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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 Colorado

DUANE A. FEURER
CLIFFORD L. WEAVER
KEVIN C. GALLAGHER
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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

DE-AC02-78CS20289

Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza
Suite 3100
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DISCLAIMER

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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 Colorado. 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 Colorado. Attention is given

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN COLORADO

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Colorado constitution designates the Public Utilities Commission (Commission) as the agency responsible for the regulation of public utilities.[1/] The Commission has been established as a subagency of the Department of Regulatory Agencies.[2/] The Commission consists of three members appointed by the governor with the consent of the Senate.[3/] The term of office for Commissioners is six years.[4/]

The Colorado constitution provides that all power to regulate the facilities, service and rates and charges of every public utility is vested in the Commission.[5/] Municipalities may, however, authorize a person to build water, gas, geothermal, solar, or electric light works beyond the limits of the city for the purpose of supplying its residents and can authorize such person to collect a rental fee from each person served.[6/] Beyond this authority, the role of local government in regulating public utilities is limited to the exercise of "reasonable police and licensing powers" as well as the power to grant franchises.[7/] There is no statutory procedure by which decisions of local governments concerning utilities are made subject to appeal or review by the Commission.

II. JURISDICTION OF THE COMMISSION

The statute defines "public utility" to include "every common carrier, pipeline corporation, gas corporation,

electrical corporation, telephone corporation, telegraph corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest."[8] "Person," as used in the statutory definition of "public utility," means any individual, firm, partnership, corporation, company, association, joint stock association, and other legal entity.[9]

Regarding municipally-owned utilities, one statute provides that, "Nothing in articles 1 to 7 of this title shall be construed to apply . . . to exemptions provided for in the constitution of the state of Colorado relating to municipal utilities."[10] The constitution declares that,

> The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever.[11]

This constitutional provision has been held to exempt from Commission jurisdiction the rates charged by a municipally-owned electric utility.[12] However, the Colorado Supreme Court held that where a municipally-owned electric utility furnishes service to customers outside its city limits, the power to fix rates lies generally with the Commission.[13] In a very recent decision,[14] the Colorado Supreme Court ruled

that the Commission has jurisdiction over municipal utilities for service rendered beyond the municipality's city limits. While the supervision of municipal utilities within their boundaries is unnecessary because the customers are citizens of the municipality and can use their votes to protest oppressive rates, non-resident customers of municipal utilities lack such a voice and require the protection of the Commission to control oppressive rates.[15/]

Cooperatives are subject to Commission regulation. The statute provides that:

> Every cooperative electric association, or non-profit electric corporation or association, and every other supplier of electrical energy, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the Commission and to the provisions of Articles 1 to 7 of this title.[16/]

The statute does not expressly define which utility functions are subject to Commission jurisdiction. A Commission spokesman has indicated that the Commission regulates steam heating service provided by an "electrical corporation" subject to Commission jurisdiction despite the absence of any express statutory reference to steam or heating services.[17/] The Commission does not regulate the provision of cooling or air conditioning services.[18/]

The statutory definition of "common carrier" (which does not encompass electric utilities) requires that

the service be supplied for compensation.[19] There is no comparable provision requiring receipt of compensation for other types of public utility services.

Indirect sales are subject to Commission jurisdiction, at least to a limited extent.[20] One recent case involved the proposed construction of a steam generating plant by an electric power wholesale cooperative. The cooperative was composed of a quasi-governmental agency, another wholesale cooperative, and eleven "distribution members" which were also cooperatives.[21] The court overruled the Commission by holding that the Commission should have refused to grant a certificate of public convenience and necessity for the project where existing electric service was admittedly adequate.[22] The court declared that, "It is thus clearly apparent that the business of Colorado Ute is affected with a special interest far beyond that of its eleven distributive co-operatives and therefore is not immune from regulation."[23] A Commission spokesperson stated that the Commission does regulate certain wholesales of electric energy between municipalities, but does not regulate rates of sales between the Public Service Company of Colorado and municipalities because it considers these sales to be subject to the jurisdiction of the Federal Energy Regulatory Commission (FERC).[24]

The statute requires that service be provided to the "public" and that the Commission is to regulate suppliers

"affected with a public interest."[25/] The statute does not define "public." In Colorado Utilities Corp. v. Public Utilities Commission, the sale of surplus electricity by a coal mine to a municipally-owned power system was found not to be the provision of service to the "public."[26/] For several years the Moffat Coal Company sold surplus electricity from its mining operations to a privately owned electric utility located in the town of Oak Creek.[27/] In 1932 the town refused to renew the electric company's franchise and constructed its own electrical distribution system.[28/] The town then solicited the coal company to make a similar arrangement with it for sale of surplus power to the municipally-owned system.[29/] In both its former contract with the private company and in its new contract with the city, the coal company advised that it was not a public utility and did not intend to become one.[30/] The contract reached with the city called for the coal company to sell up to 150 kilowatts per hour, provided that the coal company might supply an amount less than this between the hours of 6:00 a.m. and 6:00 p.m. if the power were required for mining operations.[31/] When the disenfranchised electric company complained that the coal mine was unlawfully selling electricity without a certificate of public convenience and necessity, the court rejected the argument that the coal company was a public utility:

> It is clear that Moffat Coal Company was not operating for the purpose of supplying electrical energy to the public. It is equally clear that it was operating as a coal mining company, and as such had not been declared by law to be "affected with a public interest."

> As a coal mining company, it did not fall within the definition contained in the public utilities statute and therefore could not be declared to be a public utility except by legislative action. There is no distinction between a sale by the company to the municipality, in its proprietary capacity, of its surplus energy and a sale of the same to a private enterprise. The contract provides for one sale, of one commodity, to one customer, and not for a sale to the public or the inhabitants of the particular community at large. The company had no control and no concern as to the disposition or distribution of the electricity sold, nor the charges made therefor. . . . The supplying to the public of electricity furnished under this contract was a matter solely under the control of the municipal corporation, and over which the Public Utilities Commission had no jurisdiction.32/

In Baker v. Lake City Power and Light Co.,33/ an individual held, in his own name, a certificate of public convenience and necessity to furnish electricity in the town of Lake City.34/ Because his generating facilities were insufficient and unreliable, he contracted with the complainant to purchase electricity produced at the complainant's hydro-electric plant. During the term of the contract, a dispute arose and the individual ceased all purchases of power from the complainant.

The individual, at this point, organized the defendant corporation which was to provide the individual with electric power. The corporation instituted proceedings, pursuant to a Colorado statute authorizing corporations organized to construct electric plants to acquire property by eminent domain, to acquire property needed to construct a hydro-electric facility.35/ All power generated by the

defendant corporation was to be sold to the individual who would distribute it to consumers in his assigned service area.[36/]

The complainant petitioned the Commission in an attempt to stop the condemnation proceedings. He contended that the defendant corporation was a public utility, and therefore, could not construct the proposed facility without first obtaining a certificate of public convenience and necessity. The Commission held that the wholesale of power to the individual was not sufficient to bring the defendant corporation within the Commission's jurisdiction as a public utility and refused to interfere with the condemnation proceedings.[37/]

Several other cases may be useful in construing "public." Where a natural gas pipeline company transmitted gas from Texas, Oklahoma, and Kansas, served most of the major cities on the eastern slope of Colorado and sold gas directly to eleven corporate and governmental customers, it was nevertheless held by the court in reversing the Commission that the pipeline company was not a public utility and could not be required to obtain a certificate of public convenience and necessity.[38/] After deciding that the gas sales were not subject to the jurisdiction of the Federal Power Commission, the court considered five tests of public utility status that had been employed by the Commission:

> (1) whether [the service rendered is] a natural or virtual monopoly, (2) the exorbitance or reasonableness of the charges, (3) the arbitrary control to which its customers may be subjected, (4) whether or not the impact of its service, or the lack thereof, to a class of customers affects the state or community, (5) and whether the services rendered are needful and cannot be surrendered without obvious general loss and inconvenience. 39/

The court, in reversing the Commission's decision holding that the pipeline company was a public utility, reasoned that there was no evidence in the record indicating that the pipeline company should be classified as a public utility under the first three tests and noted that the last two tests provided no objective criteria and, therefore, were of no use in resolving the issue of what makes a company a public utility. 40/

City of Englewood v. County of Denver involved a limited sale of water by the city of Denver as part of an agreement with a suburb to obtain an easement for the Denver water line. 41/ In holding that Denver was not a public utility, the court stated that:

> We find little need to enter into a lengthy discussion of what is or what is not a public utility, because we would ultimately apply the almost universally accepted test, which summarized is that to fall into the class of a public utility, a business or enterprise must be impressed with a public interest and that those engaged in the conduct thereof must hold themselves out as serving or ready to serve all members of the public, who may require it, to the extent of their capacity. The nature of the service must be such that all members of the public have an enforceable right to demand it. Application of this test to the facts before

> us reveals that this extraterritorial supply of water is on a nonutility basis, and in so operating, under express statutory authority, it can collect such charges therefor and make such conditions and limitations as it may impose, all without liability of any vested right for a continued sale or leasing thereof. 42/

As would be expected in light of the requirement that services be provided for the public, the Commission does not regulate the production, generation, or storage of energy for private use or for tenant use. 43/

III. POWERS OF THE COMMISSION

The Public Utilities Act contains a general powers provision:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all necessary rates, charges, and regulations to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things, whether specifically designated in articles 1 to 7 of this title or in addition thereto, which are necessary or convenient in the exercise of such power, and to enforce the same by the penalties provided in said articles through proper courts having jurisdiction. 44/

In addition to this broad regulatory authority, the Commission is authorized to regulate rates for sales to the public. 45/ As noted above, the Commission regulates wholesales of electric energy between municipalities but does not regulate rates of sales from the Public Service Company of Colorado to municipalities because it considers those to be interstate wholesales subject to FERC regulation.

The Commission may regulate the issuance of securities and capitalization,[46] may prescribe a system of accounts,[47] and has power to require all public utilities to carry a proper and adequate depreciation account in accordance with its rules.[48]

The Commission is also empowered to approve mergers and consolidations;[49] sales and leases of utility property;[50] construction of a new plant or expansion of an existing plant;[51] extension of service to new customers (subject to the exceptions described below);[52] transfers of utility franchises;[53] abandonment of service;[54] standards of service;[55] and initiation of service.[56] Affiliated interest transactions and agreements between utilities are not generally regulated.[57]

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

A. Generally

A certificate of public convenience and necessity is required prior to exercising a franchise. The statute provides that:

> No public utility shall exercise any right or privilege under any franchise, permit, ordinance, vote, or other authority granted after April 12, 1913, or under any franchise, permit, ordinance, vote, or other authority granted before April 12, 1913, but not actually exercised before said date or the exercise of which has been suspended for more than one year without first having obtained from the Commission a certificate that public convenience and necessity require the exercise of such right or privilege. 58/

A certificate is also required before constructing facilities. The statute provides that:

> No public utility shall begin the construction of a new facility, plant, or system or of any extension of its facility, plant, or system without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction.59/

The statute does not expressly address the question of whether a certificate is required for the replacement of existing facilities.

The Public Utilities Act creates certain exceptions to the requirement of a certificate. The statute contains a grandfather clause and a provision for extension of service into contiguous areas:

> Sections 40-5-101 to 40-5-104 shall not be construed to require any corporation to secure such certificate for an extension within any city and county or city or town within which it has theretofore, lawfully commenced operations, or for an extension into territory, either within or without a city and county or city or town, contiguous to its facility, line, plant, or system and not theretofore served by a public utility providing the same commodity or service, or for an extension within or to territory already served by it, necessary in the ordinary course of its business.60/

A public utility may operate under a preliminary order issued by the Commission prior to the granting of a franchise or a certificate.61/

B. Competition

The statute permits the Commission to grant an

exclusive certificate that prevents other utilities from providing service in the same area. The statute provides that:

> Whenever the Commission, after a hearing upon its own motion or upon complaint, finds there is or will be a duplication of service by public utilities in any area, the Commission shall, in its discretion, issue a certificate of public convenience and necessity assigning specific territories to one or to each of said utilities or by certificate of public convenience and necessity to otherwise define the conditions of rendering service and constructing extensions within said territories and shall, in its discretion, order the elimination of said duplication upon such terms as are just and reasonable, having due regard to due process of law and to all the rights of the respective parties and to public convenience and necessity.62/

This statute applies to all utilities, except municipally-owned systems operating within their own city limits. As explained above, the Commission may regulate and control a municipally-owned public service operating outside its municipal boundaries, but not within.

The Public Utilities Act provides that the Commission "shall, in its discretion" eliminate duplication.63/ In some instances the Commission has permitted more than one utility to provide a similar service in the same area. Electric cooperatives, which formerly were not regulated in Colorado, have been permitted to retain customers who were receiving service prior to the effective date of their becoming public utilities, regardless of an exclusive certificate granted to another utility.64/ In general however, Colorado adheres to a policy of regulated monopoly.65/ As one

court explained, "Regulated monopoly, as we have often reiterated in our case law, is the statutory scheme in this state."[66/]

The Public Utilities Act provides a specific procedure for obtaining a certificate.[67/] Before applying for a certificate, the applicant must obtain the necessary consent, franchise, permit or other authorization required by local governmental agencies. In addition, the statute requires that a certified copy of the applicant's articles of incorporation be filed. Commission rules describe the specific contents of an application for a certificate.[68/]

The Commission rules require approval by the Commission before a certificate can be transferred.[69/]

The Public Utilities Act does not enumerate specific criteria to be considered by the Commission in granting a certificate. Several cases may be useful in understanding what factors the Commission considers. In dividing a general area into service areas for three electric utilities, the Commission considered an extensive list of factors.[70/] The list included priority of actual and potential service, the ability of each utility to serve, the power supply of each utility, the location of natural and manmade barriers, the desirability of full utilization of existing facilities, the economic feasibility of future expansion under extension policies as limited by the cost of extension, the desirability

of defining boundaries of service areas in terms readily convenient for field use, the availability and location of other utility services, and the desirability of recognizing and maintaining areas of community interest.[71/]

In Re Western Slope Gas Co.,[72/] a gas utility case, the Commission pointed out that in arriving at a determination of whether or not to grant a certificate to a public utility, it is important to discover if there is another method available that would achieve the same end at a lower cost. According to the Commission, the test of economic feasibility cannot be so narrow as to preclude any investment that does not immediately produce revenues sufficient to cover the cost of services and expenses, and provide for a reasonable return.[73/]

It appears that being able to furnish a unique service may be a factor in permitting a utility to operate within another utility's territory. The Commission, in Re Sangre de Cristo Electric Ass'n,[74/] held that an exclusive certificate gives the holder first call and the obligation to render service in the designated area, but the term "exclusive" does not mean that no other public utility under any circumstances will ever be permitted to serve a part of the designated area. Where the "exclusive" holder is unable to render a particular service required by a customer (for example, high-voltage power), then a utility capable of

providing the service may be authorized to do so.[75]

There is no special statutory mechanism for the resolution of service area disputes by the Commission.

A utility has no authority to abandon service to certain areas without Commission approval. In Highland Utilities Co. v. Public Utilities Commission,[76] involving an electric company operating in a town without lawful authority and from which it wished to withdraw its service, the court declared:

> "Since the passage by our General Assembly of the Public Utilities Act (C.L. §2911 et seq.), the power to ascertain and determine whether or not a public utility should or should not continue service to the public is possessed solely by the Public Utilities Commission, subject to review by the courts of the action of the Commission."

The Commission has promulgated rules for discontinuance of service to individual customers, but not for discontinuance of service to entire areas.[77]

V. APPEALS OF COMMISSION DECISIONS

A party aggrieved by a decision of the Public Utilities Commission must apply for a rehearing before appealing to the judicial system. After a decision has been made by the Commission, a party may, within twenty days thereafter make application for a rehearing.[78] The application must be acted on within thirty days. Failure by the Commission to act on an application for rehearing constitutes a denial. The proper filing of an application for rehearing results in

the stay of the Commission decision pending disposition of the application.[79/]

If the Commission denies the application for rehearing, a suit to enforce, enjoin, suspend, modify or set aside the decision may be brought in a district court of Colorado.[80/] Application for review by the district court must be brought within thirty days after denial of the application for rehearing.[81/] No new or additional evidence may be introduced in the district court proceeding. The cause is heard solely on the record as certified by the Commission.[82/] Appellate review of any final judgment of the district court affirming, modifying or setting aside a Commission decision may be obtained in the supreme court in the same manner as appellate review of judgments in other civil actions.

FOOTNOTES

1. Colo. Const. art. 25.
2. Colo. Rev. Stat. §24-1-122 (2)(a)(1974).
3. Id. §40-2-101(2).
4. Ibid.
5. Colo. Const. art. 25.
6. Ibid.
7. Colo. Rev. Stat. §31-15-707(c)(1974).
8. Id. §40-1-103(1)(1974).
9. Id. §40-1-102(5).
10. Id. §40-1-103(1).
11. Colo. Const. art. 5, §35.
12. Town of Holyoke v. Smith, 75 Colo. 286, 226 P. 158 (1924).
13. City of Lamar v. Town of Wiley, 80 Colo. 18, 248 P. 1009 (1926).
14. City of Loveland v. Public Utilities Commission, 580 P.2d 381 (Colo. 1978).
15. Id., 580 P.2d at 384.
16. Colo. Rev. Stat. §40-1-1-3(2)(1974).
17. Mr. G. Parkins, Chief Engineer, Fixed Utilities Division, Commission, Telephone conversation, 9/12/78.
18. Ibid.
19. Colo. Rev. Stat. §40-1-102(3)(1974).
20. Id. §40-3-102.
21. Western Colorado Power Co. v. Public Utilities Commission, 159 Colo. 262, 411 P.2d 785, dismissed, 385 U.S. 22 (1966).
22. Id. 411 P.2d at 790-94.
23. Id. 411 P.2d at 797.

24. Mr. G. Parkins, Chief Engineer, Fixed Utilities Division, Commission, Telephone conversation, 9/12/78.

25. Colo. Rev. Stat. §40-1-103(1)(1974).

26. 99 Colo. 189, 61 P.2d 849 (1936).

27. Id.

28. Id. 61 P.2d at 850.

29. Id.

30. Id. 61 P.2d at 849-50.

31. Id. 61 P.2d at 852.

32. Id. 61 P.2d at 853-54.

33. Baker v. Lake City Light & Power Co., 3 P.U.R. 3d 97 (1954).

34. Id. 3 P.U.R. 3d at 98.

35. Id. 3 P.U.R. 3d at 100.

36. Id.

37. Id. 3 P.U.R. 3d at 105-06.

38. Public Utilities Commission v. Colorado Interstate Gas Co., 142 Colo. 361, 351 P.2d 241 (1960).

39. Id. 351 P.2d at 246.

40. Id. 351 P.2d at 147-48.

41. 123 Colo. 290, 229 P.2d 667 (1951).

42. Id. 229 P.2d at 672-73.

43. Mr. J. E. Archibold, Assistant Solicitor General, Counsel to Commission, Telephone conversation, 9/8/78.

44. Colo. Rev. Stat. §40-3-102 (1974).

45. Ibid.

46. Id. § 40-1-104.

47. Id. § 40-4-111.

48. Id. § 40-4-112.

49. Mr. G. Parkins, Chief Engineer, Fixed Utilities Division, Commission, Telephone conversation, 9/12/78.

50. Colo. Rev. Stat. §40-5-105 (1974).

51. Id. §40-5-101(1).

52. Ibid: Colo. Pub. Util. Comm'n., Rules Regulating the Service of Electric Utilities, Rule 31 (1973).

53. Mr. G. Parkins, Chief Engineer, Fixed Utilities Division, Commission, Telephone conversation, 9/12/78.

54. Colo. Pub. Util. Comm'n., Rules Regulating the Service of Electric Utilities, Rule 13 (1973).

55. Colo. Rev. Stat. §§40-3-101(2), 40-4-108 (1974).

56. Id. §40-5-102.

57. Mr. G. Parkins, Chief Engineer, Fixed Utilities Division, Commission, Telephone conversation, 9/12/78.

58. Colo. Rev. Stat. Ann. § 40-5-102 (1974).

59. Id. § 40-5-101(1).

60. Ibid.

61. Colo. Rev. Stat. Ann. § 40-5-103(2) (1974).

62. Id. § 40-5-101(2).

63. Ibid.

64. Western Colorado Power Co. v. Public Utilities Commission, 163 Colo. 61, 428 P.2d 922 (1967).

65. Priest, 1 Principles of Public Utility Regulation 362 (1969).

66 Western Colorado Power Co. v. Public Utilities Commission, 163 Colo. 61, 428 P.2d 922, 927 (1967).

67. Colo. Rev. Stat. Ann. § 40-5-103(1) (1974).

68. Colo. Pub. Util. Comm'n., Rules of Practice and Procedure, App. H (IV)(A)(1)-(8) (1974).

69. Id. App. H(IV)(A)(9).

70. Re Poudre Valley Rural Electric Ass'n., 54 P.U.R.3d 718 (1964).

71. Id.

72. 79 P.U.R.3d 552 (1969).

73. Id.

74. 39 P.U.R.3d 563 (1961).

75. Id.

76. 97 Colo. 1, 46 P.2d 80, 81 (1935).

77. Colo. Pub. Util. Comm'n, Rules Regulating the Service of Electric Utilities, Rule 13 (1973).

78. Id. §40-6-114(1).

79. Id. §40-6-114(2).

80. Id. §40-6-114(4).

81. Id. §40-6-115(1).

82. Ibid.

CHAPTER 3

SITING OF ENERGY FACILITIES IN COLORADO

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS.

Colorado has no comprehensive power plant siting act. In order to obtain permission to build a power plant, approvals from a number of separate environmental and planning authorities may be necessary.

II. COLORADO LAND USE COMMISSION

In 1970 the Colorado General Assembly passed a statute setting up a state Land Use Commission ("LUC") within the office of the governor.[1/] The LUC is responsible for developing a "total land use planning program" which may include an "environmental matrix, management matrix, growth monitoring system, and impact model."[2/] In developing the program, the LUC is required to "utilize and recognize, to the fullest extent possible, all existing uses, plans, policies, standards, and procedures affecting land use at the local, state, and federal levels and particularly note where, in its opinion, deficiencies exist."[3/] The LUC has temporary emergency power to halt certain developments where it determines that there is in progress or proposed a land development activity which constitutes a danger of injury, loss, or damage of serious and major proportions to the public health, welfare, or safety. In such cases, the commission gives written notice to the board of county commissioners of each county involved of the pertinent facts and dangers with respect to such activity. If the board of

county commissioners does not remedy the situation within a reasonable time, the commission may request the governor to review such facts and dangers with respect to such activity. If the governor grants such request, a review is conducted by the governor at a meeting with the commission and the boards of county commissioners of the counties involved. If, after such review, the governor determines that the activity does constitute a danger, the governor may direct the commission to issue its written cease and desist order to the person in control of such activity.[4/]

In 1974 the legislature amended the Colorado Land Use Act to permit more comprehensive land use planning.[5/] Unfortunately, the amended statute is complex and somewhat ambiguous. Until the legislature or the courts provide some clarification, it is difficult to say precisely what effect the statute will have on energy facility siting.

One effect of the statute is to establish "areas of state interest" and "activities of state interest." Areas of state interest include mineral resource areas, natural hazard areas, areas containing historical, natural, or archaelogical resources, and areas around "key facilities."[6/] "Key facilities" include "major facilities of a public utility."[7/] "Major facilities of a public utility" is defined to include transmission lines, power plants, and substations of electrical utilities.[8/] The statute lists criteria for administration of areas of state interest.[9/] Among the criteria is a requirement that,

"Areas around major facilities of a public utility shall be administered so as to: (I) Minimize disruption of the service provided by the utility; and (II) Preserve desirable existing community patterns."[10] Whether any particular power plant would be classified as a "major facility of a public utility" and what effect the statutory criteria would have on the construction, modification, or operation of the plant is uncertain.

As for "activities of state interest," a local government may designate a development as an activity of state interest after holding a public hearing.[11] Among the activities specifically listed by the statute as candidates for the "state interest" designation are "[s]ite selection and construction of major facilities of a public utility."[12] The statute contains criteria for administration of activities of state interest, providing that, "Where feasible, major facilities of public utilities shall be located so as to avoid direct conflict with adopted local government, regional, and state master plans."[13]

Local governments are required to develop guidelines for administering areas and activities of state interest.[14] A local government may then issue regulations interpreting and applying its adopted guidelines to specific developments in areas of state interest and to specific activities of state interest.[15] If the LUC decides that modification of a "state interest" designation or set of guidelines is required, the LUC may submit to the local government written notification of

its recommendation within thirty days.[16/] The local government may then modify its original order in a manner consistent with the recommendation or may reject the recommendation.[17/]

A provision more difficult to interpret is one that allows the LUC to halt certain activities it believes to be of state interest or to stop developments in areas it believes to be of state interest. The statute provides that:

> (a) [The LUC] may submit a formal request to a local ogvernment to take action with respect to a specific matter which said commission considers to be of state interest within the local government's jurisdiction. Such request shall identify the specific matter and shall set forth the information required in section 24.65.1-401(2). Not later than thirty days after receipt of such request, the local government shall publish notice and hold a hearing within sixty days pursuant to the provisions of section 24.65.1-404 and issue its order thereunder.
>
> (b) After receipt by a local government of a request from the Colorado land use commission pursuant to paragraph (a) of this subsection (1), no person shall engage in development in the area or conduct the activity specifically described in said request until the local government has held its hearing and issued its order relating thereto.
>
> (c) If the local government's order fails to designate such matter and adopt guidelines therefor, or, after designation, fails to adopt guidelines therefor pursuant to standards set forth in this article applicable to local governments, the Colorado land use commission may seek judicial review of such order or guidelines by a trial de novo in the district court for the judicial district in which the local government is located. During the pendency of such court proceedings, no person shall engage in development in the area or conduct the activity specifically described in said request except on such terms

and conditions as authorized by the court.[18/]

This provision has already been used once by the LUC to halt construction of a power plant project. Such action took place when the Laramie County commissioners granted permission to the Platte River Power Authority to build a 230-megawatt coal-fired plant that could ultimately have been expanded to 750 megawatts of installed capacity.[19/] After the county commissioners ruled that the project was "not a matter of state interest," the LUC obtained an injunction against construction pending submission of an environmental impact statement and the holding of public hearings.[20/]

Once an area has been designated an area of state interest, a permit must be issued by the affected local government before a development in the area may commence.[21/] Similarly, a local government permit is required when an activity has been designated of state interest.[22/] The application is filed on a form prescribed by the LUC. Not later than thirty days after receipt of an application for a permit, the local government is to publish notice of a hearing on the application. The Colorado land use commission may give notice to such other persons as it determines not later than fourteen days before the hearing.[23/] A person who does not obtain a required permit may be enjoined by either the LUC or the appropriate local government from engaging in the development or conducting the activity.[24/] Denial of a permit by the local government is subject to judicial review in the district court.[25/]

The Public Utilities Commission's jurisdiction is not affected by the Land Use Act, and though the Act does direct the PUC to foster compliance with the land use plans when feasible:

> (l) With regard to public utilities, nothing in this article shall be construed as enhancing or diminishing the power and authority of municipalities, counties, or the public utilities commission. Any order, rule, or directive issued by any governmental agency pursuant to this article shall not be inconsistent with or in contravention of any decision, order, or finding of the public utilities commission with respect to public convenience and necessity. The public utilities commission and public utilities shall take into consideration and, when feasible, foster compliance with adopted land use master plans of local governments, regions, and the state.26/

A related feature of the statute that should be noted is an exemption clause containing grandfather provisions. Among the provisions is one declaring that, "This article shall not apply to any development in an area of state interest or any activity of state interest which meets any one of the following conditions as of May 17, 1974. . . [t]he development or activity is to be on land [or the development or activity]. . . has been zoned by appropriate local government for the use contemplated by such development or activity. . . ."27/ According to a commentator, this exemption creates very severe limitations on the use of the statute as a land use control measure.28/ He writes that, "In all areas of the state that were zoned on May 17, 1974, the effective date of the act, H.E. 1041 [the amended Land Use Act] appears completely inoperative as to activities

and developments permitted by the zoning. The bill can be operative in those areas only when rezoning occurs."[29] The commentator, however, suggests an alternative and narrower interpretation of the clause: That the exemption may have been intended to apply only to land uses that were specifically contemplated and presented to a rezoning authority at the time the zoning was obtained.[30]

III. PUBLIC UTILITIES COMMISSION

The Public Utilities Law provides that, "No public utility shall begin the construction of a new facility, plant, or system without first having obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such construction."[31] The PUC's jurisdiction over utilities is discussed more fully in Chapter 2. Withregard to utilities subject to its jurisdiction, the PUC has issued no special guidelines as to what factors are considered in approving the construction of power plants. Guidelines, however, have been developed in PUC opinions. The PUC stresses such factors as the avoidance of duplication of facilities and service areas and the economic feasibility of the proposed project. See Chapter 2, Part IV.

The PUC has authority to supersede county and regional, but not municipal, zoning requirements. In superseding such zoning requirements, the PUC holds public hearings and can issue orders that the proposed plant is reasonable and may be constructed despite the conflicting zoning provisions.[32]

However, the customary practice of the PUC is to wait until other permits are received or at least applied for before taking up the issue of whether or not a certificate should be issued to authorize construction.[33/]

IV. ENVIRONMENTAL AGENCIES

Two Colorado environmental agencies have permits granting jurisdiction likely to affect the construction of power plants. Both agencies are divisions of the state Department of Health.[34/]

A. Air Pollution Control Commission

The Air Pollution Control Commission ("APCC") is responsible for developing and maintaining " a comprehensive program for prevention, control, and abatement of air pollution throughout the entire state, including a program for control of emissions from all significant sources of all pollution."[35/] The APCC is charged with promulgating ambient air goals from every portion of the state.[36/]

The APCC must issue an air contaminant emission permit before construction of any air contamination source may commence.[37/] The procedure prescribed by statute in order to obtain a permit involves filing an application with the division of administration of the Department of Health which may include such relevant plans, specifications, air quality data, and other information as the division may reasonably request. The division prepares its preliminary analysis of the effect upon the ambient air quality and the

extent of emission control within twenty days after date on which an application is filed. The division prepares its preliminary analysis of the effect upon the ambient air quality and the extent of emission control within twenty days after date on which an application is filed.

Certain types of projects or activities are defined or designated by the commission as warranting public comment. For such projects or activities, the division gives public notice of the proposed project or activity.[38]

The division must grant the permit unless the project would not meet applicable emission standards.[39] In cases where the proposed project utilizes the best practical alternatives even though applicable emission standards would not be met, the division of administration, with the concurrence of the commission, or the commission alone, may grant the permit.[40] There are further provisions for appeal of a permit decision to an independent variance board.[41] The division of administration has power to monitor and inspect a project to ensure compliance with terms of the permit.[42]

B. Water Quality Control Commission

The Water Quality Control Commission ("WQCC") is responsible for developing and maintaining "a comprehensive and effective program for prevention, control, and abatement of water pollution and for water quality protection throughout the entire state."[43] No person may discharge any pollutant into

any state water from a point source without first having obtained a waste discharge permit.[44/] Applications for a permit are made to the division of administration of the Department of Health.[45/] Upon receipt of an application, the division prepares a tentative determination to issue or deny the permit.[46/] Public notice of every completed application is required, and the WQCC may schedule a public hearing where it deems appropriate.[47/]

The state further provides that a waste discharge permit must be issued in accordance with regulations promulgated by the WQCC, and only if the division has determined that all federal and state statutory and regulatory requirements have been met with respect to both the application and proposed permit. No discharge may be permitted which will violate any duly promulgated state, regional, or local land use plan unless all requirements and conditions of applicable statutes and regulations have been met or will be met pursuant to a schedule of compliance. Finally, no discharge may be permitted that by itself or in combination with other pollution will result in pollution of the receiving waters in excess of the pollution permitted by any applicable water quality standard unless the permit contains effluent limitations and a schedule of compliance specifying treatment requirements.[48/] The WQCC has power to monitor compliance with a permit.[49/]

C. Other Environmental Authorities

The use of certain natural resources in the state requires a permit. No person may appropriate ground water with-

out applying to the state Ground Water Commission for a conditional and a final permit.[50] No person may drill a water well outside designated ground water basins without a permit to construct a well issued by the state engineer.[51] Planning for state parks and outdoor recreational areas is within the jurisdiction of the Board of Parks and Outdoor Recreation.[52] The Board has Authority to enforce regulations concerning such areas but has no power to issue permits for construction in such areas.

V. LOCAL PLANNING AUTHORITIES

A. County, Regional and District Planning

The Board of County Commissioners of any county is authorized to appoint a county planning commission, or may perform the duties of such a commission itself.[53] Counties and municipalities may cooperate in the creation of a regional planning commission for any region agreed upon by the cooperating governing bodies, if the region is within the jurisdiction of those governing bodies.[54]

It is the duty of the county planning commission to adopt master plans for the physical development of the unincorporated territory of the counties.[55] Regional planning commissions are responsible for making plans for the development of the territory within their regions, but no regional plan is effective within the boundaries of any incorporated municipality unless the plan is accepted by the governing body of

that municipality.[56] Master plans of a county or region are to include provisions for the location and extent of public utilities and terminals whether publicly or privately owned.[57] The statute further provides that:

> (a) Whenever any county planning commission or, if there is none, any regional planning commission has adopted a master plan of the county or any part thereof. . . no public utility, whether publicly or privately owned, shall be constructed or authorized in the unincorporated territory of the county until and unless the proposed location and extent thereof has been submitted to and approved by such county or regional planning commission.
>
> (b) In case of disapproval, the commission shall communicate its reasons to the board of county commissioners of the county in which the public way, ground, space, building, structure, or utility is proposed to be located. Such board has the power to overrule such disapproval by a vote of not less than a majority of its entire membership. Upon such overruling, said board or other official in charge of the proposed construction or authorization may proceed therewith.[58]

A county planning commission or Board of County Commissioners may also adopt a zoning plan for the unincorporated territory of the county.[59] Once a zoning plan is certified, no substantial change in or departure from the plan may be made without the approval of the planning commission or, if disapproved by the planning commission, the favorable vote of a majority of the board.[60]

"Whether or not a county planning commission has been created," the Board of County Commissioners may, upon petition by affected residents, appoint a district planning commission for the purpose of preparing plans for zoning cer-

tain portions or districts of the unincorporated territory within such county.[61] A district planning commission has all the powers and duties of a county planning commission with respect to the territory included within the district, except that if a county planning commission exists, then district plans must first be approved by the county planning commission.[62]

The Public Utilities Commission may override county, regional, or district master plans and zoning regulations in certain circumstances:

> After the adoption of a plan, all extensions, betterments, or additions to buildings, structures, or plant or other equipment of any public utility shall only be made in conformity with such plan, unless, after public hearing first had, the [PUC] orders that such extensions, betterments, or additions to buildings, structures, or plant or other equipment are reasonable and that such extensions, betterments, or additions may be made ever though they conflict with the adopted plan.[63]

There is no comparable statutory provision with regard to PUC overriding of municipal planning and zoning provisions.

B. Municipal Planning and Zoning

All municipalities are authorized to create by ordinance or resolution a municipal planning commission.[64] It is the duty of the planning commission to adopt a master plan for the physical development of the municipality.[65] The master plan must include provisions for "[t]he general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation,

transportation, communication, power, and other purposes."[66] The municipal planning commission is required to consult with public officials and agencies, public utility companies, civic, educational, professional and other organizations, and with citizens in relation to enforcing and carrying out the plan.[67] When the municipal planning commission has adopted the master plan of the municipality or of one or more major sections or privately owned public utility may be constructed or authorized in the municipality or in the planned section and district until the location, character, and extent thereof has been submitted for approval by the commission. In case of disapproval, the commission must communicate its reasons to the council, which has the power to overrule the disapproval by a recorded vote of not less than two-thirds of its entire membership.[68]

VI. OTHER AGENCIES WITH AUTHORITY OVER PROPOSED DEVELOPMENTS

All state agencies and institutions have the power to grant easements or rights-of-way across land owned by or under control of the state for purposes of constructing public utilities, including but not limited to, electric power lines or other services owned or controlled by a political subdivision or public corporation of the state.[69] Such easements or rights-of-way may be granted only upon approval of the chief executive officer and the commission or board, if any, of the agency across whose premises the easement or right-of-way will cross.[70]

Any electric light, power, or pipeline company or any city owning electric power producing or distribution facilities has the right to construct lines over, upon, or under all public lands of the state upon compliance with such reasonable conditions as may be required by the state Board of Land Commissioners.[71/] The state Highway Commission has power to make reasonable regulations for the construction of pipes, conduits, cables, wires, poles and other utility facilities along, across, or under any project in the federal air-primary or secondary systems or on the interstate system, including extensions thereof within urban areas.[72/]

FOOTNOTES

1. Colo. Rev. Stat. §24-65-103(1)(a) (1974).
2. Id. §24-65-104(1)(a).
3. Ibid.
4. Id. §24-65-104(2)(a) (Supp. 1976).
5. Id. §§24-65.1-101 to 502.
6. Id. §24-65.1-201.
7. Id. §24-65.1-104(7)(b).
8. Id. §24-65.1-104(8)(b).
9. Id. §24-65.1-202.
10. Id. §24-65.1-202(5)(b).
11. Id. §24-65.1-401.
12. Id. §24-65.1-203(1)(f).
13. Id. §24-65.1-204(6).
14. Id. §24-65.1-402(1).
15. Id. §24-65.1-402(2).
16. Id. §24-65.1-406(2).
17. Id. §24-65.1-406(3).
18. Id. §24-65.1-407.
19. Electrical Week, December 26, 1977, at 4.
20. Id.
21. Colo. Rev. Stat. §24-65.1-501(1)(a) (Supp. 1976).
22. Ibid.
23. Id. §24-65.1-501
24. Id. §24-65.1-501(6).
25. Id. §24-65.1-502.
26. Id. §24-65.1-105.

27. Id. §24-65.1-107.

28. Bermingham, 1974 Land Use Legislation in Colorado, 51 Denver L. J. 467, 476 (1974).

29. Id.

30. Id. 51 Denver L. J. at 477.

31. Colo. Rev. Stat. §40-5-101(1) (1974).

32. Id. §30-28-128.

33. Mr. J. E. Archibald, Asst. Solicitor General, Counsel to the Commission, Telephone conversation, 9/8/78.

34. Colo. Rev. Stat. §§25-7-104(1), 25-8-201(1) (1974).

35. Id. §24-7-105(1).

36. Ibid.

37. Id. §25-7-112(4).

38. Id. §25-7-112(4)(a)-(c).

39. Id. §25-7-112(4)(d) (Supp. 1976).

40. Ibid.

41. Id. §§25-7-112(e) to 116 (1974).

42. Id. §25-7-112(h).

43. Id. §25-8-202(1).

44. Id. §25-8-501(1) (Supp. 1976).

45. Id. §25-8-501(2) (1974).

46. Id. §25-8-502(2).

47. Id. §25-8-502(3).

48. Id. §25-8-503(1)-(4).

49. Id. §25-8-501(3)(d).

50. Id. §§37-90-107, 37-90-108.

51. Id. §§37-90-137, 37-90-138.

52. Id. §33-30-104.

53. Id. §30-28-103(1).

54. Id. §30-28-105(1).

55. Id. §30-28-106(1).

56. Id. §30-28-106(2)(a).

57. Id. §30-28-106(3)(a).

58. Id. 30-28-110(1)(a), (b).

59. Id. §30-28-111(1).

60. Id. §30-28-112.

61. Id. §30-28-119(1)

62. Id. §30-28-119(3)(b).

63. Id. §30-28-127.

64. Id. §31-23-102.

65. Id. §23-106(k).

66. Id. §31-23-106(1)(b).

67. Id. §31-23-110.

68. Id. §31-23-109.

69. Id. §24-82-201.

70. Id. §24-82-202.

71. Id. §38-5-102.

72. Id. §43-1-225(1).

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN COLORADO

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

The Colorado constitution does not provide local governments with the authority to issue franchises. The only exception relates to the power of the city and county of Denver to grant franchises under its home rule powers.[1/]

Municipalities are given the power to regulate the use of streets for power and communications poles and for the laying down of gas or water mains or pipes by statutory authority. The governing body of each municipality has the power:

> a. (I) (T)o regulate the use of [streets, parks, and public grounds].
>
> (II) To regulate the . . . laying-out of gas or water mains and pipes . . . and the erecting of utility poles. Any company organized under the general laws of this state or any association of persons organized for the purpose of manufacturing energy to supply municipalities or the inhabitants thereof with the same has the right by consent, of the governing body, but not without such consent, subject to existing rights, to erect factories and lay down pipes in the streets or alleys of any municipality in the state, subject to such regulations as any municipality by ordinance may impose.
>
> * * * *
>
> (IV) To regulate and prevent the use of streets, parks, and public grounds for . . . power and communication poles . . . .[2/]

Another statute specifies that no franchise of a waterworks, gasworks, gas distribution system for distribution of any kind of gas, or electric light and power works shall be extended or granted or authorized except upon the express condition that the municipality has the right and power to purchase or condemn any such works or system.[3] No condemnation shall occur without consent of the owner of the franchise except at periods of ten, fifteen, or twenty years after the granting of a franchise.[4]

The statutes further provide that a municipality can authorize a person to build a "water, gas, geothermal, solar, or electric light works" outside of the limits of the city for the purpose of supplying its residents and can authorize such person to charge and collect from each person supplied with water, gas, heat, cooling, or electric light, rent as may be agreed upon between the person building said works and said municipality.[5]

II. PROCEDURES FOR GRANTING FRANCHISES

The franchising procedures under the general municipal law apply to all municipalities with the exception of Denver, which operates under the home rule provisions of the Colorado constitution, or cities or towns operating under special charters of incorporation granted prior to July 3, 1877 and who wish to retain such organization.

On purely local matters, special or home rule charters may supercede the general statute, the charters being subservient only to the state constitution.[6/]

The general municipal law requires that all franchises to "construct, operate or maintain a street railway, electric light plant or system, gasworks, gas plant or system, geothermal system, solar system, or telegraph or telephone system" be granted by ordinance and published according to statutory procedure.[7/]

Procedural steps required for the valid grant of a franchise include the publication of a notice of intent to apply for a franchise in a local newspaper once a week for three weeks immediately prior to the meeting at which the franchise request is to be considered.[8/] The statute prescribes further requirements for reading and publication once the franchising ordinance is introduced to the city council or board of trustees of the city or town.[9/] The statute mentions no requirement for free and open competition, nor for any election by the voters. Regarding passage of the franchising ordinance, the statute provides that:

> Every such ordinance shall require for its passage or adoption the concurrence of a majority of all the members of the governing body of the city or town. The mayor shall not vote in the case of a tie or otherwise upon the passage or adoption of any such ordinance. [10/]

There is no statutory requirement for the filing of a written acceptance by the grantee nor is a certificate of public convenience and necessity required for the grant of a franchise. Rather, a public utility is forbidden from exercising any right granted under a franchise without first having obtained a certificate of public convenience and necessity.[11/] A certificate is required for an extension of previously authorized service.[12/]

In Inland Utilities Co. v. Schell,[13/] the court held that the failure to follow the statutory publication requirements in the adoption of an ordinance to ratify sale of an electric plant and to grant a franchise to the new owner made the grant void.[14/]

The Colorado constitution contains a special provision regarding grants of a franchise by the city and county of Denver:

> No franchise relating to any street, alley, or public place of the said city and county shall be granted except upon the vote of the qualified tax-paying electors, and the question of its being granted shall be submitted to such vote upon deposit with the treasurer of the expense (to be determined by said treasurer) of such submission by the applicant for said franchise. [15/]

The object of this provision is to give Denver's taxpaying electors absolute control over the granting of franchises.[16/] The validity of this provision limiting the

vote to qualified taxpaying electors was recently challenged under the equal protection clause of the federal constitution. In DeMoulin v. City & County of Denver,[17] the court avoided reaching the issue and refused to void an electric, gas, and steam franchise granted to the Public Service Company of Colorado because even if those who were not allowed to vote had been permitted to do so the outcome would have been the same.[18]

As was discussed above, home rule and special charter municipalities may have different procedures for the granting of franchises or the adoption of ordinances that supercede the provisions of the general municipal law. The charter requirements of such municipalities may vary significantly from the general municipal law. For example, article 16 of the Pueblo, Colorado city charter requires submission of any proposed franchise to a vote by the electors and provides that if the grantee fails to pay the city a fair percentage of the receipts, the franchise is forfeited.

Other cities may have charters specifying that franchises can be granted only by a vote of the people. The courts may find that an ordinance which appears to grant a franchise in these cities actually grants a revokable permit when the ordinance specifies that the city council may terminate the contract at any time.[19]

III. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The general municipal law prescribes a maximum period of twenty-five years for which a franchise may be granted.[20] The twenty-five-year limitation applies to "water, gas, heat, cooling, and electric light" services only.[21] The statutes and judicial decisions of Colorado do not enumerate any conditions that will result in the automatic surrender of a franchise. There is no case deciding whether a franchisee may be forced to remove its facilities and to cease providing service if its franchise is terminated, except as noted below.

B. Exclusivity

The state constitution appears to prohibit the granting of exclusive franchises. The constitution provides that, "The general assembly shall not pass local or special laws . . . granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever."[22] It is not certain whether this prohibition applies to municipalities or if a franchise granted to a public utility to use the streets of a municipality falls into this category. The city of Pueblo, a home rule municipality, expressly prohibits exclusive franchises in article 16 of its city charter. There are no cases on the

question of whether franchises will be strictly construed as not granting exclusive franchises in the absence of definite language to the contrary. However, the Public Service Commission will not certify another utility in an area already served by a utility unless the certified utility is unwilling or unable to serve a particular demand.[23/]

C. Other Characteristics

The statutory and case law of Colorado contain no criteria that must be employed by the municipality in awarding a franchise. The statute is silent as to abandonment of franchises. In certain limited cases, a utility authorized by the Public Utilities Commission may continue to operate in a municipality even when its municipal franchise expires, if the court finds that the statewide need for coordinating services outweighs any possible municipal interest. In City of Englewood v. Mountain States Telephone & Telegraph Co., where a telephone company operated under a twenty-year franchise granted by a city and subsequently refused to seek a new agreement when its franchise expired, the court held that the company acquired a valid state franchise that permitted it not only to maintain its facilities in the public ways, but also to construct additional facilities in the city without obtaining a new municipal franchise.[24/] The court pointed to the following provision as granting the telephone company a franchise from the state:

> Any domestic or foreign telegraph, telephone, electric light power, gas, or pipeline company, authorized to do business under the laws of this state, or any city or town owning electric power producing or distribution facilities, shall have the right to construct, maintain and operate lines of telegraph, telephone, electric light, wire or power or pipeline along, across, upon and under any public highway in this state, subject to the provisions of this article. Such lines of telegraph, telephone, electric light, wire or power or pipeline shall be so constructed and maintained as not to obstruct or hinder the usual travel on such highway. 25/

The court went on to explain:

> It has been said that the right of a telephone or telegraph company to maintain its facilities on or in the streets is a franchised right.
>
> A statewide telephone system, however, with its need for coordinated intra and interstate communications is also a matter of statewide concern heavily outweighing any possible municipal interest.
>
> It is not like a city gas or electric company operation whose predominant epicenter usually is limited to a local focus. Thus, the question as to whether Englewood has the power to require the company to obtain a city franchise in order to maintain its facilities within the limits of Englewood is answered by saying that the defendant already has such a right granted to it by the state and need not seek a second one, and Englewood cannot force it to either. 26/

The court was careful to state that the city still had the power to make reasonable rules regarding use of the streets, such as requiring a company to obtain a permit or requiring it to pay a fee before erecting a new pole. The court also stated that the franchise was not perpetual but could be withdrawn by the state at any time.

The words of the court suggest that the City of Englewood case may not be applicable to an energy facility.

IV. SPECIAL PROVISIONS REGARDING REGIONAL SERVICE AUTHORITIES

Residents of contiguous counties may petition to form a regional service authority area.[27/] Regional service authorities are formed to provide certain functions and services and facilities which serve a public use and to avoid duplication and fragmentation of services when such facilities transcend local government boundaries.[28/] Local gas or electric services may be provided, but must not "interfere with, impair, or otherwise affect any franchise, certificate of public convenience and necessity," or other services under the jurisdiction of the Commission.[29/] No service shall be provided by the service authority without approval of a majority of voters.[30/] However, once these voters approve such a service, the board of directors of a service authority has authority, without the necessity of a franchise, to cut into or excavate any public street.[31/]

The legislative body having jurisdiction over the street may make reasonable rules regarding the work to be done to the street, and may require payment of reasonable fees to insure proper restoration of such streets.[32/]

FOOTNOTES

1. Colo. Const. art 20, § 4 (See Part II).
2. Colo. Rev. Stat. § 31-15-702(1977).
3. Id. § 31-15-707(II).
4. Id. § 31-15-707(IV).
5. Id. § 31-15-707(c).
6. See, Woolverton v. City & County of Denver, 146 Colo. 247, 361 P. 2d 982 (1961).
7. Colo. Rev. Stat. § 31-32-101(1977).
8. Id. § 31-32-102.
9. Id. § 31-32-103.
10. Id. § 31-32-104.
11. Id. § 40-5-102(1974).
12. Id. § 40-5-101.
13. Inland Utilities Co. v. Schell, 87 Colo. 73, 285 P. 771 (1930).
14. Id.
15. Colo. Const. art. 20, § 4.
16. Berman v. City & County of Denver, 120 Colo. 218, 209 P. 2d 754 (1949).
17. DeMoulin v. City & County of Denver, 177 Colo. 129, 495 P. 2d 203 (1972).
18. Id.
19. Finney v. Estes, 130 Col. 115, 273 P. 2d 638 (1954).
20. Colo. Rev. Stat. § 31-15-707 (1)(c)(1977).
21. Ibid.

22. Colo. Const. art. 5, § 25.

23. Public Utilities Commission v. Powder Valley Rural Elec. Ass'n., 173 Colo. 364, 480 P. 2d 106 (1970).

24. City of Englewood v. Mountain States Telephone & Telegraph Co., 163 Colo. 400, 431 P. 2d 40 (1967).

25. Colo. Rev. Stat. § 38-5-101(1974).

26. Id.

27. Id. § 32-7-105 (Supp. 1978).

28. Id. § 32-7-102 (1974).

29. Id. § 32-7-111(o).

30. Id. § 32-7-112.

31. Id. § 32-7-116.

32. Ibid.