

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 Maine

DUANE A. FEURER
CLIFFORD L. WEAVER
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DAVID HEJNA
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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

DE-AC02-78CS20289

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Babcock & Parsons
One IBM Plaza
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ABSTRACT

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

This report describes laws and regulatory programs in Maine. 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 Maine. Attention is given to

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN MAINE

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Maine Supreme Court long ago held that the regulation of the operations of public utilities is a ^{1/} legitimate exercise of the police powers of the state. The legislature has delegated such regulatory authority ^{2/} to the Maine Public Utilities Commission (PUC). The statutes provide no role for local government in the regulation of public utilities. The PUC consists of three full time members, appointed by the Governor subject to review by the Joint Standing Committee on Public Utilities and to confirmation by the Legislature. They each serve seven year terms. One member is designated by the Governor as chairman. The Commission appoints a secretary, assistant secretary, director of transportation and, with the approval ^{3/} of the Attorney General, a general counsel. A member of the PUC cannot have any "official or professional connection or relation with or hold any stock or securities ^{4/} in any public utility."

II. JURISDICTION OF THE PUC

The authority of the PUC to regulate public utilities extends to:

every common carrier, gas company, natural gas pipeline company, electrical company, telephone company, telegraph company, water company, public heating company, wharfinger and warehouseman . . . and each thereof is

declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission . . . 5/

An electrical company is in turn defined as:

every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant for compensation within this State, except where electricity is generated on or distributed by the producer through private property alone solely for his own use or the use of his tenants and not for sale to others. 6/

A public heating company is defined as:

every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing a plant for the purpose of selling heat to the general public, but shall not include any of the aforesaid corporations, persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever who sells heat to a limited number of individuals or corporations not in excess of 75,000 square feet of direct radiation or its equivalent. 7/

To come within the jurisdiction of the PUC, an electrical company must be selling its products or services. The plant of the electrical company must be operated to facilitate the 8/ generation or delivery of electricity "for public use."

In addition, corporations organized for the purpose of generating electricity and selling it to a public utility or cooperative will be subject to PUC jurisdiction to the extent of fixing a rate for such sale that will be just and 9/ reasonable. This provision was added to the Maine statutes in 1978 to encourage the development of cogeneration and other

small scale power generation facilities. The Statement of Fact accompanying the Act stated:

The purpose of this bill is to clarify the authority of private companies to sell wholesale electrical power to public utility companies. The bill would permit the Public Utilities Commission to review the rates which utilities pay for electricity produced by cogeneration or small scale power generation. 10/

A public heating company is subject to regulation only if it sells heat to the general public. It is exempted if it sells to a limited number of users and not in excess 11/ of 75,000 square feet of direct radiation or its equivalent.

Other than what is implied in the heating exemption above, the statutes do not define public. The courts have defined "public" in common carrier cases when referring to certificates of "public" convenience and necessity. "Public" has been held to mean the general public as distinguished 12/ from any individual or group of individuals.

Municipalities are expressly authorized to own and operate revenue producing facilities consisting of water systems, sewer systems, airports or telecommunications 13/ systems. However, the statute is silent concerning the ownership and operation of electrical and heat utilities. No provision is made exempting such municipally owned utilities from PUC jurisdiction. Municipal corporations are included within the meaning of the term "corporation" and would thus be subject to PUC jurisdiction if other conditions 14/ creating jurisdiction are met.

Cooperatives are by statute deemed to be public utilities subject to regulation by the PUC. The PUC's power includes ordering a cooperative to provide service to a person who has previously been denied service, if such service may be reasonably rendered. ^{15/}

III. POWERS OF THE PUBLIC SERVICE COMMISSION

The PUC has been granted broad regulatory powers by statute. These powers include regulation of rates for sales of heat, light, water, gas or power to the public. ^{16/} In addition, rates for sales of electricity to a public utility for resale to the public are subject to PUC jurisdiction. ^{17/} In addition, the PUC has jurisdiction over the capitalization of utilities; ^{18/} issuance of securities; ^{19/} the system of accounts; ^{20/} depreciation; ^{21/} mergers and ^{22/} consolidations; ^{23/} affiliated interest transactions; ^{24/} agreements with other utilities; ^{25/} sales or leases of property; ^{26/} construction of a new plant; ^{27/} extension of service to new customers; ^{28/} the transfer of a franchise or permit; ^{29/} the abandonment of service; ^{30/} standards of service; ^{31/} and a variety of other items. These powers extend to all public utilities as defined in the statute.

IV. CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Before erecting any permanent generating facility over 1,000 kilowatts, an electrical company must obtain a certificate of public convenience and necessity from the PUC. Similarly, a certificate is required for any transmission line carrying 125 kilovolts or more. ^{31/} See Chapter 3, Part I for a detailed discussion of certification procedures.

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

The statute requires the consent of the PUC for a utility to furnish services in an area in which another utility is already serving or is authorized to do so. No such consent is required for any utility which was providing service in a city or town on October 8, 1967. The statute is silent about providing service in an area not already served by a utility. ^{32/} By requiring PUC consent before a utility may invade an area served by another, the statute implicitly permits more than one utility in the same service area if the PUC finds it appropriate. There is no express prohibition of such competition and there are no statutory criteria governing the PUC's decision in such a situation, except that the PUC must find that "the public convenience and necessity require such second utility" before consent ^{33/} to a second utility is given. The PUC has not yet allowed such competition in the areas of electric, gas and telephone companies, but the PUC has allowed a competitor in the area of common carriers. Recently, the PUC reviewed the public need for the second carrier and found that the benefits of the added non-stop service outweighed the adverse economic ^{34/} effect upon the existing carrier.

The statute provides a specific procedure for the adjudication by the PUC of disputes between cooperatives and other public utilities concerning the extension of service locations in areas where both the cooperative and the utility

35/
are serving or are authorized to serve. The Commission is given no specific statutory authority to resolve service area disputes between any other entities providing utility service.

VI. APPEALS FROM REGULATORY DECISIONS

An appeal from a final decision of the PUC may be taken to the Maine Supreme Court in the same manner as an appeal from a judgment of the Superior Court in a civil action. 36/
While an appeal is pending, no injunction may be obtained 37/
to suspend or stay the order of the PUC.

In cases where the reasonableness of a rate or toll of a public utility or the constitutionality of any ruling by the PUC is at issue, the court has jurisdiction upon the filing of a complaint to review, modify or annul 38/
any order of the PUC to the extent of the order's unlawfulness. 39/
No evidence beyond that contained in the record of PUC proceedings may be introduced, except the court may order additional evidence where issues of confiscation or constitutional right are involved.

A utility which has exhausted all of its rights in seeking a right, privilege, or immunity which the PUC has power to grant, can apply to the Legislature for the grant of such right, privilege, or immunity which the PUC has refused to grant. The utility must make a statement in writing, accompanying the application, that it has applied to the PUC for the right requested and that the PUC has denied 40/
its application.

FOOTNOTES

1. In re Searsport Water Co., 117 Me. 382, 107 A.452 (1919), In re Guilford Water Co.'s Service Rates, 118 Me. 367, 108 A.446 (1919).
2. Me. Rev. Stat. Ann. tit. 35 (1964).
3. Id. 35 §1.
4. Id. 35 §2.
5. Id. 35 §15(13).
6. Id. 35 §15(5) (emphasis added).
7. Id. 35 §15(12) (emphasis added).
8. Id. 35 §15(6).
9. Id. 35 §23A.
10. Me. Legislative Document No. 2100, 108th Legislature, 2nd Sess. (1978).
11. Me. Rev. Stat. Ann. 35 §15(12) (1964).
12. Merrill v. Maine Public Utilities Commission, 154 Me. 38, 141 A.2d 434 (1958).
13. Me. Rev. Stat. Ann. tit. 30 §4251(1) (1964).
14. Id. 35 §15(4).
15. Id. 35 §2809.
16. Id. 35 §51.
17. Id. 35 §2314 (West 1978).
18. Id. 35 §§171, 174 (1964).
19. Id. 35 §171.
20. Id. 35 §53.
21. Ibid.
22. Id. 35 §211.
23. Id. 35 §104.
24. Id. 35 §211.
25. Ibid.

26. Id. 35 §§13-A, 2306.
27. Id. 35 §294.
28. Id. 35 §211.
29. Id. 35 §§212, 314.
30. Id. 35 §51.
31. Id. 35 §13-A.
32. Id. 35 §2301.
33. Id. 35 §2302.
34. In re Powell, 358 A.2d 522 (Me. 1976).
35. Me. Rev. Stat. Ann. 35 §2301 (1964).
36. Id. 35 §303.
37. Id. 35 §304.
38. Id. 35 §305.
39. Ibid.
40. Id. 35 §312.

CHAPTER 3

SITING OF ENERGY FACILITIES IN MAINE

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

Maine has not adopted a siting statute directed specifically to energy facilities. Authority over siting is administered primarily by two agencies, the Public Utilities Commission ("PUC") and the Board of Environmental Protection ("BEP").

Neither BEP nor the PUC has authority to pre-empt or override the other agency. In addition to meeting BEP requirements, generating facilities with capacities in excess of 1,000 kilowatts and transmission lines carrying over 100 kilovolts may ^{1/} not be constructed without the approval of the PUC. PUC orders, however, are subject to "all other provisions of law ^{2/} and the right of any other agency to approve said facilities."^{2/} Thus, the PUC is not authorized to override the orders of the BEP or any other agency with jurisdiction over any aspect of energy facility siting. A staff member at the Maine Bureau of Land Quality Control indicated that the primary interest of the PUC is whether there is a public need for a power plant located at the proposed site. The BEP is primarily concerned with environmental impact of the proposed facility. ^{3/} However, with respect to the approval of the construction of transmission lines, the Maine Supreme Court stated that the PUC should approve the construction of transmission lines only if the proposed location "best serves the public interest." In making the determination, it must consider "all factors bearing on the public interest . . . ^{4/} including environmental factors."

The Department of Environmental Protection is comprised of the BEP and the Commissioner of Environmental Protection and has overall authority over the BEP and its programs. The Commissioner is appointed by the Governor, subject to review by the Joint Standing Committee on Natural Resources and to confirmation by the Legislature. The Commissioner serves at the pleasure of the Governor. ^{5/} The BEP consists of ten members appointed in the same manner, but for three year terms. ^{6/} The Commissioner is an ex officio member of the Board and acts as its ^{7/} Chairman. The Department also established procedures for coordinating and assisting the issuance of all environmental permits issued by agencies of the state for activities within ^{8/} organized municipalities.

II. THE PUBLIC UTILITIES COMMISSION

A. Jurisdiction of the PUC

The PUC certificating jurisdiction extends to any electrical company or companies constructing power generating facilities with capacities in excess of 1,000 kilowatts or transmission lines carrying 100 kilovolts or more. ^{9/} An "electrical company" is defined as every corporation or person, "owning, controlling, operating or managing any electric plant for compensation" except where the electricity is generated on or distributed solely through private property for the producer's own use or the use ^{10/} of his tenants. ^{11/} Rural electric cooperatives are subject to this jurisdiction. "Electric plant" includes all real estate, fixtures and personal property used in connection with or to facilitate the generation, transmission and delivery of electricity ^{12/} for light, heat or power for public use.

B. Powers of the PUC

PUC authority with respect to the siting of generating facilities is limited to a determination of need and the issuance of a certificate of public convenience and necessity. ^{13/} However, its authority over transmission lines, as noted above, is broader. The PUC has power to regulate the "location, character, size, width installation, maintenance and appearance" of transmission lines carrying 199 kilowatts or more. ^{14/}

The statutory language does not specifically resolve the issue of whether PUC approval is necessary for the expansion of existing facilities. Approval is required prior to "permanently installed power generating facilities." ^{15/} This language is broad enough, however, to provide a statutory basis for a PUC exercise of certificating jurisdiction over the expansion or replacement of existing facilities.

The PUC is empowered to make all rules and regulations necessary in carrying out its responsibilities. ^{16/} Rules respecting the information required of applicants for a certificate of public convenience and necessity have been promulgated by the PUC. ^{17/}

C. Certification Procedures

An applicant for a certificate of public convenience and necessity must file a petition on a form provided by the PUC. ^{18/} The rules prescribe the facts and details that must be filed in support of the petition. The applicant must supply specified information including peak demands for the past ten years, estimates of peak demand over the next fifteen years, actual energy sold and generated in the past 10 years, peak capacity for the last

ten years, estimates of energy to be generated and sold during the next 15 years, income statements, a description of back-up generating facilities which can be utilized during scheduled and unscheduled outages of the proposed facility, and a variety of ^{19/} other items. ^{20/} The application is then scheduled for a public hearing. If the installation includes transmission lines, the applicant must submit a map of the proposed route to the ^{21/} PUC fourteen days before the public hearing. ^{21/} This map is to be made available for public inspection at the PUC offices.

Although the PUC is required to conduct a public hearing, no provisions concerning the hearing, such as notice and participants, are set forth in the statute. No criteria aside from a determination of "public need" have been established by the PUC in regard to evaluating applications for a certificate.

Judicial review of PUC decisions is discussed in Chapter 2, Part V.

III. The Board of Environmental Protection

THE BEP was created to control the location of "developments which may substantially affect the environment." ^{22/} Applications for approval by the BEP of any such a development are circulated by the BEP to other state agencies which may have an interest in the developments in order to provide these agencies with an opportunity to report to BEP concerning the proposed ^{23/} project.

A. Jurisdiction of BEP

The BEP has jurisdiction "to control the location of

those developments substantially affecting local environment." Jurisdictional developments are defined to include "any state, municipal, quasi-municipal, educational, charitable, commercial, or industrial development, including subdivisions, which occupies a land or water area in excess of twenty acres, . . . or which is a structure." ^{24/} A "structure" is defined as any building or buildings occupying ground area in excess of 60,000 square feet or buildings, parking lots, storage areas, or any area to be stripped or graded and not to be revegetated, occupying a ground area in excess of three acres. ^{25/} BEP approval is not needed for the construction of developments under construction prior to January 1, 1970 nor for the renewal or revision of leases of parcels of land upon which a structure was located as of March 15, 1972. ^{26/} BEP retains the right to revoke or modify any license or permit issued if there has been a "change in any condition or circumstances." ^{27/}

BEP is empowered to adopt rules for the enforcement, implementation and interpretation of the laws which it is to administer. These rules have the effect of law. However, no rules relevant to ICES or electrical generation facilities have been promulgated. ^{28/}

C. Certification Procedures

Any person wishing to construct or operate a development subject to BEP jurisdiction must, before beginning construction or operation, notify the BEP in writing of his intent and of the nature and location of the development and provide any additional information required by the BEP. The applicant must also notify by registered mail each owner upon whose land any proposed lines or pipelines are to be located. It must also

file a map of the proposed site with the town clerk of each municipality in which all or part of the proposed facility is to be located. ^{29/} Although BEP has not adopted any specific rules with respect to the information to be filed with the application, it has prepared application forms to be filed by any party seeking approval of a development. ^{30/}

The statutory provisions relating to BEP approvals of developments provide explicit criteria which must be considered. The BEP must consider the applicant's financial capability to meet state pollution control standards, the effects of the proposed development on traffic movement, the suitability of the soil type to the developments and all effects on the natural environment. ^{31/} In addition, it is charged generally with determining "whether such a development will in fact substantially affect the environment or pose a threat to the public's health, safety or general welfare." ^{32/} BEP may also receive testimony on the economic effects of the development. ^{33/} Specifically with respect to application, for approval of the construction of transmission lines or pipelines, BEP must consider alternatives to the proposed location and character that may lessen its impact on the environment, without unreasonably increasing its cost. ^{34/}

The BEP is charged with "establishing coordination and assistance procedures" for all environmental permits issued by agencies of the state. ^{35/} Pursuant to this authority, BEP circulates the application for site approval together with any information provided by the applicant, among other major state agencies which may have an interest in the proposed development. The agencies among which an application is circulated is determined by BEP on a case by case basis. Each such agency

then provides the BEP with a report detailing its interest and findings with respect to the development and these reports are included in the BEP report on the application.

The BEP must either approve or disapprove an application or schedule a hearing on the application within thirty days. If the application is denied, the applicant may, within thirty days demand a public hearing. The applicant must set forth in detail in its demand the findings of the BEP to which he objects, the basis for the objections and the nature of the relief requested.

At such a public hearing, the burden is on the applicant to affirmatively demonstrate that each of the following criteria have been met:

1. The developer has the financial capacity to meet all relevant pollution standards.
2. Adequate provision has been made for traffic movement into and out of the development.
3. Adequate provision has been made such that there will be no adverse effect on the natural environment, (i.e., existing uses, scenic character, or natural resources).
4. The proposed development is being built on suitable soil types.

D. Appeals of BEP Decisions

Before seeking judicial review, an applicant may petition the BEP for rehearing seeking the correction of any part of the decision which the applicant believes to be in error or for an opportunity to present new or additional relevant evidence.

Such a petition is not a pre-requisite to seeking judicial
39/
review.

Any person aggrieved by an order or decision of the BEP, whether or not a party to the original hearings, may appeal from the BEP decision to the Superior Court. The appellant, if not the applicant, must provide notice of the appeal to the applicant. The court's review is limited to questions of law, the propriety of BEP's exercise of discretion, and whether the decision was based on substantial evidence. Review is not de novo, but is limited to evidence in the transcripts of the hearing. If there has not been a hearing of which a transcript is available, appeals are taken pursuant to Rule 80 of the Maine Rules of Civil Procedure which provides for a trial on the facts without a jury. Decisions of the Superior Court are reviewable by the 41/ Supreme Judicial Court.

IV. PLANNING AUTHORITIES

The principal sources of general planning and development authority are the BEP, Land Use Regulation Commission, and local zoning and planning commissions.

A. BEP

Within the Department of Environmental Protection, the BEP establishes and enforces ambient air quality standards, and emission standards for stationary sources, and issues 42/ licenses for contaminant sources. The Board also establishes and enforces pollution standards for water and issues waste discharge licenses for the discharge of pollutants into state 43/ waters.

BEP also has jurisdiction over the "coastal wetlands." The BEP can restrict or prohibit "dredging, filling, removing or otherwise altering any coastal wetlands, or otherwise polluting the same."^{44/} Coastal wetlands are defined as "all tidal and subtidal lands including all areas below any identifiable debris line left by tidal action, all areas with vegetation present that is tolerant of salt water and occurs primarily in a salt water habitat" and many other specified areas.^{45/}

B. Maine Land Use Regulation Commission

The Maine Land Use Regulation Commission ("Commission") has planning and permitting jurisdiction over areas of Maine not within organized towns and cities.^{46/} No person may commence construction or alteration of a structure, other than normal maintenance or repairs, in an area subject to the Commission's jurisdiction without a certificate of compliance issued by the Commission.^{47/} The Commission classified land under its jurisdiction into protection, management, or development districts, and promulgates use and pollution standards for the district.^{48/} Criteria for the issuance of a certificate of compliance includes proof of technical ability to meet state standards for air and water pollution control, solid waste disposal, offensive odors, and adequacy of healthful water supply.^{49/} Special exemptions may be granted by the Commission in cases of undue hardship.^{50/} Exemption may also be granted by the PUC for public service corporation, although the PUC can only override a total prohibition, but not "terms and conditions for use consistent with the purpose of this chapter . . ."^{51/} To do this, the PUC must hold a hearing, and must determine that overriding the

Commission's total prohibition is "necessary or desirable for
the public welfare or convenience."^{52/}

C. Regional and Municipal Planning

Regional commissions and municipal districts are given powers for planning, zoning and development by title 30, chapter 239, of the Maine statutes. A chapter of the Conservation title of the statutes imposes a mandatory requirement that municipalities enact zoning and subdivision restrictions for "shoreland areas" (which includes the shore areas of ponds) and that the restrictions must reflect environmental preservation concerns.^{53/}

The PUC has power to grant exemptions from zoning regulations otherwise applicable to real estate of public utilities if the exemption is reasonably necessary for public welfare and convenience.^{54/}

FOOTNOTES

1. Me. Rev. Stat. Ann. tit. 35 §13-A (West 1978).
2. Ibid.
3. Mr. John Bastey, Engineer, Bureau of Land Quality Control, Telephone conversation, June 19, 1978.
4. In Re Bangor Hydro-Electric Co., 314 A.2d 800, 812 (Me. 1974)
5. Me. Rev. Stat. Ann. tit. 38 §34 (West 1978).
6. Id., §361.
7. Id., §342.
8. Id., §341.
9. Id., tit. 35 §13-A.
10. Id., §15(5).
11. Id., tit. §2809.
12. Id., tit. 35 §15(6).
13. Id., tit. 13-A.
14. Ibid.
15. Ibid.
16. Id., tit. 35 §3 (West 1978).
17. P. U. C. Gen. Order No. 39.
18. Me. Rev. Stat. Ann. tit. 35 §13-A (West 1978).
19. P. U. C. Gen. Order No. 39.
20. Me. Rev. Stat. Ann. tit. 35 §13-A (West 1978).
21. Ibid.
22. Me. Rev. Stat. Ann. tit. 38 §481 (West 1978).
23. Mr. John Bastey, Engineer, Bureau of Land Quality Control, Telephone conversation, June 19, 1978.

24. Me. Rev. Stat. Ann. tit. 38 §482(2) (West 1978).
25. Id., §482(6) (A-B)
26. Id., §488; State ex. rel. Brennan v. R. D. Realty Corp., 349 A.2d 201 (Me. 1975)
27. Id., §347 (3)(c).
28. Mr. John Basety, Engineer, Bureau of Land Quality Control, Telephone conversation, June 9, 1978.
29. Me. Rev. Stat. Ann. tit. 38 §484 (West 1978).
30. Mr. John Bastey, Bureau of Land Quality Control, Telephone conversation, June 19, 1978.
31. Me. Rev. Stat. Ann. 38 §484 (1-4) (West 1978).
32. Ibid.
33. Ibid.
34. Ibid.
35. Me. Rev. Stat. Ann. tit. 38 §341 (West 1978).
36. Mr. John Bastey, Engineer, Bureau of Land Quality Control, Telephone conversations, June 19, 1978.
37. Me. Rev. Stat. Ann. 38 §483 (West 1978).
38. Id., §484.
39. Id., §344(5).
40. Id., §346.
41. Id., §346.
42. Id., §341 et. seq.
43. Ibid.
44. Me. Rev. Stat. Ann. tit. 12 §4754 (West 1974).
45. Id., titl. 38 §472 (West 1978).
46. Id., tit. 12 §§685-A(1) (West Supp. 1978); 685-C(1) (West 1974).

47. Id., §§685-B (1)(c), 685-B(8) (West 1974).
48. Id., §§685-A(3) (4).
49. Id., §685-B(4).
50. Id., §685-A(10).
51. Id., §685-A(11).
52. Ibid.
53. Me. Rev. Stat. Ann. tit. 12 §424 (1964).
54. Id., titl. 30 §4962 (1)(c).

CHAPTER 4

LAWS GOVERNING FRANCHISES IN MAINE

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

The Maine statutes do not use the term "franchise" in describing a municipal grant of permission to utility companies to use the streets for the erection and maintenance of pipes, wires and poles. Rather, the statutes refer to a "permit" which must be obtained from the applicable licensing authority before a utility company may use the streets of the state or a municipality for its facilities. Although the exact line of demarcation between a franchise on the one hand and a license or permit on the other is not clearly drawn, and the terms are frequently used synonymously,^{1/} the law does recognize distinctions between the two concepts. A license or permit is generally considered a temporary personal privilege, revocable at the will of the licensor, whereas a franchise is neither personal, temporary, nor revocable at the will of the grantor, unless the grantor has reserved the right to revoke.^{2/} In this report, the terms "license" and "permit" will be used to describe the permission that must be obtained by a utility company to use state or municipal highways and streets because these are the terms used in Maine's statutes.

The following statutes indicate that utility companies providing specified services must obtain permission

by way of permit to use local streets, and that this permission is to be obtained directly from the affected municipality. Except as otherwise provided:

. . . no company, person or association [incorporated for the transmission of intelligence, heat, light or power by electricity] shall construct facilities upon and along highways and public roads, without making an application for and obtaining a written permit under section 2483. 3/

Telegraph, telephone, gas, pipeline, electric light, heat or power companies chartered by special Act of the Legislature or organized under the general laws of the State, and all such companies, wherever chartered or organized, engaged in the business of transmitting intelligence, heat, light or power by electricity, or of transporting oil, gas, gasoline, petroleum or any other liquids or gases as a common carrier for hire, or furnishing gas for light, heat or power, may, in any city or town, place their pipes and appurtenances, wires, and cables and all conduits and other structures for conducting and maintaining such pipes, wires, and cables under the surface of those streets and highways in which such companies are empowered to obtain locations for their pipes and appurtenances, poles and wires, subject to the written permit therefor of the municipal officers of such city or town, or from the Department of Transportation when the street or highway is a state, state aid or federal aid highway, except for such state or state aid highways in the compact areas of municipalities having a population over 5,000 and subject to such rules and regulations as to location and construction as such municipal officers or the Department of Transportation may designate in their permit. Proceedings for obtaining such permit shall be had in accordance with sections 2481 to 2488. Permits to open streets and highways for the purpose of relaying or repairing such pipes and appurtenances, wires, cables,

conduits and other structures may be granted without notice. 4/

As the above statute indicates, the applicable licensing authority from which the permit is to be obtained is the Department of Transportation if the public way is a state, state aid or federal aid highway. The municipal officers grant the permit if the public way is a city or town street. The municipal authorities also have licensing authority if the public way is a state or state aid highway in a "compact area" of a municipality over 5,000 population. A "compact area" is defined as an area where structures adjacent to the highway are nearer than 200 feet apart for 5/ a distance of 1/4 of a mile. For all other public ways, 6/ the county commissioners have authority.

II. IMPLIED AUTHORITY TO GRANT PERMITS TO USE THE STREETS

In addition the explicit authority to grant to utilities permits to use the streets, municipalities in 7/ Maine also have a grant of home rule power, which would, if necessary, serve as additional franchising authorization.

III. PROCEDURES FOR GRANTING PERMITS

The procedure for obtaining a permit is outlined 8/ in the Maine statutes. 9/ This procedure is the exclusive method for obtaining a permit. The statute specifies services which must obtain permits. (See Part I).

A written application must be submitted which describes the facilities, the requested location, the minimum depth of an underground facility and the minimum

height if there are any attached wires or cables in the case
of an above ground facility. ^{10/}

The applicant must give public notice by the publication of its description of the proposed facility in a newspaper circulated in the municipality. The applicant must also send any application filed with the Department of Transportation to the town or city clerk of each municipality in which the facilities are to be located, or the clerk of the county commissioners in the case of facilities within ^{11/} an unorganized township. The procedure also provides for written objections by abutting landowners within 14 days after publication by the applicant, and a hearing on the ^{12/} objection by the licensing authority.

The applicant need not obtain a certificate of public convenience and necessity before obtaining a permit as the statute provides that the applicant will not be required to comply with or be subject to any other law in ^{13/} order to gain a permit.

After installation of the facility, the licensing authority may alter or amend the permit if the installation is deemed to impair the highway improvement or interfere ^{14/} with the free and safe flow of traffic.

Overall, the procedural requirements are quite specific and have not been subjected to litigation which would require judicial interpretation.

IV. CRITERIA USED IN EVALUATING A PERMIT REQUEST

The statute provides very little in the way of

criteria to the municipalities in order to evaluate a permit request by a utility. It gives municipalities general authority to specify requirements "necessary in the best interests of public safety and use of the right-of-way so as not to inconvenience use for public travel."^{15/} The statutes also require that the use not interfere with the navigation of waters. The user also shall not injure, cut down or destroy any fruit tree or any tree or shrub standing and growing for purposes of shade or ornament.^{16/}

The courts have provided little help in indicating when to grant a permit request. Court opinions have indicated, however, that when a public utility has been granted permission to use the public ways, these rights are "of a very respectable and respected order, and cannot be taken away in an arbitrary manner and without reasonable cause," but that such rights are "otherwise subservient to validly exercised police power."^{17/}

If the permit applicant is not a public utility engaged in the business of the transmission or distribution of electricity,^{18/} the following section applies:

No person, firm, company or association except a public utility engaged in the business of the transmission or distribution of electricity shall construct and maintain its lines with poles or other structures carrying electricity in, upon, along or under the roads, streets and public ways maintained by any city or town unless, in addition to meeting the requirements of section 2483, the applicable licensing authority finds that:

1. Compliance: National Electric Safety

Code. Construction and maintenance of the line will comply with all applicable provisions of the National Electric Safety Code and the standard requirements of the utility from whom the owner proposes to take service;

2. Posting surety bonds. The applicant has posted with the licensing authority a surety bond in an amount sufficient to:

A. Protect the public from claims, demands, and actions arising out of improper construction and maintenance of the line and unsafe conditions thereon.

B. Insure that the owner of the line, and his successors and assigns, will continue to properly maintain and repair the line and protect the public from harm.

This section shall not apply to state and stateaid highways maintained by the State. 19/

The Public Utilities Commission must also rule that the line does not duplicate an existing electric facility. 20/ All of these requirements are in addition to the permit required pursuant to section 2483 of the Maine statute. 21/

V. CHARACTERISTICS OF A PERMIT

A. Duation and Termination

The statute does not set any time limit on the permit. It does, as mentioned, reserve a right to alter or amend the permit if the installation impairs the highway improvement or interferes with the free flow of traffic. 22/

The courts have provided that a permit may be lost by abusing it (i.e., going beyond the bounds of the

23/ permit). The court have, however, protected the utility by holding that a permit cannot be taken away in an arbitrary manner and without reasonable cause. 24/

The statutes provide that no permit can be implied by continued use of facilities alone:

No enjoyment by any company, person or association, for any length of time, of the privilege of having or maintaining posts, wires or apparatus in, upon, over or attached to any building or land of other persons shall give a legal right to the continued use of such enjoyment or raise any presumption of a grant thereof. 25/

B. Exclusivity

The statutes do not expressly allow or prohibit exclusive permits. They do, however, provide that a permit holder may be protected from competition by other permit holders. The statute states that "no license, permit or franchise" shall be granted for the making, generating, selling, distributing, supplying of gas or electricity or both for lighting, heating, manufacturing, or mechanical purposes if the gas or electric facilities would be located in any city or town in which another corporation, person, association or cooperative is furnishing or authorized to furnish a similar service, unless the Public Utilities Commission has made a declaration, after a public hearing, that public convenience and necessity requires such a second 26/ public utility. The Public Utility Commission may make a declaration without a public hearing if it appears that

the previously authorized public utility, the utility seeking authorization and the customers to receive service all agree that the utility seeking consent should provide ^{27/} service.

C. Other Characteristics

The statute requiring permits to locate facilities for the transmission of heat, light and power is limited to ^{28/} facilities upon and along highways and public roads.

A new permit is not necessary for the replacement of an existing facility or appurtenance or additions to the facility and appurtenances made within the terms of the ^{29/} existing permit.

Any sale, lease, assignment, mortgage or other disposal or encumbrance of any franchise or permit or any merger or consolidation of franchises or permits must have ^{30/} prior approval of the Public Utilities Commission.

A municipality may be able to preclude the operation of an electric utility authorized to operate by the Public Utilities Commission since Maine statutes provide that such orders by the Commission approving construction of facilities are subject to all other provisions of law and the right of ^{31/} any other agency to approve the facilities.

FOOTNOTES

1. 53 C.J.S. Franchises §7.
2. 36 Am Jur. 2d Franchises §2.
3. Me. Rev. Stat. Ann. tit. 35 §2482 (West 1978).
4. Id. §2347.
5. Id. §2483.
6. Id. §2483(1) (A) (1-3).
7. Me. Const. art. 8, §1, pt. 2.
8. Me. Rev. Stat. Ann. tit. 35 §2483 (West 1978).
9. Id. §2483(21).
10. Id. §2483(2).
11. Id. §2483(3).
12. Id. §2483(4) (5).
13. Id. §2483(21).
14. Id. §2483(8).
15. Id. §2483(6).
16. Id. §2355.
17. Brunswick and Topsham Water District v. Hinman Co., 153 Me. 173, 136 A.2d 722 (1957) (corporation acting on behalf of state not required to pay to utility relocation costs caused by highway reconstruction); Central Me. Power Co. v. Waterville Urban Renewal Authority, 281 A.2d 233 (Me. 1971) (Urban renewal authority could compel power company to install underground lines at expense of power company).
18. For the definition of the term public utility, see Chapter 2.
19. Id. §2344.
20. Ibid.
21. Id. §2344.

22. Id. §2483(8).
23. Reed v. Central Maine Power Co., 132 Me. 476, 172 A. 823 (1934).
24. Central Maine Power Co. v. Waterville Urban Renewal Authority, 281 A.2d 233 (Me. 1971), Postal Telegraph Cable Co. v. Ingraham, 228 F. 392 (D. Maine 1915).
25. Me. Rev. Stat. Ann. tit. 35 §2488 (West 1978).
26. Id. §2347.
27. Ibid.
28. Me. Rev. Stat. tit. 35 §2482 (West 1978).
29. Id. §2483(10).
30. Id. §211.
31. Id. §13-A.