi have traditionally followed a policy of limiting competition among fixed service utilities. This has been accomplished by treating certificates of convenience and necessity as granting exclusive territorial rights. 38/ This position was first established in common carrier cases. In Tri-State Transit Co. of Louisiana v. Dixie Greyhound Lines, 39/ for example, the court held that "a certificate should not be granted where there is existing adequate service over the route applied for, and, if inadequate, unless the existing carrier has been given an opportunity to furnish such additional service as may be required." The rule of Tri-State Transit, however was extended to fixed service utilities soon after the enactment of the Public Utilities Act of 1956. Capital Electric Power Ass'n. v. Mississippi Power & Light Co., 40/ for example, involved a dispute as to which of two electric utilities should supply service to a wood-chipping plant. The plant was located within the area that had been certified to Capital Electric, but the plant officials preferred the service offered by the Power & Light Co. and signed a contract with it. The Power & Light Co. sought and received Commission certification for

the necessary extension of its lines. The Supreme Court, reiterating the Tri-State Transit rule, reversed the grant that had been made by the Commission. The court held that in certifying a service area the Commission granted the right to exclusive service. A second certificate, therefore, to provide service in the same area should not have been granted as long as the existing utility was willing to conform to such orders as the Commission might make, even if it was not immediately capable of providing adequate service. Similarly, in Mississippi Power Co. v East Mississippi Electric Power Ass'n.,[41] the court held that an electric utility had the exclusive right to continue operating in the area in which it had provided service prior to the effective date of the Public Utilities Act of 1956, and for which it had received Commission certification. This right to exclusive service was upheld despite the fact that the utility extended service to within one mile of a municipality operating its own electrical utility.

Since the decision in Tri-State Transit, the Mississippi courts have relaxed their stand against competition under circumstances indicating that the public would benefit from limited competition. For example, in Barnett v. Movers Conference of Mississippi, Inc.,[42] for example, the court dealt with competition among moving companies in an area that was experiencing rapid growth. It reasoned that

the Tri-State Transit rule applied only where certification extended over a definite route and that it did not preclude competition among carriers operating over irregular routes within the same general area. A more important consideration may have been the fact that there was sufficient business for all the movers to share. The court held that the Commission had "ample authority to add additional certificated movers and haulers in areas where conditions have changed so that the public may be better served in a growing, progressive area where the communities are rapidly growing."[43/] Keith v. Bay Springs Telephone Co.[44/] was an even more significant decision. There the Commission found that a proposed radiotelephone service was essentially different from the existing service because it would operate on different frequencies. The Commission, therefore, granted an additional certificate to provide service in the same area. The Supreme Court, in affirming the Commission's decision, reasoned that the rule of Tri-State Transit applied only if the grant of an additional certificate would result in wasteful duplication of services. The court further stated that the rule should not "interfere with progress in equipment or methods of serving the public or technological improvements devoted to the public service."[45/]

Some decisions have suggested that a limited degree of competition is allowable among fixed service

utilities. In Mississippi Power Co. v. South Mississippi Electric Power Ass'n,[46] the South Mississippi Power Ass'n was an umbrella corporation composed of nine electric power associations. The nine member associations individually purchased their electrical power from two privately owned electric utilities. Each of these privately owned utilities was certificated to supply electricity to certain of the facilities owned by the associations. The umbrella corporation petitioned the Commission for permission to build a generating plant and 400 miles of transmission lines in order to provide a new supply of electricity to four of its members, and the Commission granted the necessary certificates. The court affirmed the Commission decision, relying chiefly upon the court's holding in Keith v. Bay Springs Tel. Co., mentioned above. The court, in Mississippi power reasoned that there would be no "wasteful" duplication of facilities, and that the public need for more generating capacity outweighed the certificated right of the protesting companies, even though their services had not been inadequate.[47]

The exceptions to the prohibition of competition in the area of fixed service utilities, however, are strictly limited. The courts are basically committed to the concept of exclusive service areas for these kinds of public utilities. For example, the integrity of a certificated

service area will be protected by the courts even when the corporate limits of a municipality supplying its own utility services expand to encompass the area.[48] Several recent decisions have also reaffirmed the prohibition of competition among fixed service utilities providing the same service. In Capital Electric Power Ass'n v. City of Canton,[49] the court held that an award of a certificate of public convenience and necessity by the Commission to an electric utility was an exclusive permit to furnish electricity to the persons using electricity in the area designated so long as the utility holding the certificate is capable and willing to provide electric energy to the persons within the area. Also, in Capital Electric Power Ass'n v. Mississippi Power & Light Co.,[50] the court refused to permit a college to purchase electricity from one public utility and use it to provide power to a new dormitory located within the certified service area of another electrical utility, stating that "the explicit policy under our Act has been one of 'exclusive' service area."

C. Certificating Procedure

The Commission rules require that an application for a certificate of public convenience and necessity be submitted in writing generally describing the proposed services, the area in which they are to be supplied, and any

facilities that are to be built.[51] An application for certification within a municipality must be accompanied by evidence of a municipal franchise.[52] The statutory procedure for granting a certificate requires the Commission hold a hearing on the matter after having provided reasonable notice to all interested parties.[53] The grant of a certificate is contingent upon a Commission finding that "the present or future public convenience and necessity require or will require the operation of such equipment or facility."[54] A certificate can be transferred from one public utility to another only if the Commission finds, after a public hearing, that the transaction is proposed in good faith and that the "assignee, lessee, purchaser, or transferee is fit and able properly to perform the public utility services authorized by such certificate . . . and that the transaction is otherwise consistent with the public interest."[55]

V. APPEALS OF COMMISSION DECISIONS

Although there is no requirement in Mississippi that administrative remedies be exhausted before appeal to the judicial system, an optional administrative review is provided. Any party to a proceeding before the Commission may request a rehearing within 30 days after the entry of an order. The decision to grant or deny such a rehearing is

discretionary with the Commission, but it must be made within 20 days after a request has been made.[56/] Any party aggrieved by any final order, finding, or judgment of the Commission may take an appeal, regardless of the amount involved, to the Chancery Court of the First Judicial District of Hinds County.[57/] The appeal must be filed within 30 days after the entry of the Commission's order or within 30 days after an application for rehearing has been denied.[58/] No new or additional evidence may be introduced on appeal and the case is determined upon the record as certified by the Commission.[59/] A Commission order cannot be "vacated or set aside either in whole or in part, except for errors of law, unless the court finds that the order . . . is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority of jurisdiction or the Commission, or violates constitutional rights."[60/] Appeals from a final decision of the Chancery Court may be taken to the State Supreme Court as in other civil actions.[61/]

FOOTNOTES

1. Miss. Code Ann. §§77-1-1 to 7-1 49 (1973).
2. Id. §77-1-1.
3. Id. §77-3-5.
4. Id. §77-3-19.
5. Id. §77-3-1.
6. Id. §77-3-3(d).
7. Id. §77-3-3(1).
8. Id. §77-3-3(2).
9. Id. §77-3-3(4).
10. Id. §77-3-3(d).
11. Id. §77-3-3(d)(4).
12. Id. §77-3-3(d).
13. Ibid.
14. Holder v. Mississippi Fuel Co., 317 So. 2d 891 (Miss. 1975).
15. Capital Electric Power Ass'n v. McGuffee, 226 Miss. 227, 83 So. 2d 837 (1955).
16. Miss. Code Ann. §§77-3-1, 77-3-5(a) (1973).
17. Mississippi Pub. Service Comm'n v. City of Jackson, 328 So. 2d 656 (Miss. 1976).
18. Miss. Code Ann. §§77-3-5(b), 77-3-15 (1973).
19. Delta Electric Power Ass'n v. Mississippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504 appeal dismissed, 375 U.S. 77 (1963).
20. Miss. Code Ann. §77-3-5 (1973).
21. Capital Electric Power Ass'n. v. Mississippi Power & Light Co., 216 So. 2d 428, 430 (Miss. 1968).

22. Miss. Code Ann. §§77-3-79, 77-3-41 (1973).

23. Id. §77-3-35; See Rule 7(B), Utility Rules of Practice and Procedure (1957).

24. Miss. Code Ann. §§77-3-21, 77-3-33(2) (1973).

25. Id. §77-3-29.

26. Id. §77-3-11.

27. Id. §77-3-45.

28. Id. §77-3-31.

29. Id. §77-3-79.

30. Id. §77-3-31.

31. Id. §77-3-23. See Chapter 4, Parts III and V. for a detailed discussion of the power of the Commission to amend municipal franchises.

32. Miss. Code Ann. §77-3-11(1) (1973).

33. Id. §77-3-13(3).

34. Id. §77-3-15.

35. Id. §77-3-1.

36. Id. §77-3-13(3).

37. Utility Rules of Practice and Procedure Rule 6(F), (1957).

38. See generally, Phillips, Mississippi Regulatory Policy in the Electric Utility Industry, 47 Miss. L.J. 645 (1976).

39. Tri-State Transit Co. of Louisiana v. Dixie Greyhound Lines, 197 Miss. 37, 19 So. 2d 441, 444 (1944).

40. Capital Electric Power Ass'n v. Mississippi Power & Light Co., 240 Miss. 139, 125 So. 2d 739 (1961).

41. Mississippi Power Co. v. East Missippi Electric Power Ass'n., 244 Miss. 40, 140 So. 2d 286 (1962).

42. Barrett v. Movers Conference of Mississippi, Inc., 203 So. 2d 584 (Miss. 1967).

43. Id. 203 So. 2d at 587.

44. Keith v. Bay Springs Telephone Co., 351 Miss. 106, 169 So. 2d 728 (1964).

45. Id. 168 So. 2d at 732-33. Accord, Keith v. Palmer, 235 So. 2d 454 (Miss. 1970) (proposed radiotelephone service differed significantly from the existing service both because it would operate on different frequencies and because it could offer greater privacy with selective calling apparatus).

46. Mississippi Power Co. v. South Mississippi Electric Power Ass'n., 254 Miss. 754, 183 So. 2d 163, cert. den., 385 U.S. 823 (1966).

47. See also Capital Electric Power Ass'n v. Mississippi Power & Light Co., 216 So. 2d 428 (Miss. 1968) (an electric utility had the right to supply its own substation with standby power, even though it was located within the certificated service area of another public utility, and there might be limited duplication of facilities).

48. E.g. City of Jackson v. Creston Hills, Inc., 252 Miss. 564, 172 So. 2d 215 (1965) (even though the Commission lacked jurisdiction to issue a cease and desist order, a public utility water company was entilted to compensation where a city, whose corporate boundaries had expanded, invaded its certificated service area and forced it to go out of business).

49. Capital Electric Power Ass'n v. City of Canton, 274 So. 2d 665, 668 (Miss. 1973).

50. Capital Electric Power Ass'n v. Mississippi Power & Light Co., 218 So. 2d 707, 714 (Miss. 1969).

51. Rules 5 and 6, Utility Rules of Practice and Procedure (1957).

52. Miss. Code Ann. §77-3-19 (1973).

53. Id. §77-3-13(3).

54. Id. §77-3-11.

55. Id. §77-3-23.

56. Id. §77-3-65. See Rule 8(H), Utility Rules of Practice and Procedure (1957) (more complete statement of the procedures for requesting rehearing by the Commission).

57. Miss. Code Ann. §§77-1-45, 77-3-67(1) (1973).

58. Id. §77-3-67(1).

59. Id. §§77-1-45, 77-3-67(3).

60. Id. §77-3-67(4).

61. Id. §77-3-71.

CHAPTER 3

SITING OF ENERGY FACILITIES IN MISSISSIPPI

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

There is no comprehensive energy facilities siting legislation in effect in Mississippi, and there are no proposals for the enactment of siting legislation currently before the Mississippi legislature.[1/] There are, however, a number of state and local agencies with general authority over planning and development which exercise indirect control over the location of energy facilities.

II. LOCATION AND PLANNING OF DEVELOPMENT GENERALLY

A. Public Service Commission

The Commission is authorized to grant certificates of public convenience and necessity. No public utility may construct or operate equipment for the generation or transmission of electricity without Commission certification.[2/] In granting certificates, the Commission is not authorized to consider specific factors involved in the location of proposed facilities. The Commission's rules require only that an application for certification of facilities describe "the approximate location thereof."[3/] A spokesman for the Commission has confirmed that the Commission does

not consider specific siting factors such as environmental impact in granting certificates.[4/]

B. Air and Water Pollution Control Commission

The state Air and Water Pollution Control Commission establishes and enforces air and water quality standards for the state.[5/] A permit board, composed of five members of the Pollution Control Commission (all the heads of other state agencies) has authority to issue air and water permits.[6/] It is unlawful, for example, for any person to "build, erect, alter, replace, use or operate any equipment which will cause the issuance of air contaminants" without a valid permit.[7/] A permit must also be obtained prior to the "construction, installation, or operation of any industrial, commercial or other extablishment . . . or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge of wastes into the waters of the state or would otherwise alter the physical, chemical or biological properties of any waters of the state in any manner not already lawfully authorized."[8/] "Wastes" are defined to include any solid, liquid, or gaseous substance which may tend to alter the temperature of waters within the jurisdiction of the state in a deleterious manner.[9/]

C. Marine Resources Council

The state Marine Resources Council also possesses significant permit-granting authority under the Coastal Wetlands Protection Law.[10/] The "coastal wetlands" include all

Publicly owned lands subject to the ebb and flow of the tides below the watermark of ordinary high tide.[11/] With respect to these lands, the Council has authority to grant or deny permits for activities including dredging or excavating, dumping or filling of soil, damaging any flora or fauna, and the erection of structures which "materially affect the ebb and flow of the tide."[12/] In addition to meeting the requirements of the Air and Water Pollution Control Commission, an applicant for a Wetlands permit must submit an environmental impact statement, and demonstrate that the coastal wetlands will be preserved in their natural state, or that the alteration will serve "a higher public interest in compliance with the public purposes of the public trust in which the coastal wetlands are held."[13/]

D. Board of Water Commissions

The state Board of Water Commissioners controls the appropriation of surface and groundwaters.[14/] Application must be made to the Board for the appropriation of water from any surface, stream, lake or other watercourse.[15/]

E. High Commission

The state Highway Commission is empowered to regulate the "placing, erection, removal or relocations" of all transmission lines and pepelines along state highways that may interfere with ordinary travel.[16/] This does not authorize the Commission to deny the use of the state highways for utility facilities. Rather, it is intended to enable the Commission to protect the highways and to require adequate safety

standards for the construction of utilities within highway rights-of-way.[17/]

F. Local Government

The Mississippi statutes which confer zoning powers upon local governments do not specifically mention utility facilities. Municipalities and counties may, however, "regulate the height, number of stories and size of buildings and other structures, the percentage of it that may be occupied, the size of yards, courts, and other open spaces, . . . and the location and use of buildings, structuring and land for trade, industry, residence or other purposes."[18/] Zoning regulations must be adopted in accordance with a comprehensive plan.[19/]

Local soil conservation districts are empowered to formulate and enforce land use regulations primarily for the purpose of controlling soil erosion.[20/]

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FOOTNOTES

1. Mr. B. Smith, Commission Legal Counsel, Telephone conversation, 9/25/78.

2. Miss. Code Ann. §77-11 (1973).

3. Utility Rules of Practice and Procedure, Rule 6(C)(3).

4. Mr. B. Smith, Commission Legal Counsel, Telephone Conversation, 9/25/78.

5. Miss. Code Ann. §§49-17-17, 49-17-19 (Supp. 1977).

6. Id. §§49-17-28, 49-17-29.

7. Id. §49-17-29(1)(b).

8. Id. §49-17-29(2)(b)(iii).

9. Id. §49-17-5(1)(b).

10. Id. §§49-27-1 to 65.

11. Id. §49-27-5(a).

12. Id. §§49-27-5,(c), 49-27-9.

13. Id. §§49-27-3, 49-27-11, 49-27-23.

14. Id. §§51-3-31, 52-4-9 (1973).

15. Id. §51-3-31.

16. Id. §65-1-19(f).

17. Berry v. Southern Pine Electric Power Ass'n.,212 Miss. 260,76 So. 2d 212 (1954) (the authority of the Highway commission to regulate the placement of utility facilities amounted only to power of supervision in order to prevent them from endangering ordinary travel).

18. Miss. Code Ann. §17-1-3 (1972).

19. Id. §17-1-9.

20. Id. §§ 69-27-33, 69-27-39 (1973).

CHAPTER 4

LAW GOVERNING FRANCHISES IN MISSISSPPI

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

Municipalities in Mississippi are expressly authorized to grant franchises for the use of their streets. With respect to transmission lines, "the governing authorities of municipalities shall have the power to grant the right for the erection of telegraph, electric light, or telephone poles, posts, and wires along and upon any of the streets, alleys, or ways of the municipality."[1] With respect to pipelines,

> the governing authorities of municipalities shall have the power to grant to any person, corporation, or association . . . the use of the streets, alleys, and other public grounds for the purpose of laying, constructing, repairing, and maintaining gas, water, sewer, or steam pipes, or conduits for electric light, telegraph and telephone lines, and pipelines for the purpose of transporting crude oil, crude petroleum, kerosene, gasoline, and other commodities transportable by pipeline.[2]

The statutory grants are given in general terms to the "governing authorities of municipalities," which indicates that they apply to all classes of municipalities regardless of their size or form of government. Counties have no authority to grant franchises, although they may have implied authority to grant franchises over, under, or across roads and public places.[3]

The statutes do not indicate that municipal franchises can only be granted to certain kinds of entities.

With respect to pipelines, but not electronic transmission lines, municipal authorities are expressly authorized to grant the use of streets to "any person, corporation, or association."[4/]

The power of municipalities to grant franchises need not be regarded as extending only to "public utilities." Electric and gas utilities were not subject to the jurisdiction of the Public Service Commission until 1956, long after municipalities were empowered to grant franchises for electric wires and gas mains. Even today, a steam heating utility probably does not fall within the statutory definition of a "public utility" as a "public utility" is limited to electric, gas, telephone, and water sales to the public for compensation.[5/] Since municipalities are empowered to grant franchises for the laying of steam pipes, they are not limited to dealing with entities that are "public utilities" in the sense of being subject to the jurisdiction of the Commission.[5/]

The requirement that municipalities grant franchises only for a "public purpose," however, should be read into the governing statutes. The public in Mississippi possesses only an easement in the streets and highways.[6/] The grant of a franchise to make use of the streets for a purely private purpose would probably be disallowed by the courts as inconsistent with the rights of the abutting owners. The category of public purposes for which the highways may validly be used is sufficiently comprehensive, however, to allow for a grant to a cogeneration facility, whether or not it be deemed a

"public utility." Judicial decisions seems to support this proposition.

In the early case of Town of Hazlehurst v. Mayes,[7] for example, the court refused to allow damages for the loss suffered by an abutting owner whose ornamental trees were trimmed so that they would not interfere with the erection of an electric power line above one of the municipal streets. The court reasoned that the interest of the public was superior to that of the abutting owner, and that the municipal streets could properly be devoted to any use that was incidental to their use as public thoroughfares. The erection of telephone or telegraph lines, in this court's view, would have imposed an additional servitude and entitled the abutting owner to compensation. The erection of the electric wires, however, did not require compensation because they would provide power to light the city streets and further their use for transportation purposes. The city could, without infringing upon the rights of abutting owners, "dig drains, lay gas pipes or water mains, construct sewers, or erect posts and wires for lights, because such things and their incidental uses are within the contemplated scope of the dedication of the highways to the public use."[8]

In Berry v. Southern Pine Electric Power Ass'n.,[9] the uses to which the public roads could be applied without compensating the abutting owners was expanded to include the erection of telephone and telegraph lines. Applying the same rationale as Hazlehurst, the court indicated that telephone

and telegraph lines did not impose an additional servitude because the messages they carried relieved the highways of much of the traffic to which they would otherwise be exposed. The court held, however, that the erection of electric power lines in a rural setting did impose an additional servitude since they were not used to light the roads. "[T]here is no relation between the operation of an electric power line along a rural highway and public travel thereon."[10/] The damages that were awarded in that case, however, reflected injury only to the interests of the abutting owner in land lying outside the public right-of-way. The power lines, which were erected on poles only 25 feet high, interferred with television reception and reduced the value of the plaintiff's remaining land for residential purposes. The court gave no indication of what loss the abutting owner suffered merely because the lines were erected in the public right-of-way.

The rights of abutting owners were further curtailed in Mississippi Valley Gas Co. v. Boydstun.[11/] There a gas distribution line was buried three feet beneath the surface of a rural highway. The plaintiff sought damages representing the "rental" value of the land occupied by the pipe. The court refused to award such damages, but not on the basis of Hazlehurst and Berry. It reasoned, instead, that although the abutting owner retained the fee to the land underlying the road, he did not possess an interest which he could have

transferred to the gas company under any circumstances. Not having a present interest in the land, he lost nothing when the pipeline was installed. The court held that, henceforth, abutting owners could recover compensation for the construction of utility facilities within a public right-of-way if there was actual damage to their interests in property lying outside the right-of-way.

The holding in Boydstun can reasonably be extended to all manner of utility facilities. The mere installation of such facilities within a public right-of-way does not by itself encroach upon the interests of the abutting owners. They are entitled to compensation, as a general rule, only for actual damages inflicted upon their interests in adjoining property. The court in Boydstun, however, dealt with a public utility providing gas service to the general public. The fact that a "public purpose" was being served by the facilities in dispute was implicit in the reasoning of the court. An energy facility similarly supplying an important community service could probably be brought within the ruling in Boydstun, whether or not it is technically a "public utility," so long as it serves more than a purely private interest.

Municipalities are specifically authorized to grant franchises for the maintenance of poles and wires for "electric light" only.[12/] This provision could be viewed as a limitation on municipal franchising powers.

However, while there is no case law on this point, one could argue that a broader power should be implied from this statutory provision. The statutory terminology may be no more than a historic anomaly. There seems to be no other reason (given the holding in Boydstun) to distinguish between lines that provide electric power for lighting or any other useful purpose, particularly, since the same line may serve more than one purpose.

In addition, the statutory provision establishing the procedures for the granting of franchises does not maintain the same terminology and, instead, is worded in terms of grants to "electric light or power plants."[13/] Public utilities, moreover, are required to obtain a franchise before they can receive a certificate of public convenience and necessity to operate within a municipality.[14/] This requirement is imposed on all public utilities, regardless of whether they provide an electric light service or any other electrical service, and indicates that the state legislature regards municipal franchising authority as being comprehensive.

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

In view of the degree to which franchising authority is governed by explicit statutory provisions, implicit authority is only of limited relevance in Mississippi. There are, however, a number of statutory provisions from which additional franchising power may be derived. Municipalities of all classes, for example, have general power "to enact ordinances for the purposes provided by law, where same are not repugnant

to the laws of the state."[15] They also have power to regulate "public grounds,"[16] to "provide for the lighting of streets . . . and the erection of lamps and lamp posts,"[17] and to "exercise full jurisdiction in the matter of streets."[18]

These provisions suggest that any use of the streets by an energy facility that does not fall within the terms of an explicit grant of franchising authority, may, nevertheless, be franchised under an implicit municipal power to control the use of the streets.[19]

III. PROCEDURES FOR GRANTING FRANCHISES

The basic procedures governing the grant of a franchise are provided by statute.[20] Ordinances granting franchises "shall be introduced in writing and read at a regular meeting of the governing body of such municipality and shall thereafter remain on file with the municipal clerk for public inspection for at least two weeks before the final passage or adoption thereof." In addition, the grant of a franchise to any "gas works, water works, electric light or power plant, heating plant, . . . or other public utility operating within such municipality must be approved by the passage of the ordinance granting same by a majority of the qualified electors of such municipality voting thereon at a general or special election." The requirement of a public referendum will probably apply to the grant of a franchise to any energy facility, regardless of whether or not it is a "public utility" subject to the jurisdiction of the Public Service Commission. These procedures apply to all classes of municipalities.[21]

All ordinances must be read and considered by sections at a public meeting of the governing authorities.[22] An ordinance cannot contain more than one subject, which must be clearly expressed in its title.[23] All ordinances (unless otherwise provided by law) must also be certified by the municipal clerk, signed by the mayor or a majority of all the members of the governing body, recorded in the ordinance book, and published at least once in a local newspaper of general circulation.[24]

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

As mentioned, statutory provisions do not expressly limit the granting of franchises to those holding themselves out as ready and willing to serve the public at large, for public utility purposes, or the like. However, as discussed in section I of this Chapter, an attempted grant of a franchise for purely private purposes would probably be held to be in conflict with the rights of abutting owners who retain fee ownership of municipal streets.

There are no statutory requirements for obtaining the approval of the Public Service Commission or for engaging in competitive bidding prior to the grant of a franchise. The imposition of additional criteria in evaluating a franchise request is within the discretion of the local authorities. They may, for example, "regulate" the grant of a franchise for the erection of electrical wires.[25] The grant of a fran-

chise to lay pipelines is, similarly, "on such terms and conditions as the governing authorities may prescribe."[26/] Any conditions imposed upon a public utility are subject, nevertheless, to the Commission's supervening jurisdiction over rates and services.[27/] This has not been a significant area of litigation is Mississippi, however, and there are not yet any judicially established standards upon which further discussion can be based.

V. CHARACTERISTICS OF A FRANCHISE

The franchising powers of most classes of municipalities in Mississippi are established by a generally applicable statutory scheme.[28/] These statutes, however, provide for exceptions where they might conflict with the "provisions of the special charter of a municipality or the law governing the commission form of government."[29/] The law that has been enacted for the commission form of government does not differ in any significant way from the general law of the state with regard to franchises.[30/] The franchising powers of municipalities with commission governments are, therefore, established by the statutory scheme. Municipalities governed by special legislative charters, however, may possess unique grants of power. The characteristics of the franchises that can be granted by special charter cities can be definitively ascertained only by a study of their individual charters.

Municipal franchises governed by the general statutory scheme are expressly limited in duration. None can

be granted more than 25 years.[31] These same statutory provisions also expressly preclude the granting of exclusive franchises.[32] Another important characteristic of municipal franchises under the general statutory scheme is that they must be supported by payments to the local authorities.[33] The fact that franchise ordinances cannot deal with more than one subject also suggests that a franchise might have to be limited to the provision of a single utility service.[34]

The Public Service Commission cannot certify a public utility for operations within a municipality until it has secured the appropriate franchise.[35] It cannot, therefore, override the refusal of a municipality to franchise the initiation of operations by a public utility.[36] Once a public utility has received its initial franchise and certification, however, it may continue to provide service within the municipality even after its franchise expires. It is required under such circumstances to pay the municipality 2% of the revenue from its gross sales within the locality, and the only remedy of the municipal authorities is to petition the Commission for a hearing as to whether or not the certificate "may then and thereafter be granted on a permanent basis."[37] The Commission is also authorized to amend municipal franchises granted to public utilities in order to "exclude and remove therefrom any provision in conflict with or repugnant to the exclusive jurisdiction of the Commission over rates and services and which shall in any way fix or affect rates."[38]

One important limitation on the power of municipalities to franchise was enunciated in Capital Electric Power Ass'n. v. Mississippi Power & Light Co.,[39] and in Delta Electric Power Ass'n. v. Mississippi Power & Light Co.,[40] In these cases, it was held that a utility's municipal franchises do not expand coextensively with municipal boundaries into areas previously certified to another utility. In both cases, the facts were the same. A public utility had been granted a "grandfather" certificate from the state Public Service Commission to continue serving areas which it had been serving on the effective date of the Public Utility Act. These areas were immediately outside the corporate limits of a city. The city tried to prevent the utility holding the "grandfather" certificate from continuing to service an area annexed by the city subsequent to the grant of the "grandfather" certificate on the grounds that the utility had not been granted a municipal franchise to serve that area. The court disagreed and held that the "grandfather" certificate took priority over the municipal franchise granted to the utility serving the city. The court construed pertinent provisions of the Public Utility Act and found that there was no indication " that a municipal expansion shall cancel or in any way affect a Commission certificate."[41] The court stated in the Delta Electric Power case:

We hold that expansion of the city limits of Winona into the disputed area, coupled with the franchise and street lighting contract from Winona to Company, did not supersede Delta's certificate from the Commission to serve the disputed area. That certificate was issued before the area was within the municipal limits. The city at that time did not have any jurisdiction or power over this territory. Its franchise and street lighting contract, at the time of their execution, could not preclude the legislature from exercising its plenary police power over areas then outside of municipalities, nor its power to control and regulate municipal activities.

Municipal ordinances are necessarily local in their application. They apply only to the territory of the municipality by which they were enacted. They have no extraterritorial application, except when the sovereign gives them that effect.42/

FOOTNOTES

1. Miss. Code Ann. §21-27-3 (1972).

2. Id., §21-27-5.

3. Capital Electric Power Ass'n. v. Mississippi Power & Light Co., 218 So.2d 707 (1968).

4. See Miss. Code Ann. §§21-27-5, 21-27-3 (1973), 155 (i), 77-5-231(f), 77-5-443 (1973).

5. But See Holder v. Mississippi Fuel Co., 317 So.2d 891 (Miss. 1975) (although the county, in an agricultural lease, had retained the right to grant a right-of-way across the land for any "public utility line," it could not grant an easement for the construction of a gas pipeline, since the gas company, which served only one customer and lacked a certificate of convenience and necessity, was not a public utility) for an indication that the term "public utility" should be applied only to those entitites subject to the jurisdiction of the Commission.

6. Board of Mayor and Aldermen of Yazoo City v. Wilson, 232 Miss. 435, 99 So.2d 674, 679 (1958) (" . . . it is well settled in this state that the owners of property abutting on a city street have title to the center of such street, subject to the use thereof as such, and upon closing such street the use returns to the respective owners. . .") .

7. Town of Hazlehurst v. Mayes, 84 Miss. 7, 36 So. 33 (1904)

8. Id., 36 So. at 35.

9. Berry v. Southern Pine Electric Power Ass'n., 212 Miss. 260, 76 So.2d 212 (1954).

10. Id. 76 So.2d at 218.

11. Mississippi Valley Gas Co. v. Boydstown, 230 Miss. 11, 92 So.2d 334 (1957).

12. Miss. Code Ann. §§21-27-3, 21-27-5 (1972).

13. Id., §21-13-3.

14. Id. §77-3-19 (1973); See Chapter 2.

15. Id., §21-17-5 (1972).

16. Id. §21-19-31.

17. Id. §21-37-11.

18. Id. §21-37-3.

19. See Payne v. Jackson City Lines, 220 Miss. 180, 70 So. 2d 520, 522 (1954) (court derived municipal authority to franchise the operation of a bus company from a number of general statutory provisions, including the provision empowering municipal authorities to "exercise full jurisdiction in the matter of streets"). But see Capital Electric Power Ass'n. v. Miss. Power & Light Co., 218 So.2d 707, 715 (Miss. 1969) (". . . while a county may by implication have the authority to grant easements over, under, or across roads and public places, such authority cannot possibly be expanded to include the granting of electric franchises, which a county has no authority to do either by statute or necessary implication. . . .")

20. Miss. Code Ann. §21-13-3 (1972). See Payne v. Jackson City Lines, 220 Miss. 180, 70 So. 2d 520 (1954) (bus company could not be allowed to use the city streets without a franchise, since to do so would circumvent the procedural safeguards required for the grant of a franchise), for an indication that statutory safeguards must be adhered to in the grant of a franchise.

21. Id. §21-13-21. See Miss Code Ann. §21-9-49 (1972) (same procedures reiterated for municipalities operating under the council-manager plan of government).

22. Miss. Code Ann. §21-13-5 (1972).

23. Id. §21-13-9.

24. Id. §21-13-11 (Supp. 1977).

25. Id. §21-27-3 (1973).

26. Id. §21-27-5 (1972).

27. Id. §77-3-19 (1973).

28. Id. §§21-27-1 to 5 (1972).

29. Id. §21-27-1.

30. Id. §§21-5-1 to 23.

31. Id., §§21-27-1 to 5.

32. See Mississippi Power Co. v. City of Aberdeen, 95 F. 2d 990 (5th Cir. 1938) (court held, under statutory provisions similar to those in force today, that the city could properly erect an electrical distribution system to compete with its own franchisee); Mississippi Power Co. v. Town of Coldwater, 234 Miss. 615, 106 So. 2d 375 (1958) (court held, interpreting similar statutory provisions, that Mississippi municipalities could not grant exclusive franchises). But see Capital Electric Power Ass'n. v. Mississippi Power and Light Co., 250 Miss. 514, 150 So.2d 534 (1963) appeal dismissed, 375 U.S. 77 (where the franchisee held, in addition to a franchise, an exclusive contract to light the streets within the city).

33. Miss. Code Ann. §21-27-1 (1972).

34. Id. §21-13-9.

35. Id. §§77-3-19 (1973).

36. See Delta Electric Power Ass'n. v. Mississippi Power & Light Co., 250 Miss. 482, 149 So. 2d 504, appeal dismissed, 375 U.S. 77 (1963) (Miss. Code Ann. §77-3-19, authorizes the Commission to grant a certificate to operate without a franchise to a public utility which arbitrarily denied franchise by the municipality in which it operated on the effective date of the Public Utility Act of 1956, but this section applies only to utility operations commenced prior to the effective date of the Act.

37. Miss. Code. Ann. §77-3-17 (1973).

38. Id. §77-3-19.

39. Capital Electric Power Ass'n. v. Mississippi Power & Light Co., 250 Miss. 514, 150 So.2d 534 (1963).

40. Delta Electric Power Ass'n. v. Mississippi Power & Light Co., 250 Miss. 482, 149 So.2d 504, appeal dismissed, 375 U.S. 77 (1963).

41. Id. 149 So. 2d at 511.

42. Id. 149 So.2d at 513.