

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 Louisiana

MASTER

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UNITED STATES DEPARTMENT OF ENERGY

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ABSTRACT

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

This report describes laws and regulatory programs in Louisiana. 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 Louisiana. Attention is

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN LOUISIANA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the Louisiana Public Service Commission (Commission). The Commission is composed of five members elected by the general electorate. Commission members are elected for six-year terms.^{1/}

The Commission is charged with regulating all public utilities and has "such other regulatory authority as provided by law."^{2/} The Commission, however, has no power to regulate a public utility "owned, operated, or regulated on the effective date of this constitution [1921] by the governing authority of one or more political subdivisions" unless the Commission is authorized to regulate these utilities by the electorate of the political subdivision involved.^{3/} An additional statutory provision excludes all municipally-owned public utilities from Commission regulation.^{4/} New Orleans has retained the regulatory authority which it held as of the effective date of the Louisiana Constitution. Therefore, the Commission exercises no regulatory powers over investor or municipally-owned utilities in New Orleans.

A municipality is empowered to own and operate a revenue producing public utility within or without its boundaries.^{5/}

A municipality may also "sell and distribute the commodity or service of the public utility within or without its corporate limits and may establish rates, rules, and regulations with respect to the sale and distribution."^{6/} This statutory provision gives municipalities broad regulatory authority over municipally-owned utilities. No provision has been made for Commission review of municipal regulation of utilities.

II. JURISDICTION OF THE COMMISSION

The Commission is given the power to regulate any "gas, electric light, heat, power, waterworks, or other local public utility"^{7/} The term "public utility" is defined as:

any person, public or private, subject to the general jurisdiction of the [C]ommission but not including carriers by rail, water, electric, or motor vehicle or pipelines, or public utilities municipally-owned, or operated, or regulated, unless the electors of such municipality. . . have manifested their approval of such jurisdiction
. . . . ^{8/}

Beyond the specific utilities listed, the statutory provisions are of little benefit in determining what services come within the Commission's regulatory powers. An "electric public utility" is defined separately as "any person furnishing electric service, within this state, the parish of Orleans excepted, including any electric cooperative transacting business in this state."^{9/} The statutory provisions do not describe the specific functions with respect to the regulated services which are subject to Commission control. However, one statutory provision states that:

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utilities. . . . ^{10/}

This provision apparently provides the Commission with authority to regulate all phases of the jurisdictional services.

The Commission has jurisdiction over "any person, public or private."^{11/} There are no specific statutory definitions of "person," but references throughout the relevant statutory provisions indicate that the Commission does regulate companies, corporations and cooperatives. The Commission does not, as mentioned, regulate municipally-owned public utilities operating within or without the corporate boundaries.^{12/}

The Commission is authorized to regulate the rates charged for utility service.^{13/} Neither this nor any other statutory provision provides any basis for distinguishing between direct and indirect sales. However, direct sales of natural gas by natural gas producers, natural gas pipeline companies, natural gas distribution companies or any other person engaging in the direct sale of natural gas to industrial users for fuel or for utilization in any manufacturing process is exempted specifically from the Commission's jurisdiction.^{14/}

It is not required that sales be made or that service be provided to the public. The only requirement is that the regulated public utility "furnish" the service in question.^{15/}

III. POWERS OF THE PUBLIC SERVICE COMMISSION

The constitution states that the Commission "shall regulate any . . . public utility and have such other regulatory

authority as provided by law."^{16/} The legislature has granted the Commission "all necessary power and authority" to fix or regulate "the rates charged or to be charged by and service furnished by" public utilities."^{17/} In addition, these powers are to "affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by such public utilities."^{18/} These general grants of power provide the Commission with a broad statutory base from which to regulate the rates and services of public utilities.

The Commission is granted few specific powers. With respect to electric public utilities, the Commission is authorized to require such a utility to make extensions of service and facilities when economically feasible."^{19/} In addition, the Commission may approve requests from customers of electric public utilities to stop dealing with the utility presently serving the customer and request service from a different utility."^{20/} With respect to all public utilities, the Commission must approve the issue of securities."^{21/} All other powers to be exercised by the Commission must flow from the broad statutory grant of authority to regulate rates and service.

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

Public utilities which plan to operate in any municipality must obtain a franchise from the municipality."^{22/} In addition:

No public utility shall begin the construction of any new plant, equipment, property, or facility, which is not in substitution of an existing plant,

property, equipment, or facility, which will cost over two percent of the rate-making value of the property at the time the extension or addition is made, nor shall any indeterminate permit or franchise be granted, unless and until the governing authority of the city certifies that public convenience and necessity require the same. The governing authority of such city shall be the sole and final judge of what the public convenience and necessity require in every case. 23/

There is no specific statutory requirement that public utilities planning to serve areas other than municipalities obtain any sort of certificate from the Commission. The Supreme Court of Louisiana has held, however, that the Commission may forbid, by way of general order, the construction and operation of public utility facilities. 24/

As noted above, the Commission has no specific authority with respect to certificating public utilities prior to beginning service. One statutory provision does, however, deal with the question of competing electric utilities. This provision states that:

No electric utility shall construct or extend its facilities, or furnish, or offer to furnish electric service to any point of connection which at the time of the proposed construction, extension, or service is being served but is located within 300 feet of an electric line of another electric public utility 25/

A customer who is dissatisfied with his present service may petition the Commission for permission to seek service from a different utility. 26/ In addition, a Commission general order purporting to forbid any extension of electric transmission or distribution lines that will duplicate the transmission or

distribution lines of another utility, was upheld by the Supreme Court of Louisiana.^{27/} In Louisiana Power and Light Co. v. Public Service Commission, one electric utility complained to the Commission that Louisiana Power Company's construction of new electric lines would be duplication of the complainant's lines in violation of the Commission's general order dated March 12, 1974.^{28/} The Commission, agreeing with the complaining utility, ordered the Louisiana Power Company to cease construction of the lines. On appeal, the court affirmed the Commission's order with respect to Louisiana Power and stated that the general order was a valid exercise of the Commission's broad regulatory authority.^{29/} The Commission's general order states that a second transmission or distribution line will be allowed only if the existing lines cannot serve the area "in an economic and justifiable manner."

Municipalities are not permitted to grant exclusive franchises.^{30/} However, no public utility can construct new facilities without obtaining the approval of the municipality. Such approval is to be granted only if the construction is required by the public convenience and necessity.^{31/} Thus, while not technically authorized to issue exclusive franchises, a municipality could deny a second utility the required certificate of convenience and necessity, thereby precluding competition.

No specific procedure is provided for the resolution of service area disputes by the Commission. The Commission has, however, resolved these disputes in the past instances where

complaints were filed with it by an aggrieved party.

V. APPEALS OF REGULATORY DECISIONS

Any interested party may appeal any Commission order by petitioning the district court of the domicile of the Commission within three months of entry of the order.^{32/} Any decision of the district court may be appealed directly to the state supreme court.^{33/} If the plaintiff introduces evidence upon appeal that is different from that offered at the hearing before the Commission, or additional thereto, the court, before proceeding to render judgement, must send a transcript of such evidence to the Commission, and stay the proceedings for fifteen days. The Commission is to then consider the evidence and it may alter, modify, amend, or rescind its decision, act, rule, rate, charge, classification or order complained of in the suit and report its action to the court.^{34/}

FOOTNOTES

1. La. Const. art. 4, §21(A).
2. Id., §21(B).
3. Id., §31(C).
4. La. Rev. Stat. Ann. §45:1164 (West Supp. 1978).
5. Id. §33:4162 (West 1966).
6. Id. §33:4163.
7. Id. §45:1163 (West Supp. 1978).
8. Id. §45:1161.
9. Id. §45:121.
10. Id. §45:1164.
11. Id. §45:1161.
12. Id. §45:1164.
13. Id. §45:1163.
14. Id. §45:1163.
15. Ibid.
16. La. Const. art. 5, §21(B).
17. La. Rev. Stat. Ann. §45:1163 (West 1978).
18. Id. §45:1164.
19. Id. §45:122 (West 1951).
20. Id. §45:125 (West Supp. 1978).
21. Id. §45:1168 (West 1951).
22. Id. §33:4401 (West Supp. 1978) (See Chapter 4 for a discussion of franchising procedures.)
23. Id. §33:4406.
24. Louisiana Power & Light Co. v. Public Service Commission, 343 So.2d 1043 (La. 1977).

25. La. Rev. Stat. Ann. §45:123 (West Supp. 1978).
26. Ibid.
27. Louisiana Power & Light Co. v. Public Service Commission, 343 So.2d 1040 (La. 1977). See also, Louisiana Power & Light Co. v. Public Service Commission, 27 P.U.R. 4th 486 (La. P.S.C. 1978).
28. Louisiana Public Service Commission General Order dated March 12, 1974, "Duplication of Electric Service," reproduced at 343 So.2d 1040, at 1046.
29. Id. 343 So.2d at 1043.
30. La. Rev. Stat. Ann. §33:4401 (West Supp. 1978).
31. Id. §33:4406 (West 1951).
32. Id. §45:1192.
33. La. Const. art. 4, §21(E).
34. La. Rev. Stat. Ann. §45:1194 (West 1951).

CHAPTER 3

SITING OF ENERGY FACILITIES IN LOUISIANA

The state of Louisiana has no statute comprehensively governing the siting of public utilities. Various planning authorities and environmental agencies may affect the siting of an energy facility. Local governments also have a degree of control over the siting of such facilities.

I. PLANNING AUTHORITIES

The Louisiana Constitution broadly empowers any local governmental subdivision to adopt regulations for land use, zoning, and historic preservation, create commissions and districts to implement those regulations, review decisions of any such commission, and to adopt standards for use, construction, demolition, and modification of areas and structures.^{1/}

A. Municipal and Parish Planning Commissions

The Louisiana statutes empower every municipality and parish, equivalent to counties in most states (see chapter 4),^{2/} to create, by ordinance, a planning commission. A municipal planning commission consists of not less than five members nor more than nine members appointed by the chief executives of the municipality.^{3/} A parish planning commission consist of five members appointed by the chief executive of the parish with the advice and consent of the legislative body of the parish.^{4/}

A municipal planning commission is to make and adopt a master plan for the physical development of the municipality. The plan is to show the commission's recommendations for the development of the municipality "including, . . . the general location and extent of public utilities and terminals whether publicly or privately owned or operated, for water, light, sanitation, communication, power, transportation and other purposes."^{5/} No definition of public utility is provided.

The plan is to be developed with the purpose of:

[G]uiding and accomplishing a coordinated, adjusted, and harmonious development of the . . . municipality . . . and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity and general welfare, as well as efficiency and economy in the process of developments including among other things, adequate provision for traffic, the promotion of safety from fire and other dangers, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public funds, the adequate provision of public utilities and other public requirements. . . . ^{6/}

After the master plan has been adopted, no public utility, whether publicly or privately owned, is to be constructed or authorized within the area of the master plan "until the location, character and extent thereof has been submitted to and approved" by the commission.^{7/} If the commission does not approve the proposal, the local legislative body has the power to overrule that disapproval with a two-

^{8/}
thirds vote to that effect.

The commission may amend or extend the master plan. The commission is to hold at least one public hearing on the change and give notice thereof in a newspaper of general circulation in the municipality at least ten days prior to the hearing.^{9/} A parish planning commission has jurisdiction over the development of the unincorporated territory of the parish.^{10/}

The plans adopted by the parish planning commission apply to the location and extent of public utilities in the same manner as the plans of municipalities^{11/} and the plans are to be based on the same purposes and factors as municipal plans.^{12/} The procedure for amendment is also the same as for municipal plans, as is the required approval of the planning commission prior to construction.^{13/}

B. REGIONAL PLANNING COMMISSION

Various combinations of municipalities and parishes which are either contiguous or which form an urbanized area are authorized to create a regional planning area with a regional planning commission to develop and implement a regional development plan.^{14/} The regional commission is to consist of at least five but not more than nine members appointed by the governing bodies of the member municipalities and parishes.^{15/}

After the preparation of a regional development plan, copies are to be filed in the Louisiana State Planning Office and sent to the chief administrative officers, the legislative

bodies and the planning agencies of all the parishes, municipalities or other local governments within its area as well as to regional planning commissions in adjoining areas.^{16/}

A regional planning commission has no power over areas already controlled by a local planning commission unless the legislative body of the municipality or parish designates the regional planning commission as its local planning commission. After such designation, the regional commission has all of the powers that a local commission would have over that area.^{17/} If the regional commission is not given the powers of a local commission, it may still make recommendations to the local commissions for the coordination of plans and, if appropriate, recommend plans for adoption by the local commission.^{18/}

The regional planning commission is to prepare a plan for the development of the region. Among other things, the plan is to include "recommendations concerning the need for and the proposed general location of public and private works and facilities, such as utilities, . . . which works or facilities, by reason of their function, size, extent or for any other causes are of regional or metropolitan as distinguished from purely local concern."^{19/}

C. Legislatively Created Planning Commissions

The legislature has from time to time created metropolitan planning commissions for some of the larger metropolitan areas. An example of this is the Shreveport

Metropolitan Planning Commission.^{20/} This Commission has jurisdiction in the city of Shreveport and Caddo Parish and its purpose is to provide coordinated planning for Shreveport and the surrounding area.^{21/} Various developments, including public utilities, are not to be built without the permission of the planning commission.^{22/}

The planning commissions created by the legislature are similar to the local planning commissions which can be created by municipalities and parishes, but have slightly different jurisdictional boundaries and powers in order to fit the particular area.

D. Municipal and Parish Zoning

The governing authorities of all municipalities may regulate and restrict, among other things, the location and use of the buildings, structures and land for trade, industry, residence or other purposes.^{23/} No provisions of the enabling legislation deal expressly with public utilities.^{24/}

Parishes having a population over 23,000 are also empowered to zone their territory if there exists no municipality inside its boundaries. Parishes are prohibited from exercising their zoning power so as to interfere with the operation of any existing public utility facilities.^{25/}

II. ENVIRONMENTAL AUTHORITIES

A. Air Control Commission

The Air Control Commission (ACC) is charged with maintaining the purity of the air resources, "consistent with the protection of the health and physical property of the

people, maximum employment and the full industrial development of the state."^{26/}

The ACC is to prepare and develop a general plan for the control of the air resources of Louisiana.^{27/} The ACC is to adopt and promulgate rules and regulations as to the levels of air contaminants.^{28/} If those rules or regulations are violated, the ACC may issue cease and desist orders.^{29/} In issuing such orders, the ACC is to take into consideration:

- (a) the character and degree of injury to, or interference with, the health and physical property of the people;
- (b) the social and economic value of the source of the undesirable levels . . . ;
- (c) the question of priority of location involved, and
- (d) The technical practicality and economic reasonableness of reducing or eliminating the emissions resulting from such source. ^{30/}

All orders or determinations of the commission are subject to judicial review by the district court of any district where the affected property is located. Either party may introduce additional evidence in the appeal.^{31/}

B. Coastal Zone Management

The Louisiana Coastal Zone Management Act ("CZMA") was substantially amended in 1978.^{32/} The CZMA, as amended, established the Coastal Zone Management Section of the Department of Transportation and Development, and the Louisiana Coastal Commission ("Commission") which acts as an independent body within the Department of Transportation and Development.^{33/} The Commission is composed of representatives from local

governments, and representatives from various interested groups, including the oil and gas industry, agriculture and forestry, environmental protection, fishing, industry, and public utilities.^{34/} The Coastal Management Section is to develop a management program and guidelines in conjunction with the Departments of Wildlife and fisheries and Natural Resources, which is to then be submitted to the Commission for approval.^{35/} The program is to establish a balance between conservation and development. Local governments may develop their own programs and submit them for approval.^{36/}

The CZMA provides that no person may commence a "use of state or local concern" without first receiving a coastal use permit from the Coastal Management Section, or where there is an approved local program, from the local government.^{37/} "Uses of state concern" are defined to include "energy facility siting and development."^{38/} The permitted requirement does not become effective until 30 days after the guidelines have been adopted; thus far guidelines have not been adopted.

FOOTNOTES

1. La. Const. art. 6, §17.
2. La. Rev. Stat. Ann. §§33:102 (1951), 33:103 (West Supp. 1978).
3. Id. §33:103 (West Supp. 1978).
4. Ibid.
10. Id. §33:106 (1951).
5. Id. §33:106 (1951).
6. Id. §33:107.
7. Id. §33:109.
8. Ibid.
9. Id. 33:108 (West Supp. 1978);
11. Id. §33:106 (1951).
12. Id. §33:107.
13. Id. §§33:108 (West Supp. 1978); 33:109 (1951).
14. Id. §33:131 (West Supp. 1978).
15. Id. §33:132.
16. Id. §33:136.
17. Id. §33:137 (A) (B).
18. Id. §33:137 (C).
19. Id. §33:135 (1) (d).
20. Id. §33:140.1 to 33:140.16.
21. Id. §33:140.1
22. Id. §140:14.
23. Id. §33:4721 (West Supp. 1978).
24. Id. §33:4744 (1966).
25. Id. §33:4877 (West Supp. 1978).

26. Id. §40:2204 (1977).
27. Id. §40:2204 (A) (1).
28. Id. §40:2204 (A) (2).
29. Id. §40:2204 (A) (5) (i).
30. Id. §40:2204 (A) (5) (ii) (a) (d).
31. Id. §40:2213.
32. Id. §§49:213.1 to 49:213.21 (West Supp. 1979).
33. Id. §§49:213.6, 49:213.7.
34. Id. §49:213.7(B).
35. Id. §49:213.8.
36. Id. §49:213.9.
37. Id. §49:213.11.
38. Id. §49:213.5 (A) (1) (h).

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN LOUISIANA

The state of Louisiana allows municipalities to be organized in various ways. Each form of municipal government, along with the parishes (counties), the highway engineer, the various port commissions and the watershed districts, has a separate franchising statute.

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

A. Municipalities

1. Mayor and Alderman Government

In those municipalities with the mayor and board of aldermen form a government, the mayor and board of aldermen has power:

To grant a franchise to any person for the erection, maintenance and operation of (a) poles, wires and appurtenances for telephone, telegraph and electric transmission and distribution systems . . . [gas pipelines] . . . over, along and upon any of the streets, alleys, public ways and places of the municipality and to change, modify and regulate the same 1/

The statutes also empower the mayor and aldermen to:

[G]rant to any person the use of the streets, alleys and public grounds for the purposes of laying gas, water, sewer or steam pipes, conduits for electric light, to be used in furnishing or supplying the municipality and inhabitants or any person or corporation, with gas, water, sewerage, steam or hot air for heating purposes, or light 2/

2. Commission Government

Any municipality having a population over twenty-five hundred may organize under the commission plan.^{3/}

Under the commission plan, the commission may grant a "franchise or right to occupy or use the streets, highways, bridges, or public places" for public service utilities by ordinances.^{4/}

3. Commission and City Manager Government

Municipalities organized under the commission and city manager plan are empowered to "grant franchises and licenses and fix the terms and regulate the exercise thereof, . . . [and to] regulate and control the use, for whatever purpose, of the streets or other public places."^{5/} The statutes also provide specifically for franchises to public utilities.

The Commission may by ordinance grant permission to any person to construct and operate a public utility in the streets and public grounds of the city. ^{6/}

Such an ordinance is subject to petition and referendum.^{7/}

4. Cities under 25,000 Population

The statutes contain a section entitled "Granting franchise to use streets for telephone, telegraph, electric light and gas system in cities of less than 25,000." However, the text does not contain any limitation on the size, as it states that:

the governing authorities of all municipalities may grant a franchise to any person to use and occupy the streets, alleys and public places

therein and to obstruct the same or any part thereof, by constructing, maintaining, and operating (1) poles, wires, and appurtenances for telephone, telegraph, and electric transmission and distribution systems and (2) pipelines, mains for a water or gas transportation and distribution system. 8/

The statute was amended in 1972, but the amendment only changed the length of time for which a franchise could be granted from 25 to 60 years. 9/

5. Cities Over 100,000 Population

Governing authorities of cities having a population over 100,000:

may grant indeterminate permits for the use of the streets and other public places in connection with the operation and maintenance of any public utility, which permit shall remain in force until such time as the city purchases the utility under the option provided for below or until the permit is otherwise terminated according to law. 10/

B. Parishes

"In Louisiana the police juries are the governing bodies of the parishes which are political subdivisions of the state, the same as counties in other states." 11/ Those police juries are empowered to grant franchises over public places, roads, streets, and alleys of their parishes, if the public places, etc. are not within the limits of any municipality. These franchises may be granted for "the construction, maintenance, and operation of lines of poles and wire for the transmission of electric current for heat, light, or power." 12/ Franchises may also be granted for gas or water pipes,

sewerage and drain pipes, railways, and television lines or cables. ^{13/}

C. Louisiana Highway Engineer

The written consent of the Louisiana highway engineer is required before the granting of any franchise over a state highway. ^{14/}

D. Port Commissions and Watershed Districts

The legislature in Louisiana has created port commissions and watershed districts. Most of these are empowered with many of the same powers as municipalities, including franchise powers. One example of this is the Bayore D'Arbonne Lake Watershed District. Its board of commissioners is empowered:

(d) to grant franchises to telephone, telegraph and electric power companies for the purpose of supplying such service to construction within one mile of the high water line of the said reservoir.

(3) to grant franchises for the purpose of laying gas, water, sewer, electric light or other utilities supplying the inhabitants or any person or corporation with gas, water, sewage, light, when such construction is located within one mile of the high water line of the said reservoir. ^{15/}

These commissions and districts are each different and need to be dealt with on an individual basis.

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

The state constitution grants home rule power to cities. The powers of the cities include any powers "necessary, requisite, or proper for the management of its affairs, not

denied by general law or inconsistent with this constitution."^{16/} They also "have the additional powers and functions granted to local governmental subdivisions by other provisions of this constitution."^{17/} This would apparently give home rule cities the right to grant franchises since the home rule charter of New Orleans which provides for regulation of rates and services of public utilities was upheld.^{18/}

In Town of Coushatta v. Walley Electric Membership Corp.,^{19/} an implied power to grant a franchise was found to emanate from the express police power to prevent obstruction of streets and to make ordinances necessary for the health of the town.

III. PROCEDURES FOR GRANTING FRANCHISES

The various forms of local government are required to follow different procedures for the granting of franchises. Some franchising statutes provide no specific procedures to be followed. Under a municipal charter form of government a referendum election may be required to grant a franchise.^{20/}

A. Municipalities

1. Mayor and Aldermen Government

Cities of less than 2,000 inhabitants with a mayor and aldermen government are to submit a proposal for an exclusive franchise to a vote of the public. No specific procedure is provided for the granting of non-exclusive franchises.^{21/}

2. Commission Government

In all cities with the commission plan of government franchises are to be granted by ordinance. Notice of the introduction of such an ordinance is to be published in the official journal at least seven days before final adoption. If during that period, any interested person files objections in writing, the commission is to grant him the right to be heard before final adoption of the ordinance. The ordinance is then to remain on file in final form for public inspection for at least seven days before its final adoption.^{22/}

3. Commission and City Manager Government

The statutes applicable to cities operating under the commission and city manager form of government provide that ordinances granting public utility franchises are subject to petition and referendum.^{23/} Renewals of franchises to public utilities are also subject to petition and referendum.^{24/}

4. Modification of Franchises in Cities of 70,000 to 250,000 Population

Any extension, revision, modification or amendment to an existing franchise in a city of 70,000 to 250,000 inhabitants is to be granted by ordinance. The ordinance must be complete in the form in which it is to be passed and must remain on file for public inspection for at least one week before final passage. It must also be published once in the official journal at least one week before final passage.^{25/}

B. Parishes

Franchises granted by parishes are to be given to "the highest responsible bidder in accordance with the public bid laws of [Louisiana]." The specifications are to state the area to be served by the franchise, the duration of the franchise, and the other terms of the agreement.^{26/}

C. General

The statutes for the highway engineer and various other sized municipalities do not provide a procedure. None of the franchising statutes require the prior grant of a certificate of public convenience and necessity from the public service commission to obtain a franchise,^{27/} but such a certificate is required from the governing authority of a municipality before a franchise may be granted.^{28/} No judicial decisions add to the procedures required to grant a franchise.

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The statutes provide little information regarding criteria for use by the local government in granting a franchise. Some of the statutes specify which uses may be franchised. See part I supra. The courts have held that in the case of granting a franchise to a railroad and regulating its rates, the granting and regulating was at the discretion of the city of New Orleans under its home rule charter and the courts cannot question its discretion.^{29/}

V. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The constitution prohibits perpetual franchises.^{30/}

Various forms of local government are empowered to grant franchises of varying lengths. Those cities with the mayor and aldermen form of government,^{31/} those with the commission form of government,^{32/} and those with under 25,000 inhabitants,^{33/} are not to grant franchises which are valid for more than 60 years. Cities with a mayor and aldermen form of government that have less than 2,000 people may grant exclusive franchises for only 25 years.^{34/} Those cities with the commission and city manager form of government cannot grant franchises for more than 30 years.^{35/} Cities over 100,000 in population grant indeterminate permits which are good until the city exercises its option to purchase.^{36/}

Parishes are not limited as to the length of the franchises which they grant.^{37/} There have been no court cases interpreting this statute in light of the constitutional ban on perpetual franchise.

Should a franchise expire, the statute does not provide for the removal of facilities or the cessation of services, but the courts have held that the city can prohibit the use of the streets without a valid franchise.^{38/}

B. Exclusivity

Cities with the mayor and aldermen form of government, having a population under 2,000 may grant exclusive franchises valid for a maximum of 25 years if the voters of the town or

village approve.^{39/} Other cities with the mayor and aldermen form of government, those cities with commission city manager forms of government, and cities under 25,000 population are prohibited from granting exclusive franchises.^{40/}

The statutes are silent as to the exclusivity of franchises granted by cities with commission governments and those granted by parishes.^{41/}

The courts have held exclusive franchises by the state to be valid.^{42/} However, the courts have held that cities have no power to grant exclusive franchises unless there is an express statutory grant of such authority.^{43/}

Although the title of one statute seems to indicate that the ban on exclusive franchises only applies to cities under 25,000, one case indicated that all exclusive franchises are prohibited.^{44/} A prior franchise to serve an area does not confer pre-emptive rights such that a utility can enjoin a subsequent utility from competing.^{45/}

As discussed in Chapter 2, the Louisiana statute requires that no electric public utility may extend facilities to furnish electricity to a point of connection which at the time is located within 300 feet of an electric line of another electric public utility.^{46/} However, in Central Louisiana Electric Co., Inc. v. Louisiana P.S.C.,^{47/} held that the PSC is without authority to require adherence to this provision when a municipality has granted a franchise covering the area in dispute. The court went on to conclude:

The Legislature obviously favored the municipal franchise system over the arbitrary line-distance rule of the state. 48/

Consequently, a municipal franchise right to provide service will prevail over a right based on the statute and recognized by the PSC.

FOOTNOTES

1. La. Rev. Stat. Ann. §33:401(A) (11) (West Supp. 1978).
2. Id. §33:401(A) (12).
3. Id. §33:503 (1951).
4. Id. §33:552 (West Supp. 1978).
5. Id. §33:621 (1951).
6. Id. §33:821.
7. Id.
8. Id. §33:4401 (1966).
9. 1972 La. Acts. No. 189 §1.
10. La. Rev. Stat. Ann. §33:4405 (1966).
11. National Liberty Ins. Co. of America v. Police Jury of Natchitoches Parish, 96 F.2d 261 (5th Cir. 1938).
12. La. Rev. Stat. Ann. §33:4361 (1) (West Supp. 1978).
13. Id. §33:4361.
14. Id. §33:4362 (1966).
15. Id. §38:2558(11) (d-e) (1968).
16. La. Const. art. 6, §5E.
17. Id. art. 6 §5F; La. Rev. Stat. Ann. §33:1382 (West Supp. 1978).
18. State ex rel v. Council of the City of New Orleans et al., 309 So.2d 290 (La. 1975).
19. Town of Coushatta v. Valley Electric Membership Corp., 139 So.2d 822, (La. Ct. of App. 1962).
20. La. Rev. Stat. Ann. §33:4401 (1966).
21. Id. §33:401 (11-12) (West Supp. 1978).
22. Id. §33:552 (1951).
23. Id. §33:821.
24. Id. §33:822.
25. Id. §33:4431.

26. Id. §33:4361 (West Supp. 1978).
27. Id. §45:123.
28. Id. §33:4406 (1966).
29. Forman v. New Orleans & C.R. Co., 40 La. Ann. 446, 4 So. 246 (1888).
30. La. Const. art. 12, §12.
31. La. Rev. Stat. Ann. §33:401(1) (1951).
32. Id. §33:552.
33. Id. §33:4401 (West Supp. 1978).
34. Id. §33:401(11) (West Supp. 1978).
35. Id. §33:821 (1951).
36. Id. §33:4405 (1966).
37. Id. §33:4361 (West Supp. 1978).
38. Baton Rouge v. Hutton, 218 La. 371, 49 So.2d 613 (1950).
39. La. Rev. Stat. Ann. §33:401(11) (West Supp. 1978).
40. Id. §§33:401 (West Supp. 1978); 33:823 (1951); 33:4401 (West Supp. 1978).
41. Id. §§33:552 (1951); 33:4361 (West Supp. 1978).
42. New Orleans Gas Light Co. v. Louisiana Light & Heat Producing Co., 115 U.S. 650, 65 Ct. 252, 29 L. Ed. 516 (1885); Crescent City Gaslight Co. v. New Orleans Gaslight Co., 27 La. Ann. 138 (1875).
43. New Orleans C&L Railroad Co. v. New Orleans, 44 La. App. 728, 11 So. 78 (1892).
44. See, Louisiana Power & Light Co. v. Charpentier, 165 So. 614 (La. Ct. of App. 1964).
45. Gulf States Utilities Co. v. Jefferson Davis Elec. Co-op., 230 So.2d 273 (La. Ct. of App. 1969).
46. La. Rev. Stat. Ann. §45:123 (West Supp. 1978).
47. Central Louisiana Elec. Co., Inc. v. Louisiana Public Service Commission, 344 So. 2d 1046 (La. 1977).
48. Id. at 1048.