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 Delaware

MASTER

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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 Delaware. 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 Delaware. Attention is given

to the problems of the entry of an ICES into a market for energy which has traditionally been characterized by a form of regulated monopoly where only one utility has been authorized to implement 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 DELAWARE

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The regulation of public utilities in Delaware is the responsibility of the Public Service Commission (PSC).^{1/} The PSC consists of five commissioners appointed by the governor and confirmed by a majority of the senate for terms of five years each.^{2/} Not more than three members are to be from the same political party. One member is to be a resident of Kent County, one of Sussex County, one of the City of Wilmington and two members are to be of New Castle County outside of Wilmington.^{3/}

Local governments retain control over the rates, property, equipment, facilities and franchises of municipally owned utilities. Such utilities are expressly exempted from PSC regulation.^{4/}

II. JURISDICTION OF THE PSC

The PSC is given "exclusive original supervision and regulation of all public utilities."^{5/}

A "public utility" is defined to include:

every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate, within this State, any taxicab, steam, manufactured gas, natural gas, electric light, heat, power, water, telephone, including domestic public land mobile radio service, telegraph or heating oil (for residential consumption directly to residences by means

of a pipeline) service, system, plant or equipment, for public use. 6/

The definition of "public utility" includes any person providing steam, manufactured or natural gas, electric light, heat, power, water and heating oil (for residential consumption). PSC jurisdiction is limited to persons providing these utility services for "public use."^{7/} The statutes are silent as to a definition of this phrase as well as to jurisdiction over sales to tenants and sales for resale to the public and there have been no reported cases from Delaware courts shedding any light on these issues. Counsel for the PSC has indicated that the PSC has held on several occasions that service to tenants did not constitute furnishing service "to or for the public."^{8/} However, these decisions have not been published.

The statute does not indicate specific functions of a public utility which are subject to PSC jurisdiction. It speaks only of operating a "service, system, plant or equipment for public use." There is no express requirement of a sale, or the receipt of compensation, for the function to be subject to jurisdiction. Cooperatives are expressly included in the PSC's jurisdiction.^{9/} However, municipally owned utilities are expressly excluded from PSC jurisdiction.^{10/}

III. POWERS OF THE PSC

The PSC is given general regulatory powers over public utilities and their rates, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of the Public Utilities Act.^{11/}

In addition to its general authority, the PSC is given regulatory jurisdiction over rates for "any product supplied or service rendered by a public utility operating in Delaware."^{12/} The PSC is also given jurisdiction over capitalization and the issuance of securities by a public utility^{13/} and may prescribe a uniform system of accounts.^{14/} The PSC must also approve mergers and consolidations;^{15/} transactions with other entities concerning the sale, lease, assignment or mortgage of a utility's property;^{16/} siting and construction of a new plant or expansion of an existing plant through the issuance of a certificate of public convenience and necessity;^{17/} abandonment of service;^{18/} and standards of service.^{19/} The extension of service by a utility may be required by the PSC after a hearing and a finding that such extension is reasonable and practical.^{20/}

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

The PSC has the power to issue certificates of public convenience and necessity. These certificates are required before any "individual, copartnership, association, joint stock company, agency or department of the State, cooperative or the lessees, trustees or receivers thereof . . . begin the business of a public utility."^{21/} Any extension of a public utility's business or operations also requires a certificate. The only exception to this requirement is for extensions within the perimeter of any territory already served by the utility.^{22/}

It is unclear from the statute whether a certificate

is required prior to the beginning of construction of a utility facility or only prior to the initiation of service to a new territory. However, the court in In Re Delaware Power and Light Co., indicated that, if the extension of service is one that requires a certificate, the certificate must be obtained before the utility beings to construct the facilities necessary for implementing the extension. The court stated that:

[A] utility may not begin the extension of its business or operation without first obtaining the necessary certificate; in other words, it must be obtained before, not after, the extension is begun. The Act clearly does not intend that the utility make what may prove to be a wasted expenditure by starting the construction work before the Commission will entertain its application for a certificate. 23/

Under present Delaware law, a certificate is necessary for any extension of service into territory not presently being served by the utility.

An application for a certificate of public convenience and necessity must be filed with the PSC. A proposed rate schedule is to accompany the application. 24/

Upon complaint by any public utility claiming to be adversely affected, the PSC may, after a public hearing on the matter, prescribe such terms and conditions in the certificate as may be required by "the public convenience and necessity." 25/

The statutes prescribe no standards or criteria to be used in evaluating an application for a certificate other than that the PSC must determine if the award of a certificate will serve the public convenience and necessity. 26/

The statutes require a utility to obtain a certificate of convenience and necessity prior to providing service but do not expressly prohibit competition. There is no provision authorizing or prohibiting the issuance of more than one certificate for an area. This determination is left to the discretion of the PSC in evaluating the public convenience and necessity.^{27/} In re Delaware Power & Light Co.,^{28/} a private utility had attempted to extend service into an area being served by municipal utility. In finding that a certificate authorizing the extension was necessary, the court held:

Obviously, what the section [203] is designed to do is to prevent one water company, for example, from entering into direct competition with another water company without first obtaining the consent of the commission thereto. ^{29/}

Service area disputes are to be resolved by the PSC. Any public utility adversely affected by a proposed extension may file a complaint with the PSC. After a hearing, the PSC may issue an order with regard to the proposed extension as may be required by the public convenience and necessity.^{30/} In City of Milford v. Delaware Electric Cooperative, Inc.,^{31/} the PSC recognized that determining the degree of competition to be permitted between utilities is its responsibility. The PSC stated that:

The statute, of course, does not absolutely prohibit the extension of one utility into another's service territory, but gives the commission discretion to describe the terms and conditions upon which such an extension can be made. ^{32/}

In City of Milford, the PSC reluctantly permitted the extension of electric service by a public utility into an area served

by a public utility into an area served by a municipal utility. The lines at issue already had been established and in use for three years and it would have been wasteful to tear them out. The PSC indicated that if the complaint had been brought sooner than three years after the extension, it might have barred the extension. The PSC, in its decision, offered the following discussion of its authority to resolve service area disputes between private and municipal utilities under Section 203 of the Delaware Code:

[T]he basic problem is that the commission can exercise no jurisdiction, either affirmatively or otherwise, over the activities, rates, or services, of municipal utilities. Thus, the municipality is free to extend to whatever territory the city fathers ordain, while the private utility, if it extends to the lines of the municipality, must first seek the authority of this commission. 33/

In In Re Delaware Power & Light Co., the court found that a municipal utility, though not subject to PSC jurisdiction, has standing to file a complaint with the PSC when its service area is invaded by a public utility. 34/

The transfer of a certificate is not dealt with in the statutes. However, in Greater Wilmington Transp. Auth. v. Kline 35/ the court held that a certificate of public convenience and necessity is a mere license which is personal in character and is not transferable. The certificate was found to be purely a regulatory measure that vests no right in the holder.

The statutes contain no provision specifically requiring a utility to obtain PSC approval for the abandonment of a service area.

V. APPEALS OF PSC DECISIONS

No rehearings or additional administrative procedures are provided for by statute. Any public utility affected by an order of the PSC, or any original party or intervenor may appeal to the Superior Court within 30 days of the date the order was served.^{36/} All appeals are to be based upon the record before the PSC. The court may not conduct a trial de novo.^{37/} The order of the PSC may not be overturned unless not supported by sufficient evidence, based on an error of law or arbitrary and capricious.^{38/} Appeals from the Superior Court are to be heard by the State Supreme Court.^{39/}

FOOTNOTES

1. Del. Code Ann. tit. 26 §101 et. seq.; §201 (Supp. 1977).
2. Id. §103(a).
3. Id. §103(b).
4. Id. §202.
5. Id. §201.
6. Id. §102(2).
7. Ibid.
8. Mr. Michael Fischer, Counsel for PSC, Telephone conversation, 9/15/78.
9. Del. Code Ann. tit. 26 §102(2) (Supp. 1977).
10. Id. §202.
11. Id. §201.
12. Id. §§301 to 312.
13. Id. §215.
14. Id. §208(a).
15. Id. §215.
16. Ibid.
17. Id. §§203, 204.
18. Id. §117.
19. Id. §209.
20. Id. §204.
21. Id. §203.
22. Id. §203(a).
23. In re Delaware Power & Light Co., 48 Del. 149, 99 A. 2d 270 (Super. Ct. 1953) (Emphasis in original).
24. Del. Code Ann. tit. 26 §301 (Supp. 1977).
25. Id. §203(a).

26. Del. Code Ann. tit. 26 §203(a)(Supp. 1977).
27. Id. §203 (Supp. 1977).
28. In re Delaware Power & Light Co., 48 Del. 149, 99 A. 2d 270 (Super. Ct. 1953).
29. Id. 99 A.2d 273.
30. Del. Code Ann. tit. 26 §203(a)(Supp. 1977).
31. City of Milford v. Delaware Electric Cooperative, Inc., 82 PUR 3d 201, 203 (Del. P.S.C. 1969).
32. Id.
33. City of Milford v. Delaware Electric Cooperative, Inc., 88 PUR 3d 203 (Del. P.S.C. 1969).
34. In Re Delaware Power & Light Co., 48 Del. 149, 99 A. 2d 270 (Super. Ct. 1953).
35. Greater Wilmington Transp. Auth. v. Kline, 285 A. 2d 819 (Del. Super. 1971).
36. Del. Code Ann. tit. 26 §510(a)(1975).
37. Id. §510(b).
38. Id. §510(c).
39. Del. Const. art. 55, §1.

CHAPTER 3

SITING OF ENERGY FACILITIES IN DELAWARE

The state of Delaware does not have a comprehensive energy facility siting law. Such a law may eventually be proposed by the Energy Facilities Siting Liason Committee. The Department of Natural Resources and Environmental Control, local planning authorities, local zoning boards, the State Coastal Zone Industrial Control Board, the Energy Agency and the Public Service Commission may all affect the siting of an energy generating facility.

I. ENERGY FACILITIES SITING LIASON COMMITTEE

In July 1978, Delaware enacted the Delaware Energy Act,^{1/} which created the Energy Facility Siting Liason Committee.^{2/} The Committee is comprised of the director of the Delaware Energy Office, the chairman of the Department of Natural Resources and Environmental Control, the director of the Delaware Office of Management, Budget and Planning, the secretary of the Department of Community Affairs and Economic Development and the state Geologist.

The Committee is responsible for coordinating and developing state policy, and proposing state legislation regarding the siting of energy facilities. The Committee is to prepare an annual siting report which is to include an inventory of current state and local regulators and duplicative federal regulations.^{3/} The report is also to

include a consolidated outline, including flowchart, time-line diagram and description of steps and procedures an applicant must go through for siting of an energy facility in Delaware. The Committee is to make recommendations for "the elimination, consistent with the statutory environmental goals of the State, by either executive order or legislation, of such overlap and duplication in the statutes, regulations and permit requirements inventoried."^{4/}

The Act also directs state agencies, instrumentalities, and political subdivisions to review their rules and regulations relevant to siting of energy facilities, and report to the Energy Office.^{5/}

II. PUBLIC SERVICE COMMISSION

A certificate of public convenience and necessity is generally required from the Public Service Commission (PSC) prior to beginning or extending service as a public utility in Delaware,^{6/} although there are some exceptions to this requirement for extensions of service in any territory already being served by the utility.^{7/} In awarding certificates of public convenience and necessity, the PSC may consider the choice of site, but only as it relates to factors such as service territories, efficiency and adequacy of service. This position was taken by the PSC with respect to an application for a certificate for a water storage facility proposed by a public utility water company.^{8/}

III. PLANNING AND ZONING AUTHORITIES

- A. The Office of Management, Budget and Planning and the Coastal Zone Industrial Control Board

All industrial development, other than that of heavy industry, in the coastal zone of Delaware requires a permit.^{9/} Heavy industrial uses are prohibited entirely in the coastal zone.^{10/} The "coastal zone" is defined as "all that area of the State of Delaware, whether land, water or subaqueous land between the territorial limits of Delaware in the Delaware River, Delaware Bay and Atlantic Ocean and a line formed by certain Delaware highways and roads" near the shorelines of the various rivers in Delaware and the Atlantic Ocean.^{11/}

"Heavy industry use" is a use characteristically involving more than twenty acres and characteristically involving, among other things, smokestacks, chemical processing equipment, oil refineries, basic steel manufacturing plants and petrochemical complexes.^{12/}

All applications for permits are to be directed to the Office of Management, Budget and Planning.^{13/} In passing on permit requests, the Director of the office is to consider (1) the environmental impact, including, among other things, probable air and water pollution, the impact of site preparation on drainage, flood control, land erosion and ground water, and the likelihood of the generation of heat, or noise; (2) the economic impact, including jobs created and tax revenue generated; (3) the aesthetic effect; (4) the number and type of supporting facilities required; (5) the effect on neighboring land uses; and (6) county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction.^{14/}

Appeals are to be taken to the State Coastal Zone Industrial Control Board which consists of five members appointed by the governor and confirmed by the Senate, the Secretary of Natural Resources and Environmental Control, the Secretary of Community Affairs and Economic Development, and the chairmen of the County planning commissions.^{15/} Appeals may be taken from the Board to the Superior Court in and for the county of the location of the land in question.^{16/}

B. Local Zoning Regulations

The Delaware Constitution empowers the General Assembly to enact laws under which the municipalities and counties may adopt zoning ordinances.^{17/} The General Assembly has authorized the legislative bodies of cities and incorporated towns to regulate and restrict, among other things, the location and use of buildings, structures and land for trade, industry, residence and other purposes.^{18/} These regulations are to be made pursuant to a division of the municipality into districts, and in accordance with a comprehensive plan, and are to be designed:

to lessen congestion in the streets, to secure safety from fire, panic and other dangers, to promote health and the general welfare, to provide adequate light and air, to prevent the overcrowding of land, to avoid undue concentration of population, to facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.^{19/}

There are no provisions dealing with public utilities specifically.

C. Local Planning Authorities

Any incorporated city or town is empowered to

establish a planning commission of five to nine members appointed by the mayor to two to five year terms and confirmed by the city council.^{20/} The planning commission is to develop a comprehensive plan for the development of the city or town. The plan is to show, among other things, "sites for public buildings and structures, pierhead and bulkhead lines, waterways, routes of railroad and buses, locations of sewers, watermains and other public utilities."^{21/}

D. State Planning Authorities

The State Planning Office is authorized to undertake comprehensive planning and research on a statewide and interstate basis.^{22/} The Office is to prepare, revise, amend, extend or add to the "Delaware Development Plan."^{23/} The Plan is to contain recommendations concerning the need for and the proposed location of major public and private works and facilities which, by reason of their function, size, extent, legal status, or for any other cause, are of state as distinguished from purely local concern, or which are legally within the jurisdiction of state bodies or officials.^{24/} The Office is to function as "an advisory, consultative and coordinating agency."^{25/} The planning done by the Office is only of an advisory nature.

IV. ENVIRONMENTAL AGENCY

The Department of Natural Resources and Environmental Control (Department) has jurisdiction over most activities which may give rise to some form of pollution. No person is to undertake, without a permit from the Secretary of the

Department, any activity:

- (1) In a way which may cause or contribute to the discharge of an air contaminant; or
- (2) In a way which may cause or contribute to discharge of a pollutant into any surface or ground water; or
- (3) In a way which may cause or contribute to withdrawal of ground water or surface water or both; or
- (4) In a way which may cause or contribute to the collection, transportation, storage, processing or disposal of solid wastes; or
- (5) To construct, maintain or operate a pipeline system including any appurtenances such as a storage tank or pump station; or
- (6) To construct any water facility; . . . 26/

Similar provisions require a permit with respect to constructing, installing, replacing, modifying or using any equipment, device or other article:

- (1) Which may cause or contribute to the discharge of an air contaminant; or
- (2) Which may cause or contribute to the discharge of a pollutant into any surface or ground water; or
- (3) Which is intended to prevent or control the emission of air contaminants into the atmosphere or pollutants into surface or ground waters; or
- (4) Which is intended to withdraw ground water or surface water for treatment and supply; or
- (5) For disposal of solid waste. 27/

No permit under the above provisions is to be granted except in accordance with Department regulations and, "unless the county or municipality having jurisdiction has first approved

the activity by zoning procedures provided by law."^{28/}

Any person wishing to obtain a permit is to submit an application to the Secretary of the Department accompanied by such plans, specifications and other information as required by applicable statutes or regulations. The Secretary, upon receipt of the application, is to advertise in a daily newspaper of general distribution throughout the state "(1) the fact that the application has been received, (2) a brief description of the nature of the application, and (3) the place at which a copy of the application may be inspected." The Secretary is not to hold a public hearing unless he receives, within a reasonable time stated in the advertisement, a public hearing request which he deems meritorious.^{29/}

Appeals of the Secretary's decisions are taken to the Environmental Appeals Board which is required to hold a public hearing.^{30/} Appeals from the Board may be taken to the Superior Court in and for the county in which the activity is wholly or principally located.^{31/}

The Secretary of the Department is to formulate, adopt, amend and implement a statewide comprehensive water plan, a statewide air resources management plan, a statewide water pollution management plan, and a comprehensive solid waste management plan.^{32/} Variances from these plans and permits may be granted by the Secretary pursuant to statutory procedures involving public notice and a hearing.^{33/}

Any "activity" specifically in the wetlands must be performed under a permit from the Department.^{34/} The

Wetlands are defined as:

those lands above the mean low water elevation including any bank, marsh, swamp, meadow, flat, or other low land subject to tidal action in the State along the Delaware Bay and Delaware River, Indian River Bay, Rehoboth Bay, Little and Big Assawoman Bays, the coastal inland waterways, or along any inlet, estuary or tributary waterway or any portion thereof, including those areas which are now or in this century have been connected to tidal waters, whose surface is at or below an elevation of two feet above local mean high water, and upon which may grow or is capable of growing any but not necessarily all of [a list of about thirty plants follows]. ^{35/}

"Activity," is defined to include "dredging, draining, filling, bulkheading, construction of any kind, including but not limited to drilling or excavation, . . ."^{36/} No permit is to be granted until the county or municipality having jurisdiction has first approved the activity by zoning procedure provided by law.^{37/} Expansions^{38/} or extensive pre-existing uses also require permits.

The Secretary, prior to approving any permit, is to take the following factors into consideration:

- (1) Environmental impact, including but not limited to, likely destruction of wetlands and flora and fauna; impact of the site preparation on tidal ebb and flow and the otherwise normal drainage of the area in question, especially as it relates to flood control; impact of the site preparation and proposed activity on the quality and quantity of tidal waters, surface, ground and sub-surface water resources and other resources;
- (2) Aesthetic effect, such as the impact on scenic beauty of the surrounding area;
- (3) The number and type of public and private supporting facilities required and the impact of such facilities on all factors listed in

this subsection;

- (4) Effect on neighboring land uses, including but not limited to, public access to tidal waters, recreational areas and effect on adjacent residential and agricultural areas;
- (5) State, county and municipal comprehensive plans for the development and/or conservation of their areas of jurisdiction;
- (6) Economic effect, including the number of jobs created and the income which will be generated by the wages and salaries of the jobs in relation to the amount of land required, and the amount of tax revenues potentially accruing to the state, county and local governments. 39/

Any person desiring to obtain a permit is to submit an application, accompanied by plans, specifications and other information required by statute or regulation, upon the receipt of which the Secretary is to advertise its receipt and nature in a newspaper of general circulation in the county in which it is proposed. A public hearing is to be held if the Secretary deems it to be in the best public interest. A public hearing is required if a meritorious objection is received within twenty days of the advertisement. 40/

Appeals are to be taken to the Wetlands Appeal Board, 41/ and the Board's decision may be applied to the Court. 42/

FOOTNOTES

1. Del. Code tit. 29 §§9401-9418 (Supp. 1978).
2. Id. §9408.
3. Id. §9408(e).
4. Id. §9408(e)(3)(4).
5. Id. §9414.
6. Id., tit. 26 §§202, 203(a) (Supp. 1977).
7. Id. §203(a). See Chapter 2 for fuller discussion.
8. In re Complaint of City of Newark and In re Application of Artesian Water Co., PSC Docket Nos. 346 and 352, June 20, 1962.
9. Del. Code Ann. tit. 7 §§7001; 7004 (Supp. 1977).
10. Id. §7003 (1975).
11. Id. §7002(a).
12. Id. §7002(e).
13. Id. §7005 (Supp. 1977).
14. Id. §7004(b).
15. Id. §§7006 (1975), 7007 (Supp. 1977).
16. Id. §7008 (Supp. 1977).
17. Del. Const. art. II, §25.
18. Del. Code Ann. tit. 22 §301 (1975).
19. Id. §303.
20. Id. tit. 22 §701 (Supp. 1977).
21. Id. §702 (1975).
22. Id. tit. 29 §9104 (Supp. 1977).
23. Id. §9108(l).
24. Id. §9108(l)(d) (1975).
25. Id. §9104(a) (Supp. 1977).
26. Del. Code Ann. tit. §6003(a) (1975).

27. Id. §6003(b).
28. Id. §6003(c).
29. Id. §6004 (Supp. 1977).
30. Id. §6008.
31. Id. §6009.
32. Id. §6010.
33. Id. §6011.
34. Id. §§6601-6620 (1975).
35. Id. §6603(8).
36. Id. §6603(1).
37. Ibid.
38. Id. §6605.
39. Id. §6604(b).
40. Id. §6608.
41. Id. §§6610, 6611.
42. Id. §6612.

CHAPTER 4

FRANCHISING OF PUBLIC UTILITIES IN DELAWARE

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

The right of public utilities to use the public ways, commonly called a franchise, emanates from a direct grant by the Delaware legislature:

[E]very corporation organized under Chapter I of Title 8 for the purpose of constructing, maintaining and operating works for the supply and distribution of electricity for electric lights, heat or power, in addition to the powers conferred upon corporations generally, may use the public roads, highways, streets, avenues and alleys in this State for the purpose of erecting posts or poles on the same to sustain the necessary wires and fixtures. 1/

Similar statutory authority exists for steam, heat and power corporations, 2/ and gas, water and oil corporations. 3/

Although the franchise itself is automatic with respect to corporations organized to provide the enumerated services, the statutes also require that:

[t]he consent of the council, town commissioners or other persons having control over the public roads, highways, streets, avenues and alleys of the county, city, town and district wherein or through which it is contemplated to lay such pipes, mains, and conduits beneath such public roads, highways, streets, avenues or alleys shall first and as a condition precedent be obtained before any such public roads, highways, streets, avenues or alleys are disturbed, opened or dug up. 4/

The above statute pertains specifically to gas, water and oil corporations. Similar statutes are provided for electric, 5/

steam, heat and power corporations.^{6/}

These provisions do not give the municipalities the right to grant franchises to distribute electricity or other utility services. The municipality only has the power to determine when, where, and how the utility may erect poles for transmission of current,^{7/} and can place no restriction on the corporation which is inconsistent with those conditions imposed by the State.^{8/} However, the courts have pointed out that although the franchise emanates directly from a grant by the State, the condition that the consent of the local government agency be obtained before the franchise may be exercised, makes the legal result, for practical purposes, to be as though the franchise were granted by the local unit.^{9/} The courts have further pointed out that a franchise conferred by the State is of no practical value until supplemented by the consent of the municipality.^{10/} Thus, although technically the State grants the actual franchise, the effect is the same as if the city actually granted franchises.

One court, in a recent case, explained the Delaware franchising law by stating that:

[T]he statutes give the utility a general but qualified right to locate its facilities beneath public roads. The nature of the right, as well as any conditions to be placed on its exercise, are to be determined by the appropriate local unit or agency having control over the public roads and whose consent is deemed a condition precedent to the exercise of the right. ^{11/}

II. IMPLIED AUTHORITY TO GRANT FRANCHISES

While the express franchising authority contained in the Delaware statutes appears sufficient to cover all foreseeable situations, it should be noted that Delaware statutes also give home rule powers to municipalities by granting them the right "to have and assume all powers which, under the Constitution of this State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute".^{12/}

III. PROCEDURES FOR GRANTING FRANCHISES

The franchising statute pertaining to electric corporations does not establish a specific procedure to be followed to obtain a municipality's consent to use the streets. The statute for steam, heat and power corporations calls for the granting of consent by ordinance adopted at a meeting of the governing body held not less than 30 days after notice has been posted in 5 of the most public places on the public road proposed to be used.^{13/} An identical procedure is provided for gas, water and oil corporations.^{14/} No statutory guidelines have been established for the passing of an ordinance. The ordinance procedure is apparently within the discretion of the municipality under its home rule power. See part II supra.

A certificate of public convenience and necessity from the PSC is a condition precedent to the validity of franchises, but the grant of a certificate itself is not the grant of a proprietary interest in the public highways.^{15/}

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The statutes provide no criteria for granting franchises, or more accurately, permission to use the streets. The courts have held that a municipality has nearly total discretion to determine when and under what circumstances an electric utility may use the highways to transmit electric current.^{16/} As noted above, however, the condition of a franchise may not be inconsistent with any conditions imposed by the state.

The statutes do provide that pipes and conduits for steam, heat and power are to be laid at least three feet below the surface of the highways.^{17/} Pipes, mains and conduits of gas, oil and water corporations are to be at least 18 inches below the surface of the highway.^{18/}

V. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

A franchise, or permission to use the streets, may be perpetual if stated in the grant but such franchises are not favored. A perpetual franchise may never be implied.^{19/}

Should a franchise be terminated, the city may be granted an injunction requiring the removal of the electric company's poles.^{20/}

B. Competition and Exclusivity

The statutes are silent as to the exclusivity of a franchise. However, one early court opinion held the grant of an exclusive franchise to be valid.^{21/}

C. Other Characteristics

A utility cannot use the streets until it has ob-

tained a certificate of public convenience and necessity^{22/}
nor can it exercise its certificate of public convenience
and necessity until a municipality gives it permission to
use the streets.^{23/}

A franchise fee can only be imposed at the time
the franchise is granted by a municipality. Such a fee
cannot be imposed during the term of the franchise unless
the power to impose future terms and conditions is reserved
when the franchise is granted.^{24/}

It has been held that one who accepts a franchise
to construct utility lines under or along a public street,
road or highway, impliedly consents, as a condition for the
franchise, to bear all costs in relocating its facilities^{25/}
when made necessary to facilitate highway improvements.
The government is not required to give relocation cost com-
pensation to a franchisee when some legitimate public need
exists which requires disturbance of the franchise, since
removal or relocation of a franchisee's facilities is not a
"taking."^{26/}

FOOTNOTES

1. Del. Code Ann. tit. 26, §906 (1975).
2. Id. §1101.
3. Id. §1301.
4. Id. §1301 (Emphasis added).
5. Id. §906.
6. Id. §1101.
7. Delaware Power & Light Co. v. City of Newark, 37 Del. Ch. 259, 140 A.2d 258 (1958).
8. Eastern Shore Public Service Co. v. Town of Seaford, 23 Del. Ch. 199, 2 A.2d 265, (1938) appeal dismissed 306 U.S. 616 (1938).
9. Town of Seaford v. Eastern Shore Public Service Co., 22 Del. Ch. 288, 2 A.2d 258 (Ch. 1937), aff'd, 23 Del. Ch. 199, 2 A.2d 265 (Super. Ct. 1938), cert. denied 306 U.S. 616 (1938).
10. Eastern Shore Public Service Co. v. Town of Seaford, 23 Del. Ch. 199, 2 A.2d 265 (Super Ct. 1938), appeal dismiss 306 U.S. 616 (1938).
11. Artesian Water Co. v. State Dept. of Highways and Transp., 330 A.2d 4321, modified 330 A.2d 441 (Del. 1974).
12. Del. Code Ann. tit. 22, §802 (1975).
13. Id. §1101.
14. Id. §1301.
15. Greater Wilmington Transportation Auth. v. Kline, 285 A.2d 819 (Del. Super. 1971).
16. Simon v. Town of Seaford, 22 Del. Ch. 417, 197 A. 681 (1938).
17. Del. Code Ann. tit. 26 §1101.
18. Id. §1301.
19. Eastern Shore Public Service Co. v. Town of Seaford, 23 Del. Ch. 199, 2 A.2d 265 (Super. Ct. 1938), 306 U.S. 616, 59 S. Ct. 483, 83 L. Ed. 1024, (1938).

20. Town of Seaford v. Eastern Shore Public Service Co., 22 Del. Ch. 1, 191 A. 892 (1937).
21. Thoroughgood v. Georgetown Water Co., 9 Del. Ch. 84, 77 A. 720 (1910).
22. Del. Code Ann. tit. 26 §906 (1975).
23. Id. §203. See also Chapter 2 generally.
24. Delaware Power and Light Co. v. City of Newark, 37 Del. Ch. 259, 140 A.2d 258 (Ch. 1958).
25. Artesian Water Co. v. State Dept. of Highways and Transp., 330 A.2d 432, modified 330 A.2d 441 (Del. 1974).
26. Ibid.