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STUDY OF THE IMPACTS OF REGULATIONS
AFFECTING THE ACCEPTANCE OF
INTEGRATED COMMUNITY ENERGY SYSTEMS

PRELIMINARY BACKGROUND REPORT

MASTER

Public Utility, Energy Facility
Siting and Municipal Franchising
Regulatory Programs in Alabama

DUANE A. FEURER
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Babcock & Parsons
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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 Alabama. 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 Alabama. Attention is given

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

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

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

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN ALABAMA

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The Alabama legislature has created the Public Service Commission (PSC)^{1/} which has general supervisory powers over utilities.^{2/} The PSC consists of a president and two associates,^{3/} who are elected to four year terms.^{4/}

The PSC has no jurisdiction over municipal utilities and, as a result, local governments retain the power to regulate the operation of their municipally-owned utilities.^{5/} Municipalities also retain their police power over streets and highways within their territory.^{6/}

II. JURISDICTION OF THE PSC

The PSC has "general supervision of all persons, firms and corporations operating utilities."^{7/} A utility includes every person, not engaged solely in interstate business, that owns, operates, leases or controls:

a. Any plant, property or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat or power for other uses, including any conduits, ducts, or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for lights, heat or power, or other uses.

b. Any plant, property or facility for the manufacture, storage, distribution, sale or furnishing to or for the public of natural or manufactured gas for light, heat or power

or other uses.

c. Any plant, property or facility for the supply, storage, distribution or furnishing to or for the public of water for manufacturing, municipal, domestic or other uses.

d. Any plant, property or facility for the production, transmission, conveyance, delivery furnishing to or for the public of steam for heat or power, or other uses. 8/

The definition of "utility" requires that any distribution, sale or furnishing of utility services must be directly to the public or for the public. 9/ Sales by a utility for redistribution by another party or use by the producer or the use of his tenants are not within the PSC jurisdiction. The statute expressly provides that none of its other provisions apply to the:

generation, transmission or distribution of electricity, . . . or to the production, delivery or furnishing of steam for heat or power by a producer who is not otherwise a utility, for the sole use of such producer, or for the use of tenants of such producer, nor shall they apply to any person not otherwise a utility who manufactures and supplies such products to a utility for its use or distribution without participation by such manufacturer in such use or distribution. 10/

There is no express definition of "public" in either the statutes or case law. Some guidance as to the meaning of "to or for the public" is provided by the above exemption from PSC jurisdiction by the producer, the use of tenants or for sale to a party for resale. 11/ In Southern Liquid Gas Co. v. City of Dothan, 12/ the plaintiff was in the

business of selling artificial gas by tanks, drums and cylinders. The court, in finding that plaintiff was not a public utility, indicated that to realize such status, the gas company must serve all the inhabitants in its area. The court stated that "an essential element of a utility is that it is both serving and is constituted to serve all the inhabitants in the area who comply with reasonable conditions."^{13/}

The PSC has no jurisdiction over municipal utilities,^{14/} and, as a result, local governments retain the power to regulate the operations of their municipally-owned utilities. Municipalities also retain police power over streets and highways within their territory.^{15/} Cooperatively owned utilities are exempt from PSC jurisdiction.^{16/}

III. POWERS OF THE PUBLIC SERVICE COMMISSION

The PSC is given "general supervision of all persons, firms and corporations operating utilities," and is to examine those utilities to:

keep informed as to their general conditions, their franchises, capitalizations, rates and other charges, and the manner in which their plants, equipment and other property are owned, leased, controlled, managed, conducted and operated, not only with respect to adequacy, security and accommodation afforded by their service, but also with respect to their compliance with the provisions of this title. ^{17/}

The PSC is expressly given power over rates for sales to the public;^{18/} capitalization;^{19/} the issuance of securities;^{20/} the prescription of a system of uniform accounts;^{21/} depreciation (through a uniform system of accounts);^{22/} mergers, consolidations, sales or leases;^{23/} transactions with

holding companies or affiliated interests;^{24/} construction or expansion of new or existing plants;^{25/} abandonment of service;^{26/} and standards of service.^{27/} Rates for sales for resale to the public are, as mentioned previously, expressly outside the powers of the PSC.^{28/}

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

The Alabama statutes do not provide for the granting of the right to a public utility to provide service in a specific assigned area. However, prior to the construction of any facility for the production, transmission, delivery or furnishing of gas, electricity, water or steam, a utility must apply for and receive from the PSC a certificate of public convenience and necessity.^{29/} The only exception to this requirement is for the construction of "ordinary extensions of existing systems in the usual course of business."^{30/}

The need for a public utility to obtain a certificate is not stated in terms of a requirement prior to instituting service to the public but rather in terms of a requirement that a public utility obtain a certificate prior to the construction of facilities for the production, transmission or delivery of the utility service. This requirement extends to construction on even a small scale, including the stringing of new transmission wires,^{31/} unless the construction is merely an ordinary extension in the usual course of business. Although the Alabama statute does not assign a specific territory to an operating utility, the requirement of a

certificate for construction provides a means for the PSC to restrict the duplication of service facilities.

While not specifically authorizing the Commission to issue exclusive certificates, the requirement that a utility obtain a certificate prior to construction, in effect, provides the PSC with authority to regulate the degree of competition among utilities. However, in Clarke-Washington Elec. Membership Corp. v. Alabama Power Co.,^{32/} the court held that a public utility lawfully operating within the territory of a municipality and possessing a valid franchise from the municipality has no duty to obtain a certificate of public convenience and necessity from the PSC. This exception is based on the requirement that nothing in the Public Utility Act shall be construed:

in respect of matters other than rates and service regulations and equipment, over which exclusive jurisdiction is conferred by this title upon the commission, to affect existing rights and powers hereafter acquired by municipalities under valid contracts with utilities. (emphasis added) ^{33/}

Also, in Covington Elec. Co-op v. Alabama Power Co.,^{34/} the requirement that a public utility must obtain a certificate of convenience and necessity from the PSC prior to construction of facilities was limited by the court. The court construed this section of the Alabama statutes in light of the section quoted above and Section 220 of the Alabama constitution which provides as follows:

No person, firm, association, or corporation shall be authorized or permitted to

use the streets, avenues, alleys or public places of any city, town, or village for the construction or operation of any public utility or private enterprise, without first obtaining the consent of the proper authorities of such city, town or village. 35/

The Alabama court in construing together these statutory provisions concluded that it is not unlawful for a regulated utility to construct facilities on the public ways and places in a city, as authorized by that city, without a certificate from the PSC. A competitor operating under a certificate from the PSC is not entitled to have such construction enjoined. Thus, the statutory requirement of a certificate of public convenience and necessity is subject to this qualification based on the authority reserved for municipalities and, therefore, the Commission will be able to regulate competition among public utilities through the exercise of its certificating authority only in unincorporated areas.

A utility seeking a certificate of public convenience and necessity must file a written application with the PSC. The PSC must conduct a public hearing which includes all interested parties. 36/

The PSC may or may not, at its discretion, issue a certificate. If the certificate is issued, it may contain such conditions as the PSC deems advisable. No specific factors or criteria are prescribed by statute or articulated by court decisions for the granting of a certificate. The process is handled on a case-by-case basis. 37/

Any discontinuance of service pursuant to a certi-

ificate by a utility must be approved by the PSC based on a finding that the present or future public convenience and necessity permits such abandonment.^{38/} The sale of a utility's property, franchises, contracts, business, goodwill and other assets must be approved by the PSC.^{39/}

V. APPEALS OF PSC DECISIONS

Any person interested in an order of the PSC may apply for a rehearing of the PSC's decision. Such a rehearing must be held within sixty days after the application has been filed. An application for rehearing does not stay enforcement of the order, unless the PSC so directs.^{40/}

Appeal from any final action or order of the PSC may be taken to the Circuit Court of Montgomery County.^{41/} Any intervenor or interested party may appeal from any final order.^{42/} The appeal must be taken within 30 days from the final order and must be accompanied by a security bond for the cost of the appeal.^{43/}

The appeal is limited to the certified record of the proceeding. No new evidence may be introduced, except as to fraud or misconduct on the part of some person administering the Public Utilities Act and affecting the order.^{44/} The court can set aside the order only if the PSC erred to the prejudice of the appellant's substantial rights in its application of the law or if the order was procured by fraud or was based on a finding of facts contrary to the substantial weight of the evidence. The court may also remand the case

to the PSC for further proceedings in conformity with the
direction of the court. 45/

Any party may appeal the judgment of the Circuit
Court of Montgomery County directly to the Supreme Court of
Alabama. 46/

FOOTNOTES

1. Ala. Code tit. 37 §1-1 (1975).
2. Id. §1-32; Ex-parte Alabama Public Service Commission, 268 Ala. 322, 106 So. 2d 158 (1958).
3. Id. §1-1.
4. Id. §1-3.
5. Id. §1-34.
6. Id. §1-35.
7. Id. §1-32.
8. Id. §4-1(7).
9. Id. §4-1(7a).
10. Id. §1-33.
11. Id. §1-33.
12. Southern Liquid Gas Co. v. City Dothan, 44 So. 2nd 744 (Ala. 1950).
13. Id. 44 So. 2d at 747.
14. Ala. Code tit. 37 §1-32 (1975).
15. Id. §1-35.
16. Id. §6-27.
17. Id. §1-32.
18. Id. §§1-80 (Supp. 1978); 1-81 (1975).
19. Id. §§1-32 (1975).
20. Id. §§4-7 to 4-16.
21. Id. §1-54.
22. Ibid.
23. Id. §§4-40 to 4-41 (1975).
24. Id. §§4-26; 4-1 (12).
25. Id. §4-28.

26. Id. §1-50.
27. Id. §1-52.
28. Id. §1-33.
29. Id. §4-28.
30. Ibid.
31. Id. §4-28.
32. Clarke-Washington Elec. Membership Corp. v. Alabama Power Co., 133 So. 2d 488 (Ala. 1961).
33. Ala. Code tit. 37, §1-35 (1975).
34. Covington Elec. Co-op v. Alabama Power Co., 168 So. 2d 5 (Ala. 1964).
35. Ala. Const. §220.
36. Ala. Code tit. 37 §4-28 (1975).
37. Mr. Carl Evans, General Counsel for the PSC, Telephone conversation, 6/19/78.
38. Ala. Code tit. 37 §1-52 (1975).
39. Id. §4-40 (1975).
40. Id. §1-105.
41. Id. §1-120.
42. Id. §1-121.
43. Id. §1-122.
44. Id. §1-124.
45. Ibid.
46. Id. §1-132.

CHAPTER 3

SITING OF ENERGY FACILITIES IN ALABAMA

The state of Alabama has no energy facility siting statute centralizing decision-making authority in any particular agency. Some control over energy facility siting is exercised by Environmental Improvement Authorities, the Air Pollution Control Commission, and the Coastal Area Board. A degree of control over energy facility siting also rests with regional and municipal planning and zoning authorities.

I. PUBLIC SERVICE COMMISSION

Before construction of any facility for the production, transmission, delivery or furnishing of gas, electricity, water or steam, except for ordinary extensions of existing systems in the usual course of business, a certificate of public convenience and necessity must be obtained from the Public Service Commission (PSC).^{1/}

The statutes do not specify any criteria for approval. The PSC may prescribe such conditions as it deems advisable. Each application is considered on a case by case basis; written rules or criteria are not provided. The site may be considered as a factor in issuing a certificate if the PSC considers it important.^{2/}

See Chapter 2 for a discussion of the powers and jurisdiction of the PSC.

II. PLANNING AUTHORITIES

A. Municipal Planning Commissions

All municipalities are empowered to create a city planning commission and a municipal plan.^{3/} The planning commissions is to have from nine to sixteen members, depending upon the size of the city.^{4/}

The planning commission is to make and adopt a master plan for the physical development of the municipality. The plan is to incorporate the commission's recommendations for the development of the municipality, including among other things:

the general location and extent of public utilities and terminals, whether publicly or privately owned or operated, for water, light, sanitation, transportation, communication, power and other purposes, the removal, re-location, widening, narrowing, vacating, abandonment, change of use or extension of any of the foregoing ways, grounds, open spaces, buildings property, utilities or terminals. ^{5/}

The overall purpose of the plan is to be one of:

guiding and accomplishing a coordinated, adjusted and harmonious development of the municipality and its environs which will, in accordance with present and future needs, best promote health, safety, morals, order, convenience, prosperity and general welfare as well as efficiency and economy in the process of development, including, among other things, adequate provision for light and air, the promotion of the healthful and convenient distribution of population, the promotion of good civic design and arrangement, wise and efficient expenditure of public

funds and the adequate provision of public utilities and other public requirements. 6/

Before the adoption of a municipal plan or any part thereof, the commission must hold at least one public hearing and give notice by publication in a newspaper of general circulation in the municipality and the official gazette, if any, of the municipality. 7/ After the master plan has been adopted:

no street, square, park, or other public way, ground or open space or public building or structure or public utility, whether publicly or privately owned, shall be constructed or authorized in the municipality or in such planned section or district until the location, character and extent thereof shall have been submitted to and approved by the commission. 8/

Failure of the commission to act within sixty days after the date of official submission of a project to the commission is to be deemed approval. Should the commission disapprove a proposed project, the city council, board, commission or body having jurisdiction may overrule such disapproval by a two-thirds vote. 9/

B. Regional Planning Commissions

Planning commissions of any municipality or county, or any 100 citizens by signed petition may apply to the governor for the establishment of a region for planning purposes. The governor is to hold at least one public hearing on the creation of such a region to determine whether the boundaries of the proposed region are appropriate

for planning purposes. ^{10/}

The governor of the state is to grant an application, define the boundaries of a region, and appoint a regional planning commission if he finds:

that by reason of urban growth and development not corresponding to existing municipal boundary lines or by reason of other developments or trends in the growth and distribution of population, commerce and industry or by reason of topographic or other conditions two or more separate municipalities or the territory of one or more municipalities and neighboring nonmunicipal territory have overlapping and interrelated or common problems of such nature as not to be capable of intelligent, economical and adequate solution by means of the separate planning of each separate political unit and require for such solution a general plan of the physical development of the entire area of such municipalities or territories as a whole and that, consequently, it is to the public interest that a region be established for planning purposes.

The regional planning commission is empowered to adopt a master regional plan for the physical development of its region. The master plan is to include, among other things:

the general location, extent and character of streets, parks and other public ways, grounds and open spaces, public buildings and properties and public utilities (whether publicly or privately owned or operated) which affect the development of the region as a whole or which affect more than one political subdivision of the state within the region. ^{11/}

The purpose of this master plan is one of:

guiding and accomplishing a coordinated, adjusted and harmonious development of the region and of public improvements and utilities which do not

begin and terminate within the boundaries of any single municipality. 12/

After adoption of the plan, the regional planning commission certifies the plan to the Governor and all counties, municipalities and political subdivisions within the region. Municipalities have the option of adopting the plan or rejecting it. For non-municipal areas, the statute provides: 13/

no street, park or other public way, ground or open space, public building or other public structure and public utility, whether publicly or privately owned or operated, shall be constructed or authorized in nonmunicipal territory within the region until the location, character and extent thereof shall have been submitted to and approved by the regional planning commission of the region. 14/

C. Advisory Planning

Other regional planning districts may be designated by the governor by executive order. 15/ These planning districts are empowered among other things to carry on continuous planning programs and studies, and assist local governmental units in planning their development. These powers, however, are to be exercised in a purely advisory capacity. 16/

Any two or more governmental units are empowered to create a regional advisory planning commission even where no planning district has been designated by the governor. 17/ Such commissions are to perform comprehensive advisory planning and research for the region. 18/ Compre-

hensive advisory planning consists of "studies of the present and future development of the land economics and land policies of a region."^{19/}

D. Zoning

Every municipality is empowered to divide the territory within its corporate limits into business, industrial and residential zones and "may provide the kind, character and use of structures and improvements that may be erected or made within the several zones."^{20/} Such zoning regulations are to be made in accordance with a comprehensive plan and are to" . . . facilitate the adequate provision of transportation, water, sewerage, schools, parks and other public requirements."^{21/}

Pursuant to its zoning powers, a municipality may regulate and restrict "the location and use of buildings, structures and land for trade, industry, residences or other purposes."^{22/}

III. ENVIRONMENTAL AGENCIES

A. Air Pollution Control Commission

The Air Pollution Control Commission (APCC) is composed of the state health officer and six persons appointed by the governor, including an engineer and a physician.^{23/} The APCC has overall authority to make policies and rules, grant variances and issues orders,^{24/} while

the Division of Air Pollution Control, which is a division of the Department of Health, has authority to administer the rules and regulations adopted by the APCC and to issue permits thereunder.^{25/}

The APCC is specifically authorized to hold hearings, conduct studies, develop an air pollution comprehensive plan, establish emission control standards and regulations governing the issuance of air pollution permits.^{26/} The construction, installation, modification or use of any equipment, device or other article which the APCC finds may cause or contribute to air pollution, is prohibited unless a permit has been obtained from the director of the Division of Air Pollution Control pursuant to regulations established by the APCC.^{27/}

The air pollution control chapter generally pre-empts the field of air pollution control in Alabama. However, municipalities with pollution control ordinances in effect on July 1, 1969 and county boards of health may administer local air pollution control programs provided the requirements are "consistent with or more strict" than those imposed by the APCC.^{28/}

B. Water Improvement Commission

A permit is required to be issued from the Alabama Water Improvement Commission (WIC) before any pollution may be discharged into the waters of Alabama.^{29/} With respect

to industrial waste, the WIC may require the submission of "applications, plans, specifications and other data."^{30/}

The WIC conducts studies concerning water pollution, and holds public hearings to adopt local water quality standards.^{31/} The WIC has broad powers of enforcement.^{32/}

Penalties may be imposed for violations of WIC orders of as much as \$10,000.00 per violation, plus costs of mitigating damages incurred and restoring damaged fish and wildlife.^{33/}

Any "person aggrieved by an order of the [WIC] may obtain a hearing before the [WIC]."^{34/}

C. Environmental Improvement Authorities

Public corporations may be formed as environmental improvement authorities in order to make engineering, technical, financial, legal or other studies with respect to pollution problems and hazards. They may also acquire, sell or lease pollution control equipment as well as lend financial assistance to municipalities or industries for purposes of pollution control or abatement.^{35/} These authorities are only advisory in nature and have no actual control over the siting of specific developments.

D. Coastal Area Board

The Coastal Area Board (CAB) is to coordinate activities and plans of all existing interests, other state governments, local governments, regional planning agencies, interstate compacts and commissions and federal agencies

which have programs relevant to the coastal area.^{36/}

The CAB is also to provide for the development of a comprehensive coastal area management program, in co-operation with local, regional, state and federal interests.^{37/} Among other things, the program is to provide for:

adequate consideration of the local, regional, state and national interest involved in the siting of facilities for the development, generation, transmission and distribution of energy . . . and other public services necessary to meet requirements which are other than local in nature. ^{38/}

The management program determines permissible land and water uses having a direct and significant impact on the coastal area, and considers requirements for agriculture, industry, commerce, resource conservation, residential development, recreation, extraction of mineral resources and fossil fuels and pulpwood, transportation and navigation, waste disposal and harvesting of fish, shellfish and other living marine resources.^{39/} The program is to become effective upon approval by the governor.^{40/}

The coastal area includes "the coastal waters, the lands therein and thereunder and the adjacent shorelands, including the waters therein and thereunder, strongly influenced by each and in proximity to the shorelines of Alabama and including transitional and intertidal areas, salt marshes, wetlands, and beaches."^{41/} The coastal areas extends "to the outer limit of the United States territorial

sea and extends inland from the shorelines only to the extent necessary to control shorelands, the uses of which have a direct and significant impact on the coastal waters."^{42/}

Permits are required for actions having a direct and significant impact on the coastal area. However, permits from CAB are not necessary if other permits are required by the WIC, the APCC, the Oil and Gas Board, the Department of Conservation and Natural resources or "any other agency having jurisdiction of an action within the coastal area."^{43/}

However, none of these agencies may issue their permits until CAB has determined that such a permit will be in compliance with CAB's management program.^{44/}

FOOTNOTES

1. Ala. Code, tit. 37, §4-28 (1975).
2. Mr. Carl Evans, General Counsel for the PSC, telephone conversation, 6/19/78.
3. Ala. Code tit. 11 §52-2 (1975).
4. Id. §52-3.
5. Id. §52-7.
6. Id. §52-9.
7. Id. §52-10.
8. Id. §52-11.
9. Ibid.
10. Id. §85-1.
11. Id. §85-4.
12. Id. §85-6.
13. Id. §85-4.
14. Id. §85-7.
15. Id. §85-51.
16. Id. §11-85-23.
17. Id. §85-21.
18. Id. §85-23.
19. Id. §85-20.
20. Id. §52-70.
21. Id. §52-72.
22. Id. §52-73.
23. Id. tit. 22 §28-5.
24. Id. §§28-10 to 28-17.

25. Id. §§28-4, 28-16, 28-17.
26. Id. §§28-10 to 28-16.
27. Id. §28-16.
28. Id. §28-23(b)(1).
29. Id. §22-9(j)(5), (6).
30. Id. §22-9(h).
31. Id. §22-9.
32. Id. §22-9(f), (j), (k), (l).
33. Id. §22-9(o), (p), (q).
34. Id. §22-9(m).
35. Id. tit. 9 §6-3.
36. Id. §7-14 (Supp. 1978).
37. Id. §7-15.
38. Ibid.
39. Id. §7-15.
40. Id. §7-17.
41. Id. §7-10(1).
42. Ibid.
43. Id. §7-20.
44. Ibid.

CHAPTER 4

LAW GOVERNING FRANCHISES IN ALABAMA

I. EXPRESS AUTHORITY TO GRANT FRANCHISES

A. Constitutional Provisions

Alabama has several constitutional provisions related to municipal franchising. Article XII of the Alabama constitution provides:

No person, firm, association, or corporation shall be authorized or permitted to use the streets, avenues, alleys, or public places of any city, town, or village for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of such city, town, or village. 1/

The term "consent" in this provision has been uniformly construed to mean a franchise. 2/ Another constitutional provision fixes the liability of public utilities exercising a franchise for damage done to abutting property.

No person, firm, association, or corporation, who may construct or operate any public utility along or across the public streets of any city, town, or village, under any privilege or franchise permitting such construction or operation, shall be liable to abutting proprietors for the actual damage done to abutting property on account of such construction or operation. 3/

A third provision specifies the maximum duration of public utility franchises in cities and towns having a population of over 6,000.

No city or town having a population of more than six thousand shall have authority to grant to any person, firm, corporation, or association the right to use its streets, avenues, alleys, or public places for the construction or operation of water works, gas works, telephone or telegraph line,

electric light or power plants, steam or other heating plants, streets, railroads, or any other public utility, except railroads other than street railroads, for a longer period than thirty years. 4/

Although none of these constitutional provisions specifies the type of utility which may be franchised, it was long ago stated that the test of the power to confer franchises is whether the privilege is conducive to the public good. 5/ Cases interpreting the constitutional grant of authority to permit franchises demonstrate how broad and certain this power is. In fact, Article 12, §220 has been described as part of a "bill of rights recognizing certain fixed constitutional rights which shall not be invaded." 6/ One case described a municipality's power as follows:

The municipality, in the exercise of the authority granted by [art. 12, §220 of the Constitution], coupled with the police powers granted municipalities by the state, has the irrevocable [sic] discretion to determine whether, and to what extent a service is needed, and to fix and determine the streets and to name the grantee of such right. 7/

Another case explained that the purpose of Article 12, §220 was to

restrict the power of the legislature to the extent that it could not enact laws affecting or governing the use of local public ways that did not recognize or respect the thus permanently preserved rights of the local authorities to determine, according to their judgements, whether or not the ways and places mentioned in §220 should be used for the purposes prescribed in §220. 8/

This section recognizes the inherent power in towns and cities to withhold consent for the use of said streets. 9/

Although §220 authorizes municipalities to grant franchises, by this section the state is not divested of its

power to grant franchises also subject to the consent of the municipality affected.^{10/}

Where power lines are constructed in an area prior to incorporation, and the area is later incorporated as part of a new municipality, the newly incorporated municipality has no authority to compel removal of the power lines on the grounds that they constitute a nuisance. The subsequent incorporation of these streets by the municipality does not supercede the power company's right to maintain its lines.^{11/} However, where a previously incorporated municipality being served by one utility annexes an area being served by a second utility, the utility serving the municipality may extend its facilities into the newly annexed area. The utility previously serving the annexed area possesses no exclusive right to serve customers in the area after annexation. Persons in a newly annexed area are required to support the municipality financially and, therefore, are entitled to all of the benefits of being a part of the municipality, including the opportunity to be served by any public utilities which have contracted to serve residents of the municipality.^{12/}

B. Statutory Provisions

The statutes grant public utilities the right to contract with municipalities for franchises. "Street railways, gas, electric and water companies and all other corporations formed for the purpose of maintaining any works of internal improvement or public utility"^{13/} are specifically mentioned

as being authorized to contract with the authorities of any county or municipal corporation in reference to the use of the streets, public roads and other public places therein for the construction and operation of their lines or works. The section further provides that the cities can require a change in the construction of the lines and works of such corporations, whenever the public good or convenience requires. ^{14/}

The city council of a municipality is empowered to regulate the use of the streets for the erection of telephone, telegraph, electric and all other systems of wires and conduits, may require lines to be placed underground, and generally may control use of the streets for any and all purposes. It may also sell or lease any franchise which it has the power to grant. ^{15/}

The statutes state that no utility may operate without a franchise granted by the municipality:

No person, firm, association or corporation is authorized to use the streets, avenues, alleys and other public places of cities or towns for the construction or operation of any public utility or private enterprise without first obtaining the consent of the proper authorities of said city or town. ^{16/}

The grant is very broad as it includes the "construction or operation of any public utility or private enterprise". ^{17/}

II. PROCEDURES FOR GRANTING FRANCHISES

A. Sale or Lease

The city council of a municipality is empowered to

sell or lease any franchise which it has the power to grant. The sale or lease may be "in such manner as it may deem advisable."^{18/}

All moneys received from this sale or lease are to be paid into the city treasury.^{19/}

B. Ordinance

The Alabama statutes provide that all grants of a franchise are to be by ordinance or resolution duly passed by the board of city commissioners.^{20/} This resolution or ordinance is not to take effect until thirty days after its final enactment and publication once a week for three consecutive weeks in some newspaper published in that city or town.^{21/}

Pending the passage of the resolution granting the franchise or during the time between its final passage and the expiration of the 30 days prior to its effectiveness, the citizens of the city, by petition signed by four of every 100 inhabitants, may require an election to vote for or against the proposed resolution.^{22/}

The above provision regarding petitions and elections applies generally to cities with a commission form of government,^{23/} and specifically to cities with an "option A" form of commission government, where the details regarding such election are more specific.^{24/} The procedures for "option B" form of commission government do not mention petition and election.^{25/}

The statutes forbid an officer of a municipality from being employed by any corporation holding or operating a franchise to use the streets. This section does not apply to any

attorney or physician employed by a municipality.^{26/}

IV. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

The statutes and cases provide little in the way of criteria for the grant of a franchise. The statutes only provide for sales or leases as the council deems advisable.^{27/} Any franchise may be altered by mutual consent of the municipality and public utility.^{28/} The criteria are apparently left to the municipality to determine. The courts have held that it is within a municipality's power to refuse to grant a franchise.^{29/}

V. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

The constitution expressly limits the grant of a franchise by a city of over 6,000 population to 30 years or less.^{30/} The courts have held that even if the ordinance expressly grants the franchise for more than 30 years, the ordinance will be read to grant a franchise for 30 years only.^{31/} The state, however, may grant a franchise exceeding thirty years.^{32/}

Should the franchise expire, there is no provision for the removal of a utility's facilities. In addition, a public utility cannot discontinue service without the approval of the PSC. However, the utility does need the municipality's permission to use the streets.^{33/} Neither the courts nor the PSC has been confronted with a situation necessitating reconciliation of the conflicting provisions.

Although Article I, §22 of the state constitution

states that "every grant or franchise privilege . . . shall forever remain subject to revocation, alteration, or amendment," it has been held that municipalities have no power to revoke a franchise unless the legislature has conferred that authority upon them; only the State has full authority to revoke a franchise at will.^{34/}

B. Exclusivity

The constitution prohibits the passage of special laws granting corporations powers.^{35/} All laws must be general laws.^{36/} As mentioned above, the constitution further states that all franchises are subject to revocation.^{37/} These provisions have been interpreted as prohibiting exclusive franchises. For example, in City of Andalusia v. Southeast Alabama Gas District,^{38/} the complainant challenged the validity of several municipal franchises which, by their plain language, granted exclusive rights to the franchisee. The court held that exclusive franchises were forbidden and, therefore, regardless of the language to the contrary, the franchises would not be interpreted as granting exclusive rights.^{39/}

C. Franchise Tax

All public utilities must pay state and local taxes on any franchise pursuant to which they provide utility services.^{40/} However, a license tax has been held invalid.^{41/}

D. Other

Municipalities can preclude a utility from commencing operation if it does not obtain a franchise.^{42/} A utility which

has obtained a franchise from a municipality is not required to also obtain a certificate or permission from the PSC before commencing construction of electric lines and facilities on city streets and, therefore, can operate under a municipal franchise without obtaining PSC approval.^{43/}

FOOTNOTES

1. Ala. Const. art. 12, §220.
2. Boman v. Birmingham Transit Co., 280 F.2d 531, 534, (5th Cir. 1960).
3. Ala. Const. art. 12, §227.
4. Ala. Const. art 12, §228.
5. Horst v. Moses, 48 Ala. 129 (1872); (State legislature forbidden from granting a franchise to carry on a lottery).
6. Birmingham Interurban Taxicab Service Corp. v. McLendon, 210 Ala. 525, 98 So. 578 (1923).
7. Crabtree v. City of Birmingham, 292 Ala. 684, 299 So. 2d 282, 287 (1974).
8. City of Montgomery v. Montgomery City Lines, 254 Ala. 652, 49 So.2d 199, 208 (1949).
9. City of Montgomery v. Orpheum Taxi Co., 203 Ala. 103, 82 So. 117 (1919).
10. Phoenix City v. Alabama Power Co., 239 Ala. 547, 195 So. 894 (1940).
11. City of Pritchard v. Alabama Power Co., 234 Ala. 339, 175 So. 294 (1937).
12. Clark-Washington Elec. Membership Corp. v. Alabama Power Co., 272 Ala. 598, 133 So. 2d. 488 (1961).
13. Ala. Code tit. 10 §5-14 (1975).
14. Ibid.
15. Id. tit. 11 §43-62.
16. Id. §49-1.
17. Ibid.
18. Id. §43-62.
19. Ibid.
20. Id. tit. 11 §§44-36; 44-88.
21. Id. §§44-88, 44-137.
22. Id. §§44-36, 44-88.

23. Id. §44-34.
24. Id. §44-88.
25. Id. §4-137.
26. Id. §43-410.
27. Id. §43-62.
28. Id. tit. 10 §5-14.
29. City of Decatur v. Meadors, 235 Ala. 544, 180 So. 550 (1938).
30. Ala. Const. art. 12 §228.
31. Andalusia v. Southeast Alabama Gas Dist., 261, Ala. 297, 74 So. 2d 479 (1954).
32. Water Works Bd. v. Huffstutler, 292 Ala. 669, 299 So. 2d. 268 (1974).
33. Ala. Code tit. 11 §49-1(1975).
34. Phoenix City v. Alabama Power Co., 239 Ala. 547, 195 So. 894, 899 (1940); See also Pickett v. Matthews, 238 Ala. 542, 192 So.2d 261 (1939).
35. Ala. Const. art. 12, §229.
36. Id.
37. Ala. Const. art 1, §22.
38. Andalusia v. Southeast Alabama Gas Dist., 261 Ala. 297, 74 So.2d 479 (1954).
39. Id. 74 So.2d at 483.
40. Ala. Const. art XII §229 and Ala. Code tit. 40 §21-26 (1975).
41. City of Montgomery v. Montgomery City Lines, 254 Ala. 652, 49 So. 2d 199 (1949).
42. Ala. Code tit. 11 §49-1(1975); City of Mobile v. Farrell, 229 Ala. 582, 158 So. 539 (1934)(legislature has sovereign power over the streets and can grant franchises, but the city must approve the grant before a utility may use the franchise.
43. Covington Elec. Co-op v. Alabama Power Co., 277 Ala. 162, 168 So. 2d 5 (1964).

CATEGORIES

EDB	☒
ERA	☒
EPA	☒
WDA	☐

ALD	☐
INS	☐
RIP	☐
GAP	☐

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AUGMENTATION:

SPLIT	DESCRIPTORS	FLAGS
	ICES	T2 Q1
	legal aspects	
	implementation	
	communities	
	human populations	
	government policies	
	decision making	
	institutional factors	
	laws	
	public utilities	
	regulations	Q2
	energy facilities	
	site selection	
	operation	
	state government	
	local state government	
	national government	
	energy conservation	
	Alabama	T1