DOE/CS/20289-11

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 Georgia

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 Georgia. 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 Georgia. Attention is given

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

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

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

CHAPTER 2

REGULATION OF ENERGY FACILITIES IN GEORGIA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested generally in the Public Service Commission (Commission). The Commission is composed of five members elected to six-year terms by the general electorate.[1/] Commissioners must be free of employment or pecuniary interests which are incompatible with the duties of the Commission.[2/]

The Commission is the only agency that may exert regulatory control over public utilities. The legislature has delegated no regulatory authority to local government. Except for the powers incident to granting a franchise and its normal police powers, municipal corporations do not have any role in the supervision of public utilities. The Commission's general supervisory authority does not extend to public utilities owned or operated by municipal corporations.

II. JURISDICTION OF THE PUBLIC SERVICE COMMISSION

The jurisdiction of the Commission extends to several specific public utilities, including gas or electric light and power companies.[3/] This statutory provision extends the Commission's jurisdiction only to the specifically enumerated utilities. The Commission's jurisdiction does not extend, by implication, to any other businesses which might generally be considered "public utilities." For example, the Attorney General for the State of Georgia stated that the Commission would be without

"jurisdiction to regulate the rates charged by an electric power company for the steam which is generated as a by-product of the company's manufacture of electricity."[4] In reaching this conclusion the Attorney General noted that the "Commission has only such powers as the legislature has expressly, or by fair implication, conferred upon it" and that simply because a "utility is providing some services subject to regulation does not, without more, sweep all of its activities within the scope of the commission's jurisdiction."[5] Because steam was not specifically enumerated in the statute, the Attorney General reasoned that the Commission would be without jurisdiction.

Under some circumstances, however, nonjurisdictional services provided in a package including jurisdictional services may be regulated by the Commission. In Atlanta Gas Light Co. v. Georgia Public Service Comm.,[6] the Commission exercised its regulatory authority over Atlanta Gas with respect to its contract to provide total energy service (electricity and hot and cold water) to a landlord for use by its tenants. Atlanta Gas, while admitting that it was a public utility with respect to its other operations, contended that its contract with the landlord was a private, non-utility operation and was not subject to Commission regulation.[7] The court held that a public utility "cannot avoid regulation of its rates by converting its natural gas into a total energy service, which includes electricity, a utility also subject to regulation." The court further noted that "[i]f the commission can not regulate the charge for electricity alone because the charge for electricity is inseparably

interwoven with the charge for hot and cold water, the commission may consider the rate for the total energy service."[8/] Thus, if nonjurisdictional services are "inseparably interwoven" with electrical services, all services provided may be subject to regulation. This decision did not indicate how the services were furnished or why the charges for the jurisdictional service (electricity) and the non-jurisdictional utilities (hot & cold water) could not be separated for purposes of regulation.

No statutory provision expressly states the particular functions of a utility which are subject to the Commission's jurisdiction. The authority to generally supervise utilities within the Commission's jurisdiction is broad enough to allow for the regulation of all necessary functions.

The jurisdiction of the Commission extends only to "gas plants and electric light and power plants furnishing service to the public."[9/] In determining whether a company will qualify as a public utility, the Attorney General has declared that "it is necessary to examine such factors as the extent of service, whether the operation holds itself out as ready to serve the public generally, and whether in other ways the business has conducted itself as a public utility."[10/]

In Atlanta Gas Light Co. v. Georgia Public Service Commission, a gas company which admitedly engaged in some public utility operations subject to Commission regulation was held to be within the Commission's jurisdiction also with respect to a contract with a landlord to provide a total energy package for use by its tenants because the gas company would be supplying

energy to be distributed to over 16,000 persons.[11/]

In contrast to Atlanta Gas Light, however, are two attorney general opinions stating that resales of energy to tenants by a landlord would not subject the landlord to Commission regulation.[12/] The specific facts involved in the controversies resolved by these opinions are not set out, but the opinions indicate that such sales will lead to Commission regulation only when they involve a significant number of tenants (for example, the 16,000 tenants involved in the Atlanta Gas Light).

There are no statutory provisions dealing specifically with the subject of indirect sales. The Commission's rate-reviewing authority, however, extends to "any rate [or] charge."[13/] No distinction is made between rates and charges for direct sales and those for indirect sales.

Electric membership corporations (cooperative, non-profit corporations organized pursuant to statutory specifications)[14/] are exempted from general Commission jurisdiction.[15/] In addition, municipally-owned or operated utilities are not subject to general Commission jurisdiction.[15/] Both of the above are subject to limited statutory regulation concerning delineation of service areas.[17/] See Part IV.

III. POWERS OF THE PUBLIC SERVICE COMMISSION

In addition to its general supervisory authority over jurisdictional utilities, the Commission has been granted several specific powers. The Commission is granted the power to determine the reasonableness of all rates and charges,[18/] and to prescribe a uniform system of accounts.[19/] The Commission must

approve the issuance of corporate securities,[20] may regulate capitalization,[21] and must approve agreements or arrangements between regulated utilities.[22] In addition, the Commission has supervisory authority over the adequacy of service[23] and control over the extension or initiation of electric service to new customers.[24]

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

A natural gas pipeline or distribution system is required to obtain a certificate of public convenience and necessity from the Commission prior to constructing, operating or extending such a system.[25]

There are no specific statutory provisions requiring an electric utility to obtain a certificate from the Commission prior to beginning or extending operations or constructing any facilities. The Georgia legislature, however, has passed the Territorial Electric Service Act (Service Act) which has created "legal monopolies" with respect to electric service.

The Service Act applies to the distribution of electricity in both rural and municipal areas throughout the State of Georgia. The Act is an attempt to implement the policies of the state which have been declared to be:

(1) to assure the most efficient, economic and orderly rendition of retail electric service within the State;

(2) to inhibit duplication of the lines of electric suppliers;

(3) to foster the extension and location of electric supplier lines in the manner most compatible with the preservation and enhancement of the State's physical environment; and

> (4) to protect and conserve the lines heretofore and hereafter lawfully constructed by electric suppliers . . . 26/

In order to implement these policies, the legislature has included electric membership corporations and municipalities within its definition of "electric suppliers" to be regulated under the Act.[27] Neither, however, are subject to Commission control over rates or service rules.[28]

The Service Act distinguishes between areas inside and areas outside municipal limits. Rights within municipalities have been assigned to the primary supplier, that electric supplier which is furnishing service to the majority or plurality of the electric meters inside the corporate limits of the municipality.[29] The effect of such assignment is to give the primary supplier the right to extend and to continue furnishing service to new premises within the area.[30] This right is subject only to:

> (1) the exclusive right of every secondary supplier to extend and to continue furnishing service to new premises located at least partially within 300 feet of its line and wholly more than 800 feet from the lines of every other electric supplier, and
>
> (2) the right of every secondary supplier, if chosen by the consumer utilizing such premises, to extend and continue furnishing service to new premises located at least partially within 300 feet of both its lines and the lines of any other electric supplier. 31/

Areas located outside the corporate limits of any municipality have either been assigned to electric suppliers or declared "unassigned areas."[32] The effect of assignment is to give the assignee electric supplier exclusive rights within the designated area.[33] The effect of declaring an area an "unassigned

area" is to allow an electric supplier:

> to extend and thereafter continue furnishing service to new premises locating therein if chosen by the consumer utilizing such premises, except that an electric supplier whose line . . . is at least partially within 500 feet of such new premises shall have the exclusive right to extend and continue furnishing service to such premises if the line of every other electric supplier, so existing or so thereafter constructed, is . . . wholly more than 500 feet from such premises. 34/

Unlike areas located within a municipality, assigned automatically to the primary supplier, areas located without a municipality are assigned "as determined by public convenience and necessity, having primary regard for the location of electric suppliers' lines but having no regard for differences in electric suppliers' retail rates or for the fact that retail consumers are not then being served from such lines." 35/ No judicial or administrative opinions have been found listing additional criteria or discussing the public convenience and necessity requirement of this section.

The Service Act allows little opportunity for competition among electric suppliers, anticipating that most customers will be located within the domain of one supplier. The Service Act does provide for the extension of lines to serve new customers by the primary or secondary suppliers in an assigned municipal area, 36/ or by suppliers in an assigned or unassigned rural area. 37/ These extensions depend on the new customer being located within a short distance of existing lines, however. In addition, any supplier may continue serving any customer lawfully served on the effective date of the Service Act (1973). 38/ There are no pro-

visions, however, to allow an electric supplier which was not serving customers as of the effective date of the Service Act to serve any customers. Thus, there is no need for any certificating procedure with respect to electric utilities.

The Service Act does provide for complaints, by any interested party, that the service of an electric supplier is not adequate or dependable or that the supplier's rates, charges or service rules and regulations are unreasonably discriminatory.[39] The Service Act also provides that the Commission may reassign an area assigned to an electric supplier or transfer service from one electric supplier to another "if it determines that the public convenience and necessity so require . . . ."[40] These provisions do not provide opportunities for new suppliers to break into the market. Rather, they provide only for the redistribution of customers among existing utilities.

No specific statutory provisions govern the resolution of service area disputes by the Commission. Should it appear that any electric supplier is attempting to serve a customer in violation of the Service Act, the dispute may be resolved under the Commission's general complaint procedure.[41]

V. APPEAL OF REGULATORY DECISIONS

Any dissatisfied party of record is entitled to petition the Commission for a rehearing of any final order or decision. Such petition must be filed within ten days of a decision and must state, with particularity, the matters claimed to be wrongly decided.[42]

A petition for rehearing is mandatory and all adminis-

trative remedies must be exhausted before a party is allowed to seek review from the judicial system.[43] A final order may be appealed to the Superior Court of Fulton County. Petition for appeal must be filed within 30 days of entry of a final order.[44] If the court determines that additional evidence should be offered, the Commission will hear such evidence and modify its order if the new evidence requires such modification. The court may not substitute its judgement for that of the Commission on questions of fact.[45] Appeals from the Superior Court are taken as in any other civil proceeding.[46]

FOOTNOTES

1. Ga. Code Ann. §2-1901 (1978).
2. Id. §93-202.
3. Id. §93-307.
4. Op. Atty. Gen. 76-91 (August 18, 1976).
5. Id.
6. Atlanta Gas Light Co. v. Georgia Public Service Comm., 228 Ga. 347, 185 S.E. 2d 403 (1971).
7. Id. 185 S.E. 2d at 405.
8. Id. 185 S.E. 2d at 351.
9. Ga. Code Ann. §93-304 (1978).
10. Op. Atty. Gen. 72-84.
11. Atlanta Gas Light Co. v. Georgia Public Service Comm., 228 Ga. 347, 185 S.E. 2d 403 (1971).
12. Op. Atty. Gen. No. 69-27 (Jan. 21, 1969) and No. 71-81 (April 30, 1971).
13. Ga. Code Ann. §93-701(a)(1978).
14. Id. tit. 34B.
15. Id. §34B-131 (1970).
16. Georgia Public Service Commission v. City of Albany, 179 S.E. 369 (Ga. 1935).
17. Ga. Code Ann. §34-303(b)(Supp. 1978).
18. Id. §93-309 (1978).
19. Id. §93-307.
20. Id. §93-414.
21. Id. §93-307.
22. Id. §§93-303.
23. Id. §93-307.
24. Id. ch. 34B-1, 34B-3.

25. Id. §93-701.

26. Id. §34B-302 (Harrison Supp. 1978).

27. Id. §34B-302.

28. Id. §34B-302.

29. Id. §§34B-303(k); 34B-305.

30. Id. §34B-303(b).

31. Id. §34B-305.

32. Id. §34B-304.

33. Id. §34B-303(f).

34. Id. §34B-303(h).

35. Id. §34B-304.

36. Id. §34B-305.

37. Id. §34B-309.

38. Id. §34B-309(b).

39. Id. §34B-309(c).

40. Id. §34B-309(d)(d).

41. Id. §93-309.2.

42. Georgia Public Utility Comm'n., Utility Rules, Rule 515-2-2-.08.

43. Ga. Code Ann. Id. §93-309.2(c)(Harrison 1978).

44. Id. §93-309.2(c).

45. Id. §93-309.2(c)(5),(6).

46. Id. §93-309.2(c)(f).

CHAPTER 3

SITING OF ENERGY FACILITIES IN GEORGIA

The State of Georgia has not yet enacted a comprehensive energy facility siting statute. Though such proposals have been introduced in past legislative sessions, a comprehensive siting statute has failed to emerge.[1/] Instead, a "one-stop" procedure has been authorized to obtain the required permits from the State Department of Natural Resources (DNR). Local regulatory provisions also affect the siting of energy facilities.

I. PLANNING AUTHORITIES

A. Municipal Planning

The legislature has declared that it shall be the duty of municipal planning commissions to develop a master plan specifying, among other things, the "location of public utilities whether publically or privately owned . . . ."[2/] Using the recommendations contained in the master plan, the municipal governing authority is given the power to establish zoning regulations.[3/] Construction begun in violation of the zoning regulations may be enjoined upon petition by any party residing in the municipality.[4/]

B. Municipal Franchising

Local government is empowered by statute[5/] to grant franchises to any public utility for the use and occupancy of the streets of the city. See Chapter 4 for a detailed discussion of franchising in Georgia.

II. DEPARTMENT OF NATIONAL RESOURCES

A. Environmental Permitting

Georgia has enacted various laws pertaining to environmental protection. Among these include the Georgia Air Quality Control Law,[6] the Georgia Water Quality Control Act,[7] the Coastal Marshlands Protection Act,[8] and the Solid Waste Management Act.[9] Each of these acts require that a developer obtain certain permits prior to commencing construction or maintaining operation of any facility which would adversely affect the environment.

To eliminate the confusion surrounding permitting, the legislature, at the suggestion of then Governor Carter, passed the Executive Reorganization Act of 1972.[10] This act vests all permitting authority in DNR. A prospective developer of an energy facility would contact the Division of Environmental Protection (DEP) of DNR to ascertain what permits would be required and to coordinate the procedure for obtaining such permits.

B. Jurisdiction of DNR

DNR, through the provisions of various acts, is given permitting authority over most operations which would affect the environment. The statutes require that a permit be obtained prior to:

1) beginning the construction or modification of any facility which may result in air pollution . . . [11]

2) operating a facility from which air contaminants are or may be emitted . . . [12]

3) discharging or proposing to discharge any pollutant from a point source into the waters of Georgia . . . 13/

4) withdrawing, diverting or impounding surface water of the state at an average monthly rate of 100,000 gallons per day . . . 14/

5) engaging in solid waste handling or operating a solid waste disposal facility (solid waste includes ashes and other industrial wastes). 15/

The statutes are not directed toward any particular type (i.e., gas, electric or steam) or phase (i.e., generation, transmission, distribution or storage) of utility operations. Rather, almost any activity adversely affecting the environment will invoke DNR's jurisdiction. 16/

Jurisdiction extends to any person engaged or preparing to engage in any of the aforementioned activities. "Person" is defined differently in each of the relevant statutes but generally is held to include any individual, public or private corporation, partnership, association or political subdivision. 17/

No grandfather provisions have been found which would exempt a particular operation from DNR's jurisdiction. Permits must still be obtained, though a facility is allowed to operate for a limited period while all applications are being processed.

In addition to its authority over the permitting of any facility affecting the environment, DNR is generally given the power in each act to continually monitor and regulate facilities after a permit has been issued. If any facility fails to comply with established standards, DNR may revoke the necessary permit and prevent the facility

from continuing operations.

Each act concerning the environment provides that the administering agency may promulgate all rules and regulations necessary to carry out the provisions of the Act. To date, most rules have been promulgated by the predecessor agencies and deal primarily with acceptable pollution levels. Certain procedural and definitional matters are also covered by agency reulations.

C. Certification Standards

When reviewing applications for particular construction and operation permits required by the various environmental acts, DEP is concerned with any type of impact the proposed facility may have upon the environment. To guide DEP in reviewing a permit application, the legislature has included specific criteria in certain acts which should be considered in evaluating applications.[18/] DEP is not required to consult with, nor follow the recommendations of, other agencies, with the exception of marshland alteration. No agency has authority to veto the issuance of a permit.

Published administrative decisions were not found developing or applying the standards listed in the statutes and regulations. Furthermore, there have been no cases raising any issues as to the applicable standards.[19/]

DEP is an autonomous agency having permitting authority over operations affecting the environment. All local agencies having jurisdiction must also be consulted and their regulations must be followed. There is no pro-

vision for preempting the jurisdiction of these local agencies. The DNR is considered a "one-stop" permitting agency at the state level for all environmental concerns, and accordingly, there is no conflict or overlap regarding the jurisdiction of the DNR and other state agencies.

D. Certification Procedures

Each environmental protection act specifies particular procedures which an applicant must follow in order to obtain the necessary permitting. In general, however, an applicant need only contact DNR which will coordinate the entire application procedure.

Applications should include all relevant information required for a full evaluation of the proposed construction. The particular content requirements may be found in the Rules and Regulations of DNR and in the Georgia statutes.[20/]

The applicant is generally not under any duty to give notice. If notice is required, as in the case of permits issued for the use of water[21/] and marshlands,[22/] it is given directly by DNR.

Public hearings are not ordinarily conducted on an initial application. Except for a permit issued pursuant to the Water Quality Control Act, which does mandate public participation,[23/] the DNR will make a decision based solely on its own investigation and on the contents of an application. Nor is there generally any requirement that the DNR consult with other agencies. Consultation is only required in the case of a permit allowing a party to alter the Georgia marsh-

lands. In such case, the DNR must be satisfied that the laws of local government (zoning) will be complied with before issuing a permit.

E. Appeals of DNR Decisions

As indicated, permitting decisions are generally made without a hearing. The statutes do not specify any consistent time within which a decision must be rendered. Only after the DNR has rendered an initial decision may an aggrieved party seek a hearing as part of the appellate process.

An aggrieved party requesting a hearing must file within thirty days of the DNR's decision. Any party aggrieved by the decision may request a hearing to be held before a single examiner in accordance with the Georgia Administrative Procedures Act.[24/] Subsequent to the first hearing, a rehearing may be requested. The rehearing is held before a five member committee appointed by the Board of Natural Resources.[25/]

After exhausting the aforementioned administrative remedies, resort may be had to the state courts. Starting with the superior court (trial court level) and progressing through the appellate courts, a party may seek review of the DNR's decision. Review is based on the record at the agency level and a decision will not be changed if supported by substantial evidence.[26/]

FOOTNOTES

1. Mr. Jim Talley, Esq. of the Dept. of Natural Resources, telephone conversation, July 24, 1978

2. Ga. Code Ann. §69-1206 (Harrison, 1976)

3. Id. §§69-801, 69-1207

4. Id. §69-839

5. Id. §69-310(e)

6. Ga. Code Ann. Ch. 88-9 (Harrison, 1971)

7. Id. Ch. 17-5 (Harrison Supp. 1978)

8. Id. 45-136 (Harrison, 1977)

9. Id. Ch. 43-16

10. Id. §§40-35129-40-35162 (Harrison, 1975)

11. Id. §88-903(a)4 (Harrison 1971);
Ga. Rules and Regs. §391-3-1-03(1)(a)

12. Ga. Rules and Regs. §391-3-1-03(2)(a)

13. Id. §17-510(2); Ga. Rules and Regs. §391-3-6-06(3)

14. Id. §17-510.1(1); Ga. Rules and Regs. §391-3-6-07(3)

15. Id. §43-1607-1 (Harrison 1977)
Ga. Rules and Regs. §391-3-4-02

16. A relevant exception exists in the Rules and Regulations pertaining to the Air Quality Control Act exempting:

    a) fuel burning equipment only gas as a fuel and having a total heat input of 50 million BTU's per hour or less; a fuel burning equipment having a total heat input of 10 million BTU's per hour or less burning only gas and or distillate fuel and containing 0.50 percent sulfur by weight or less; or

    b) internal combustion engines under 3,000 H.P.
    Ga. Rules and Regs. §391-3-1-03(6)

17. Ga. Code Ann. §§17-503(e) (Harrison 1971), 43-1603(a) (Harrison 1977), 88-902(g) (1971)

18. The criteria include the gamut of environmental concerns and may be found at:

    Ga. Code Ann. §88-906(a)-(a) (1971) (air);
    Ga. Code Ann. §45-140(e) (1977) (marshlands);
    DEPDNR Rules and Regs. §391-3-6-06(4) (water); and
    DEPDNR Rules and Regs. §391-3-4-01 et sea. (solid waste)

19. Mr. Jim Talley, Council for DEPDNR, Telephone conversation, July 24, 1978.

20. DEPDNR Rules and Regs. 391-3-1-03, 391-3-6-06(5), 391-3-4-03; Ga. Code Ann. §45-140 (Harrison 1977)

21. DEPDNR Rules and Regs. 391-3-6-06(7)

22. Ga. Code Ann. §45-140(7)(d)

23. DNR Rules and Regs. 391-3-6-06(7)

24. Ga. Code Ann. §3A-101 (Harrison 1977)

25. Id. §2-2201

26. Mr. Jim Talley, Council for DEPDNR, Telephone conversation, July 24, 1978.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN GEORGIA

I. AUTHORITY TO GRANT FRANCHISES

Municipal corporations in the state of Georgia have been given the power to grant franchises by express statutory provision. The legislature has declared that any incorporated municipality shall have the authority to grant franchises to or make contracts with,

> railroads, street railway or urban transportation companies, electric light or power companies, gas companies, steam-heat companies, telephone and telegraph companies, water companies and other public utilities for the use and occupancy of the streets of the city for the purpose of rendering utility service 1/

Franchises under this statute relate solely to the right to use public streets and land and not to the right to carry on business. In Weyerhaeuser Co. v. City of Adel, 2/ a municipality sought to prevent a power company from furnishing electric service to a corporation located within the municipal boundaries. The company did not propose to use any municipal streets or public ways. The court rejected the municipality's petition and allowed the company to operate, indicating the state's position that a franchise is needed to use the public ways but not to commence operations.

II. PROCEDURES FOR GRANTING FRANCHISES

The Georgia statutes do not provide any particular procedures to be followed when granting a franchise. Thus,

the procedure will vary depending upon the provisions of individual municipal charters.

If the municipal charter does not address franchising, the procedure is rather simple. No public notice or hearing is required nor is there any requirement of free and open competition.

The municipality may impose such conditions as it may deem appropriate in granting a franchise.[3/] These conditions may include, among other things, a mandatory franchise fee payable to the local government. It should be noted, however, that the Territorial Electric Service Act,[4/] provides that where an electrical supplier is already serving customers within a municipality:

> any secondary supplier . . . shall pay the municipality for street franchise rights a sum of money calculated and payable in the same manner and on the same basis as is utilized with respect to the payment, if any, by the primary supplier (other than the municipality itself) for the same or substantially identical rights . . . . [5/]

Where the municipal charter directly authorizes franchising, additional procedures may be specified. Counsel for one utility company has stated that it is not uncommon for a municipal charter to require detailed public advertising and lengthy public hearings as a prerequisite to obtaining a franchise.[6/] A prospective developer must consult the municipal authorities in the area of the proposed site for details concerning the local franchising regulations.

III. CRITERIA USED TO EVALUATE A FRANCHISE REQUEST

The statute conferring on municipalities the power to

grant franchises is rather broad and unspecific. A franchise or privilege may be granted to certain enumerated companies "and other public utilities for the use and occupancy of the streets of the city for the purpose of rendering utility services . . . ."[7/]

Notwithstanding the inclusion of the words "other public utilities," the Director of the Georgia Legislative Council has said that franchises may be given to private companies not serving or otherwise accommodating the public.[8/] Indeed, the Secretary of the Commission has confirmed that franchises have been granted to private cotton mills operating adjacent to a river and producing energy for their own use.[9/] No judicial decisions have been found limiting or concurring in this broad statutory interpretation.

There is no requirement that the franchise be awarded to the highest bidder, that the franchisee first obtain a certificate of public convenience and necessity, or that the franchise meet any specified standards. It appears that franchising is a predominantly municipal concern with no particular factors controlling the manner of issuance. Of course, a municipality's incorporating charter may limit the city's discretion, but the individual charter must be consulted to determine the restrictions or relevant criteria in such cases.

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The Georgia legislature, in authorizing municipalities

to grant franchises, has declared that such permits or contracts shall be "for such time as the governing authority of the municipality may deem wise."[10/] Although such wording would seem to allow municipalities to grant a franchise of indefinite duration, grants in the past ten years have generally been for a fixed period of time and franchises issued prior to this period are being renegotiated and reissued for a fixed duration.[11/] In addition, the state constitution specifically prohibits the passage of any law making an irrevocable grant of special privileges.[12/] No court decisions, however, have discussed this constitutional provision as it relates to indefinite franchises.

Once granted, a franchise will normally remain in effect until the termination date. Failure of the franchisee to comply with any conditions stated in the franchise, however, will allow the municipality to revoke the grant. In South Georgia Power Co. v. Baumann,[13/] for example, the court decided that a franchise was automatically surrendered and that the municipality could grant permission to another after the original franchisee had violated the terms by failing to post a required bond.

Ambiguity arises when attempting to determine whether a franchisee can be forced to remove its facilities and to cease providing service if the franchise expires or is in any way terminated. In the closest case to date, a municipality brought an action to expel a company after the franchise had expired. Anticipating an unfavorable decision, the

municipality chose to dismiss the action and renegotiate the franchise, leaving Georgia with no clear precedent on the issue.[14/]

B. Exclusivity

The statute enabling local government to grant franchises neither expressly permits nor prohibits the granting of an exclusive franchise.[15/] Instead, the Supreme Court of Georgia has held that "in granting exclusive franchises the exercise of such power must be found in the powers granted in the charter."[16/] The charter of each municipality must, therefore, be consulted to determine whether such municipality may grant an exclusive franchise.

Where exclusive franchises are permitted in a particular locality, all grants will be strictly construed as not being exclusive in the absence of clear language to the contrary. By explicit provision, the legislature has declared that "[n]o franchise granted by this State shall be held to be exclusive, unless plainly and expressly so declared to be in the grant."[17/] Judicial decisions, extending back to 1851, have also held that "grants of exclusive privileges to a corporation, or an individual, are to be strictly construed."[18/]

Though exclusive franchises may be atypical in Georgia, the state legislature has provided for exclusive service areas for electric utilities. The details of the Territorial Electric Service Act,[19/] are discussed in Chapter 2.

C. Other Characteristics

All franchises including those granted to public

utilities by municipalities, issued in the State of Georgia are subject to taxation. Yearly returns must be filed with the State Revenue Commission describing and stating the value of the franchise.[20/]

While there is doubt about whether a Georgia municipality could prevent the operation of a utility authorized to provide service by the Commission if the utility has not obtained a franchise, Counsel for one power company opined that municipalities probably did not have such power.[21/]

The City of Doraville v. Southern Railway Co.,[22/] dealt with a municipality's petition to enjoin proposed construction of a railroad switching yard facility within the corporate limits of the city. The court held that where the Commission granted a common carrier by rail authority to condemn specific property within municipal limits for necessary expansion of the carrier's Commission approved operations, the municipality in which proposed facilities were to be constructed could not prohibit the use of such property for the purpose authorized by the Commission.[23/]

This case tends to indicate that if the Commission authorizes a company to operate in a particular area, the affected municipality may not intervene and prohibit operations.

The Georgia legislature has not provided for the abandonment of franchises.

FOOTNOTES

1. Ga. Code Ann. §69-310(e)(Harrison 1976).

2. Weyerhaeuser Co. v. City of Adel, 223 Ga. 668, 157 S.E. 2d 441 (1967).

3. Ga. Code Ann. §69-310(e)(Harrison 1976).

4. Id. §34B-3 (Harrison 1973).

5. Id. §34B-315 (Harrison 1973).

6. Mr. Carlson, Counsel for Georgia Power Company, Telephone conversation, July 26, 1978.

7. Ga. Code Ann. §69-310(e)(Harrison 1976).

8. Mr. Frank Edwards, Director of the Georgia Legislative Council, Telephone conversation, July 20, 1978.

9. Mr. Hugh Jordan, Executive Secretary of the PSC, Telephone conversation, July 20, 1978.

10. Ga. Code Ann. §69-310(e)(Harrison 1976).

11. Mr. Carlson, Counsel for Georgia Power Company, Telephone conversation, July 26, 1978.

12. Ga. Const. art. I, §2-107.

13. South Georgia Power Co. v. Baumann, 169 Ga. 649, 151 S.E. 513 (1929).

14. Mr. Carlson, Counsel for Georgia Power Company, Telephone conversation, July 26, 1978.

15. Ga. Code Ann. §69-310(e)(Harrison 1976).

16. Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E. 2d 598 (1962)(court invalidated a five-year exclusive franchise to an ambulance service).

17. Ga. Code Ann. §85-1312(Harrison 1978)

18. McLeod v. Burroughs, 9 Ga. 213 (1851); See, also, Macon Ambulance Serv., Inc. v. Snow Properties, Inc., 218 Ga. 262, 127 S.E. 2d 598 (1962).

19. Ga. Code Ann. §34B-3 (Harrison 1973).

20. Ga. Code Ann. §92-2303 (Harrison 1974).

21. Mr. Carlson, Counsel for Georgia Power Company, Telephone conversation of July 26, 1978.

22. City of Doraville v. Southern Railway Co., 227 Ga. 504, 181 S.E. 2d 346 (1971).

23. Id. 181 S.E. 2d at 348-351.