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2

STUDY OF THE IMPACTS OF REGULATIONS AFFECTING THE ACCEPTANCE OF INTEGRATED COMMUNITY ENERGY SYSTEMS

PRELIMINARY BACKGROUND REPORT

MASTER

Public Utility, Energy Facility Siting and Municipal Franchising Regulatory Programs in Nebraska

DUANE A. FEURER
CLIFFORD L. WEAVER
KEVIN C. GALLAGHER
DAVID HEJNA
KEVIN J. RIELLEY

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 Nebraska. 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 Nebraska. 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 recom- mendations 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, regu- lations 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 NEBRASKA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

A. Power Review Board

The state agency with principal authority to regulate electric public utilities is the Power Review Board (Board). However, the Board in fact, exercised little regulatory authority over heat and power utilities because all electrical power in Nebraska is currently supplied by public authorities and is not subject to regulation by the Board. Gas and water utilities are also subject to general supervision by municipalities.

The Board is subsumed under the Department of Water Resources for administrative purposes but is not subject to supervision by that agency. It is comprised of five members appointed by the governor and confirmed by the legislature. One member must be an attorney, one an engineer, one an accountant, and two lay persons. No one is eligible for membership on the Board who has been an elected state official or an employee of an electric utility within the previous four years. All members are appointed to overlapping four-year terms, and none may serve more than two consecutive terms. Decisions by the Board require the approval of a majority of its members.[1/]

The Board has authority to establish and modify service areas for suppliers of electricity outside municipal boundaries,[2/] and to police voluntary service area agreements among suppliers of electricity.[3/] The Board also has authority to ensure that retail suppliers of electricity provide service without discrimination to all applicants within their service areas.[4/] The authority of the Board extends only to suppliers of electricity, however, and is sharply curtailed within the boundaries of municipalities.[5/]

B. Public Service Commission

The Public Service Commission of Nebraska (Commission) is a constitutionally created body. Its powers and duties include "the regulation of rates, service, and general control of common carriers as the legislature may provide by law."[6/] The Commission is unlikely to have authority over a power plant, however, because the legislature has not expanded the scope of its regulatory powers beyond the field of common carriers.[7/]

C. Regulation by Other State Agencies

Other state agencies also possess limited regulatory jurisdiction which may be relevant to an energy facility. The Department of Roads, for example, is authorized to promulgate regulations with respect to the construction and maintenance of transmission lines and pipelines upon any highway. This grant of authority, however, is clearly limited to the statutory purposes of promoting public safety and protecting the state highway system.[8/] The Department of Labor has comparable authority to assure proper standards of safety by making annual inspections of steam-generating equipment.[9/] The Department of Environmental Control also has considerable authority to ensure that air and water quality standards are met.[10/]

Somewhat greater authority is vested in the Department of Water Resources. It has "jurisdiction over all matters pertaining to water rights for . . . power or other useful purposes," and it controls and may hear complaints regarding the appropriation of water rights.[11/] These provisions may be relevant to any use of water by a utility for generating hydroelectric power, cooling or waste disposal. In addition, the Department of Water Resources has initial approving authority for the establishment of public power districts.[12/]

The specific powers of the various state agencies are discussed in greater detail in Chapter 3, Part V.

D. Municipal Regulation

The regulation of rates and manner of operation of the electric utility services within municipalities is left essentially to the municipalities.[13/] Although some aspects of local regulation may be shared by the Board, the role of local governments is essentially exclusive, and there is no process by which local decisions are reviewed by any state agency.

The legislature has made it advantageous for municipalities and other public bodies to condemn and operate their own electrical services, and this has been widely done. Because the management of such utilities is in the hands of elected officials, policies regarding rates and standards of service can be influenced directly by the electorate. State level supervision has been necessary only to curb wasteful competition among the public bodies providing electrical services. Jurisdiction for this purpose is generally vested in the Board, but significant exceptions are made with respect to municipalities. The delineation of service areas within municipalities and the construction of utility facilities by municipalities within their own corporate limits and zoning areas are exempt from control by the Board. See Chapter 3, Part II.[14/]

II. JURISDICTION OF REGULATORY AGENCIES

A. Power Review Board

The Power Review Board has authority only over "suppliers of electricity." This term is not statutorily defined but, as a minimum, includes public power districts, public power and irrigation districts, municipalities, electric membership associations, and cooperatives.[15/] However, as noted in Part I of this Chapter, its jurisdiction over these suppliers is limited.

Privately financed suppliers of electricity are not specifically enumerated in any of the relevant statutory provisions, but would appear to fall under the jurisdiction of the Board as well, since the statute is broadly worded in terms of "any supplier," "any electric generating facilities," "any transmission lines," and the like. Moreover, the purpose underlying the creation of the Board is the assurance of "adequate electrical service at as low overall cost as possible" by eliminating unnecessary competition and duplication of facilities.[16/] Any private utility affecting that purpose should logically be included. Privately financed electrical utilities were probably not specifically enumerated simply because none has existed in Nebraska for many years. However, in _City of Auburn v. Eastern Nebraska Pub. Power Dist._,[17/] the court stated that an administrative agency such as the Board has no power or authority other than that specifically conferred upon it by statute or by a construction necessary to accomplish the purpose of the act.

B. Public Service Commission

The Public Service Commission (Commission) is constitutionally mandated to generally regulate common carriers.[18/] Common carriers are defined by statute to include "all carriers, including contract carriers, engaged in the transportation of freight or passengers for hire, or furnishing communication services for hire in Nebraska intrastate commerce."[19/] This definition encompasses all entities providing transportation and communication services for hire, including telephone and telegraph companies, but not those providing merely heat and power. Pipelines subject to Commission jurisdiction include those "transporting, transmitting, conveying, or storing any liquid or gas by pipeline for hire in Nebraska intrastate commerce."[20/]

This definition excludes utilities furnishing heat and power they have generated themselves. The Supreme Court of Nebraska has held that pipelines are not common carriers subject to Commission jurisdiction unless used to transport the commodities of others and available to the public at large.[21/] In that case the defendant gas company was excused from Commission regulation because it carried only natural gas purchased by it and sold at retail by delivery to consumers through its own distribution system. The court stressed that the defendant did not sell gas to others for resale, indicating that it might have been regarded as a common carrier had it served only as the transportation link between the producers and ultimate users of the gas.

The Commission does have limited regulatory power with respect to certain categories of electric transmission lines. It has general supervisory authority over all wires passing over or under railroad tracks at a public highway crossing.[22/] It also has limited supervisory authority over transmission lines erected outside municipal boundaries.[23/] A permit is required before an electric transmission line of over 700 volts can be constructed (or its voltage increased) in close proximity to existing transmission, telephone, or telegraph lines,[24/] or before erecting lines above specified heights in the vicinity of licensed airfields.[25/] Commission jurisdiction under these provisions is strictly limited, however, and designed to ensure that adequate safety standards are met.[26/]

III. POWERS OF REGULATORY AGENCIES

A. Power Review Board (Board)

The power of the Board to regulate the operations of electrical suppliers is limited. It has power to approve and enforce voluntary agreements with respect to service areas and customers.[27/] Such agreements are binding only on suppliers participating in thier formation.[28/]

The Board may also establish the service areas of electrical suppliers outside the corporate limits of any municipality.[29/] The retail service area of a municipally-owned electric system includes the corporate area of the municipality and the zoning area outside of its corporate boundaries, except as to customers already served by other suppliers.[30/] For areas beyond the corporate limits of a municipality, the establishment of a service area can only be made upon the application of an interested supplier to the Board and following notice to competing suppliers and a public hearing.31/ The criteria for establishing a service area basically constitute a finding of public convenience and necessity. They include the following:

(1) The supplier best able to provide the electrical load required;

(2) The most logical future supplier of the area;

(3) The desires of the supplier with respect to loads and service areas;

(4) The ability to provide cost-competitive service; and

(5) The ability of the supplier to cope with problems of expanding loads and increased costs.32/

Except by voluntary agreement, such service areas cannot be violated by another supplier without first applying to the Board. Board approval for such intrusion must be conditioned upon a finding that the existing supplier cannot provide adequate service or that the intrusion would prevent a wasteful and unwarranted duplication of facilities.33/

As indicated in Chapter 3, *infra*, the Board also has approving authority over construction of electric generating facilities and transmission lines carrying more than 700 volts "by any supplier other than a municipality within its corporate limits and its zoning area outside such corporate limits."34/ Approval of construction must be conditioned upon a finding that it will serve the public convenience and necessity and will avoid unnecessary duplication of facilities and operations.35/

The Board has a broad grant of authority to ensure the adequacy of service provided to new customers by suppliers at retail, i.e., those selling to the ultimate users of electricity.36/ The statute requires that a retail supplier provide service to any applicant within its service area. It provides further that if the supplier and the applicant cannot agree "upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier and the applicant cannot agree "upon any of the terms under which service is to be furnished, or if the applicant alleges that the supplier is not treating all customers and applicants fairly and without discrimination, the matter shall be submitted to the Board for hearing and determination."37/ There is no exception for municipalities. The section does not specify what action the Board is allowed to take. However, submission of disputes to the Board for "determination" indicates that decisions by the Board are intended to be binding.

The Board is expressly limited to an advisory role in controversies about rates.38/ In the face of specific grants of authority to local governments, the statute should be construed as affording an additional forum within which a dissatisfied applicant for retail services may air his grievances. With respect to rates, any role for the Board larger than that of an impartial mediator would require a more explicit delegation of power and greater procedural safeguards for the utility interests involved.[39/]

B. Municipal Regulation

General powers of regulation over utilities providing electricity or heating and cooling services in Nebraska are found only at the municipal level. The authority of municipalities in relation to franchises is discussed in Chapter 4. However, in Nebraska municipalities exercise rate-making powers that in most other states would be exercised by a state agency.

Cities of the metropolitan class are given general power to "regulate the sale and use of gas and electric lights, and fix and determine from time to time the price of gas, the charge of electric lights and power, and the rent of gas meters within the city."[40/] This provision authorizes cities of the metropolitan class to establish rates both for the gas that may be used by a power plant and any electricity it may offer for sale. Power to regulate the rates charged by a heating or cooling service may arguably to found in the statute which authorizes the city council to "fix rates to be charged by such enterprises" as "waterworks, gas works, [and] electric light and power plants."[41/]

This section has been interpreted by the courts to apply to privately owned ventures as well as those operated by the city.[42/]

Cities of the primary class are authorized to regulate "the sale and use of gas and electric lights and fix and determine the price of gas, the charge of electric light and power, and the rents of gas meters within the city."43/ This is a clear grant of authority to regulate the rates charged for both gas and electricity. Authority to regulate the rates charged for heating and cooling services may arguably be derived from more general grants of authority, such as that empowering cities of the primary class to "make all ordinances, by-laws, rules, and regulations not inconsistent with the general laws of the state as may be necessary or expedient, in addition to the special powers otherwise granted by law."44/

Cities of the first class are authorized to "regulate and fix the rents or rates of water, power, gas, electric light or heat."45/ This rate-making power is not to be abridged by ordinance, resolution, or contract. The juxtaposition in this section of "electric light or heat" should probably not be construed as limiting the rate-making powers of the city to heat supplied electrically. Elsewhere in the same section, "light or heat" is referred to generally, and related provisions refer to "heat"46/ and "heating plants."47/

Second-class cities and villages are authorized to make "any reasonable regulation . . . as to charges for . . . gas."48/ They may also by franchise "establish the amount that may be charged during such period for electricity and provide that such city or village may, after such period, make any reasonable regulation . . . either as to charges for electricity or otherwise."[49/] Authority to regulate the rates for heating and cooling services may be implied from more general grants of power. One section, for example, authorizes cities of the second-class and villages to make "all such ordinances . . . not inconsistent with the laws of the state as may be necessary for maintaining the peace, good government, and welfare of the corporation."[50/]

In addition to the specific regulatory powers noted above, each of the various classes of municipalities has some general regulatory authority over local utility services under its general grant of police power. This is particularly true with respect to the provision of heating and cooling services, which escape any significant regulation by state agencies. Moreover, cities of the metropolitan class are empowered to condemn electric light and power plants by majority vote of their qualified electors.[51/] All other classes of municipalities are empowered to condemn heating plants as well as electric light and power plants by the same procedure.[52/]

The scope of local regulatory jurisdiction over the functions of public utilities is not defined in terms of production, distribution, storage, or the like. Nor do the statutes require that local regulation hinge upon sales to the public or dedication of facilities to public use. In addition to their specific grants of authority, municipalities can probably regulate all of the functions of a power plant of sufficient magnitude to affect the general welfare and fall within the scope of local police powers. Such regulation would probably be limited only by the general judicial requirements that it be reasonably related to the general welfare.[53/]

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

The Public Service Commission of Nebraska issues certificates of convenience and necessity and assigns service areas only to common carriers. With respect to electric service, service areas are delineated by voluntary agreements among suppliers[54/] or by the Board where suppliers are unable to agree to service areas.

When two or more suppliers serve the same municipality at retail, such agreements must specify the area within the municipality that each is to serve.[55/] Unlike other service area agreements, those dividing a single municipality among several retail suppliers may be modified by the parties without the approval of the Board.[56/]

Any supplier failing to reach an agreement is required to file a statement with the Board indicating the service area and customers it actually serves, what it claims to be its service area, the reason for failing to reach an agreement with adjoining suppliers, and the nature and extent of any disputes regarding its service area.[57/] The Board is authorized, following notice and a hearing, to establish the service areas of those suppliers who fail to reach a voluntary accommodation.[58/] No supplier can offer retail service outside its own service area, except by voluntary agreement, without first securing the approval of the Board. Such approval can only be granted if the Board finds, after notice and a hearing, that the "customer or customers proposed to be served cannot or will not be furnished adequate electric service by the supplier in whose service area the customer is located or that the provision thereof by such supplier would involve wasteful and unwarranted duplication of facilities."[59/] The Board, however, is not empowered to establish service areas within the corporate limits of municipalities,[60/] and municipalities are given preference in providing retail service to the zoning area outside their corporate limits.[61/] The maximum area that can be served by a municipally owned electric system, however, includes only the corporate area of the municipality, the zoning area outside the corporate limits, and any additional area it was serving prior to the creation of the Board in 1963.[62/]

Approval of the Board, therefore, is a prerequisite for the initiation of utility services in Nebraska only for those activities by a party being undertaken outside an established service area. The Board does not issue traditional certificates of convenience and necessity. Rather, it approves the furnishing of service in designated service areas. In some instances, however, it does control construction and establish service areas on the basis of public convenience and necessity.[63/]

V. APPEALS OF REGULATORY DECISIONS

There is no requirement that administrative remedies be exhausted before appealing decisions of the Board to the judicial system.[64/] An administrative path to review is available, however, by filing a motion for rehearing within ten days after the Board renders a final decision.[65/] Appeals are made directly to the Supreme Court and require the filing of a notice of appeal and the appropriate docket fee with the Board within thirty days after it makes its final decision.[66/] The appeal of a contested case to the Supreme Court is ordinarily heard "de novo on the record."[67/] Judicial decisions, however, indicate that the orders of the Board may be modified only if there is no substantial evidence to sustain them or if the record shows that they were otherwise arbitrary or unreasonable.[68/]

1. Neb. Rev. Stat. § 70-1003 (1971).
2. Id. §§ 70-1005 to 1011.
3. Id. §§ 70-1002 to 1002-03.
4. Id. § 70-1017 (Supp. 1976).
5. Id. §§ 70-1008, 70-1012 (1971).
6. Neb. Const. art 6, § 20.
7. See Part II, _infra_, for discussion of the jurisdiction of the Commission.
8. Neb. Rev. Stat. § 39-699 (Supp. 1974).
9. Id. § 48-702.
10. Id. §§ 81-1507, 81-1508 (Supp. 1976).
11. Id. §§ 46-209, 46-233, 46-236 (1974).
12. Id. § 70-608 (1971).
13. Id. §§ 14-106, 14-108, 15-266, 16-679, 17-528.02, 17-528.03 (1974).
14. Confirmed generally by Mr. G. Gustafson, Board legal counsel, telephone conversation, 7/10/78.
15. Neb. Rev. Stat. §§ 70-1001, 70-1002 (Supp. 1977).
16. Id. § 70-1001 (Supp. 1971).
17. _City of Auburn v. Eastern Nebraska Pub. Power Dist._ 179 Neb. 439, 138 N.W.2d 629 (1965) (dictum).
18. Neb. Const. art. 6, § 20.
19. Neb. Rev. Stat. § 75-109 (1971).
20. Id. § 75-501.
21. _City of Bayard v. North Central Gas Co._, 164 Neb. 819, 83 N.W.2d 861 (1957).
22. Neb. Rev. Stat. § 75-702 (1971).
23. Id. §§ 75-709 to 724.

24. Id. §§ 75-710, 75-711.

25. Id. §§ 75-713, 75-714.

26. Consumers Pub. Power Dist. v. Twin Valleys Pub. Power Dist., 172 Neb. 315, 109 N.W.2d 372 (1961).

27. Neb. Rev. Stat. §§ 70-1002 to 1002.03 (Supp. 1976).

28. Id., § 70-1002.01. See also City of Lincoln v. Nebraska Pub. Power Dist., 191 Neb. 556, 216 N.W.2d 722 (1974) (provision that no supplier shall offer electric energy in violation of an agreement applied only to parties to that agreement).

29. Neb. Rev. Stat. § 70-1005 (1971).

30. Id. § 70-1008.

31. Id. § 70-1005.

32. Id. § 70-1007.

33. Id. §§ 70-1010, 70-1011.

34. Id. § 70-1012.

35. Id. § 70-1014.

36. Id. § 70-1017 (Supp. 1976).

37. Ibid.

38. Id. §§ 70-1002.03, 70-1018.

39. Confirmed by Mr. G. Gustafson, Board legal counsel, telephone conversation, 7/10/78, that the Board has not exercised rate-making powers under this section and has rendered decisions regarding the installation of equipment and the manner of providing service.

40. Neb. Rev. Stat. § 14-106 (1974).

41. Id. § 14-107.

42. See Dunmar Investment Co. v. Northern Natural Gas Co., 185 Neb. 400, 176 N.W.2d 4 (1970). The city was found to have authority to issue a permit allowing a privately owned defendant gas company, for an annual fee, to pipe steam and chilled water under the city streets for purposes of heating and air conditioning.

43. Neb. Rev. Stat. § 15-266 (1974).

44. Id. § 15-263.

45. Id. § 16-679.

46. Id. § 15-678.

47. Id. §§ 16-673 (Supp. 1976), 16-674 (1974).

48. Id. § 17-528.02 (1977).

49. Id. § 17-528.03 (1977).

50. Id. § 17-505 (1977).

51. Id. § 14-376 (1974).

52. Id. § 19-701 (1977).

53. E.g., Kansas-Nebraska Natural Gas Co. v. City of Sidney, 186 Neb. 168, 181 N.W.2d 682 (1970). Although the legislature had delegated to municipalities the authority to regulate reates for gas, public utility was entitled to a fair return on its property being put to public use.

54. Neb. Rev. Stat. § 70-1002 (1971).

55. Id. § 70-1002(2).

56. Id. §§ 70-1002(3), 70-1010.

57. Id. § 70-1004.

58. Id. § 70-1005.

59. Id. § 70-1011.

60. Id. § 70-1005.

61. Id. §§ 70-1008, 70-1009.

62. Id. § 70-1008.

63. See the discussion in Parts I and II, supra, and in Chapter 3 for the role of the Board.

64. Neb. Rev. Stat. §§ 70-1016, 75-137 (Supp. 1977).

65. Id. § 75-137.

66. Ibid.

67. Id. § 84-918.

68. _E.g._ _Omaha Pub. Power Dist. v. Nebraska Pub. Power Project_, 196 Neb. 477, 243 N.W.2d 770 (1976) (court refused to overturn a Board decision to allow construction of a nuclear power plant because there was substantial evidence that the proposed facility was necessary).

CHAPTER 3

SITING OF ENERGY FACILITIES IN NEBRASKA

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

There are no statutes in Nebraska directed specifically to the siting of energy generating facilities. The Power Review Board (Board) has jurisdiction only over suppliers of electricity. Its powers do not supersede or pre-empt those of other state and local agencies, and those powers are sharply curtailed within municipalities. However, the Board does have authority over service areas of electric suppliers and authority to deny approval for the construction of electric generating facilities and transmission lines over a certain minimum capacity except those owned by a municipality and located within its own corporate limits or zoning area.[1/]

No other agencies are required to participate in proceedings before the Board for the approval of construction, but a number of other agencies do have independent permit granting authority which may be relevant to the location of a power plant. Those agencies include the departments of water resources, roads, environmental protection and the Public Service Commission (PSC).[2/]

II. SCOPE OF SITING JURISDICTION

Before "any electric generation facilities or any transmission lines or related facilities carrying more than 700 volts are constructed by any supplier" other than a municipality operating within its own corporate boundaries and zoning area, they must be approved by the Board.[3/] Board approval is required within municipal boundaries whenever the electrical supplier desiring to construct such facilities is not the local government itself.

In approving electric generating facilities, the Board considers some aspects of location in applying statutory criteria for approval which include a determination of whether unnecessary duplication of facilities is likely to occur. The Board has not sought to consider environmental type issues in exercising its responsibilities.[4/] Rather, the Board stresses economic considerations in exercising its jurisdiction over the construction of electric generating and transmission facilities. Greater consideration by the Board of environmental concerns could perhaps be justified under the statutory criteria of whether the "public convenience and necessity" requires a new power plant at the proposed site.

Certain factors limit the Board's exercise of broad powers to control siting. Most aspects of electrical utility siting in Nebraska are already subject to the direct or indirect control of other public bodies. As mentioned in Chapter 2, municipally-owned electrical utilities are expressly exempted from Board jurisdiction, and the legislature has encouraged municipalities to operate their own electrical services.[5/] The existence of independent pollution and other environmental control agencies with permit granting powers forecloses any real need for the Board to consider environmental factors in considering public convenience and necessity.[6/] The short time span allowed the Board for consideration of applications (a maximum of 120 days) also militates against a thorough investigation of environmental factors involved in an applicant's choice of sites.[7/] Finally, the legislative purpose underlying the creation of the Board is phrased in terms of providing adequate electrical service at as low overall cost as possible by eliminating wasteful competition among electrical suppliers and the resulting duplication of facilities.[8/] Because of this purpose, the Board has stressed only truly economic factors rather than environmental siting considerations.

The Board has jurisdiction only over "suppliers of electricity." This term is not statutorily defined but does not literally extend to suppliers of heating and cooling services. Nevertheless, the Board would have an effect on the siting of heating and cooling systems where the systems would be appurtenant to electrical generating equipment. The heating and cooling systems would have an impact on the cost of the electrical service which would be relevant to the Board's finding of public convenience and necessity.[9/]

The Nebraska statute applies to "any" electric generating facilities and transmission lines to be constructed by "any" supplier.[10/] The term "supplier" is not defined in the statute, and an establishment producing electricity strictly for its own needs may not be regarded as a "supplier" within the meaning of the statute. The statute, however, has been construed by the courts to apply to those supplying electricity for resale as well as directly to consumers.[11/]

Exempted from the jurisdiction of the Board is the construction of transmission line extensions within a supplier's own service area. Lines may also be constructed up to one-half mile beyond a given service area without Board approval by securing the written consent of all other suppliers having lines within one-half mile of the proposed construction.[12/] As previously noted, municipal suppliers are totally exempt from Board control over construction within their corporate limits and zoning areas. Nor do they require Board approval for construction within their own counties of facilities that are not to be utilized to provide retail service outside their existing municipal service areas.[13/]

The Board is authorized to adopt "such rules of procedure as are advisable and in conformity with law."[14/] The rules that have been promulgated under this provision are procedural; they do not further clarify the Board's jurisdiction over the siting of energy facilities.[15/]

The Board's jurisdiction over the construction of generating facilities does not pre-empt the authority of other agencies over siting factors. As mentioned, the Board is only one of several agencies with approval authority over the construction of generation facilities. The legislation creating the Board, however, does supersede prior inconsistent legislation.[16/] In one case, for example, the court held that the grant of authority to the Board to approve construction of electrical facilities modified conflicting legislation.[17/] A municipality in that case was denied permission to build an electric transmission line by the Board. The city argued that it should have been exempt from the jurisdiction of the Board because it had lawfully contracted to supply electricity to a neighboring city, and the Board's denial of its application amounted to an unconstitutional impairment of the obligation of contract. The court affirmed the Board's decision, reasoning that the statutes authorizing municipalities to contract for the sale of electricity beyond their corporate limits were modified by the grants of power made to the Board. Such contracts had to be conditioned upon securing the approval of the Board for construction of the necessary facilities.

III. CERTIFICATION PROCESS

Electric suppliers subject to the jurisdiction of the Board desiring to construct generating facilities or transmission lines carrying over 700 volts must submit an application "containing such information as the Board shall prescribe."[18/]

The Board may approve an application without notice to alternate power suppliers or a hearing if it determines that the necessary findings can be made without a hearing.[19/] In all other instances the Board must hold a hearing, providing ten days' notice by mail to "such alternate power suppliers as it deems to be affected by the application."[20/] The hearing is to be held within thirty days but may be delayed an additional sixty days for "good cause shown."[21/] The requirement that the hearing be within thirty days has been held to be directive rather than mandatory.[22/] Any interested parties may appear at the hearing and offer evidence.[23/]

Decisions by the Board establishing the legal rights and obligations of specific parties qualify as "contested cases" and require compliance with the procedures generally applicable to administrative agencies.[24/] Under these procedures the Board is required to keep an official record, including testimony and exhibits.[25/] It is not bound by the ordinary rules of evidence, however, unless a written request to that effect is made by one of the parties at least three days prior to the hearing.[26/] The Board is required to render a decision within thirty days following the conclusion of the hearing.[27/] Adverse decisions must be in writing or stated in the record and must be accompanied by findings of fact and conclusions of law.[28/]

IV. CERTIFICATION STANDARDS

Before approving an application to construct electric utility facilities, the Board must find that it will serve the public convenience and necessity to do so and that the applicant can most economically supply the electric service to result from the proposed construction without unnecessary duplication of facilities or operations.[29/] These criteria must be considered in light of the legislative policy underlying the creation of the Board. This policy, as previously mentioned, is to provide adequate electrical service to all citizens at as low an overall cost as possible by the elimination of wasteful competition among suppliers and the consequent duplication of facilities.[30/] The statutory standards to be applied by the Board are, therefore, essentially economic. The applicant must convince the Board that it can most economically supply the electrical service to result from the construction, without such duplication of facilities or operations, and that the proposed facilities will serve the public convenience and necessity.[31/] These standards are to be applied generally to all facilities subject to the Board's jurisdiction.

V. LOCATION AND PLANNING OF DEVELOPMENT GENEPALLY

A. Public Service Commission

Several state agencies have permit granting authority likely to impact construction of a power plant. The Public Service Commission (PSC) has "general supervisory authority" over electric transmission wires passing over or under railroad tracks at public highway crossings.[32/] It also has limited authority to control the construction of transmission lines erected outside of municipalities in close proximity to existing power lines and telephone and telegraph wires,[33/] or airfields.[34/] Permission to construct such lines requires that an application be filed with the PSC.[35/] The applicant must demonstrate at a public hearing that appropriate safety standards have been met.[36/]

B. Department of the Roads

The Department of Roads has a grant of authority comparable to that of the PSC. No person, firm or corporation may lay pipes or install poles within any right-of-way included in the state highway system unless a permit is first obtained from the Department.[37/] The Department must grant the necessary permits, however, if the facilities will not interfere with the use of right-of-way for highway purposes.

C. Department of Water Resources

The Department of Water Resources has initial approving authority over the establishment of public power districts.[38/] Public power districts are public corporations, political subdivisions of the state, organized under provisions of the Nebraska statutes to engage in the electric light and power business in one or more municipalities.[39/] The Department is required to find that such districts will conform to the public convenience and necessity before granting certification, although the relevant investigation may be conducted by the Power Review Board.[40/] Applications must also be made to the DWR for a variety of uses of water which may be important to a power plant. Permits are required for any appropriation of water,[41/] for the construction of storage reservoirs,[42/] and for the construction of ditches, dams, or pipelines for "conveying water to be applied to domestic, agricultural, or any other beneficial use."[43/] These provisions may be of significance to a generating plant requiring large amounts of water.

D. Department of Environmental Protection

Permits from the Department of Environmental Protection are required with respect to sources of air, water or soil pollution. Without current permits, it is unlawful to engage in the:

> construction, installation, or operation of any industrial, commercial, or other establishment or any extension or modification thereof or addition thereto, the operation of which would cause an increase in the discharge or emission of wastes into the air, waters, or land of the state or would otherwise alter the physical, chemical or biological properties of any air, waters, or land of the state in any manner not already authorized.44/

Failure to obtain the necessary permits or violation of the conditions imposed by a permit may result in a civil penalty of as much as $5,000 per day.45/ An applicant can, however, seek a variance from rules or regulations that would cause serious hardship without equal benefit to the public.46/ Separate permits are ordinarily required with respect to air pollution, water pollution, and solid waste disposal, but provisions have been made in the departmental regulations for the consolidation of procedures with respect to a single facility or applicant.47/ The permit granting authority of DEP may be superseded, under Section 8-1528 of the Nebraska statutes, within political subdivisions which themselves provide for the protection of the environment in accordance with the provisions of the Nebraska Environmental Protection Act.48/

E. Local Government Planning

Local governments are probably the most significant remaining group with siting jurisdiction. In addition to franchising authority over municipal streets, cities and towns are authorized to restrict the height, size, location and use of buildings, structures, and land.49/ The zoning powers of cities of the metropolitan and primary classes may be exercised in an area extending three miles beyond their corporate limits.50/ Similar authority to regulate the use of land outside the zoning areas of municipalities is granted to the governing boards of counties.51/ The adoption of a comprehensive development plan is a prerequisite to the exercise of zoning powers in each case.52/ Local governments, however, may grant variances from the requirements of such comprehensive plans. The board of appeal in a city of the metropolitan class, for example, is specifically empowered to grant special permits "to public utilities for public service purposes" which may conflict with zoning regulations.53/

FOOTNOTES

1. Neb.Rev.Stat. §§ 70-1001 to 1020 (1977).

2. See Part VI, *infra*.

3. Neb.Rev.Stat. § 70-1012 (1977).

4. Confirmed by Mr. G. Gustafson, Board legal counsel, telephone conversation, 7/10/78.

5. Municipalities, for example, are empowered to condemn electric generating plants and transmission lines simply by majority vote, and this provides an attractive way of attempting to reduce rates. Neb.Rev.Stat. §§ 14-376, 19-701 (Supp. 1977). Confirmed by Mr. G. Gustafson, Board legal counsel, telephone conversation, 7/10/78.

6. See Part VI, *infra*.

7. Neb.Rev.Stat. § 70-1013 (1977).

8. Id. § 70-1001.

9. Id. §§ 70-1007, 70-1014.

10. Id. § 70-1012.

11. *See City of Auburn v. Eastern Nebraska Pub. Power Dist.*, 179 Neb. 439, 138 N.W.2d 629 (1965), decision by the Board allowing only one of two competing wholesale suppliers to erect a transmission line affirmed because the purpose of the legislation was to eliminate unnecessary duplication of facilities regardless of the distinction between wholesale and retail suppliers.

12. Neb.Rev.Stat. § 70-1012 (1977).

13. *Ibid*.

14. Id. § 70-1006 (1977).

15. *See* Neb. Power Review Board, Revised Rules of Practice and Procedure (1972).

16. See Part VI, <u>infra</u>.

17. <u>City of Auburn v. Eastern Nebraska Pub. Power Dist.</u>, 179 Neb. 439, 138 N.W.2d 629 (1965).

18. Neb.Rev.Stat. § 70-1012 (Supp. 1977).

19. <u>Id</u>. § 70-1013. (1977).

20. Ibid.

21. Ibid.

22. <u>Omaha Pub. Power Dist. v. Nebraska Pub. Power Project</u>, 196 Neb. 477, 243 N.W.2d 770 (1976). (Board did not lose jurisdiction over an application to construct a nuclear power plant simply because the evidentiary hearing was delayed longer than thirty days.)

23. Neb.Rev.Stat. § 70-1013 (1977).

24. <u>Id</u>. § 84-901(3). See <u>City of Lincoln v. Nebraska Pub. Power Dist</u>., 191 Neb. 556, 216 N.W.2d 722 (1974)(hearing before the Board on an agreement between two public power districts, to which interested municipalities objected, was a contested case); <u>City of Auburn v. Eastern Nebraska Pub. Power Dist</u>., 179 Neb. 439, 138 N.W.2d 629 (1965)(action by the Board rejecting an application by a city to construct a transmission line in favor of a competing application by a public power district was quasi-judicial, and due process was satisfied by notice and a hearing).

25. Neb.Rev.Stat. § 84-913 (1977).

26. <u>Id</u>. § 84-914.

27. <u>Id.</u> § 70-1013.

28. <u>Id</u>. § 84-915.

29. <u>Id</u>. § 70-1014.

30. <u>Id</u>. § 70-1001.

31. Confirmed by Mr. G. Gustafson, Board legal counsel, telephone conversation, 7/10/78, that current application procedures do not require the submission of information specifically addressed to the selection of sites.

32. Neb. Rev. Stat. §75-701 (1977).

33. Id. §§75-709, 75-710.

34. Id. §75-713.

35. Id. §§ 75-710, 75-713.

36. Id. §75-711, 75-714 to 717.

37. Neb. Rev. Stat. §39-1361 (1977).

38. Id. §§70-607, 60-608.

39. Id. §§70-602, 70-604.

40. Id. §70-607.

41. Id. §46-232.

42. Id. §46-241.

43. Id. §46-246.

44. Id. §81-1506(2)(d).

45. Id. §81-1508(c).

46. Id. §81-1513.

47. Rule 22, 2 Envir. Rep. State Air Laws (BNA) 436:0503 (1975).

48. Nev. Rev. Stat. §§81-1501 to 1532 (1977).

49. Id. §§14-409, 15-902, 19-901.

50. Id. §§14-418, 15-905.

51. Id. §23-114.

52. Id. §§14-403, 15-902, 19-901(2), 23-114.01.

53. Id. §14-412; see also Neb. Rev. Stat. §§15-902, 19-907, 23-168.04.

CHAPTER 4

LAW GOVERNING FRANCHISES IN NEBRASKA

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

Municipalities in Nebraska have been granted explicit franchising authority by the legislature with respect to a variety of functions that may have relevance to power plants. Although several of the relevant statutory provisions address only the grant of franchises to private individuals or corporations, public power districts are also required to obtain franchises in a like manner.[1/] Separate statutes for each class of municipality require a public purpose.

A. Metropolitan Cities

Cities of the metropolitan class (cities having a population of at least 300,000)[2/] are authorized to:

> regulate and provide for the lighting of streets, laying down gas and other pipes, and erection of lamp posts, electric towers, or other apparatus . . . [and] to prohibit or regulate the erection of telegraph, telephone, or electric wire poles or other poles for whatever purpose desired or used in the public grounds, streets, or alleys, and the placing of wires thereon.[3/]

Such authority extends to the prohibition of transmission lines and poles and amounts to a complete franchising authority. The franchising authority over the steam and water pipes likely to be important to a power plant is less clear. The city is stated only to have the power to "regulate and provide for" the laying down of pipes, and it not given the specific authority to prohibit such pipes.

Authority for metropolitan cities to forbid altogether the installation of pipelines within or under the municipal streets, however, may be derived from related statutory provisions. One section, for example, authorizes the city to "control and direct all work upon the public streets" and to adopt "all reasonable regulations relating to excavations in the streets or public grounds by any and all parties, including waterworks, gas, and other franchised corporations."[4/] This section indicates that gas companies, which operate through pipelines, may be franchised and that the city's authority over its streets is comprehensive. A statute further authorizes the city to make all police regulations necessary for the general welfare "in addition to the police powers expressly granted."[5/] The city is apparently authorized to forbid the installation of pipes whenever the general welfare demands such action.

Another section of the Nebraska statutes authorizes the city to "fix and charge rentals for subways and conduits" with respect to a variety of utility enterprises.[6/]

This section has been construed by the courts to authorize a metropolitan city to charge an annual fee for the installation of pipelines beneath the city streets and, by implication, to require a franchise. In Dunmar Investment Co. v. Northern Natural Gas Co.,[7/] the defendant gas company piped steam and chilled water to several buildings in downtown Omaha for heating and cooling purposes. It did not purport to be a public utility, reserving the right to accept or reject customers on an individual basis. Plaintiff challenged the right of defendant to conduct this business without a franchise. The suit would have been frivolous if the city did not possess the necessary franchising authority, and all parties assumed that it did. The court indicated that franchises could be granted whenever the general welfare demanded that a particular course of conduct be regulated, modified, or restrained altogether. It held that the city was authorized to allow this use of the space beneath its streets by the grant of a permit and the charge of an annual fee as provided by statute.[8/] The grant of a franchise, with its more rigid procedural requirements, was not necessary because defendant only affected a very small segment of the city's populace.

The Dunmar case has important implications for a power generating facility. It indicates that a city of the metropolitan class does have franchising authority over pipelines but may adopt a more informal permit granting procedure for small-scale operations. This kind of permit would be temporary, would require the payment of an annual fee, and would not grant a vested right to make use of the municipal streets.[9/] The case also indicates that the provision of steam and chilled water for heating and cooling purposes, rather than for consumption, was not the "laying of pipes in connection with a water plant" in the sense required by the statute,[10/] which vests franchising authority in the board of directors of the metropolitan water district.[11/]

In addition to their general franchising authority, cities of the metropolitan class are empowered under the Nebraska statutes to regulate the rates charged for electric light and power and gas works.[12/] Such cities also have authority to regulate the operations and adequacy of service of power generating utilities.[13/]

B. Primary Cities

Cities of the primary class are those with a population between 100,000 and 300,000.[14/] They are authorized to "prevent and remove all encroachments . . . [and] to regulate and prevent the use of streets, sidewalks and public grounds for . . . telegraph, telephone, or other poles."[15/] This power of regulation, allowing the city to forbid the installation of poles along its streets, amounts to a complete franchising authority with respect to transmission lines. Cities of the primary class are also empowered to "make contracts with and authroize any person, company or association to erect gas works, electric or other light works in said city." 16/ Such cities are authorized:

> to regulate and provide for the lighting of streets, laying down gas, water and other pipes, and the erection of lamp posts, electric towers, or other apparatus . . . . [and to] prohibit and regulate the erection of telephone, telegraph, or electric wire poles or other poles for whatsoever purpose desired or used in the public grounds, streets, or alleys, and the placing of wires thereon. 17/

This reiterates the city's franchising authority over transmission lines. It may be regarded as a general grant of franchising authority over pipelines as well, in light of the previous discussion covering metropolitan cities. The conclusion that cities of the primary class have franchising authority over pipelines is reinforced by a statute which provides that they "shall have supervision and control of all public ways." 18/ A grant of franchising authority can also be implied from a section which allows such cities to make all ordinances "not inconsistent with the general laws of the state as may be necessary or expedient." 19/

Cities of the primary class are empowered to regulate the rates charged for gas and electric light and power.[20/]

C. First-Class Cities

Cities of the first class are those with populations between 5,000 and 100,000. They are granted explicit franchising authority over transmission lines by a statute which provides that "a city of the first class may prevent and remove all encroachments into and . . . regulate and prevent the use of streets, sidewalks, and public grounds for . . . telegraph, telephone, or other poles."[21/] Such cities are also empowered to "make contracts with and authorize any person, company or association to erect a gas works, power plant, electric or other light works, heating plant, or waterworks in such city."[22/] In view of related sections, this should be read as a grant of franchising authority sufficient to encompass pipelines and all uses that an energy generating facility would be likely to make of municipal streets.

One statute, for example, authorizes the city to "prevent the digging of holes, pits, or excavations within the city, except for the purpose of building where such excavations are made."[23/] Furthermore, such a city is authorized to "regulate for the city any such waterworks, gas works, power plant, electric or other light works, or heating plant."[24/] With this degree of control over power plants, extending to the power of condemnation, it would be inconsistent for cities of the first class to lack franchising authority over pipelines. A further grant of authority over pipelines can be derived from a statute which empowers a city of the first class to "make all such ordinances . . . not inconsistent with the general laws of the state as may be necessary or expedient."[25/]

Cities of the first class are also authorized to regulate the rates charged for "power, gas, and electric light or heat."[26/] This provision also authorizes the city to require individuals or private corporations operating power utilities to furnish service to any applicant "along the line of its pipes, mains, wires, or other conduits." See Chapter 2, Part III.

D. Second-Class Cities and Villages

Cities of the second class are those having populations between 800 and 5,000, although they may choose to be governed as villages.[27/] Villages require at least 100 inhabitants.[28/]

Both cities of the second class and villages are given explicit franchising authority with respect to utilities providing gas and electricity. They are authorized to "grant a franchise . . . to any person, company, corporation, or association, whether publicly or privately owned, to furnish light and power to the residents, citizens, and corporations doing business in such a city or village."[29/] A similar grant of franchising authority exists to "lay and maintain gas mains, pipes, service, and all other necessary structures in the streets, lanes, alleys, and public places of such city or village for the purpose of transporting gas."[30/] A section of the statutes reiterates the franchising powers with respect to "poles, lines, wires, and conductors of electricity."[31/] These provisions make no mention of franchising authority with respect to the laying of pipes for conveying steam or water.

The power to control the use of municipal streets by all manner of pipelines, however, may be found in other statutory grants of authority. One section, for example, provides that "second-class cities and villages shall have the power to remove all obstructions from the sidewalks, curbstones, gutters and crosswalks . . . and to . . . regulate . . . all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks in the said city or village."[32/] Another section provides that the city council or board of trustees shall have the care, supervision, and control of all public highways, bridges, streets, alleys, public squares, and commons within the city or village."33/ Cities of the second class and villages are also empowered to "make all ordinances . . . not inconsistent with the laws of the state as may be expedient for maintaining the peace, good government, and welfare of the corporation."34/

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

In addition to the specific statutory provisions noted in Part I, a general grant of franchising authority for municipalities larger than cities of the second class can be implied from the home rule provisions of the state constitution. Cities with populations of more than 5,000 are empowered to adopt home rule charters, which are required only to be "consistent with and subject to the constitution and laws of this state."35/ Since the legislature has refrained from virtually all regulation of heating and power utilities at the state level, it would not be unlawful for a home rule city to exercise the full gamut of franchising powers with respect to the use of its streets by an energy generating facility. In view of the broad power afforded home rule cities and the general powers of all classes of municipalities to control and regulate the use of their streets, it would be inconsistent if any size municipality were denied franchising authority over the laying of pipes by such a facility, whether or not specifically enumerated in the statutes. In Dunmar Investment Co. v. Northern Natural Gas Co., the court implied that a metropolitan city had franchising authority over pipelines conveying steam and chilled water under its home rule charter and general statutory provisions relating to the regulation of pipelines.[36/]

The Nebraska courts in the past have derived municipal franchising authority from more general grants of power. In City of Plattsmouth v. Nebraska Telephone Co.,[37/] for example, the court found that the plaintiff city had granted a franchise to the telephone company by passage of an ordinance, allowing it to erect its poles and wires in the city streets. Acceptance of the franchise by the telephone company was held to constitute a contract, and the court refused to grant an injunction ordering the telephone company to place its wires underground in the absence of a showing of public necessity. The finding was that there was a franchise made despite the absence of explicit statutory provisions. The court stated that "under the general power given to the plaintiff by its charter and the general control which it exercises over the streets and public grounds of the city, its right to extend to the defendant the privilege of occupying its streets and public grounds cannot be questioned."[38/]

It seems likely, therefore, that the courts in the future will find that municipalities have sufficient implied franchising power to encompass any likely use of the streets by a power plant. This is particularly true because of the absence in Nebraska of state level regulation of power and heating utilities.

III. PROCEDURES FOR GRANTING FRANCHISES

The procedures for granting franchises in Nebraska are not clearly defined. The broad outlines are indicated in a limited way by the statutes relating to the separate classes of municipalities. The cases dealing with franchises, however, indicate that they are generally granted by the passage of an ordinance.[39/] There are no requirements for securing a certificate of public convenience and necessity prior to the grant of a franchise.

A. Franchising Procedures in Metropolitan Cities

A city of the metropolitan class may grant or modify a franchise by an "ordinance or resolution," but only after the passage of four weeks following its "introduction or proposal."[40/] The ordinance or resolution must be published daily for two weeks in the official newspaper of the city, and it must require that an "annuity or royalty" be paid to the city. Before a franchise becomes binding, the ordinance or resolution must be approved at an election by a majority vote among the qualified electors of the city. A subsidiary contract included within such a franchise to supply the city with electricity for use "on its streets and public places" is subject to a 40-year limit.[41/] A city of the metropolitan class may grant permits for limited use of its streets without meeting the above listed procedural requirements as long as the public is not seriously affected.[42/]

B. Franchising Procedures in Primary Cities

The procedural requirements set out in the statutes for the granting of franchises by cities of the primary class permit the mayor and city council to grant franchises for up to 25 years.[43/] Franchises of a longer duration require a majority vote by the electors of the city.[44/] Contracts for furnishing the city with light and power also require an election if made for more than one year and in any case, cannot exceed five years.[45/] The statute provides that "all franchise ordinances shall require three readings on three separate days before passage by the council,"[46/] indicating that franchises are normally granted by the passage of an ordinance.

Little additional guidance is available from the general provisions regarding the passage of ordinances.[47/] Ordinances are passed pursuant to the rules and regulations the city council may adopt.[48/] No ordinance may contain a subject that is not clearly expressed in its title.[49/] Ordinances take effect fifteen days after publication in a newspaper of general circulation or posting on the official bulletin board of the city.[50/]

C. Franchising Procedures in First-Class Cities

Franchise granting authority for cities of the first class is exercised by the mayor and city council.[51/] Contracts to furnish the city and its inhabitants with light, heat, and power cannot exceed 25 years' duration.[52/] It is not clear by what procedure franchises are granted, but the statute provides that the "mayor and council may provide by ordinance the details necessary for the full exercise of such powers"[53/] whenever they are not spelled out elsewhere.

The general requirements for the passage of an ordinance are similar to those for other classes of municipalities. Ordinances cannot contain a subject not clearly expressed in their title, and those of a general or permanent nature must be read by title on three separate days before their passage.[54/] They take effect fifteen days after newspaper publication.[55/]

D. Franchising Procedures in Second-Class Cities and Villages

Cities of the second class and villages may not grant franchises for longer than 25 years.[56/] Contracts to furnish the municipality and its residents with light and power cannot exceed five years.[57/] The general provisions regarding the passage of ordinances do not materially differ from those discussed in relation to primary cities and cities of the first class.[58/]

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

Statutory provisions do not limit the grant of franchises to those holding themselves out as ready and willing to serve the public at large, for utility purposes, or the like. The express grants of franchising authority, however, tend to be limited in scope, identifying particular functions, such as the installation of wires, for which they may be granted. There is no requirement that the award of a franchise be competitive, awarded to the highest bidder, or that the services meet any special standards. One case[59/] indicates that permits may be granted for a limited use of the streets for private purposes without the formality required for the grant of a franchise. On the other hand, a much earlier case stressed that a city exercising an implicit authority to grant franchises was serving a public purpose.[60/] This emphasis on the public benefit was necessary because the general grants of authority to control the city streets were worded in terms of maintaining the public welfare and serving the public good. The exercise of implied franchising authority by a Nebraska municipality today must still be based largely upon the existence of police powers that can only be utilized in the public interest. The power of municipalities to control the use of their streets is less certain with respect to pipelines than transmission lines, since authority to control the former is based largely upon implied grants of power. This has not been a significant area of litigation, however, and judicial decisions provide little indication of what criteria are likely to be used in evaluating the franchise requests by power plants.

V. CHARACTERISTICS OF A FRANCHISE

The Nebraska Constitution forbids the passage of laws "making any irrevocable grant of special privileges or immunities."[61/] The Nebraska Supreme Court defined a special privilege for purposes of constitutional law as a "right, power, franchise, immunity, or privilege granted to or vested in a person or class of persons, to the exclusion of others and in derogation of common right."[62/] Building upon this definition, the United States Supreme Court held that the grant of a non-exclusive franchise was perpetual in the absence of an explicit limit as to duration.[63/]

There the defendant city attempted to disconnect the electric transmission lines of a private electric utility which had been granted an unlimited right-of-way for the erection of its poles and wires. The Court granted an injunction against the city, reasoning that since the franchise was not exclusive it did not fall under the provision forbidding irrevocable grants of "special privileges." The reservation by the city of the right to require the removal of the transmission lines in case of public necessity was not regarded by the court as having any bearing on the duration of the franchise. It would endure forever or until such a necessity arose.[64/]

The statutory provisions relating to the duration of franchises are noted in Part III of this chapter. Both cities of the first and second class are prohibited from making franchises for more than 25 years.[65/] Metropolitan cities and cities of the primary class may grant franchises for more than 25 years, but only after holding public elections.[66/] Such franchises can probably be granted as long as they are not exclusive.

There are no statutory provisions regarding the exclusivity of franchises. The State Constitution, however, prohibits the legislature from passing "local or special laws" granting exclusive privileges, immunities or franchises.[67/]

This constitutional provision has been construed to permit the granting of exclusive franchises by municipalities if explicitly authorized to do so under the terms of a general law.[68/] In May v. City of Gothenberg, the court found that the legislature had not explicitly authorized municipalities to grant exclusive franchises to telephone companies. It therefore refused to enjoin the city from granting a franchise to a second telephone company.[69/]

In the absence of explicit enabling legislation, therefore, it seems unlikely that municipalities can grant exclusive franchises for utility purposes unless the franchise was perceived to be a mere police regulation.[70/] However, there is a clear legislative preference in favor of exclusive service areas with which a power-generating facility will have to deal.[71/]

FOOTNOTES

1. Neb. Rev. Stat. §70-660 (Supp. 1977).
2. _Id._ §14-101.
3. _Id._ §14-106.
4. _Id._ §14-3, 108.
5. _Id._ §14-102(25).
6. _Id._ §14-107.
7. _Dunmar Investment Co. v. Northern Natural Gas Co._, 185 Neb. 400, 176 N.W. 2d 4 (1970).
8. Neb. Rev. Stat. §14-107 (Supp. 1977).
9. _Dunmar_, _supra_, 185 Neb. at 403-04, 176 N.W. 2d at 6-7.
10. Neb. Rev. Stat. §14-1009 (Supp. 1977).
11. _Dunmar_, _supra_, 185 Neb. at 401-02, 176 N.W. 2d at 5-6.
12. Neb. Rev. Stat. §§14-106, 14-107 (Supp. 1977).
13. _Id._ §14-107.
14. _Id._ §15-101.
15. _Id._ §15-208.
16. _Id._ §15-222.
17. _Id._ §15-266.
18. _Id._ §15-265.
19. _Id._ §15-263.
20. _Id._ §15-266.
21. _Id._ §16-210.
22. _Id._ §16-673.
23. _Id._ §16-232.
24. _Id._ §16-679.
25. _Id._ §16-245
26. _Id._ §16-549.

27. _Id._ §17-101.

28. _Id._ §17-201.

29. _Id._ §17-528.

30. _Id._ §17-528.02.

31. _Id._ §17-528.03.

32. _Id._ §17-555.

33. _Id._ §17-567(1).

34. _Id._ §17-505.

35. Neb. Const. art. XI, §2.

36. _Dunmar Investment Co. v. Northern Natural Gas Co._, 185 Neb. 400, 176 N.W. 2d 4 (1970).

37. _City of Plattsmouth v. Nebraska Telephone Co._, 80 Neb. 460, 114 N.W. 588 (1908).

38. _Id._ 80 Neb. at 466, 114 N.W. at 591. _Accord, Old Colony Trust Co. v. City of Omaha_, 230 U.S. 100 (1913)(franchising power derived from a charter which entrusted the city council with the care, management, and control of the city).

39. _See, e.g., Old Colony Trust Co. v. City of Omaha_, 230 U.S. 100 (1913)(franchise granted under an implied power to control the use of the streets by passage as an ordinance).

40. Neb. Rev. Stat. §14-811 (Supp. 1977).

41. _Id._ §14-108.

42. _See Dunmar Investment Co. v. Northern Gas Co._, 185 Neb. 400, 1976 N.W. 2d 4 (1970)(pipes beneath the city streets conveying steam and chilled water to a limited clientele for heating and cooling purposes did not require a franchise).

43. Neb. Rev. Stat. §§15-222, 15-266 (Supp. 1977).

44. _Id._ §15-222.

45. Ibid.

46. Ibid.

47. _Id._ §§15-401 to 406.

48. _Id._ §15-402.

49. Neb. Rev. Stat. §15-404.

50. Id. §15-403.

51. Id. §§16-673, 16-174.

52. Id. §16-673.

53. Id. §16-253.

54. Id. §16-404.

55. Id. §16-405.

56. Id. §§17-528.02 to .03.

57. Id. §17-528.

58. Id. §§17-613 to 616.

59. Dunmar Investment Co. v. Northern Natural Gas Co., 185 Neb. 400, 176 N.W. 2d 4 (1970). See Part IA supra.

60. City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N.W. 588 (1908)(grant to use the city streets for the erection of telephone poles and wires).

61. Neb. Const. art. I, §16.

62. City of Plattsmouth v. Nebraska Telephone Co., 80 Neb. 460, 114 N.W. 588 (1908).

63. Old Colony Trust Co. v. City of Omaha, 230 U.S. 100 (1913).

64. See also Nebraska Gas & Electric Co. v. City of Stromsberg, 2 F.2d 518 (8th Cir. 1924)(dictum)(grant of a franchise fixing for 20 years the rates to be charged for electricity held not to contravene the constitutional prohibition against "irrevocable" grants of special privileges).

65. Neb. Rev. Stat. §§17-528 to 528.03, 16-673 (Supp. 1977).

66. Id. §§14-811, 15-222.

67. Neb. Const. art. III, §18.

68. May v. City of Gothenberg, 88 Neb. 772, 130 N.W. 566 (1911).

69. See also State v. Knutson, 178 Neb. 375, 133 N.W. 2d 577 (1915)(dictum)(court affirmed the constitutionality of a requirement for the registration of professional architects and indicated that the grant of special or exclusive privileges was permissible as long as the legislative purpose was to promote the public interest

rather than the private benefit of the grantees); *Coombs v. MacDonald*, 43 Neb. 632, 62 N.W. 41 (1895) (court upheld the right of a municipality to grant an exclusive contract for the collection of garbage, stating that Neb. Const. art. III, §18, was intended only to prevent agreements in restraint of trade and had no relevance to mere police regulations designed to promote the general welfare).

70. *See* *Coombs v. MacDonald*, *supra*.

71. *See* Chapter 2, Part III.