DOE/CS/20289- 4

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 Arizona

MASTER

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January, 1980

WORK PERFORMED UNDER DOE CONTRACT NO.

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
under Contract No. DE-AC02-78CS20289

ABSTRACT

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

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

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

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

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Arizona state constitution establishes the Arizona Corporation Commission ("Commission") to regulate public service corporations.[1/] Courts have described the Commission as, in fact, a fourth department of government "with powers and duties as well defined as any branch of the government."[2/]

Within the area of its jurisdiction, the Commission has exclusive power and may not be interfered with by the legislature except in one narrow instance described below.[3/] In other areas of the Commission's jurisdiction, the legislature may give direction to the Commission by statute. In Corporation Commission v. Pacific Greyhound Lines,[4/] it was held that the legislature could enact a statute prescribing conditions for issuance of a certificate of public convenience and necessity. In another decision, Pacific Gas & Electric Co. v. State,[5/] the Commission was held to have pre-empted the legislature by acting first in an area in which both the Commission and the legislature had power to regulate. The court invalidated a statute dealing with the placement and construction of electric poles, wires, cables, and appliances because the Commission had already issued a general order on the subject.

Title 40 of the Arizona Revised Statutes Annotated [hereinafter cited as Corporation Commission Act], contains the primary statutes governing the Commission. Miscellaneous acts applying to public utilities include the Arizona Power Authority Act,[6] and statutes providing for power districts,[7] and electric cooperatives.[8] The Arizona Power Authority consists mainly of hydroelectric projects along the Colorado River. These are largely independent of Commission jurisdiction.[9] Power districts involve federal participation and are exempt from regulation by the Commission.[10]

The Commission is composed of three members elected by the people at a general election for two year terms.[11] The governor may appoint a Commissioner to fill a vacancy until the next general election.[12] The Commission elects its own chairman.[13]

The Commission may regulate only "public service corporations," not all public utilities. The definition of "public service corporation" explicitly excludes municipally owned utilities,[14] which are subject to regulation only by local governments.[15] The role of local government in the regulation of public service corporations extends only to the exercise of its police power. In Yuma Gas, Light & Water Co. v. City of Yuma,[16] the court invalidated a municipal ordinance attempting to fix rates of a locally operating public service corporation. On another occasion the court upheld the power of the Commission to change the routes of

a street railway and order abandonment of a portion of the line in violation of the railway's municipal franchise.[17/] In addition, local governments have been precluded from assessing license fees and taxes on public service corporations because they exceeded the bounds of legitimate police power.[18/]

The previously mentioned potential exception to the Commission's rate-making jurisdiction arises out of a constitutional provision by which the legislature is empowered to authorize "incorporated cities and towns . . . to exercise supervision over public service corporations doing business therein, including regulation of rates and charges to be made and collected by such corporations."[19/] The legislature, however, has never exercised its power to transfer jurisdiction over public service corporations from the Commission to municipalities.[20/]

II. JURISDICTION OF REGULATORY AGENCY

As noted, the supervisory and regulatory jurisdiction of the Corporation Commission extends to all "public service corporations," which are constitutionally defined as:

> All corporations other than municipal engaged in carrying persons or property for hire; or in furnishing gas, oil, or electricity for light, fuel, or power; or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public

> telegraph or telephone service, and all corporations other than municipal, operating as common carriers, shall be deemed public service corporations. 21/

"Gas plant" is defined statutorily to include all property used in connection with the production, transmission or delivery of gas for light, heat or power for sale. 22/ "Electric plant" is defined in the statutues as "all property used in connection with the production, transmission, or delivery of electricity for light, heat or power for sale." 23/ No definitions for heating or cooling services are given. The word "furnishing," as employed by the constitution, has been interpreted as meaning any sale to an outside entity, whether it be direct or indirect. Thus, one sale may be enough in proper circumstances to invoke Commission jurisdiction. 24/

"Public" is not defined in the constitution or in any statute. A cooperative operating a utility has generally been held to be a public service corporation even though it offers service only to its members and not to the public at large. 25/

The grant of regulatory authority to the Commission specifically covers "public service corporations." The Commission assumes jurisdiction over an entity not because it is a public utility, but because it is a public service corporation. 26/ Arizona courts have distinguished between a public utility and a public service corporation reasoning that public service corporation is a broader term than public

utility. As the Arizona Supreme Court explained in Trico Electric Cooperative, Inc. v. Senner,[27] "under our constitution, all public utilities are classified as public service corporations . . . ."[28] In another case the court found that a public utility is "a person, corporation or association engaged in a business affected with a public interest and therefore must serve everyone in an area where it operates who applies for service."[29] A public service corporation, on the other hand, need not necessarily hold itself out as serving the public generally; and in no case may a public service corporation be municipally owned.[30]

There is no specific number of customers that need be served by a public service corporation for it to become subject to Commission regulation. It has been estimated that 50% of the water companies regulated by the Arizona Commission serve fewer than twenty-five customers.[31] One regulated water company has only four customers.[32] By contrast, in Prina v. Union Canal and Irrigation Co.,[33] a mutual irrigation company was held to be not "furnishing water for irrigation," within the constitutional provision that corporations furnishing water for irrigation shall be deemed public service corporations. Although the court did little to explain the reason for its decision, it may have been influenced by the non-profit status of the mutual irrigation company. The court here stated:

> Since the organization of the new corporation in 1938 and during the period subsequent to that

> covered by the Olsen case, from the pleadings and the evidence here, it is not engaged in serving the public, but only its members as a nonprofit corporation. As alleged by the plaintiff, it is a mutual irrigation company and such a company is not "furnishing water for irrigation" in the sense that this term is used in sec. 2, art. 15 of the Arizona Constitution. 34/

In a recent case, joint venturers who operated a trailer park containing 250 trailer spaces with 175 more spaces contemplated and who supplied water to their tenants for domestic consumption were held not to be operating a public service corporation. 35/ The court acknowledged that the cost to trailer park tenants of their water system must surely have been reflected in their rental. Notwithstanding, the court was impressed that there was only one monthly charge for all services rendered and that the park management screened its tenants. The court rejected the argument that the large number of persons involved was a talisman.

The Arizona Court has provided a checklist enumerating the factors it considered important in making its judgment of whether a party is a public service corporation. The factors are:

1. What the corporation actually does.
2. A dedication to public use.
3. Articles of incorporation, authorization, and purposes.
4. Dealing with the service of a commodity in which the public has been generally held to have an interest . . . .
5. Monopolizing or intending to monopolize the territory with a public service commodity . . . .

6. Acceptance of substantially all requests for service . . . .

7. Service under contracts and reserving the right to discriminate is not always controlling . . . .

8. Actual or potential competition with other corporations whose business is clothed with public interest. 36/

III. POWERS OF REGULATORY AGENCY

There is a general powers provision in the state constitution describing the authority of the Commission. The provision states that:

> The Corporation Commission shall have full power to, and shall, prescribe just and reasonable classifications to be used and just and reasonable rates and charges to be made and collected, by public service corporations within the State for service rendered therein, and make reasonable rules, regulations, and orders, by which such corporations shall be governed in transaction of business within the State, and may prescribe the form of contracts and the systems of keeping accounts to be used by such corporations in transacting such business, and make and enforce reasonable rules, regulations, and orders for the convenience, comfort, and safety, and the preservation of health, of the employees and patrons of such corporations 37/

In addition, the Corporation Commission Act gives the Commission the following broad grant of regulatory authority:

> The Commission may supervise and regulate every public service corporation in the state and do all things, whether specifically designated in this title or in addition thereto, necessary and convenient in the exercise of such power and jurisdiction. 38/

The Commission regulates rates for sale to the public and for sales to a party for resale to the public. 39/

The Commission regulates issuance of securities[40] and prescribes a uniform system of accounts.[41] The NARUC system of accounts, with some modifications, is prescribed for electric utilities. Depreciation rates are also regulated by the Commission.[42]

Mergers, consolidations, and affiliated interest transactions are subject to Commission approval,[43] as are most agreements or arrangements with other utilities.[44] The Commission is not concerned with new construction, expansion, or plant sites if a corporation is already certificated for the area involved.[45] Sales or leases of property and transfers of franchises or permits require an order of the Commission authorizing such transactions.[46] Initiation and abandonment of service are strictly regulated by certificate of convenience and necessity.[47]

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

Arizona statutes provide that any gas or electrical corporation, among others, must obtain from the Commission a certificate of public convenience and necessity before beginning construction of any line, plant, service or system, or any extension thereof.[48] As for heating and cooling services, in Williams v. Pipe Trade Industry Program of of Arizona, the court found that nowhere in the Arizona statutes was there authority for the Commission to grant an exclusive monopoly through the issuance of a certificate

of public convenience and necessity to persons furnishing hot or cold air or steam for heating or cooling purposes. Although such persons fall within the constitutional definition of "public service corporations" they are not required to obtain certificates of public convenience and necessity. They are, however, subject to the Commission's regulatory powers.

A certificate is not required for an extension within a city, county or town within which a corporation has lawfully commenced operation, or for an extension into territory either within or without a city, county or town, contiguous to the corporation's plant or system, and not already served by a public service corporation of like character, or for an extension within or to territory already served by the corporation, necessary in the ordinary course of its business.[50/]

Arizona is a regulated monopoly state for street railroad, gas, electric, telephone or water corporations.[51/] The state has expressly adhered to this doctrine for many years and has articulated it most forcibly in motor carrier cases, particularly in Corporation Commission v. Peoples Freight Line, Inc.:[52/]

> [H]istory and experience both clearly demonstrated that public convenience and necessity are not furthered in most cases by the maintenance and operation of a number of competing plants or systems of the same character to supply a locality, but that they are generally far better served in the long run by the maintenance only of the

> smallest number of such instrumentalities which will adequately serve the public needs. Many years of bitter experience have proved beyond a doubt in every line of public service, including that of carriers, that if more than one instrumentality is allowed to operate when one is amply sufficient to meet the public needs, the actual cost to the public in the long run is not only as a rule greater than it would be with but one plant, but the service is also less satisfactory. Past history has also shown that in public service enterprises competition in the end injures rather than helps the general good and that whether in public or private hands, such utilities are best conducted under a system of legalized and regulated monopoly. 53/

Motor carriers are regulated by a separate section of the Corporation Commission Act. One provision of that act expressly states that when a motor carrier applicant requests a certificate to operate in an area already served by another motor carrier, the Commission may only grant a certificate when the existing carrier will not provide satisfactory service in the area. 54/

Although the courts have had fewer opportunities to enunciate the regulated monopoly doctrine in cases involving electric and other non-motor utilities, they have generally done so when occasion arose. The series of Trico cases are directly on point. Under its charter Trico Electric Cooperative operated a non-stock corporation on a non-profit basis. 55/ The cooperative furnished electricity to several hundred consumers in three counties. Two regulated electric utilities operated in the general vicinity. The cause of action arose when a group of Trico members, representing others in that area similarly situated, asked that

the Commission take jurisdiction of Trico and control its rates. The court found that Trico was a public service corporation under the state constitution and went on to say:

> . . . [Trico] is in a position, in the distribution of electricity, to wage a competitive war with Tucson Gas or Citizens which could, without proper restriction, result in undue waste by the duplication of lines or other competitive measures to the detriment of all consumers in the area affected. If we need anything other than the language of the Constitution as authority of the jurisdiction of the Corporation Commission over Trico, the threatened competitive war between Tucson Gas and Trico makes it imperative that Trico be subjected to the regulatory powers of the Commission. 56/

Three years later the court declared in another case:

> We hold that the Corporation Commission was under a duty to Trico to protect it in the exclusive right to serve electricity in the region where it rendered service, under its certificate. The Commission was under a duty to prohibit a private utility under its jurisdiction from competing in that area, unless, after notice and an opportunity to be heard, it shall have been made to appear that Trico failed or refused to render satisfactory and adequate service therein, at reasonable rates. 57/

It must be kept in mind that the Commission has no power to restrain a municipally owned utility that invades another utility's service area. At one time Arizona law provided no remedy to a public service corporation that suffered such an incursion. Where a municipal water service supplied water to residents both within and without the corporate limits of the city in competition with a utility under the jurisdiction of Commission, it was held that any damage to the latter utility was not actionable. 58/ The

legislature quickly moved to furnish relief. The statute today provides that:

> It is the declared policy of the state that when adequate public utility service under authority of law is being rendered in an area, within or without the boundaries of a city or town, a competing service and installation shall not be authorized, instituted, made or carried on by a city or town unelss or until that portion of the plant, system and business of the utility used and useful in rendering such service in the area in which the city or town seeks to serve, has been acquired. 59/

The procedure for obtaining a certificate is as follows:

A. If the applicant for a certificate of convenience and necessity is a corporation, a certified copy of its articles of incorporation shall be filed in the office of the commission before any certificate of convenience and necessity may issue.

B. Every applicant for a certificate shall submit to the commission evidence required by the commission to show that the applicant has received the required consent, franchise or permit of the proper county, city and county, municipal or other public authority.

C. The commission may, after hearing, issue the certificate or refuse to issue it, or issue it for the construction of only a portion of the contemplated street railroad, line, plant or system, or extension thereof, or for the partial exercise only of the right of privilege, and may attach to the exercise of rights granted by the certificate terms and conditions it deems that the public convenience and necessity require.

D. If a public service corporation desires to exercise a right or privilege under a franchise or permit which it contemplates securing, but which has not yet been granted to it, the corporation may apply to the commission for an order preliminary to the issue of the certificate. The commission may thereupon make an order declaring that it will thereafter, upon application, under rules

> and regulations it prescribes, issue the desired certificate, upon terms and conditions it designates, after the corporation has obtained the contemplated franchise or permit. Upon presentation to the commission of evidence that the franchise or permit has been secured by the corporation, the commission shall thereupon issue the certificate. 60/

Statute and case law give little guidance as to what factors are considered by the agency in granting a certificate. An information sheet entitled, "Application for Certificate of Public Convenience and Necessity (Electric)," is published by the Commission. The information sheet lists the following "general requirements" for such applications:

1. Application setting forth all details.
2. Copy of franchise from county or city.
3. Proposed rate schedule and complete justification for proposed rates.
4. A map of the area sought to be certificated and the complete legal description of the area.
5. The names of the responsible parties and/or the corporate officers.
6. If any state or federal lands are to be included in the certificate of convenience and necessity, written approvals must be obtained from the agency in charge of such land.
7. Complete financial statements.
8. A list of all property to be devoted for public use and a complete original cost breakdown of all such items.

There is no specific statutory procedure for transfer of a certificate to another utility, though, such transactions must, of course, have Commission approval. The

normal mechanism for resolution of service area disputes is a hearing before the Commission.[61/]

V. APPEALS OF REGULATORY DECISIONS

After an order or decision of the Commission is made, any interested party may apply for a rehearing of the matter. Before obtaining judicial review of a Commission decision or order a party must apply for a rehearing.[62/] Any party may within 30 days after its petition for rehearing has been denied or the Commission issues its final order on rehearing commence an action in the superior court of the county in which the Commission has its office to vacate and set aside the order of the Commission. The action is commenced by filing a complaint. The Commission is required to file an answer. Such appeals are heard de novo by the trial court and the trial is to conform as nearly as possible to other trials in civil actions.[63/] The burden of proof is upon the party adverse to the Commission to show by "clear and satisfactory evidence" that the Commission's order is unreasonable or unlawful.[64/]

Within 30 days after the judgment of the superior court is given, either party may appeal to the state supreme court.[65/]

FOOTNOTES

1. Ariz. Const. art. 15.

2. State v. Tucson Gas, Electric Light & Power Co., 15 Ariz. 294, 138 P. 781, 786 (1941).

3. Ibid; Ariz. Const. art. 15, §3.

4. 54 Ariz. 159, 94 P.2d 443 (1939).

5. Pacific Gas & Electric Co. v. State, 23 Ariz. 81, 201 P. 632 (1921).

6. Ariz. Rev. Stat. Ann. §§30-101 to 30-228 (1976).

7. Id., §§30-501 to 30-600.

8. Ariz. Rev. Stat. Ann. §§10-751 to 10-779 (1977).

9. See Ariz. Rev. Stat. Ann. §§45-2501 to 45-2521 (Supp. 1977), for further legislation associated with the Arizona Power Authority.

10. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/7/78.

11. Ariz. Const. art. 15, §1.

12. Ibid.

13. Ariz. Rev. Stat. Ann. §40-102 (1974).

14. Ariz. Const. art. 15, §2.

15. See City of Phoenix v. Kasun, 54 Ariz. 470, 97 P.2d 210, 212 (1940)(a water case); Menderson v. City of Phoenix, 51 Ariz. 280, 76 P.2d 321 (1938)(a bus line case).

16. 20 Ariz. 153, 178 P. 26 (1919).

17. Phoenix Ry. Co. v. Lount, 21 Ariz. 289, 187 P. 933 (1920).

18. City of Phoenix v. Sun Valley Bus Lines, Inc., 64 Ariz. 319, 170 P.2d 289 (1946).

19. Ariz. Const. art. 15, §3.

20. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/7/78. See Yuma Gas, Light & Water Co. v. City of Yuma, 20 Ariz. 1953, 178 P. 26, 28 (1919), where the court followed this rationale in invalidating a municipal rate-fixing ordinance.

21. Ariz. Const. art. 15, §2.

22. Ariz. Rev. Stat. Ann. §40-201-4 (1979).

23. Id. §40-201-2.

24. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/6/78.

25. Trico Electric Cooperative, Inc. v. Corporation Commission, 86 Ariz. 27, 339 P.2d 1046 (1959); Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 69 Ariz. 328, 213 P.2d 677, adhered to, 70 Ariz. 235, 219 P.2d 324 (1950); Op. Att'y Gen. No. 61-43.

26. Trico Electric Cooperative, Inc. v. Corporation Commission, 86 Ariz. 27, 339 P.2d 1046, 1054 (1959).

27. 92 Ariz. 373, 377 P.2d 309, 318 (1962).

28. Id. 377 P.2d at 318.

29. Trico Electric Cooperative, Inc. v. Corporation Commission, 86 Ariz. 27, 339 P.2d 1046, 1054 (1959).

30. Id. 339 P.2d at 1054.

31. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/6/78.

32. Ibid.

33. 63 Ariz. 473, 163 P.2d 683 (1945).

34. Id. 163 P.2d at 685.

35. Arizona Corporation Commission v. Nicholson, 108 Ariz. 317, 497 P.2d 815 (1972).

36. Natural Gas Service Co. v. Serv-Yu Cooperative, Inc., 70 Ariz. 235, 219 P.2d 324, 325-26 (1950).

37. Ariz. Const. art. 15, §3.

38. Ariz. Rev. Stat. Ann. §40-202(A)(1974).

39. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/6/79.

40. Ariz. Rev. Stat. Ann. §§40-301 to 40-302 (1974).

41. Id. §40-221.

42. Id. §40-222.

43. Id. §40-285.

44. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/6/79.

45. Ariz. Rev. Stat. Ann. §40-281 (1974).

46. Id. §40-285.

47. Id. §40-281.

48. Id. §40-281.

49. Williams v. Pipe Trade Industry Program of Arizona, 100 Ariz. 14, 409 P.2d 720 (1966).

50. Ariz. Rev. Stat. Ann. §40-281 (1974).

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

52. 41 Ariz. 158, 16 P.2d 420, 422 (1932).

53. Corporation Commission v. People's Freight Line, Inc., 41 Ariz. 158, 16 P.2d 420, 422 (1932).

54. Ariz. Rev. Stat. Ann. §40-607 (1974).

55. Trico Electric Cooperative v. Corporation Commission, 86 Ariz. 27, 339 P.2d 1046, 1048 (1959).

56. Id. 339 P.2d at 1054.

57. Trico Electric Cooperative, Inc. v. Senner, 92 Ariz. 373, P.2d 309, 319 (1962). See also Tucson Gas, Electric Light and Power Co. v. Trico Electric Cooperative, Inc., 2 Ariz. App. 105, 406 P.2d 740 (1965).

58. City of Tucson v. Polar Water Co., 76 Ariz. 126, 259 P.2d 561 (1953), modified, 76 Ariz. 404, 265 P.2d 773 (1954).

59. Ariz. Rev. Stat. Ann. §9-516 (1977).

60. Id. §40-282 (1974).

61. Mr. G. Howard, Rate Analyst, Ariz. Corp. Comm'n., telephone conversation, 7/6/78.

62. Ariz. Rev. Stat. Ann. §40-253(B)(1974).

63. Corporation Commission v. People's Freight Line, Inc., 41 Ariz. 158, 16 P.2d 420, 421 (1932).

64. Ariz. Rev. Stat. Ann. §40-254E(1974).

65. Id. §40-254D.

CHAPTER 3

SITING OF ENERGY FACILITIES IN ARIZONA

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

The Arizona Siting Act governs the siting of electric power plants and transmission lines within the boundaries of the state.[1/] The Siting Act authorizes the Corporation Commission to establish the Power Plant and Transmission Line Siting Committee (the Siting Committee) which is responsible for administering the Siting Act. The Siting Committee is an interagency body with power to issue certificates of environmental compatibility for certain proposed thermal electric, nuclear, or hydroelectric generating units and transmission lines. The Siting Committee consists of the following members:

1. State Attorney General
2. State Land Commissioner
3. Chairman of the State Water Quality Control Council
4. Director of the Department of Health Services
5. Director of the Game and Fish Department
6. Executive Director of the State Water Commission
7. Executive Director of the Office of Economic Planning and Development
8. Chairman of the Arizona Corporation Commission

9. Chairman of the Archaelogical Department of the University of Arizona

10. Director of the State Parks Board

11. Executive Director of the Arizona Atomic Energy Commission

12. Seven members appointed by the Corporation Commission to serve for a term of two years of which two members shall represent the public, two members shall represent incorporated cities and towns, two members shall represent counties, and one member shall be a registered landscape architect. 2/

The Attorney General or his designee acts as chairman of the Siting Committee. 3/

According to the preamble of the Siting Act, "it is the purpose of this article to provide a single forum for the expeditious resolution of all matters concerning the location of electric generating plants and transmission lines in a single proceeding . . . ." 4/ The Siting Committee's authority is not, however, fully preemptive. The statute states that:

> Notwithstanding any other provision of this article, the committee shall require in all certificates for facilities that the applicant comply with all applicable nuclear radiation standards and air and water pollution control standards and regulations, but shall not require compliance with performance standards other than those established by the agency having primary jurisdiction over a particular pollution source. 5/

The Siting Committee may override any ordinance, master plan, or regulation of the state, a county, or an incorporated city or town if it finds that compliance would be unreasonably

restrictive and unfeasible.[6] The statute specifically provides that:

> Any certificate granted by the committee shall be conditioned on compliance by the applicant with all applicable ordinances, master plans and regulations of the state, a county or an incorporated city or town, except that the committee may grant a certificate notwithstanding any such ordinance, master plan or regulation, exclusive of franchises, if the committee finds as a fact that compliance with such ordinance, master plan or regulation is unreasonably restrictive and compliance therewith is not feasible in view of technology available. When it becomes apparent to the chairman of the committee or to the hearing officer that an issue exists with respect to whether such an ordinance, master plan or regulation is unreasonably restrictive and compliance therewith is not feasible in view of technology available, he shall promptly serve notice of such fact by certified mail upon the chief executive officer of the area of jurisdiction affected and, notwithstanding any provision of this article to the contrary, shall make such area of jurisdiction a party to the proceedings upon its request and shall give it an opportunity to respond on such issue. [7]

II. SCOPE OF SITING JURISDICTION

The Siting Act provides that, "No utility may construct a plant or transmission line within this state until it has received a certificate of environmental compatibility."[8] "'Utility' means any person engaged in the generation or transmission of electric energy."[9] "'Person' means any state or agency or political subdivision thereof, or any individual,

partnership, joint venture, corporation, city or county, whether located within or without this state, or any combination of such entities."[10] Thus, the requirement of a certificate extends to all utilities, including state and local governmental units as well as public service corporations.[11] The statute applies only to electrical suppliers, however, and not to the furnishing of heat or cooling.

The statute defines "plant" as "each separate thermal electric, nuclear or hydroelectric generating unit with a nameplate rating of one hundred megawatts or more."[12] A "transmission line" is "a series of new structures erected above ground and supporting one or more conductors designed for the transmission of electric energy at nominal voltages of one hundred fifteen thousand volts or more and all new switchyards to be used therewith."[13] The Siting Committee interprets the statute as giving it jurisdiction not only over preparation for new construction at a new site but over replacement or extension of existing facilities at old sites.[14]

The statute has a grandfather clause which exempts projects "for which expenditures or financial commitments for land acquisition, materials, construction or engineering in excess of fifty thousand dollars have been made prior to the effective date of this article [August 31, 1971]."[15]

The Siting Committee has siting authority only; its jurisdiction does not encompass other matters. The

Siting Committee does not have power to promulgate rules and regulations in its own name. Procedural rules for review of proposed siting plans are issued by the Commission.[16] Rules of practice and procedure were adopted for the Siting Committee in Arizona Corporation Commission General Order U-51 (Feb. 16, 1972). These rules contain no further definition of the Siting Committee's jurisdiction nor do any cases discuss the scope of the Siting Committee's jurisdiction.

As mentioned above, the Siting Committee requires in all certificates that the facility comply with all applicable radiation, air, and water standards issued by the agency having primary jurisdiction over a particular pollution source.[17] The Department of Health Services and the State Air Pollution Control Board have "original jurisdiction and control" over:

> [m]ajor sources of air pollution as . . . defined by rules and regulations promulgated by the director [of the Department of Health Services], which shall include any air pollution source capable of generating more than seventy-five tons of air contaminants per day. [18]

The Department and Board also have original jurisdiction over "[a]ir pollution generated by operations and activities of all agencies and departments of the state and its political subdivisions."[19] Air pollution sources not subject to Department and Board jurisdiction are subject to jurisdiction and control of the county or multi-county air quality control region.[20]

The Water Quality Control Council, established within the Department of Health Services, exercises "supervision and

control over the establishment, review, revision or deletion of water quality standards for waters of the state and of rules, regulations and orders pertaining thereto."[21]

A further requirement of the Siting Act is the filing of ten year plans.[22]

> A. Every person contemplating construction of any facilities within the state during any ten year period shall file a ten year plan with the commission on or before the thirty-first day of January of each year.
>
> B. Each plan filed pursuant to subsection A shall set forth the following information with respect to the proposed facilities to the extent such information is available:
>
> 1. The proposed general area of each plant.
>
> 2. The approximate generating capacity of each plant and the number of plants proposed for each site.
>
> 3. The type of fuel proposed for each plant.
>
> 4. The proposed source of fuel and water for each plant.
>
> 5. The size and approximate route of the transmission lines associated with each proposed plant and of the transmission lines proposed to be constructed to serve any other purposes.
>
> 6. The purpose to be served by each proposed transmission line.
>
> 7. The estimated date by which each plant or transmission line will be in operation.
>
> C. Failure of any person to comply with the requirements of subsection A or B may, in the commission's discretion in the absence of a showing of good cause, constitute a ground for refusing to consider an application of such person.
>
> D. Such plans shall be recognized and utilized as tentative information only and are subject to change at any time at the discretion of the person filing the same. [23]

III. CERTIFICATION PROCESS

The Siting Act requires that:

> Every utility planning to construct a plant, transmission line or both in this state shall first file with the commission an application for a certificate of environmental compatibility. The application shall be in a form prescribed by the commission and shall be accompanied by information with respect to the proposed type of facilities and description of the site, including the areas of jurisdiction affected and the estimated cost of the proposed facilities and site. Also the application shall be accompanied by a receipt evidencing payment of the appropriate fee required by §40-360.09. The application and accompanying information shall be promptly referred by the commission to the chairman of the committee for the committee's review and decision. 24/

Procedures to be followed by power plant siting applicants are outlined in Commission rules.[25/] Applications are filed with the director of the Utilities Division of the Commission.[26/] If a proposal to be made to the Siting Committee has not been previously described in a ten year plan, the application must state the reason why.[27/]

In addition to names and addresses of the applicant and his technical representative, the application for an electric generating plant must contain the following data:

1. Type of facility (nuclear, hydro, fossil fueled, etc.).

2. Number and size of proposed units.

3. Source and type of fuel to be used, including a proximate analysis of fossil fuels.

4. Amount of fuel to be utilized daily, monthly, and yearly.

5. Type of cooling and source of any water to be utilized.

6. Height and number of stacks.

7. Dates for scheduled start-up and firm operation of each unit and date construction must commence to meet schedules.

8. Estimated costs of the proposed facilities and site, stated separately.

9. Legal description of the proposed site. 28/

Alternate sites need not be proposed, but if they are listed the applicant must give the order of his preference and his reasons for such order of preference. 29/ If alternate sites are listed, the application must specify changes such alternate sites would require in the plans, and the reasons for any variances in cost estimates between the sites. 30/

The chairman of the Siting Committee must provide public notice as to the time and place of a public hearing within ten days after he receives the application. 31/ The chairman is responsible for notifying affected areas of jurisdiction at least twenty days prior to a scheduled hearing. 32/ Hearings are to be held not less than thirty days nor more than sixty days after the date notice is first given. 33/

Each county and municipal government and state agency interested in the proposed site may become a party to a certification proceeding by filing with the chairman of

the Siting Committee not less than ten days before the hearing date.[34/] Nonprofit corporations or associations promoting conservation, personal health or other biological values, preservation of historical sites, consumer interests, commercial or industrial viewpoints, or the orderly development of the affected area may also become parties to a proceeding.[35/]

No special report is required of the Siting Committee other than a complete record of the proceeding, including a certified transcript.[36/] Committee decisions are made by majority vote and become due within 180 days after the application has been filed with or referred to the Siting Committee.[37/]

A certificate of environmental compatibility issued by the Siting Committee must be affirmed and approved by an order of the Commission between thirty and sixty days after the certificate is issued in order for construction to commence. Within fifteen days after the Siting Committee has rendered its written decision, any party to a certification proceeding may request a more thorough review of the record of the Siting Committee's decision from the Commission than would normally be provided in connection with affirming an uncontested decision by the Siting Committee.[38/] Grounds for this thorough review are to be stated in a written notice filed with the Commission, which may, at the request of any party, require written briefs or oral argument.[39/] The

Commission, within sixty days from the date notice is filed, must either confirm or modify any certificate granted by the Siting Committee, or in the event the Siting Committee refuses to grant a certificate, the Commission may issue a certificate to the applicant.[40] One commentator suggests that the language is unclear as to whether the Commission may deny a certificate once the Siting Committee has approved one.[41]

"The decision of the Commission is final with respect to all issues, subject only to judicial review as provided by law in the event of an appeal by a person having a legal right or interest that will be injuriously affected by the decision."[42] Application to the Commission for a rehearing before the effective date of the order or decision is required before an appeal can be taken to any court.[43] Within thirty days after a rehearing is denied or granted, a dissatisfied party may commence an action in a superior court to vacate and set aside the order or decision.[44]

> Subject to the rights of judicial review recognized in §§40-254 and 40-360.07, no court in this state has jurisdiction to hear or determine any case or controversy concerning any matter which was or could have been determined in a proceeding before the committee or the commission under this article or to stop or delay the construction or operation of any facility, except to enforce compliance through the procedures established by article 3 of this chapter [§§40-241 to 40-255]. [45]

IV. CERTIFICATION STANDARDS

The Siting Act lists nine initial factors to be examined by the Siting Committee in considering applications:

1. Existing state, local government, or private plans at or near the proposed site.

2. Fish, wildlife, and plant life.

3. Noise emission levels and interference with communication signals.

4. Public recreation.

5. Existing scenic areas and historic or archaeological sites.

6. Total environment of the area.

7. Technical practicability and previous experience with available equipment and methods.

8. Estimated costs, "recognizing that any significant increase in costs represents a potential increase in the cost of electric energy to the customers or the applicant."

9. Any other factors requiring consideration under federal and state law. 46/

A tenth factor is listed separately; its separate listing may indicate that the legislature desired it to receive greater emphasis. "The committee shall give special consideration to the protection of areas unique because of biological wealth or because they are habitats for rare and endangered species." 47/ No specific criteria are to be used in evaluating an applicant's compliance with the ten factors.

Recommencations of other agencies are given no specified weight other than that all applicable radiation, air

quality, and water quality standards must be complied with.[48/] Decision is by majority vote of the Siting Committee members.[49/]

No other agency may veto approval of the site except possibly the Commission, as discussed above.[50/] In arriving at its decision in any review of the Siting Committee's findings, the Commission is required to consider the aforementioned ten factors and to "balance in the broad public interest, the need for an adequate, economical and reliable supply of electric power with the desire to minimize the effect thereof on the environment and ecology of this state."[51/] There are no statutes, agency rules or regulations, administrative decisions, or court cases (decided or pending) providing any additional standards. An estimated four or five power plants have been sited under the Siting Act since its enactment in 1971.[52/]

V. LOCATION AND PLANNING OF DEVELOPMENTS GENERALLY

Because of the 100-megawatt minimum size limit for Siting Committee jurisdiction, it is likely that many developers of energy facilities will not be subject to Siting Act requirements and will have to secure permission from other state agencies and local governmental units prior to constructing an energy facility.

A. Environmental Agencies

The principal agency for environmental regulation in Arizona is the Department of Health Services (Department). The Department may enforce its authority by withholding permits

or approval required for construction and operation of facilities. As discussed above, jurisdiction over air pollution is divided between the Department and county or multi-county air quality control regions.[53/] Before any equipment or device that may cause air pollution is erected, installed, replaced, or altered, the Department or county air quality control region as appropriate must issue an installation permit.[54/] Before an item of equipment is placed in operation, an operating permit must be obtained.[55/]

Water quality standards are promulgated by the Water Quality Control Council, an interagency body.[56/] A permit for the discharge of any pollutant into the waters of the United States within Arizona must be obtained from the Department.[57/] The Department must give its approval before construction of any waste treatment works, including plants for treating or stabilizing industrial wastes.[58/] Approval must be obtained from the Department for all new disposal sites and for any method used for the disposal of refuse, including ashes in sanitary landfills.[59/]

B. Planning Agencies

There are a number of land use and natural resource planning authorities in Arizona, but not all of them have the power to prohibit development that does not conform to the authority's master plan.

As mentioned, the Department of Health Services is responsible for preparing comprehensive plans to abate air

pollution, minimize water pollution, and manage solid waste.[60] The permit-granting powers mentioned above give the Department authority to prohibit nonconforming developments.

The Environmental Planning Commission prepares the state environmental land use plan.[61] The plan is then administered and updated by the Office of Environmental Planning.[62] The powers of this commission and office are limited to advice, consultation, and coordination under the auspices of the Governor.[63]

The Arizona Water Commission is charged with formulating plans for the development, management, conservation, and use of watersheds and waters of the state.[64] Nevertheless, the actual permit-granting authority for water appropriation is vested in the Land Department.[65] When the Land Department is satisfied that appropriation has been properly perfected, it will issue a certificate of water right.[66] "An application for appropriation of waters of a stream within the state for generating electric energy in excess of twenty-five thousand horsepower . . . shall not be approved or granted unless authorized by an act of the legislature."[67] Drilling any well for the use of ground water requires prior filing of notice with the Land Department.[68]

The permission of the Land Department is required for any person other than the holder of a certificate of purchase of the lands from the State to engage in construction or to make improvements upon state lands.[69] "The state land depart-

ment may grant rights of way for any purpose it deems necessary, and sites for . . . power or irrigation plants . . . on or over state lands, subject to terms and conditions the department imposes."[70/]

An Outdoor Recreation Coordinating Commission is responsible for preparing a comprehensive plan for developing outdoor recreation resources of the state, but this commission lacks power to prohibit specific developments that do not conform to its plan.[71/]

Municipal planning agencies are required to adopt a comprehensive, long-range general plan for the development of the community.[72/] Such plans are to include "[A] public services and facilities element showing general plans for . . . local utilities, rights-of-way, easements and facilities for them."[73/]

> No public real property may be acquired by dedication or otherwise for . . . public purposes, no public real property may be disposed of, . . . and no public building or structure may be constructed or authorized, if an adopted general plan or part thereof applies thereto, until the location, purpose and extent of such acquisition or disposal . . . or such public building or structure have been submitted to and reported upon by the planning agency as to conformity with such adopted general plan or part thereof. [74/]

Municipalities are authorized to adopt zoning ordinances regulating the use of land in accordance with the applicable general plans.[75/] In addition, municipalities shall "[r]equire

the preparation and submission of acceptable engineering plans and specifications for the installation of required street, sewer, electric and water utilities . . . as a condition precedent to recordation of an approved final plat."[76/]

County government is also involved with planning and zoning. County zoning commissions submit to the County Board of Supervisors a comprehensive plan for the coordinated physical development of the county.[77/] It is unlawful to construct any building or structure within a zoning district without first obtaining a building permit.[78/] The county may enforce its zoning ordinance by means of withholding building permits.[79/] Building codes may be adopted for unincorporated areas of the county, but exempted from such codes are "electric, gas or other public utility systems operated by public service corporations operating under a franchise or certificate of convenience and necessity."[80/]

C. Natural Resources and Conservation Agencies

In addition to aforementioned agencies, the Game and Fish Commission may also take steps to block certain kinds of projects:

> The commission is authorized to bring suit in the name of the state against any person, corporation, or government agency, to restrain or enjoin the . . . discharging or dumping into a stream or body of water in the state [of] any deleterious substance which is injurious to wildlife. 81/

D. Other Agencies

Siting Committee jurisdiction does not eliminate the need for a certificate of public convenience and necessity. 82/

The Corporation Commission Act provides that:

> A. A street railroad, gas, electrical, telephone, private fire protection service, sewer or water corporation shall not begin construction of a street railroad, a line, plant, service or system, or any extension thereof, without first having obtained from the commission a certificate of public convenience and necessity.
>
> B. This section shall not require such corporation to secure such a certificate for an extension within a city, county or town within which it has theretofore lawfully commenced operations, or for an extension into territory either within or without a city, county or town, contiguous to its street railroad or line, plant or system, and not theretofore served by a public service corporation of like character, or for an extension within or to territory already served by it, necessary in the ordinary course of its business. 83/

Certificates of public convenience and necessity, as well as the powers and jurisdiction of the Corporation Commission generally, are discussed in Chapter 2, above.

FOOTNOTES

1. Ariz. Rev. Stat. Ann. §§40-360, 40-360.01 to 40-360.12 (West 1974; West Supp. 1978-79).
2. Id. §40-360.01 (West Supp. 1978-79).
3. Ibid.
4. 1971 Ariz. Sess. Laws, ch. 67, §1.
5. Ariz. Rev. Stat. Ann. §40-360.06(C) (West 1974).
6. Id. §40-360.06(D).
7. Ibid.
8. Id. §40-360.07(A).
9. Id. §40-360(10).
10. Id. §40-360(7).
11. Schroeder, Public Regulations of Private Land Use in Arizona, 1974 Ariz. State L.J. 163, 181.
12. Ariz. Rev. Stat. Ann. §40-360(8) (West 1974).
13. Id. §40-360(9).
14. Mr. R. G. Kircher, Director of Utilities, Corporation Commission, Telephone conversation, 6/30/78.
15. Ariz. Rev. Stat. Ann. §§40-360(8), 40-360(9) (West 1974).
16. Id. §40-360.01(D) (West Supp. 1978-79).
17. Id. §40-360.06(C) (West 1974).
18. Id. §36-1706(A).
19. Ibid.
20. Id. §36-1706(B).
21. Id. §36-1854 (West Supp. 1978-79). See also Ariz. Rev. Stat. Ann. §36-1857 (1974) for a description of water quality standards.

22. Ariz. Rev. Stat. Ann. §40-360.02 (West 1974).

23. Ibid.

24. Id. §40-360.03.

25. Ariz. Corp. Comm'n Gen. Order U-51 (1972).

26. Ariz. Rev. Stat. Ann. §40-360.03 (West 1974).

27. Ariz. Corp. Comm'n Gen. Order U-51, XIX(3) (1972).

28. Id. XIX(4).

29. Ibid.

30. Ibid.

31. Ariz. Rev. Stat. Ann. §40-360.04(A) (West 1974).

32. Ibid.

33. Ibid.

34. Id. §40-360.05(A).

35. Ibid.

36. Id. §40-360.07(B).

37. Id. §40-360.04(D).

38. Id. §40-360.07(A).

39. Id. §40-360.07(B).

40. Ibid.

41. Comment, Power Plant and Transmission Line Siting: Improving Arizona's Legislative Approach, 1973 Law & Soc. Ord. 519, 533.

42. Ariz. Rev. Stat. Ann. §40-360.07(B) (West 1974).

43. Id. §40-253(B).

44. Id. §40-254(A).

45. Id. §40-360.11.

46. Id. §40-360.06(A).

47. Id. §40-360.06(B).

48. Id. §40-360.06(C).

49. Id. §40-360.04(D).

50. Id. §40-360.07.

51. Ibid.

52. Mr. B. Paulsen, Asst. Director of Utilities Division, Corporation Commission, Telephone conversation, 7/26/78.

53. Ariz. Rev. Stat. Ann. §36-1706 (West 1974).

54. Id. §§36-779.01, 36-1707.01 (West Supp. 1978-79); Dept. of Health Services Regulations, 9-3-1201.

55. Ibid.

56. Ariz. Rev. Stat. Ann. §36-1854 (West Supp. 1978-79).

57. Id. §36-1859.

58. Id. §36-136 (West Supp. 1977); Dept. of Health Services Regulations, 2-3-1.3.

59. Ariz. Rev. Stat. Ann. §36-136 (West Supp. 1977); Dept. of Health Services Regulations 2-4-4.1, 2-4-4.2.

60. Ariz. Rev. Stat. Ann. §§36-132.01, 36-1705, 36-1856 (West 1974).

61. Id. §37-162.

62. Id. §37-163.

63. Id. §§37-162, 37-163.

64. Id. §45-506 (West Supp. 1978-79).

65. Id. §45-142.

66. Id. §45-152 (West 1956).

67. Id. §45-146(A).

68. Id. §45-305.

69. Id. §37-321 (West 1974).

70. Id. §37-461.

71. Id. §41-511.25 (West Supp. 1978).

72. Id. §9-461.05 (West 1977).

73. Id. §9-461.05(D)(4).

74. Id. §9-461.07(C).

75. Id. §9-462, et seq (West 1977; West. Supp. 1978-79).

76. Id. §9-463.01(C)(7)(West 1977).

77. Id. §11-806(B).

78. Id. §11-808(B)(West Supp. 1978-79).

79. Ibid.

80. Id. §§11-861, 11-865(2)(West 1977).

81. Id. §17-237 (West 1975).

82. Mr. B. Paulsen, Asst. Director of Utilities Division, Corporation Commission, Telephone conversation 7/26/78.

83. Ariz. Rev. Stat. Ann. §40-281(A)(B) (West 1974).

CHAPTER 4

LAWS GOVERNING FRANCHISES IN ARIZONA

I. AUTHORITY TO GRANT FRANCHISES

The Arizona state constitution provides for the municipal grant of franchises upon approval of the local electors:

> [N]o municipal corporation shall ever grant, extend, or renew a franchise without the approval of a majority of the qualified electors residing within its corporate limits who shall vote thereon at a general or special election, and the legislative body of any such corporation shall submit any such matter for approval or disapproval to such electors at any general municipal election, or call a special election for such purpose at any time upon thirty days notice. 1/

The Constitution limits franchises to 25 years 2/ and provides further that:

> No grant, extension, or renewal of any franchise or other use of the streets, alleys, or other public grounds or ways, of any municipality shall divest the State or any of its subdivisions of its or their control, and regulation of such use and enjoyment; nor shall the power to regulate charges for public services be surrendered; and no exclusive franchise shall ever be granted. 3/

Finally the state constitution specifically provides for municipal corporations themselves to engage in businesses which are usually engaged in by others by virtue of a franchise from a corporation:

> Every municipal corporation within this State shall have the right to engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation. 4/

An early case involved a dispute between a municipality and the Arizona Corporation Commission (Commission) over regulation of a street railway. The court explained: "It is now the law, and we believe it has always been in this jurisdiction, that the right to grant franchises to public utilities to occupy the streets and alleys of incorporated cities is vested in the municipal authorities." 5/

Express statutory authority for municipal corporations to grant a franchise for a public utility is currently contained in the following statute:

> No franchise for a public utility shall be granted by a municipal corporation to be operated by the grantee unless authorized by a majority vote of the qualified voters of the municipal corporation at a regular election or at a special election duly and regularly called by the governing body of the municipal corporation for that purpose. 6/

The term "public utility" has been defined by case law to mean a "person, corporation or other association who carries on an enterprise to accommodate the public, where any member of the public is entitled to use its facilities, and all persons must be treated without discrimination." 7/

The Board of Supervisors of a county is given express statutory authority to grant a "license or franchise" for the use of highways, except state highways within unincorporated areas of the county:

> A. Any person engaged in transportation or transmission business within the state may construct and operate lines connecting any points within the state and connect at the state boundary with like lines, except that within the confines of municipal corporations the use and occupancy of streets shall be under rights acquired by franchises according to

> law, and subject to control and regulation by the municipal authorities. The use of highways, except state highways, by public utilities not within any incorporated city or town, shall be regulated by the board of supervisors of the county by license or franchise.
>
> B. A board of supervisors in granting a license or franchise, or at any time after it is granted, may impose restrictions and limitations upon the use of the public roads as it deems best for the public safety or welfare. 8/

The statute does not define the term "transmission business," nor does there appear to be any case law on that specific issue. The Commission interprets "transmission business" in the statute to include electric utilities. 9/

II. PROCEDURES FOR GRANTING FRANCHISES

There is one procedure for municipal grants of franchises which applies to all types of "public utilities."

> (1) A person desiring to obtain a franchise to operate a public utility from a municipal corporation shall present the franchise desired to the governing body of the municipal corporation and it shall be filed among its records.
>
> (2) If the governing body deems the granting of the franchise beneficial to the municipal corporation, it shall pass a resolution, to be spread upon its record, stating that fact, and shall submit the question to the qualified electors as to whether or not the franchise shall be granted at the following regular election held in the municipal corporation or at a special election called for that purpose.
>
> (3) The proposed franchise shall be published in full in some newspaper of general circulation published in the municipal corporation for at least thirty consecutive days prior to the election.
>
> (4) If a majority of votes cast are in favor of granting the franchise, the governing body shall grant the franchise only in the form filed and published. 10/

The procedures are somewhat different for grants of franchises in unincorporated areas by county boards of supervisors. The Arizona statutes provide that:

> (c) Every franchise granted under this article shall include provisions requiring the grantee thereof to bear all expenses, including damage and compensation for any alteration of the direction, surface, grade or alignment of a county road, made for the purpose of such franchise. If the surface of a county highway is used by any grantee for truckage, the franchise shall include reasonable regulations for maintenance by the grantee of that portion of the highway so used.
>
> (d) A board of supervisors, before granting any of the privileges authorized under this section, shall give public notice of its intention to make such grant by publishing notice in a newspaper of general circulation, published within the county, for at least once a week for three days prior to the day set for consideration of such action. If, on or before such date, more than fifty percent of the qualified electors of the county petition the board of supervisors to deny such privileges, it shall do so, and any privileges granted against such petition shall be void. 11/

A certificate of public convenience and necessity is not a precondition for a grant of a franchise. In fact, the converse is true. The usual procedure is for the Commission to issue a preliminary order allowing a public service corporation to operate pending grant of a franchise. Evidence that the franchise has been secured must be presented before the Commission will issue a certificate. 12/

If a utility has already obtained a franchise, it may not proceed to exercise it without having obtained a certificate of public convenience and necessity. 13/ No certificate is required for extending operations in an area within which it has previously "lawfully commenced operations." 14/

The majority vote requirement for approval of a franchise by electors has been held to mean a majority of the number of votes cast on the franchise issue, not the total number of votes cast in the general election if the two numbers differ.[15/]

III. CRITERIA TO BE USED IN GRANTING A FRANCHISE REQUEST

There is no statutory or case law defining the criteria to be used in granting a franchise other than that it be "beneficial to the municipal corporation."[16/] A municipal corporation itself may "engage in any business or enterprise which may be engaged in by a person, firm, or corporation by virtue of a franchise from said municipal corporation."[17/]

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The Arizona Constitution provides that no franchise shall be granted, extended, or renewed for a period exceeding twenty-five years.[18/] In addition, "no law granting irrevocably any privilege, franchise, or immunity shall be enacted."[19/] There are no conditions, enumerated in statutes or judicial decisions, the occurrence of which will cause automatic surrender of the franchise.

If a franchise is revoked under inequitable circumstances, that is, revoked when there has been no wrongdoing by the utility, a court may permit the public utility to continue its service. In one case, a municipality granted

to a gas and light company, its successor and assigns, a franchise to operate an electric system in the municipality provided that it construct its facilities within eighteen months.[20] One year later, before having even begun construction, the gas and light company assigned the franchise to a power company which did not comply with its terms within eighteen months except by mere skeleton construction. These facilities were destroyed by fire six months later.[21] The franchise was then sold at a foreclosure sale to one from whom the defendant purchased it in good faith.[22] The defendant purchased the franchise knowing its history, but not knowing that the city intended to forfeit or cancel it.[23] By the time the city attempted to cancel the franchise, the defendant had constructed and was operating an electric system in the city.[24] When, shortly after the purchase, the city repealed the ordinance granting the franchise and sought to obtain judicial confirmation of the revocation, the court held that the franchise had become an inviolable executed contract that the city could not cancel because the defendant had provided an operating system before the franchise was cancelled.[25]

A spokesman for the Commission reported he knew of no recent instance in which a local government took the initiative to revoke the franchise of any public service corporation except in cases of condemnation and takeover by the municipality.[26] The usual course of events in an involuntary termination case is for the Commission to act first by revoking its certificate of public convenience and necessity.

B. Exclusivity

The article of the state constitution dealing with the legislature declares that, "No local or special laws shall be enacted in any of the following cases . . . granting to any corporation, association, or individual any special or exclusive privileges, immunities, or franchises."[27] In describing the powers of municipal corporations, the constitution stipulates that, "[N]o exclusive franchise shall ever be granted."[28]

C. Other Characteristics

The grant of a franchise to a public utility cannot result in the surrender of the power of the state or any political subdivision to regulate rates and charges.[29]

There is no mandatory franchise tax provided by statute. A preliminary order of the Commission may enable a public service corporation to begin operating, but no certificate of public convenience and necessity will be issued by the Commission if suitable franchises are not obtained.[30] Although the grant of a franchise is not conditional upon obtaining a certificate of public convenience and necessity, the exercise of a franchise is conditional upon obtaining such certificate.[31]

FOOTNOTES

1. Ariz. Const. art. 13 §4.
2. Ibid.
3. Id. 13, §6.
4. Id. 13, §5.
5. Phoenix Ry. Co. v. Lount, 21 Ariz. 289, 187 P. 933, 936 (1920).
6. Ariz. Rev. Stat. Ann. §9-501 (West 1977).
7. Trico Electric Cooperative Inc., v. Corporation Commission, 86 Ariz. 27, 339 P. 2d 1046 (1959).
8. Ariz. Rev. Stat. Ann. §40-283(A), (B) (West 1974).
9. Mr. B. Paulsen, Asst. Director of Utilities Div., Corporation Commission, Telephone conversation 7/26/78.
10. Ariz. Rev. Stat. Ann. §9-502 (West 1977).
11. Id. §40-283 (West 1974).
12. Id. §40-282(D).
13. Id. §40-281(C).
14. Id. §40-281(B).
15. Nogales Electric Light, Ice & Water Co. v. International Gas Co., 19 Ariz. 219, 168 P. 504 (1917).
16. Ariz. Rev. Stat. Ann. §9-502 (West 1977).
17. Ariz. Const. art. 13, §5; Ariz. Rev. Stat. Ann. §9-511 (West 1977).
18. Ariz. Const. art. 13, §4; Ariz. Rev. Stat. Ann. §9-502 (West 1977).
19. Ariz. Const. art. 2, §9.
20. City of Bisbee v. Bisbee Improvement Co., 18 Ariz. 126, 157 P. 228, (1916).
21. Ibid.

22. Id. 157 P. at 229-230.

23. Ibid.

24. Id. 157 P. at 231.

25. Id. 157 P. at 231-32.

26. Mr. G. Howard, Rate Analyst, Corporation Commission, Telephone conversation, 7/6/78.

27. Ariz. Const. art. 4, §19, pt. 2.

28. Id. art. 13, §6.

29. Ibid.

30. Ariz. Rev. Stat. Ann. §40-282(D) (West 1974).

31. Id. §40-281(C).