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 California

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

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Ross, Hardies, O'Keefe,
Babcock & Parsons
One IBM Plaza
Suite 3100
Chicago, Illinois 60611

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UNITED STATES DEPARTMENT OF ENERGY

Division of Buildings and Community Systems
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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 California. 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 California. Attention is

given to the problems of the entry of an ICES into a market for energy which has traditionally been characterized by a form of regulated monopoly where only one utility has been authorized implementation of the ICES concept and a series of recommendations for responding to those impediments. oriented 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 CALIFORNIA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Constitution of the State of California grants to the Legislature control over persons and private corporations that own or operate a line, plant or system for the production, generation or transmission of heat, light, water or power to be furnished either directly or indirectly to or for the public.^{1/}

In addition, the Constitution establishes the Public Utilities Commission (PUC)^{2/} and grants certain specific powers to the PUC, including the power to fix rates, establish rules and prescribe a uniform system of accounts.^{3/} The Constitution also recognizes that the Legislature has plenary power, consistent with the provisions of Article XII of the Constitution, to confer additional authority and jurisdiction upon the PUC.

The Constitution prohibits regulation by a city, county or other municipal body of matters over which the Legislature has granted regulatory power to the PUC.^{4/} This provision does not, however, impair the right of any city to grant franchises for public utilities.

Based upon this constitutional authority the California legislature has enacted the California Public Utilities Code (Code) and has designated the PUC as the agency to

implement the regulatory provisions of the Code.^{5/} The PUC's membership and the qualifications and term of office of its members are provided for in the Constitution.

"The Public Utilities Commission consists of five members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term."^{6/}

Certain limited powers over the conduct of public utilities may still be exercised by municipalities. These powers fall into two basic categories. First, municipalities are expressly authorized by the Code to grant franchises for the provision of utility services. (See Chapter 4). Secondly, municipalities retain their "power of control" to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience and safety of the general public.^{7/}

II. JURISDICTION OF THE COMMISSION

The Code provides that the PUC may supervise and regulate every "public utility" in the state and may do all things necessary and convenient in the exercise of such power and jurisdiction.^{8/} To determine more precisely the jurisdiction of the PUC, it is necessary to examine the definition of the term "public utility."

The Code defines a "public utility" to include every gas corporation, electrical, water and heat corporation

where the service is performed for the public or any portion thereof.^{9/} The Code further states that whenever any gas, electrical, water or heat corporation performs a service for or delivers a commodity to the public or a portion thereof for which compensation is received, such corporation is a public utility subject to the jurisdiction, of the PUC.^{10/} In addition, the Code extends jurisdiction to any corporation or person which performs such a service for or delivers such a commodity to any person, private corporation, municipality or other political subdivision of the state, which in turn directly or indirectly services or delivers the commodity to the public or a portion thereof.^{11/}

"Public or any portion thereof," is defined to include the public generally or any limited portion thereof, including a person, private corporation, municipality or other political subdivision of the state, for which the service is performed.^{12/}

Several California Supreme Court cases have required a showing that a person or business entity has dedicated its property to public use before it may be held a public utility and subject to PUC jurisdiction. The standard for showing dedication is vague and depends to a large extent on the facts of a particular transaction. Generally a dedication of property to public use is demonstrated by acts which expressly or impliedly constitute a holding out to serve the public.^{13/}

In Richfield Oil Co. v. Public Utilities Comm.,^{14/}

the California Supreme Court found the dedication doctrine to be an integral part of the definition of "public utility" in the Code. The court stated,

"[I]t must be concluded that the Legislature by its repeated reenactment of the definition of public utilities without change has accepted and adopted dedication as an implicit limitation on their terms."

The application of the dedication doctrine to a private electric generation facility which sells its surplus energy to a public utility is unclear. Such a facility which sells its surplus on an infrequent basis at a price separately determined for each sale is less likely to have dedicated its property to public use. However, if the power is sold on a firm basis at a fixed price for a substantial period of time, dedication is likely to be found. Because of the uncertainty of this doctrine's application to private generation facilities, an Assistant General Counsel for the PUC has called for legislation which would clarify the utility status of such facilities.^{15/}

Several other definitions in the Code are helpful in determining if a particular energy facility will be subject to the PUC's regulatory jurisdiction. The definition of "electrical corporation" includes every person or corporation owning, controlling or operating any electrical plant for compensation, except where solely for the person's own use or the use of this tenants.^{16/} "Electrical plant" consists

solely for his or its own use or the use of his or its tenants; or generating or producing electricity, or owning the means thereof, to or for any electrical corporation, heat corporation, state agency, city, county, district, or an association thereof, but not to or for the public for any other purpose. Notwithstanding any other provision of law, a private energy producer shall not be found to be a public utility subject to the general jurisdiction of the commission solely because of conducting any activity authorized by this chapter.^{19/}

The statute defines "conventional power source" as meaning power derived from nuclear energy or the combustion of fossil fuels.^{20/} Fossil fuel is defined to include coal, petroleum or natural gas. This chapter also provides a procedure by which a private energy producer may interconnect with the facilities of a public utility providing service to the area. This exemption from regulation will be unavailable unless the source of electric production is something other than a conventional power source.

The California legislature has recently amended the definition of "electrical corporation" so as to exclude:

a corporation or person employing cogeneration technology solely for the generation of electricity for its own use or the use of its tenants or for sale to an electrical corporation or state or local public agency, but not for sale to others, unless such corporation or person is otherwise an electrical corporation.

^{21/}

"Cogeneration technology" is defined as:

the use for the generation of electricity of exhaust steam, waste steam, heat, or resultant energy from an industrial, commercial, or manufacturing plant or process, or the use

of exhaust steam, waste steam, or heat from a thermal powerplant for an industrial, commercial, or manufacturing plant or process. For purposes of this division, the industrial, commercial, or manufacturing plant or process shall not be considered a thermal powerplant or portion thereof. Cogeneration technology shall not include steam or heat developed solely for electrical power generation.

The PUC's regulatory power extends to every public utility operating in the State of California including cooperatives. The only exception to the broad scope of PUC regulatory power is made for utilities owned by a municipal utility district.^{23/} The Code requires that the governing board of a municipal utility district supervise and regulate every utility owned and operated by the district, including the fixing of rates and all other matters necessary for the proper administration of the affairs of the district. Except for utilities owned by a municipal utility district, every facility which falls within the definition of public utility will be subject to the PUC's regulation.

III. POWERS OF REGULATORY AUTHORITY

The PUC is authorized to supervise and regulate every public utility in the state and to do all things necessary and convenient in the exercise of such power and jurisdiction.^{24/} This broad grant of authority is supplemented by specific grants of authority. For example, the PUC may investigate rates, classifications, rules, contracts or practices of any public utility and establish new rates,

classifications, rules, contracts or practices in place of those established by the utility.^{25/} The PUC may also establish a system of accounts to be kept by the public utilities subject to its jurisdiction.^{26/} The power of a public utility to issue stocks, bonds, notes and other evidences of indebtedness is subject to such regulation as the PUC prescribes.^{27/} No public utility may begin the construction or extension of facilities or exercise rights under any franchise or permit without first having obtained from the PUC a certificate of public convenience and necessity.^{28/} The PUC must also approve the disposal of any property of a public utility which is necessary or useful in its operations.^{29/}

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

Before construction of a facility or the exercise of a franchise, a public utility must obtain a certificate of public convenience and necessity from the PUC. The Code states that no gas, electrical or water corporation (heat corporation is not included) shall begin construction of a line, plant or system, or any extension thereof, without first obtaining from the PUC a certificate that the present or future public convenience and necessity requires such construction.^{30/}

The statute excepts from this requirement the following situations:

1. No certificate is required for an extension within a city or county within which a utility has lawfully commenced operations.

2. No certificate is necessary for an extension into territory either within or without a city or city and county contiguous to the utility's line plant or system and not previously served by a utility of like character.

3. No certificate is required for an extension within or to territory already served by a utility, which is necessary in the ordinary course of its business.

If the construction or expansion results in a boundary dispute, the PUC, on the complaint of the utility claiming injury, will review the situation and order the location of lines and plants as it finds just and reasonable. ^{31/}

The Code requires that the PUC, in granting certificates, shall consider:

- (a) Community values
- (b) Recreational and park areas
- (c) Historical and aesthetic values
- (d) Influence on environment. ^{32/}

In addition, the PUC must determine whether the public convenience and necessity requires the issuance of a certificate authorizing the utility service. A fundamental requirement for the granting of a certificate is a showing that the utility company will furnish adequate and continuing service at reasonable rates. ^{33/} The PUC has identified several factors which it will consider in evaluating an application

for a certificate. These factors include the quantity and quality of existing service, the need of the public for additional service, the ability of the prospective operator to provide dependable service, and the impact of multiple service.^{34/}

In the case of thermal powerplants and electrical transmission lines (as defined in the Public Resources Code), no certificate shall be granted until the Energy Resources Conservation and Development Commission Energy Commission has certified the site. The Energy Commission's decision making process takes the place of the PUC's consideration of factors (a-d) above. Before a certificate will issue, the utility making application must file a certified copy of its articles of incorporation or charter with the PUC.^{35/} Every applicant must also file evidence showing that the applicant has received the required consent, franchise, or permit from the county, city or other public authority.^{36/}

The PUC may, with or without a hearing, issue the certificate, refuse to issue it, or issue it for only a portion of the proposed construction or for the partial exercise of the franchise, right or privilege.^{37/}

A public utility which desires to exercise a right or privilege under a franchise which it contemplates securing, may seek from the PUC an order preliminary to the issuance of the certificate.^{38/} Such an order contains a declaration

by the PUC that it will issue the desired certificate after the public utility has obtained the contemplated franchise or permit.^{39/}

Notice of the filing of an application for a certificate of public convenience and necessity by an electric public utility must be given to county and municipal planning commissions, state highway engineers, a variety of state agencies and the general public by newspaper advertisement. Any party entitled to participate in the certificate proceedings under the PUC's rules may request that the PUC hold hearings on the application.^{40/}

The PUC, in determining the public convenience and necessity, must find that the proposed electric facility:

- A. Is reasonably required to meet area demands for present and/or future reliable and economic electric service; and
- B. Will not produce an unreasonable burden on natural resources, aesthetics of the area in which the proposed facilities are to be located, public health and safety, air and water quality in the vicinity, or parks, recreational and scenic areas, or historic sites and buildings or archeological sites.

41/

However, if the Energy Commission has already certified the site for the electric facility, the PUC may rely on the Energy Commission's findings as to environmental and aesthetic impact.

The PUC may grant or deny an application for a certificate or grant and attach such terms, including acquisition

by the public utility of a municipal franchise, as it determines are required by the public convenience and necessity.^{42/}

The Code contains a legislative declaration that the provisions with regard to certificates are concurrent with the rights of any city or county to grant franchises for public utilities upon the terms and conditions and in the manner prescribed by law.^{43/}

Although the California statutes do not expressly require the PUC to grant certificates on an exclusive basis, the PUC does in fact seek to avoid unnecessary and wasteful duplication of facilities. In Sale v. Railroad Commission,^{44/} the court described the PUC's role stating, "Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries."^{45/}

In Greyhound Lines, Inc. v. Public Utilities Commission,^{46/} the court recognized that the general purposes of certificates in utility regulation are to protect the public from speculation and duplication of facilities, and to protect utilities from competition. However, the California constitution and statutes do not create an absolute barrier to competition. The PUC, must determine if the public convenience and necessity are best served by the exclusive provision of a particular utility service or by competition. In Ventura County Waterworks v. Public Utilities Commission,^{47/} the court recognized that under California law a public

utility has no constitutional right to operate free from competition. A public utility does, however, have a right to a hearing before the PUC may grant to a competitor a certificate of public convenience and necessity.

V. APPEALS OF PUC DECISIONS

After the issuance of any order or decision by the PUC, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the affected public utility, may apply for rehearing.^{48/} No cause of action shall accrue in any court for the judicial review of a PUC decision or order unless the party seeking review has first filed with the PUC for a rehearing. The application for rehearing must set forth specifically the grounds on which the applicant considers the decision or order to be unlawful.^{49/}

Within thirty days after the application for rehearing is denied, or, if rehearing is granted, within thirty days after a decision on rehearing, the applicant may apply to the Supreme Court for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision inquired into and determined.^{50/} On review the cause shall be heard on the record of the PUC as certified by it. No new or additional evidence may be introduced in the Supreme Court.^{51/} The review shall consider only whether the "commission has regularly pursued its authority."^{52/}

No court, except the Supreme Court, has jurisdiction to review decisions of the PUC.^{53/} The pendency of a writ of review does not automatically stay or suspend the order or decision of the PUC. The Supreme Court may, at its discretion, stay in whole or in part the operation of the PUC's order or decision.^{54/}

FOOTNOTES

1. Cal. Const. art. 12, §3.
2. Id. §1.
3. Id. §5.
4. Id. §8.
5. Cal. Pub. Util. Code §301 (1977).
6. Cal. Const. art. 12, §1.
7. Cal. Pub. Util. Code §2902 (1977).
8. Id. §701.
9. Id. §216(a).
10. Id. §216(b).
11. Id. §216(c).
12. Id. §207.
13. Story v. Richardson, 186 Cal. 162 (1921); Klatt v. R.R. Comm'n. 192 Cal. 689 (1923).
14. 54 Cal. 2d 419 (1960).
15. Mr. William N. Foley, PUC Assistant General Counsel, Memorandum, March 3, 1978.
16. Cal. Pub. Util. Code §218 (Supp. 1978).
17. Id. §217 (1977).
18. Id. §2801-2806.
19. Id. §2802.
20. Id. §2805.
21. Id. §218 (1978 Supp.).
22. Id. §218.5

23. Id. §11885 (1977).
24. Id. §701.
25. Id. §729.
26. Id. §792.
27. Id. §816.
28. Id. §1001.
29. Id. §851.
30. Id. §1001.
31. Ibid.
32. Ibid.
33. Eastshore Consol Water Co., 55 Cal. PUC 613 (1957).
34. Ernest Tyhurst, 47 Cal. PUC 667 (1948).
35. Cal. Pub. Util. Code §1004 (1977).
36. Ibid.
37. Id. §1005.
38. Id. §1003.
39. Ibid.
40. PUC Gen. Order No. 131-A, §§4, 5.
41. Id. §9.
42. Cal. Pub. Util. Code §1005 (1977).
43. Id. §1001.
44. 109 P.2d 38 (Cal. 1940).
45. Id. at 41 (emphasis added).
46. 67 Cal. Rptr. 97, 438 P.2d 801 (1968).
47. 39 Cal. Rptr. 8, 393 P.2d 168 (1964).
48. Cal. Pub Util. Code §173 (1977).
49. Id. §1732.
50. Id. §1756.
51. Id. §1757.

52. Ibid.

53. Id. §1759.

54. Id. §1761.

CHAPTER 3

SITING OF ENERGY FACILITIES IN CALIFORNIA

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

California's Warren-Alquist State Energy Resources Conservation and Development Act^{1/} has established the Energy Resources Conservation and Development Commission (Energy Commission) to implement a comprehensive state energy policy. As part of this policy, the Energy Commission has been granted exclusive authority to certify all sites of power plants and related facilities in the state. This authority includes both new sites and changes or additions to existing facilities.^{2/}

Prior to the passage of the Warren-Alquist Act, siting authority in California was divided among many different agencies. In response to this situation, the California legislature created the Energy Commission and granted it exclusive and pre-emptive authority over power plant siting:

The issuance of a certificate by the commission shall be in lieu of any permit, certificate, or similar document required by any state, local or regional agency, or federal agency to the extent permitted by federal law, for such use of the site and related facilities, and shall supersede any applicable statute, ordinance or regulation of any state, local, or regional agency, or federal agency to the extent permitted by federal law.^{3/}

The Energy Commission, consisting of five members appointed by the governor with the advice and consent of the Senate^{4/} is charged with the implementation of the broad

energy policies contained in the Warren-Alquist Act. The Commissioners serve for a term of five years. The statute mandates that the Energy Commission shall consist of one member with a background in the field of engineering or physical science and a knowledge of energy supply or conversion systems; one shall be an attorney with administrative law experience; one with a background in environmental protection; one with a background in economics and experience in the field of natural resource management; and one from the public at large.^{5/} In addition to site certification, the Energy Commission's responsibilities include electrical energy demand planning and forecasting, energy research and development, energy resources conservation and energy shortage contingency planning.

The Energy Commission is authorized to certify a sufficient number of sites and related facilities so as to provide a supply of electrical power sufficient to accommodate the state's projected energy demand.

II. SCOPE OF THE ENERGY COMMISSION'S SITING JURISDICTION

The grant of siting authority to the Energy Commission includes the exclusive power to certify all sites and related facilities in the state, whether a new site and related facility or a change or addition to an existing facility. The statute prohibits the commencing of construction

of any facility or modification of any existing facility without first obtaining certification of any such site and related facilities.^{6/}

"Site" is defined as any location on which a facility is constructed or is proposed to be constructed.^{7/}

"Facility" is defined as "any electric transmission line or thermal power plant, or both . . . , regulated according to the provisions of this division." The Energy Commission's siting authority does not extend to the siting of gas storage or transmission facilities nor to facilities for the production or transmission of steam.

"Electric transmission line" is defined as "any electric powerline carrying electric power from a thermal power plant located within the state to a point of junction with any interconnected transmission system."^{8/} "Thermal power plant" includes any stationary or floating electrical generating facility using any source of thermal energy, including geothermal energy,^{9/} with a generating capacity of 50 megawatts or more, and any facilities appurtenant thereto.^{10/}

"Modification of an existing facility" means any alteration, replacement, or improvement of equipment that results in a 50 megawatt or more increase in the electric generating capacity of an existing thermal power plant or an increase of 25 percent in the peak operating voltage or peak kilowatt capacity of an existing electric transmission

line.^{11/} The mere replacement of existing power lines at an existing site is not subject to the siting requirement.^{12/}

Any entity which seeks to construct an electric generating or transmission facility subject to the Act or seeks to modify such a facility is required to first obtain certification from the Energy Commission.^{13/} The site certification requirement is not limited to investor-owned public utilities. Thus, a municipality, electric cooperative or private individual seeking to construct or modify such facilities must comply with the terms of the Act.

The definitions above reveal limitations on the site certification authority of the Energy Commission. Only the following facilities appear to be subject to the Act's certification requirement:

1. A thermal power plant with a generating capacity of 50 megawatts or more.
2. Any alteration, replacement or improvement of equipment that results in a 50 megawatt or more increase in the generating capacity of a thermal power plant.
3. An electric transmission line from a thermal power plant (50 megawatts or more) in the state to a point of junction with an interconnected system.

4. Any increase of 25 percent or more in the peak operating voltage or peak kilowatt capacity of an existing transmission line.^{14/}

The statute contains a grandfather clause which exempts certain facilities from compliance. Any site for which the California Public Utilities Commission (PUC) had issued a certificate of public convenience and necessity prior to the effective date of the Act, January 7, 1975, is exempt. Also exempt is any site for which construction was planned to commence within three years from the effective date of the Act.^{15/}

The certification of a site by the Energy Commission is all that is required for the construction of the facilities. This does not preclude the requirement of a certificate of public convenience and necessity from the PUC to provide the utility service. (See Chapter 2). The Act requires that the PUC issue no certificate of public convenience and necessity for a site or facilities unless the utility has obtained site certification from the Energy Commission.^{16/} Such an application may be initiated concurrently.^{17/}

The list does, however, eliminate the need to obtain "any permit, certificate, or similar document required by any state, local or regional agency, or federal law, for such use of the site and related facilities." The California attorney general, in a published opinion, has recognized that since the Energy

Commission is charged with evaluating, regulating and approving thermal power plant sites and facilities, a county government would not have power to regulate or prohibit construction of such a plant if the plant was under Energy Commission jurisdiction.^{18/} The attorney general did recognize, however, that the Energy Commission must solicit extensive comments and recommendations from the county government concerning the siting of such facilities. The solicitation of comments from interested state, regional, and local agencies is built into the application process discussed below. The Act also contains an express legislative finding that state, regional and local plans be considered:

The Legislature further finds and declares that in planning for future electrical generating and related transmission facilities, state, regional and local plans for land use, urban expansion, transportation systems, environmental protection, and economic development should be considered.^{19/}

The Energy Commission may not certify any facility where it finds, in its written opinion, that the facility does not conform with any applicable state, local or regional standards, ordinances, or laws, unless the Energy Commission determines, "that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity."^{20/}

The Energy Commission is expressly prohibited by statute from making any finding in conflict with applicable federal law or regulation.^{21/} In addition, the Energy

Commission may not approve as a site for a facility any location designated for protecting from development by the California Coastal Commission or the San Francisco Bay Conservation or San Francisco Bay Commission finds that the proposed use is not inconsistent with the primary use of such land and there will be no adverse environmental effects. The certification of such a site designated for protection may not be made unless the approval of any public agency having ownership or control of such land is obtained.^{22/}

III. CERTIFICATION PROCESS

A. Applicant's Obligations

The process of obtaining site certification begins with the filing of a notice of intention to file an application for the certification of a site for the construction of a thermal power plant or electric transmission line. This notice is preliminary in nature and permits the Energy Commission to determine if the proposed sites are able to accommodate such facilities and to determine if the proposals conform with Energy Commission standards and forecasts. Each notice of intention to file an application must contain the following information:

1. The notice must contain at least three alternative sites. If the notice is for modification of an existing facility, the Energy Commission may require that alternative methods for making the proposed modification be specified in the notice.^{23/}

2. The notice must include a statement describing the location of the proposed sites; a summary of the design of the facility; the types of fuel to be used; the methods of construction and operation; the proposed location of structures on each site; a statement of the relative economic, technological, and environmental advantages and disadvantages of alternative sites; a statement of the need for the facility and information showing the compatibility of the proposals with the most recent planning and forecasting report issued by the Energy Commission. The notice may also contain any other information that the applicant deems desirable to submit to the Energy Commission.^{24/}

3. If an applicant, in the notice, proposes approval of a site which will accommodate a maximum capacity in excess of the capacity being proposed for initial approval, then additional information must be provided. The notice must contain information concerning the generating units the facility ultimately will accommodate and their maximum generating capacity. In addition, the projected installation schedule, the environmental impact of the fully developed site, the amount and sources of cooling water, and location and specifications of auxiliary facilities for each state of development must be stated in the notice.

B. Energy Commission's Responsibilities

After the notice of intention to file an application has been submitted, the responsibility for investigating and processing the notice shifts to the Energy Commission. It is mandated by statute to take the following steps:

1. The Energy Commission must publish a summary of the notice in a newspaper in each county in which sites are proposed to be located. Copies of the notice must be transmitted to the PUC, if the proposed facility requires a certificate of public convenience and necessity, and to other agencies having an interest in any of the proposed sites.^{25/}

2. The Energy Commission must also request comments and recommendations regarding the designated facilities from all appropriate local, regional, state and federal agencies.^{26/}

3. For sites and related facilities requiring a certificate of public convenience and necessity, the Energy Commission shall request comments and recommendations from the PUC regarding the design, operation and location of the facilities in relation to the economic, financial, rate, system reliability and service implications of the proposed facilities.^{27/} Also, if a proposed facility is located within the Suisun Marsh or the jurisdiction of the San Francisco Bay Conservation and Development Commission, then a copy of the notice must be transmitted to that commission.^{28/}

4. If one of the alternative sites is proposed to be located within the coastal zone, the Energy Commission must transmit a copy of the notice to the California Coastal Commission which shall prepare a report and findings. The Coastal Commission or the San Francisco Bay Commission may participate as an interested party in public hearings on the notice of intention.^{29/}

5. The Energy Commission must conduct a public informational presentation in the county or counties where the proposed sites are located within 45 days after receipt of the notice.^{30/}

6. No sooner than 15 days after the conclusion of the public informational presentations, the Energy Commission shall commence non-adjudicatory hearings. Any person may participate in these hearings to the extent deemed reasonable and relevant by the presiding Commissioner. Such hearing has its purpose:

- (a) To set forth the electrical demand basis for the proposed site and related facility.
- (b) To provide knowledge and understanding of proposed facilities.
- (c) To obtain the views and comments of the public, parties and concerned governmental agencies on the environmental, public health and safety, economic, social and land use impacts of the facility at the proposed sites.
- (d) To solicit information regarding reasonable alternative sources of the electric generating capacity or energy. . . .^{31/}

7. The Energy Commission must review the factors related to safety and reliability of the facilities at each of the alternative sites. This includes, where necessary, onsite investigations and other studies.^{32/}

8. The Energy Commission must publish, within 150 days after the filing of the notice of intention to file an application, a summary of the notice and an order setting the time and place of the adjudicatory hearing.^{33/}

9. No earlier than 30 days after distribution of the summary and hearing order, the Energy Commission shall commence adjudicatory hearings pursuant to the hearing order.^{34/}

10. After conclusion of the adjudicatory hearings and no later than 300 days after the filing of the notice of intention, a final report shall be prepared and distributed. The final report shall include:

(1) The 12 year forecast of statewide and service area electric power demands.

(2) Applicable local, regional, state and federal standards, ordinances and laws including any findings and comments submitted by the Coastal or San Francisco Bay Commissions.

(3) The Energy Commission's findings on the acceptability and relative merits of each alternative siting proposal.

(4) Findings and conclusions with respect to reliability and safety of the facilities at each of the sites.^{35/}

11. No later than 30 days after the final report is distributed, a hearing on the final report must be held.

12. The Energy Commission shall grant or deny approval of the notice based on the findings in its final report.^{36/}

In order to obtain certification of a particular site, an application for certification must be filed after

the Energy Commission has acted on the proposed sites described in the notice. Such an application must be made for a site which has been found acceptable by the Energy Commission.^{37/} The application phase of the proceedings cannot begin until the notice phase has been completed.

The contents of the application are prescribed by statute.^{38/} The information which must be provided is substantially the same as that contained in the notice. After the application has been filed, the Energy Commission must hold a public hearing, commencing no earlier than 90 nor later than 240 days after filing.^{39/} The Energy Commission shall issue a written decision as to such application within 18 months of the filing date or at a later time mutually agreed upon.^{40/}

The Energy Commission may order a reconsideration of all or part of a decision or order on its own motion or on petition of any party. A petition for reconsideration shall be filed within 30 days after the issue of a decision or order by the Energy Commission.^{41/}

The decision of the Energy Commission on any application for certification of a site is subject to judicial review in the same manner as would be the decision of the PUC on an application for a certificate of public convenience and necessity for the same site and related facility.^{42/}

On review, no new or additional evidence may be introduced and the cause will be heard solely on the record as certified by the Energy Commission. The review will consider only whether the Energy Commission has properly pursued

its authority, including whether the order or decision violates any constitutional rights of the petitioner.^{43/}

Except for the right of judicial review of Energy Commission decisions, no court has jurisdiction to hear any case or controversy which was or could have been determined in a proceeding before the Energy Commission. No court has authority to stop or delay construction or operation of any thermal power plant except to enforce a decision of the Energy Commission.^{44/}

IV. CERTIFICATION STANDARDS

The Energy Commission is charged by statute with certifying sufficient sites and related facilities in order to supply electric power sufficient to accommodate the demand projected by the Energy Commission in its most recent forecast of electric power demands.^{45/} The Energy Commission may not certify any facility unless it finds that the facility conforms with its twelve year forecast of statewide and service area electric power demands.^{46/} In addition to this consideration, the following factors are employed in evaluating a site certification application:

1. The recommendations of local, regional, state and federal agencies regarding the design, operation, and location of the facilities in relation to environmental quality, public health and safety, and other factors within the agencies' expertise.^{47/}

2. The recommendations of the PUC (for those sites and facilities which require a certificate of public convenience and necessity) as to the proposed facilities in relation to the economic, financial, rate, system reliability and service implications of the proposed facility.^{48/}

3. The views and comments of the public on the environmental, public health and safety, economic, social, and land use impacts of the facility at the proposed sites.^{49/}

4. The feasibility of alternative sources of electric generating capacity from alternative sites which might better carry out the energy policies and objectives of the Energy Commission.^{50/}

5. Factors relating to the safety and reliability of the facilities in relation to the characteristics of each particular site. (If necessary, on-site investigations by the Energy Commission will be conducted.)^{51/}

6. The provisions of any state law or local or regional ordinance or regulation, including long-range land use plans adopted by state, local or regional planning agencies, which would apply to the certification of a site but for the grant of exclusive authority of the Commission.^{52/}

7. Any findings and comments submitted by the California Coastal Commission or the San Francisco Bay Conservation and Development Commission.^{53/}

8. All significant environmental factors as contained in the environmental impact report.

In considering applications for certification, the Energy Commission shall give its greatest consideration to the need for protecting areas of critical environmental concern, including irreplaceable wildlife habitats, historical, archaeological and cultural sites, lands of hazardous concern, and areas under consideration for wilderness or wildlife reserves.^{54/}

It should be noted that although the Act grants exclusive siting authority to the Energy Commission, it also imposes certain procedural requirements on the Commission which restrict its actual authority. The Act requires the Energy Commission to accommodate other agencies' standards in the exercise of its site certification power unless the Energy Commission is able to find "that such facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving such public convenience and necessity."^{55/} The full dimension of this override authority has not yet been tested in the courts. A significant role in the siting process has been granted to the California Coastal Commission. Under the 1972 Coastal Act, the Energy Commission could not certify an energy facility site without first obtaining the Coastal Commission's approval. The 1976 Coastal Act changed this requirement by exempting electric generating facilities from the requirement of obtaining Coastal Commission approval for coastal development.

The Energy Commission's authority has been expanded to include the coastal zone area. However, the Coastal Commission still plays a major role in the site certification process. The Coastal Act requires the Coastal Commission to designate certain areas where power plants would prevent achievement of the Act's objectives. If a proposed facility is located in this area, the Energy Commission cannot approve the site unless the California Coastal Commission first finds that such use is not inconsistent with the primary uses of such land and that there will be no substantial adverse environmental effects and the approval of any public agency having ownership or control of such land is obtained.^{56/} Similar authority is vested in the San Francisco Bay Conservation and Development Commission for sites located within its territory.^{57/}

If a proposed facility is not in a designated area but violates a standard or requirement promulgated pursuant to the Coastal Act, the Energy Commission must find that the site and facility are required for the public convenience and necessity and that more prudent and feasible means for achieving the public convenience and necessity are not available.^{58/}

In addition, the Energy Commission must provide, in its written report, specific provisions for meeting the Coastal Commission's report on the particular site, unless the Energy Commission finds "that the adoption of the provisions specified in the report would result in greater adverse effect on the environment or that the provisions proposed in the report would not be feasible."^{59/}

FOOTNOTES

1. Cal. Pub. Res. Code Ann. §§25000-25968 (Deering 1976).
2. Id. §25500 (Supp. 1979).
3. Ibid.
4. Id. §25200 (Deering 1976).
5. Id. §25201.
6. Id. §25500 (Supp. 1979).
7. Id. §25119 (Deering 1976).
8. Id. §25107.
9. Id. §25120.
10. Id. §25120 (Supp. 1979).
11. Id. §25123 (Deering 1976).
12. Id. §25107.
13. Id. §25500 (Supp. 1979).
14. Lake Co. Energy Council v. County of Lake, 139 Cal. 176 (1977).
15. Cal. Pub. Res. Code Ann. §25501 (Deering 1976).
16. Id. §25518.
17. Id. §28518.5.
18. 58 Op. Atty. Gen. 729, 10-31-75.
19. Cal. Pub. Res. Code Ann. §25003 (Deering 1976).
20. Id. §25525.
21. Ibid.
22. Id. §25526 (Supp. 1979).
23. Id. §25503; There has been before the California legislature in recent years proposed legislation to amend the Act to permit a thermal power plant utilizing cogeneration technology to file a notice with the Energy Commission without proposing three alternative sites.

24. Cal. Pub. Res. Code §25504 (Deering 1976).
25. Id. §25505.
26. Id. §25506.
27. Id. §25506.5.
28. Id. §25519(e) (Supp. 1979).
29. Id. §§25507, 25508.
30. Id. §25509.
31. Id. §25509.5.
32. Id. §25511.
33. Id. §25510.
34. Id. §25513.
35. Id. §25514.
36. Id. §25516.
37. Ibid.
38. Id. §25520 (Deering 1976).
39. Id. §25221.
40. Id. §25222.
41. Id. §25530.
42. Id. §25531 (a) (Supp. 1979).
43. Id. §25531 (b).
44. Id. §25531 (c).
45. Id. §25500.
46. Id. §25524.
47. Id. §25506 (Deering 1976).
48. Id. §25506.
49. Id. §25509 (Supp. 1979).

50. Id. §25509.5 (d).
51. Id. §25511.
52. Id. §25003 (Deering 1976).
53. Id. §25514 (Supp. 1979).
54. Id. §25527 (Deering 1976).
55. Id. §25525.
56. Id. §25526 (Supp. 1979).
57. Id. §25526 (6).
58. Id. §25523 (b).
59. Ibid.

CHAPTER 4

LAW GOVERNING FRANCHISES IN CALIFORNIA

I. AUTHORITY TO GRANT FRANCHISES

California law vests authority in units of local government to grant franchises to public utilities operating in their jurisdictions. The power to grant franchises is derived from two sources of authority, one constitutional, the other statutory.

The Constitution of the State of California authorizes any municipal corporation to establish and operate public works for the provision of various utility services to its inhabitants.^{1/} In addition, the Constitution provides that persons or corporations may establish and operate works for supplying the inhabitants with such services "upon such conditions and under such regulations as the municipality may prescribe under its organic law."^{2/} This constitutional provision does not give to all municipalities the power to regulate public utilities operating within its borders; it merely places utilities under such control as may be provided for by the charter or organic law of the municipality.^{3/} A municipality's control is limited to the making and enforcement of local, police, sanitary and other regulations. A municipality may exercise no power of control over a public utility if such power has been conferred upon the PUC.^{4/} Certain

municipalities may have within their free-hold charters the authority to grant franchises for the provision of public utility services.

A specific delegation of the power to grant franchises is found in the Franchise Act of 1937.⁵ This Act empowers the legislative body of any municipality to grant a franchise "to use, or to construct and use, poles, wires, conduits, and appurtenances for transmitting and distributing electricity for all purposes" or to use or lay pipes for gas or water, across or upon the public streets within the municipality.⁶ In order to exercise this power the grant of such a franchise must conform to the terms and conditions provided in the Act.

II. PROCEDURES FOR GRANTING FRANCHISES

There are two procedures for the granting of franchises under California law. The first of the alternative procedures for the granting of a franchise is found in Chapter 1, Section 6001 of the Public Utilities Code of the California statutes:

Every franchise or privilege to erect or lay telegraph or telephone wires . . . to lay gas pipes for the purpose of carrying gas for light, heat, or power, to erect poles or wires for transmitting electricity for light, heat, or power, along or upon any public street or highway, or to exercise any other privilege proposed to be granted by the governing or legislative body of any county, city and county, or city shall be granted upon the conditions in this article provided, and not otherwise, except when such franchises are granted pursuant to Chapters 2 or 3 of this division.

This article does not apply . . . to franchises or privileges for purposes not involving the furnishing of any service or commodity to the public or any portion thereof.7/

The following requirements must be met for a franchise to be granted validly under the procedures mandated by Section 6001:

1. The franchise must not contain any clause or condition which shall restrict free and open competition in the bidding and no clause which favors one person or corporation over another may be a part of the franchise.8/

2. The applicant must file with the municipality's legislative body an application and that body must advertise the fact of the application, together with a statement that it proposes to grant a franchise, in a local newspaper.9/

3. The newspaper advertisement must inform the public that bids will be received for the franchise and that it will be awarded to the highest bidder.10/

4. The publication must also state the character of the franchise, the term for which it is to be granted, that the successful bidder and his assigns shall during the life of the franchise pay to the local government 2% of the gross annual receipts arising from the use of the franchise, and that the franchise will be awarded to the person, firm

or corporation making the highest cash bid.11/

5. Other requirements include a deposit of the full amount of the bid at the time of the sale, or in the case of a person who makes his bid at the time of sale, a deposit of at least 10% of the full amount. The remaining 90% must be paid within 24 hours of the acceptance of the bid. The advertisement offering the franchise may also require that the bidder file a bond and that the bond be deemed liquidated damages in the event of failure to perform any of the requirements under the franchise.12/

6. Construction work pursuant to the franchise grant must begin within four months of the award of the franchise. If not, the franchise will be declared forfeited.13/

7. The Attorney General, at the request of any county or municipality, shall sue for the forfeiture of any franchise for non-compliance with any condition contained in the franchise.14/

The Franchise Act of 1937 provides an alternative procedure for the granting of a franchise. Section 6202 of the Public Utilities Code empowers the legislative body of any municipality to grant a franchise for the use of the public streets in providing utility service:

The legislative body of any municipality is empowered to grant a franchise to any person, firm, or corporation, whether operating under an existing franchise or not, to use, or to construct and use, poles, wires, conduits, and appurtenances for transmitting and distributing electricity for all purposes, or to use, or to lay and use, pipes and

appurtenances for transmitting and distributing gas for any and all purposes, or to lay and use pipes, ditches, flumes, conduits, and appurtenances for transmitting and distributing water for any and all purposes, under, along, across, or upon the public streets, ways, alleys and places within the municipality upon the terms and conditions provided in this chapter.15/

The following steps must be observed in the granting of a franchise.

1. An application must be filed with the legislative body of the municipality stating applicant's name, the purpose of the franchise, and whether a definite or indeterminate term is desired. A statement that the applicant will pay 2% of its gross annual receipts to the municipality must also be included in the application.16/

2. The municipality, upon receipt of the application, may pass a resolution of intent to grant the franchise applied for, stating the character of the franchise, publishing notice and providing an opportunity for the public to respond in open meeting.17/ The notice will state that the grantee will pay a specified percentage to the municipality and will designate the term for which the franchise is to be granted.18/

3. Written protests may be delivered to the legislative body up to the time of the public hearing. If no protests are made or those made are overruled or denied,

the legislative body may grant the franchise. The franchise shall be granted by ordinance adopted in the manner prescribed by law for the enactment of ordinances.19/

4. A franchise granted under these proceedings does not become effective until the grantee files a written acceptance with the clerk of the granting municipality.20/

It should be noted that this statute does not apply to a municipality having a freeholder's charter adopted and ratified under the Constitution. If such charter contains provisions for the issuance of franchises by the municipality, it will be necessary to satisfy those requirements in the granting of a franchise.

There is no requirement that a public utility obtain a certificate of public convenience and necessity from the PUC before it can be granted a franchise. In fact, the reverse is true. As part of its application for a certificate, a public utility must provide the PUC with evidence showing that the applicant has received the necessary franchise.

III. CRITERIA TO BE USED IN EVALUATING A REQUEST FOR A FRANCHISE

The California statutes do not prescribe specific criteria for municipalities to use in determining the grant of a franchise. The procedure outlined under Section 6001 et seq. does require that the bidding for the franchise be competitive and indicates that a municipality must accept the highest bid. Although certain conditions are made mandatory

to the grant of a franchise, the criteria to be employed in determining the award of a franchise are not prescribed. Presumably a municipality, after conforming with the procedural requirements of the various franchise statutes, is free to determine the award of a franchise based on its own power to regulate the use of its streets.

IV. CHARACTERISTICS OF A FRANCHISE

Many of the characteristics of municipal franchises will be determined by the conditions imposed by the local legislative body in granting the franchise. The statutes merely set out a few basic requirements and establish procedural guidelines for the granting of franchises. The two procedures outlined in the statutes 21/ permit the municipality to add terms or conditions to the franchise which are not in conflict with the statutory requirements and which the legislative body determines are in the public interest.

A franchise granted pursuant to Section 6001 must bear the following characteristics:

1. The franchise must be one that involves the furnishing of a service or commodity to the public or any portion of the public.22/

2. The privilege of holding the franchise will be taxed at the rate of 2% of the holder's gross annual receipts arising from the use of the franchise.23/

3. The duration of the franchise and its exclusivity or non-exclusivity will be determined by the local legislative body. The statute does not mandate these terms. In City of San Diego v. Southern Cal. Tel. Corp., 24/ the court recognized that upon the expiration of a franchise the holder no longer had permission to use the streets. It was the city's responsibility to determine whether the company should receive a new franchise. In an earlier decision in the same case the court held that the continued use of the streets by a telephone company after its franchise had expired was illegal. The court found that this unlawful use of the streets amounted to a public nuisance and that the city was vested with the power to require the removal of the lines and equipment that constitute the encroachment.25/

A franchise granted under the Section 6201 procedures will automatically bear the following characteristics:

1. The franchise given under this section, with respect to a particular utility service, will be in lieu of all other franchises, privileges or rights owned by the grantee within the limits of the municipality.25/

2. The granting municipality may still acquire the property of the grantee by purchase or condemnation despite the grant of a franchise.26/

3. Every franchise granted pursuant to Section 6201 et seq. is of an indefinite term, unless the municipality specifies a definite term in granting the ordinance.27/

4. The franchise shall remain in effect until it is voluntarily surrendered or abandoned, purchased or condemned and taken under the power of eminent domain or until it is forfeited for non-compliance with its terms.28/

5. Every electric franchise granted under this provision confers upon its holder the right to use, or construct and use, poles, wires or conduits for the purpose of transmitting and distributing electricity along the public streets.29/

FOOTNOTES

1. Cal. Const. art. 11, §19.
2. Ibid.
3. See, Oro Electric Corp. v. Railroad Comm., 146 P. 118 (1915).
4. Key System Transit Co. v. City of Oakland, 13 P. 2d 979 (Cal. 1932)
5. Cal. Pub. Util. Code §6201-6302 (Deering 1970).
6. Id. §6202.
7. Id. §6001.
8. Id. §6003.
9. Id. §6004.
10. Id. §6005.
11. Id. §§6006, 6007.
12. Id. §§6008, 6009, 6010.
13. Id. §6013.
14. Id. §6016.
15. Id. §6202.
16. Id. §6231.
17. Id. §6232.
18. Id. §6233.
19. Id. §6234.
20. Id. §6235.
21. Id. §6001 et seq.; Id. §6201 et seq.
22. Id. §6001.

23. Id. §6006.
24. City of San Diego v. Southern Cal. Tel. Co., 266 P.2d 14 (S. Ct. Cal., 1954).
25. City of San Diego v. Southern Cal. Tel. Co., 208 P. 2d 27 (App. Ct. Cal. 1949)
26. Cal. Pub. Util. Code §6261 (Deering 1970).
27. Id. §6262.
28. Id. §6264.
29. Ibid.
30. Id. §6265.