Distribution Category UC-95d

MASTER

COMMUNITY ENERGY SYSTEMS
AND THE LAW OF PUBLIC UTILITIES

Volume Fifty-Two

WYOMING

Final Report of
A Study of the Impacts of Regulations
Affecting the Acceptance of
Integrated Community Energy Systems

DUANE A. FEURER

CLIFFORD L. WEAVER

Program Managers

KEVIN J. RIELLEY

KEVIN C. GALLAGHER

SUSAN B. HARMON

DAVID T. HEJNA

Professor Edmund W. Kitch, Consultant

January, 1981

ROSS, HARDIES, O'KEEFE, BABCOCK & PARSONS
One IBM Plaza, Suite 3100
Chicago, Illinois 60611
Telephone: (312) 467-9300

Prepared For

UNITED STATES DEPARTMENT OF ENERGY

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

This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States nor any agency thereof, nor any of their employees, makes any warranty, expressed or implied, or assumes any legal liability or responsibility for any third party's use or the results of such use of any information, apparatus, product, or process disclosed in this report, or represents that its use by such third party would not infringe privately owned rights.

DISCLAIMER

This book was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.

DISTRIBUTION OF THIS DOCUMENT IS UNLIMITED

MGW

DISCLAIMER

This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency Thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.

DISCLAIMER

Portions of this document may be illegible in electronic image products. Images are produced from the best available original document.

TABLE OF CONTENTS

	<u>Page</u>
ABSTRACT	
PREFACE	i
ACKNOWLEDGEMENTS	vi
CHAPTER 1: EXECUTIVE SUMMARY	1
CHAPTER 2: REGULATION OF PUBLIC UTILITIES	8
Footnotes	15
CHAPTER 3: SITING OF ENERGY FACILITIES	17
Footnotes	32
CHAPTER 4: FRANCHISING OF PUBLIC UTILITIES	34
Footnotes	37
CHAPTER 5: REGULATION OF PUBLIC UTILITY RATES.	38
Footnotes	51
CHAPTER 6: SUMMARY OF IMPEDIMENTS TO IMPLEMENTATION OF ICES	54
CHAPTER 7: OVERCOMING IMPEDIMENTS TO ICES -- A SUMMARY	63

ABSTRACT

This report contains a detailed description of the laws and programs of the State of Wyoming governing the regulation of public energy utilities, the siting of energy generating and transmission facilities, the municipal franchising of public energy utilities, and the prescription of rates to be charged by utilities including attendant problems of cost allocations, rate base and operating expense determinations and rate of return allowances. These laws and programs are analyzed to identify impediments which they may present to the implementation of Integrated Community Energy Systems (ICES). This report is one of fifty-one separate volumes which describe such regulatory programs at the federal level and in each state as background to the report entitled "Community Energy Systems and the Law of Public Utilities -- Volume One: An Overview." This report also contains a summary of a strategy described in Volume One -- An Overview for overcoming these impediments by working within the existing regulatory framework and by making changes in the regulatory programs to enhance the likelihood of ICES implementation.

CHAPTER 1

EXECUTIVE SUMMARY

I. REGULATION OF PUBLIC UTILITIES

The authority to regulate utilities in Wyoming is vested in the Wyoming Public Service Commission (hereinafter "Commission"). The three member Commission is appointed by the Governor, with the advice and consent of the state senate, and serves for terms of six years. No more than two of the three members may be from the same political party. The Commission's regulatory role over jurisdictional utilities is nearly exclusive, with municipalities regulating only municipally-owned and operated utility systems.

The Commission exercises regulatory authority over all public utilities, which are defined by statute to include any plant, property or facility which manufactures or furnishes for the public electricity, gas, water, steam or any other substance for heat or power. Municipally-owned and operated utility systems are exempt from Commission jurisdiction unless they provide service to customers outside of corporate limits. Providers of service are exempt to the extent that they provide for their own sole use or that of their tenants. Cooperative water companies are also exempt from Commission regulation. Both direct and indirect sales to the public are regulated by the Commission. The Commission has statutory authority over all conventional forms of utility ownership.

A certificate of public convenience and necessity must be obtained by a public utility before construction of a line, plant or system, or extension of a system, or commencement of operations under a municipal franchise. A certificate of public convenience and necessity is not required for extensions of service in areas where the utility has lawfully commenced operations or for extensions, in cases of minor emergencies, into a territory contiguous to a utility's line, plant, or system. The Commission will ordinarily sanction competition between public utilities only if the certificate holder is unwilling and unable to adequately service the area. Transfers of certificates will be granted if they comply with the basic statutes relating to certification.

In considering applications for certificates, the Commission will take into account the financial ability and good faith of the applicant and the necessity of additional service in the community. The applicant's power supply, the proximity of existing service facilities to the prospective loads, the nature of such loads, the physical characteristics of the area, and the type of facilities to be constructed will also be examined.

Upon the agreement of all the parties, the Commission may serve as arbitrator for service area disputes. In such cases, the Commission's decision is final.

Decisions of the Commission may be appealed to the district court for the county in which the administrative

action or inaction was taken or in which any property affected by the order is located. Further appeal may be taken to the Wyoming Supreme Court.

II. SITING OF ENERGY FACILITIES

Standards for siting of new power plants in Wyoming are set forth in the Wyoming Industrial Development Information and Siting Act ("Siting Act"), which is administered by a seven member Wyoming Industrial Siting Council ("Council"). The Council staff comprises the Office of Industrial Siting Administration ("Siting Administration"). Several other state agencies also have jurisdiction over various aspects of energy facility siting within the state.

The Council has siting jurisdiction over energy generating and conversion plants, as well as certain industrial facilities. The Siting Act, however, exempts facilities under construction or in operation as of March 1, 1975 from submitting a full application for a permit, although certain information must be filed. Each person operating a jurisdictional facility is required to submit an annual report of long-range plans.

Details as to the form and content of applications under the Siting Act are provided by Council rules. Applicants for siting permits are not obligated to give notice of their applications.

Not less than 20 nor more than 30 days after receipt of an application for a permit, the director of the Siting Administration must serve notice, publish a summary of the

application, and file a copy of the application with the county clerk in the counties in which the proposed facility will be constructed.

The decision of a state agency of the State Engineer, if required under the Siting Act, is binding on the Council. Determinations by the Public Service Commission with respect to the public convenience and necessity of proposed facilities are also binding on the Council. Once a permit has been issued, however, no other state agency may impose additional requirements, except that the Department of Environmental Quality retains authority to determine compliance with state and federal environmental standards.

A public hearing must be held by the Council after receipt of a permit application. Thereafter, the Council must issue an order which either approves the application (with or without conditions) or rejects the application pending further study. In the case of a rejected application, a second hearing must be held after the study has been completed.

The Siting Act does not provide for a rehearing of a permit denial. The decision may be appealed to the court in the district where the proposed facility is to be located.

In passing upon permit applications, the Council considers: (1) whether the facility would comply with applicable law; (2) whether the facility would adversely affect the environment; and (3) whether the facility would adversely affect the inhabitants.

III. FRANCHISING OF PUBLIC UTILITIES

The authority to grant franchises for the use of public streets and places in connection with providing utility service in Wyoming is vested by statute in the cities and towns.

All franchises must be granted by ordinance and must be passed pursuant to the rules and regulations adopted by the local governing body. Prior to seeking a franchise, a public utility must obtain a certificate of public convenience and necessity. There are no established criteria which govern franchise applications.

Cities and towns are prohibited from granting exclusive franchises. There is no statutory limit on the duration of a franchise, although the statutes provide that a franchise may be granted "upon such terms as the governing body deems proper."

IV. UTILITY RATE REGULATION

The statutes of Wyoming vest the general and exclusive authority to regulate rates of public utilities in the Commission. However, the Wyoming Natural Gas Pipeline Authority is vested with the power to establish rates or other charges for the use of all natural gas facilities operated by it, and each local board of public utilities is empowered to fix rates for water and electrical service furnished by the municipality to customers. The Commission prescribes the use of the FERC uniform system of accounts.

The statutes provide that the Commission may order a hearing prior to any change in rates. Pending its decision, the

Commission may suspend the proposed rates for an initial period not longer than six months and extensions not to exceed, in the aggregate, three months.

The statute requires that all rates be just, reasonable and uniform. In determining a utility's rate base, the Commission uses a year end test period, except that the Commission will employ an average rate base if it determines that the public interest so requires. Rate base is valued on the basis of original cost less depreciation.

The Commission includes only "used or useful" property in the rate base. The Commission generally excludes CWIP from rate base, although it will permit capitalization of an allowance for funds used during construction and adjustment to rate base where inflation and attrition effects are severe. The Commission will also include research and development costs incurred prior to the generation of revenue.

The Commission has not set forth a general rule for determining what expenses will be allowed or disallowed for ratemaking purposes, although it will generally accept actual expenses incurred in a test year, adjusted to annualize changes and to exclude or amortize unusual items. The Commission generally allocates demand costs using the average and excess demand method.

The Commission prefers the normalization of tax benefits realized through accelerated depreciation over the flow-through method, and the accumulated deferred taxes arising from use of normalization will generally be deducted from the rate base. The Commission similarly allows a normalization of investment tax

credits. The Commission has not yet permitted the normalization of construction overheads. Although the Commission has not adopted any single method for arriving at a rate of return, it apparently prefers the comparable earnings test, with adjustments for differences in various risk elements. The Commission has not enunciated any risk factors where it would feel compelled to grant a higher than normal return, although it has made adjustments to accommodate a company's market position. The Commission uses the "double-leveraging" method of determining return on equity when the utility is a subsidiary of another organization.

The Commission utilizes a compromise between the "cost-of-service" and "strict averaging" approaches to rate-making, considering value of service, customer demand and ability to pay, competition, quality of service, and other factors.

The Commission controls the right of every gas and electric corporation acting as a public utility to issue securities. The Commission may authorize the issuance of securities for the following purposes: acquisition of property, construction of facilities, maintenance of service, discharge of obligations, reimbursement of monies used for such purposes, or any other approved purpose. The Commission may not authorize the issuance of securities if inconsistent with the public interest.

CHAPTER 2

REGULATION OF PUBLIC UTILITIES IN WYOMING

I. PUBLIC AGENCIES WHICH REGULATE PUBLIC UTILITIES

The authority to regulate public utilities is vested in the Wyoming Public Service Commission (Commission). The Commission is comprised of three members appointed by the Governor with the advice and consent of the state senate. Each member of the Commission serves a six-year term and no more than two members may be from the same political party.^{1/}

The Commission has exclusive regulatory authority over public utilities. The statutory definition of public utility, however, does not include municipally-owned and operated utility systems to the extent they provide services within the municipality.^{2/} Such utilities are regulated locally. The Commission reviews no documentation of rates or services of municipally-owned systems.^{3/}

II. JURISDICTION OF THE PUBLIC SERVICE COMMISSION

The jurisdiction of the Commission extends to all "public utilities" which are defined as:

(C) Any plant, property or facility for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat or power, 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 light, heat or power;

(D) Any plant, property or facility for the manufacture, distribution, sale or furnishing to or for the public of natural or manufactured gas for lights, heat or power;

(G) Any plant, property or facility for the supply, storage, distribution or furnishing to or for the public of water for manufacturing, municipal, agriculture or domestic uses, except and excluding any such plant, property or facility owned by a municipality;

(F) Any plant, property or facility for the production, transmission, conveyance, delivery or furnishing to or for the public of steam or any other substance for heat or power; 4/

Several types of utility operations are exempted from Commission regulation. Municipally-owned and operated utility systems are subject to Commission regulation only to the extent that they provide service to customers outside of corporate limits. 5/ Providers of electric, gas, water, and steam service for the sole use of the provider or his tenants are not subject to the Commission's jurisdiction. 6/ Cooperative water companies are also not subject to Commission regulation. 7/ However, other utility cooperatives are subject to regulation.

With the previously noted exemptions, the Commission has statutory authority over all conventional forms of utility ownership, including "individuals, associations of individuals, firms, partnerships, companies [and] corporations." 8/

There is no requirement that a utility sell or receive compensation for its service. The service is subject to Commission jurisdiction if provided "to or for the public." An indirect sale, while not a sale to the public, is a sale or furnishing for the public and, thus, indirect sales are subject to regulation by the Commission. There is no statu-

tory definition of the term "public." The Supreme Court of Wyoming, however, has on one occasion offered criteria for determining if a business is a public utility. In Rural

Electric Co. v. State Board of Equalization,^{9/} the Court

held that a rural electric association was a public utility for excise tax purposes. Among the factors which the Court considered were: indiscriminate service or solicitation, exercise of the right of eminent domain, dealings in a commodity in which the public is interested, service to a substantial portion of a geographic area, existence of a monopoly in the area being served, competition with other regulated utilities, and the maintenance of poles and wires along state and county highways. None of these factors are determinative of public utility status, but all the factors may bear on the question.

III. POWERS OF THE WYOMING PUBLIC SERVICE COMMISSION

The Commission has been granted the "general and exclusive power to regulate and supervise every public utility" in Wyoming.^{10/}

It is authorized to issue certificates of public convenience and necessity to any public utility seeking to extend its facilities or operations;^{11/} may set standards of service^{12/} and regulate rates;^{13/} and must approve abandonment of service.^{14/} In addition, the Commission must approve the issuance of securities by public utilities;^{15/} must approve sales or leases of property;^{16/} and regulates

agreements between public utilities.^{17/}

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

A. Generally

No public utility may begin the construction of a line, plant or system without having first obtained a certificate that the public convenience and necessity will require such construction. A certificate is also required before a public utility may extend its system, or before it may commence operations under a municipal franchise.^{18/}

A certificate of public convenience and necessity is not required for extensions of service in areas where a utility has lawfully commenced operations. A certificate is not required to extend service into a territory contiguous to a utility's line, plant, or system, and which is not already being served by a public utility of similar character.^{19/} The Commission has stated that it will permit extensions under the "contiguous territory" exception of Section 37-31 however, only in cases of minor emergencies. Areas which can be served by contiguous extension are generally required to be certificated at the earliest feasible time.^{20/}

B. Competition

There is no specific statutory authority allowing the Commission to grant exclusive certificates which prevent other utilities from providing similar service in the same area. A Commission spokesman, however, stated that the

Commission has not authorized competition between gas, electric, steam or water companies.^{21/} In Re Town of Wheatland,^{22/} the Commission expressed a policy against authorizing competition between utilities:

This Commission has never in its combined experience seen any duplication of service facilities--including those historically allowed or sanctioned as a hopefully expedient or easy solution to an existing problem--that was not wasteful and which did not lead to more duplication and further undesirable conflicts and complications the longer the same was allowed to exist. ^{23/}

The Commission has indicated, though, that competition between public utilities will be sanctioned if it is demonstrated that the existing certificate holder is unwilling and unable to adequately service the area.

C. Certificating Procedures

In order to obtain a certificate of public convenience and necessity, an applicant must file with the Commission a certified copy of its articles of incorporation.^{24/} An application is also to state the utility proposal in detail, including a description of construction schedules, the applicant's financial condition and the proposed rates to be charged for the service to be rendered.^{25/}

In considering applications for a certificate, the Commission must take into account the financial ability and good faith of the applicant and the necessity of additional service in the community.^{26/} "The existing and continuing public need that must be shown does not presume an absolute

present necessity for the type of utility service involved but rather a reasonable affirmative present need coupled with an expectation of future development such as would sustain the involved investment."^{27/} In addition to the statutory criteria listed above, the Commission will examine the source and adequacy of the applicant's power supply, the proximity of existing service facilities to the prospective loads, the nature of such loads, the physical characteristics of the area, and the type of facilities which are to be constructed.^{28/}

Before a certificate may be transferred, the Commission must find that the transfer complies with the basic statutes relating to certification. The burden is on the applicant to prove that the public convenience and necessity is consistent with the terms of the transfer.^{29/}

D. Service Area Disputes

Upon the agreement of all parties involved, any controversy between a public utility and any other person may be submitted to the Commission for arbitration. In such a case, the Commission's decision is final.^{30/} This procedure could be used to resolve service area disputes.

In addition, the Commission may hear complaints from a public utility concerning interference with its operations by another utility.^{31/} After a hearing, the Commission will make any order necessary to resolve the dispute.^{32/}

E. Abandonment of Service

Any public utility which seeks to abandon any portion of its lines and facilities, or seeks to discontinue its operations, must obtain the approval of the Commission.^{33/} No statutory criteria have been established to govern the approval of such applications. In the only published Commission case which discussed abandonment, a steam-heating company was allowed to discontinue its operations. The company no longer had a supply of steam from its electric generating operation, and replacement of the system would have yielded a low return on the investment. Because the customer list for steam had diminished, recovery of operating expenses would have required a 4-1/2 times increase in rates.^{34/}

V. APPEALS OF REGULATORY DECISIONS

Any order of the Commission may be appealed as provided in the Wyoming Administrative Procedure Act.^{35/} Pursuant to its provisions, appeal is taken to the district court for the county in which the administrative action or inaction was taken or in which any property affected by the order is located.^{36/} A rehearing may be requested prior to seeking judicial review but is not mandatory.^{37/} No new or additional evidence may be introduced except as to fraud or official misconduct.^{38/} Review of the district courts judgment may be had in the state supreme court.^{39/}

FOOTNOTES

1. Wyo. Stat. (Michie Supp. 1980).
2. Id. §37-1-101 (vi) (H) (Michie 1977).
3. Mr. John Forwood, Asst. Counsel for the Commission, Telephone conversation, 8/3/78.
4. Wyo. Stat. §37-1-101 (vi) (C&F) (Michie 1977).
5. Id. §37-1-101 (vi) (H).
6. Ibid.
7. Ibid.
8. Id. §37-1-101 (v).
9. 57 Wyo. 541, 120 P.2d 741 (1942).
10. Wyo. Stat. §37-2-112 (Michie 1977).
11. Id. §37-2-205.
12. Id. §37-3-114.
13. Id. §37-2-121.
14. Wyo. P.S.C. Rule 11(3).
15. Wyo. Stat. §37-6-101 (Michie 1977).
16. Wyo. P.S.C. Rule 11(4).
17. Wyo. Stat. §37-3-111 (Michie 1977).
18. Id. §37-2-205.
19. Ibid.
20. Re Town of Afton, 79 P.U.R. 3d 30.
21. Mr. John Forwood, Asst. Counsel for the Commission, Telephone conversation, 8/3/78.
22. 76 P.U.R. 3d 113 (1968).
23. Id. at 122.
24. Wyo. Stat. §37-2-205 (C) (Michie 1977).
25. Wyo. P.S.C. Rule 11(2).

26. Wyo. Stat. §37-2-205(C) (Michie 1977).
27. In Re Cheyenne Light, Fuel, and Power Co., Docket No. 9452 Sub 1 (Wyo. P.S.C. 1966).
28. Big Horn Rural Elec. Co. v. Pacific Power & Light Co., 397 P.2d 455 (Wyo. 1964).
29. Bridger Valley Elec. Assoc. v. Pub. Serv. Comm'n, 430 P.2d 919 (Wyo. 1967).
30. Wyo. Stat. §37-2-113 (Michie 1977).
31. Id. §37-2-205(a).
32. Ibid.
33. Wyo. P.S.C. Rule 11(3).
34. Re Pacific Power and Light Co., 8 P.U.R.3d 452 (1955).
35. Wyo. State §37-2-219 (Michie 1977).
36. Id. §9-4-114(a).
37. Id. §37-2-214.
38. Id. §9-4-114(b).
39. Id. §9-4-115.

CHAPTER 3

SITING OF ENERGY FACILITIES IN WYOMING

I. PUBLIC AGENCIES WHICH ADMINISTER SITING LAWS

The Wyoming Industrial Development Information and Siting Act ("Siting Act") ^{1/} governs the siting of electric power plants, oil and gas plants and certain other industrial facilities. ^{2/} The Siting Act is administered by the Wyoming Industrial Siting Council ("Council"). The Council is composed of seven members appointed by the governor with the advice and consent of the senate. Council members serve six year terms. The Council staff comprises the Office of Industrial Siting Administration ("Siting Administration"). ^{3/}

The Wyoming Public Service Commission ("Commission") has authority under other statutes to issue certificates of public convenience and necessity for the construction of public utility facilities. ^{4/} The Commission's authority and its procedures are discussed fully in Chapter 2.

While the Council administers the overall permitting procedure, ^{5/} numerous other state agencies do participate in this procedure. ^{6/} These agencies are identified and their roles discussed in Part III, B.2., below. The Council's siting jurisdiction is preemptive of separate approvals that may be required by other state and local agencies, except for approvals by the Department of Environmental Quality and the Public Service Commission. Those separate approval

requirements are discussed in Part V below.

II. SCOPE OF SITING JURISDICTION

The Council has siting jurisdiction over energy generating and conversion plants; (1) designed for or capable of, generating 100 megawatts of electricity, or any addition increasing the capacity of the facility by that amount or more; (2) designed for, or capable of, producing 100,000,000 cubic feet of synthetic gas per day or any addition increasing the capacity of the facility by at least that amount; (3) designed for, or capable of, producing 50,000 barrels of liquid hydrocarbon products per day or more by any extraction process; or (4) designed for, or capable of, enriching uranium minerals from U308 in quantities exceeding 500 pounds of U308 per day. The Council's siting jurisdiction also includes "industrial facilities" (without further definition of "industrial"), having estimated construction costs of at least \$50,000,000.^{7/}

The Siting Act exempts facilities under construction or in operation as of March 1, 1975.^{8/} In addition, electric transmission lines not exceeding one hundred fifteen thousand volts, oil and gas pipelines, coal slurry pipelines and oil and gas field processing facilities are deemed to be outside of the Siting Act's application.^{9/} However, certain information concerning such projects must be filed with the Council. The required information includes a specific description of the

facility, an estimate of construction time, an estimate of the number of employees of the applicant during construction and operation of the facility and a copy of any environmental impact studies which have been made.^{10/}

The Siting Act applies to all "persons," which includes individuals, groups, partnerships, corporations, cooperatives and associations. Excluded are state, federal government and local government units.^{11/}

Any person may submit an application to the Council for a certificate of insufficient jurisdiction. An application for such a certificate states that the Council lacks sufficient jurisdiction to require that an application for a permit be submitted, and must contain a specific description of the proposed facility and an estimate of construction costs. After publication of notice, the Council must issue or deny the certificate of insufficient jurisdiction.^{12/}

Each person operating a jurisdictional facility is required to submit an annual report of long-range plans for the construction, expansion and operation of the facility. The plan should include the following: (1) the general location, size and type of all facilities to be owned and operated and whose construction is projected to commence during the ensuing five years, as well as facilities to be removed from service during the planning period; and (2) a description of efforts to identify and minimize environ-

mental, social and economic problems at the earliest possible stage in the planning process.^{13/}

III. CERTIFICATION PROCESS

A. Procedural Requirements to be Satisfied by the Applicant

Details as to the form and contents of applications under the Siting Act are provided by Council rules.^{14/} Extensive technical information is required including a graphic description of the location of the proposed facility, an inventory of all materials flowing out of the facility, scheduling of construction, a list of all state and federal permits which the facility will require, an evaluation of the environmental, social and economic impacts of the facility, and a statement specifying why the proposed location is superior to alternative locations.

The applicant for a siting permit is not obligated to notify other individuals or agencies, or to publish notice of its application. Application fees are set at 0.5% of the estimated cost of constructing the facility, but no more than \$100,000.^{15/}

B. Procedural Obligations of the Siting Administration and Council

1. Notice

As noted, the Siting Administration serves as an administrative staff for the Council. Not less than 20 nor more than 30 days after the receipt of an application for a

permit the director of the Industrial Siting Administration must: (1) serve notice of the application upon the local governments that will be affected by the proposed facility; (2) publish a summary of the application in one or more newspapers within the area primarily affected by the proposed facility; and (3) file a copy of the application with the county clerk of the counties in which the proposed facility will be constructed.^{16/}

2. Consultation with Other Agencies

The heads of several state agencies which, prior to the enactment of the Siting Act, had permitting authority over the siting of energy facilities shall attend meetings of the Council at which applications for permits are considered.^{17/} The Council, however, is not bound to accept the views of these agencies.

If construction of the facility would, but for the provisions of the Siting Act, require the approval of any other state agencies, that agency is to review the portion of the application formerly subject to its jurisdiction and render a decision with respect to that portion of the application.^{18/} This decision is binding on the Council. The State Engineer is required, under the Siting Act, to review any proposed project which will use waters of the state, and to render an opinion as to the amount of water available. This opinion is binding on the Council in granting permits

under the Act, and is also reviewed by the Commission prior to issuing a certificate of public convenience and necessity.^{19/} In practice, the Council requires all applicants to submit separate applications to all agencies formerly having permitting power and the Council follows the recommendations of these agencies.^{20/}

Determinations by the Public Service Commission with respect to the existence of present or future public convenience and necessity of a proposed facility are binding on the Council. However, according to the statute, such a determination does not bind the Council to issue or deny a permit. The statute provides that:

The finding in the certificate of the public service commission as to the present or future public convenience and necessity of the proposed facility shall be binding on the council, but such finding shall not be binding on the council with respect to issuance or denial of a permit under this act. ^{21/}

Representatives of the Council and the Commission have failed to agree on the meaning of this provision. The Council has contended that it is free to issue a permit regardless of a negative recommendation from the Commission.^{22/} The Commission, however, has disputed this contention.

While the Siting Act does not clearly resolve the issue of the Council's power to grant a permit over the negative recommendation of the Commission or any other state agency,

it does state expressly that, once a permit is issued by the Council, no other state agency may impose additional requirements.^{23/} However, the Act does provide that the Department of Environmental Quality retains its authority to determine compliance of the proposed facility with state and federal environmental protection standards and implementation plans, and to enforce those standards.^{24/}

If the Council rejects an application pending further study, it must obtain information and recommendations from other state agencies before a second-stage hearing is held.^{25/} Thirteen state agencies, including the Commission, must be contacted, depending upon the issues involved in the permit application.^{26/} These agencies are:

- (i) Wyoming highway department;
- (ii) Public Service Commission;
- (iii) Department of economic planning and development;
- (iv) Game and fish department;
- (v) Department of health and social service;
- (vi) Department of education;
- (vii) Office of state engineer;
- (viii) Wyoming recreation commission;
- (ix) Wyoming state geologist;
- (x) Wyoming department of agriculture;
- (xi) Department of environmental quality;
- (xii) Wyoming state conservation commission;
- (xiii) The University of Wyoming.

3. Public Hearing

Not less than ninety and no more than one hundred twenty days after the receipt of a permit application, a public hearing is to be held by the Council, provided the

State Engineer has submitted a preliminary and final opinion as to the quantity of water available for the proposed facility. The Siting Administration must give notice of the hearing to the applicant and local governments must give public notice locally. The hearing is to be conducted in a "community as close as practicable to the proposed facility."^{27/}

4. Initial Order by the Council

Within 60 days after the hearing, the Council must issue an order authorizing one of the following: (1) approving the application and issuing a permit with no conditions; (2) approving the application and issuing a permit conditional upon commencing construction with a specified, reasonable time; (3) approving the application and issuing a permit conditioned upon specified changes in the application; (4) rejecting the application pending further study if the applicant is not able to demonstrate to the Council that the certification standards of the Siting Act have been met. The Council must issue with its decision, an opinion stating in detail its reasons for the decision.^{28/}

In Laramie River Conservation Council v. Industrial Siting Council,^{29/} the Wyoming Supreme Court affirmed the Council's approval of a 1,500 MW steam electric generating facility, made at the conclusion of the initial hearing, without any further studies.

When the Council rejects an application pending further study, the applicant is required to submit fees to cover the study.^{30/} Within 30 days after the initial hearing, the Director and applicant prepare a study design, and thereafter the Siting Administration commences an intense investigation, study and evaluation. The Siting Act enumerates various topics for the Council to consider for designation as areas for the study. These include: the purpose of the facility, impacts on land use, water resources, air quality, solid wastes, radiation, noise, and social and economic impacts. The Act also enumerates various agencies which may be consulted in the study, as noted in Part III., B.2.^{31/} The Siting Administration must complete the study and submit a report to the Council within one hundred eighty days. In unusual circumstances, the Siting Administration may receive two extensions not to exceed sixty (60) days, to complete the report.^{32/} The Council is to schedule a hearing date within sixty (60) days of the receipt of the study.^{33/} Within sixty (60) days of the completion of the hearing, the Council will either grant or deny a permit.^{34/}

C. Parties to Permit Proceedings

The parties to a permit proceeding include:

- (i) The applicant;
- (ii) Each local government entitled to receive service of a copy of the application under the statute;
- (iii) Any person residing in a local government entitled to receive service of a copy of the application under (the statute) and any nonprofit organization with a Wyoming chapter, concerned in whole or in part to promote conservation or natural beauty,

to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups, or to promote the orderly development of the areas in which the facility is to be located.

In order to act as a party, the person or organization must file a notice of intent to be a party not less than ten days before the date set for the hearing.^{35/} Any party mentioned above and entitled by statute to be a party to the permit proceedings waives its right to be a party if it does not participate orally in the proceeding.^{36/}

Any person may make a limited appearance in the proceeding by filing a statement in writing with the office not more than five days after the date set for the hearing. Such filed statements of persons making a limited appearance become part of the record and must be made available to the public. No person making a limited appearance may be a party to the proceeding.^{37/}

D. Review of Council Decisions

The Siting Act does not provide for a rehearing of a permit denial. The decision is final for purposes of judicial review. The decision may be appealed to the court in any district in which the major portion of the proposed facility is to be located. The petition for appeal must be filed within thirty days after the issuance of the decision. A copy of the Council's decision and opinion constitute the record on appeal.^{38/}

The standard of judicial review of administration actions is set out in the Wyoming Administrative Procedures Act.^{39/} Review is limited to determining (1) whether the agency acted without or in excess of its power; (2) whether the decision was procured by fraud; (3) whether the decision or other agency action is in conformity with law; (4) whether the findings of fact in issue are supported by substantial evidence; and (5) whether the decision or other agency action is arbitrary, capricious or characterized by abuse of discretion.

IV. CERTIFICATION STANDARDS

The Siting Act establishes three general criteria to be used by the Council in considering applications. The applicant must demonstrate to the Council that: (1) the proposed facility will comply with all applicable law; (2) that the facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the affected area; and (3) that the facility will not substantially impair the health, safety or welfare of the inhabitants.^{40/}

The Siting Rules and Regulations provide more specific guidance. Compliance with all applicable law means the applicant must comply with all applicable local, state and federal law throughout all phases of planning, construction and operation. The law which must be complied with means that law in force on the date of application. The

Siting Rules and Regulations also provide illustrative definitions of factors such as the environment, social conditions, economic conditions, health, safety, and welfare.

In the event the Council orders further study of an application, the standards for approval are clarified. The Council must then determine:

(i) The nature of the probable environmental impact is acceptable, including a specification of the predictable adverse effect on the normal environment, public health and safety, aesthetics, scenic, historic and recreational value, forest and parks, air quality, water supply and quality, fish, wildlife and agricultural resources;

(ii) That by the design and location of the facility, any adverse environmental impact is reduced to the extent deemed acceptable considering:

- (A) The state of available technology;
- (B) The nature and economics of the various alternatives;
- (C) Preservation of historic sites, forest and parks, fish and wildlife, air quality, water supply and quality, agriculture resources and land areas possessing sensitive ecological conditions; and
- (D) Other pertinent considerations.

(iii) That the facility is compatible with the public health and safety;

(iv) That the facility is compatible with the state, intrastate regional, county and local land use plans, if any, and with existing and projected nearby land utilization;

(v) That the facility is designed in compliance with applicable state and local laws and regulations issued thereunder, except that the council may refuse to apply any local law or regulation if it finds that, as applied to the proposed facility, such law or regulation is unreasonably restrictive

in view of the existing technology, or of factors of cost or economics;

(vi) That the department of environmental quality has determined that the proposed facility or cumulative effects intensified by the facility will not violate state and federally established standards and implementation plans. The judgments of the department are conclusive on all questions related to the satisfaction of state and federal standards;

(vii) That the facility represents an acceptable impact upon the environmental, social and economic well being of the municipality and people in the area where the facility is proposed to be located, considering the factors enumerated in W.S. 35-502.81 (a) (xii). 41/

In Laramie River Conservation Council v. Industrial Siting Council, 42/ two environmental groups objected to the Council's approval of the Laramie River Station, which was to consist of three coal-fired steam electric generating units, each unit having a 500 megawatt capacity. The trial court affirmed the Council, and the Wyoming Supreme Court affirmed the trial court. The court held that the Siting Act only required the applicant to show that the project posed no significant detriment to, or impairment of, the environmental or social or economic conditions, and rejected a "no reasonable possibility of serious injury" test urged by the plaintiff environmental groups. The court further found "substantial evidence" in the record to support the Council's decision.

V. LOCATION AND PLANNING OF DEVELOPMENTS GENERALLY

Because the comprehensive regulation of industrial siting pursuant to the Siting Act does not apply to smaller facilities, the following state and local agencies can, to some degree, regulate construction of smaller energy facilities pursuant to general grants of authority over the use of land, air and water. Even under the Siting Act, the Public Service Commission, discussed in Chapter 2 above, and the Department of Environmental Quality, discussed below, retain independent permitting jurisdiction.

A. Wyoming Department of Environmental Quality ("DEQ")

The Wyoming DEQ is responsible for preserving the air, water and land resources of the state. As part of the Wyoming Environmental Quality Act, the DEQ requires that permits be obtained before proceeding to construct or modify any industrial facility capable of causing or increasing air and water pollution in excess of the standards established by the department.^{43/} The Air Quality Standards issued by DEQ indicate that a permit to construct will not be issued unless the facility is located in accordance with proper land use planning as determined by the "appropriate state or local agency."^{44/}

B. Wyoming State Land Use Commission

The State Land Use Commission is authorized to issue guidelines for statewide land use and to develop a

state land use plan. The guidelines are to include definitions of land uses including industrial and utilities.^{45/} The statewide plan has yet to be issued by the Commission and the guidelines are advisory to state, local and regional governing authorities.

C. Local Control

Cities and towns^{46/} and counties^{47/} have general zoning powers. District regulations must be uniform and cities and towns must follow a comprehensive plan.^{48/}

County regulations do not apply to incorporated cities and towns.^{49/} No zoning provision deals specifically with public utilities or powerplants.

FOOTNOTES

1. Wyo. Stat. §35-12-101 et seq. (Michie 1977 and Michie Supp. 1980).
2. Id. §35-12-102(a)(iii).
3. Id. §35-12-104 (Michie 1977 and Michie Supp. 1980).
4. Id. §37-2-205.
5. Id. §35-12-106.
6. Id. §§35-12-104(f), (g).
7. Id. §35-12-102.
8. Id. §35-12-121(b).
9. Id. §35-12-121(e).
10. Id. §35-12-108.
11. Id. §35-12-102(xi).
12. Siting Rules and Regs. §3(f) (1977).
13. Wyo. Stat. §35-12-120 (Michie 1977).
14. Siting Rules & Regs. §§4,5 (1977).
15. Id. §9(d).
16. Wyo. Stat. §35-12-109(a) (Michie 1977).
17. Id. §35-12-104(f).
18. Id. §35-12-104(g).
19. Id. §35-12-107.
20. Mr. Richard Moore, Engineer, Council, Telephone conversation, 8/14/78.
21. Wyo. Stat. §35-12-104(g) (Michie 1977).
22. Mr. J. Forweed, Asst. Counsel, Commission, Telephone conversation, 8/3/78.
23. Wyo. Stat. §35-12-114(a)(vi) (Michie 1977).
24. Id. §35-12-116
25. Id. §35-12-109(e)(iv).

26. Id. §35-12-112(b).
27. Id. §35-12-109(b)(iv).
28. Id. §35-12-109(e).
29. 588 P.2d 1241 (Wyo.1978).
30. Wyo. Stat. §35-12-110 (Michie 1977).
31. Id. §35-12-111.
32. Id. §35-12-111(d).
33. Id. §35-12-111(e).
34. Id. §35-12-114(a).
35. Id. §35-12-112(a).
36. Id. §35-12-112(b).
37. Id. §35-12-112(c).
38. Id. §35-12-115(a).
39. Id. §9-4-114(b).
40. Id. §35-12-109(c).
41. Id. §35-12-114(a).
42. 588 P.2d 1241 (Wyo. 1978).
43. Wyo. Stat. §35-11-801 (Michie 1977).
44. Wyo. Air Quality Standards & Regs. §21 (1974).
45. Wyo Stat. §9-19-203 (Michie 1977).
46. Wyo. Stat. §15-1-601 to 15-1-609 (Michie 1980).
47. Id. §18-5-101 to 18-5-315 (Michie 1977).
48. Id. §15-1-601(d).
49. Id. §18-5-201.

FRANCHISING OF PUBLIC UTILITIES

I. AUTHORITY TO GRANT FRANCHISES

The Wyoming constitution provides that no street, railway, telegraph, telephone, or electric light line may be constructed within the limits of any municipal organization without the consent of local authorities.^{1/} The Wyoming statutes specifically grant all cities and towns the power to:

(xxxiii) Grant franchises for such terms as the governing body deems proper to any utility company, provided no franchise may be entered into with any person in which that person is given an exclusive right for any purpose whatsoever and:

(A) Grant to any franchisee utility company the privilege to install and maintain necessary installations under or over any streets, alleys or avenues;

(B) Contract for not exceeding ten (10) years, with any franchisee electric light or gas company for the necessary energy and service for the lighting of streets, public buildings or other requirements for the city or town; 2/

II. PROCEDURES FOR GRANTING FRANCHISES

No specific method has been established by statute for the granting of franchises by a city or town and no reported agency or judicial opinions have discussed the appropriate method for granting franchises. However, in granting a franchise, the city or town must act through its governing body and, therefore, can be expected to utilize the standard ordinance enacting procedure in granting franchises.

All ordinances must be in writing and passed pursuant to the rules and regulations adopted by the local governing body. Ordinances generally may contain only one subject and this subject must be expressed clearly in the title.^{3/} All ordinances granting franchises must have public readings on three different days unless three-fourths of the governing body votes to suspend this rule. At least ten days must elapse between the introduction of an ordinance and final passage of the ordinance.^{4/} Ordinances must be published at least once in a local newspaper of general circulation before becoming effective.^{5/}

No public utility may exercise any right of privilege or obtain a franchise from any municipality or county without first obtaining a certificate of public convenience and necessity from the Wyoming Public Service Commission.^{6/} Thus, if a utility is required to obtain a certificate from the Commission before initiating service or constructing facilities, it must do so before seeking a local franchise. The issue of whether a local government can refuse to franchise a certificated utility, thereby precluding operation by that utility, has not been resolved by statute or agency or judicial decision.

III. CRITERIA TO BE USED IN EVALUATING A FRANCHISE REQUEST

Local franchising authority is not limited by statute to grants for public utility purposes. Any utility is eligible for a local franchise. Nor have the Wyoming courts imposed this restriction on local franchising powers. No other statutory or

judicial criteria have been established for evaluating franchise requests.

IV. CHARACTERISTICS OF A FRANCHISE

A. Duration and Termination

While a ten year limit has been placed on municipal contracts for the supply of electric light and gas service, franchises are subjected to no such limit.

A franchise may be granted "for such terms as the governing body deems proper."^{7/} No reported cases offer any insight into any implicit limitations on the franchising power. Similarly, neither the statutes nor judicial decisions have established any conditions resulting in the surrender or termination of a franchise.

B. Exclusivity

Cities and towns are expressly prohibited from granting exclusive franchises.^{8/}

FOOTNOTES

1. Wyo. Const. art. 13, §4.
2. Wyo. Stat. §15-1-103 (xxxiii) (Michie 1980).
3. Id. §15-1-115(a).
4. Id. §15-1-115 (c).
5. Id. §15-1-116(a).
6. Id. §37-2-205(b)(Michie 1977).
7. Id. §15-1-103 (xxxiii) (Michie 1980).
8. Ibid.

CHAPTER 5

RATE REGULATION IN WYOMING

I. RATEMAKING AUTHORITY

A. General

The Wyoming Statutes grant the Public Service Commission of Wyoming (Commission) general and exclusive authority to regulate and supervise every public utility within the state.^{1/} The term "public utility" includes investor-

owned utilities and cooperatives, but does not include public utilities owned and operated by municipalities.^{2/}

The power to regulate rates and charges of utilities is included among the Commission's general powers.^{3/} However, the

Wyoming Natural Gas Pipeline Authority (Authority) is vested with the power to establish rates or other charges for the

use of all natural gas facilities operated by it.^{4/} The rates and charges prescribed by the Authority are not subject to the jurisdiction of the Commission.^{5/} The board of public

utilities of any city or town is empowered to fix the rates for water and electric service furnished by the municipality to customers.^{6/}

The Commission also has authority to prescribe uniform methods of keeping accounts, records and books, to be observed by all public utilities operating within the state.^{7/} The system of accounts established by the Commission and the forms of accounts, records and memoranda prescribed

by it shall, in the case of interstate public utilities, conform as nearly as possible to those prescribed by the Interstate Commerce Commission.^{8/} However, Wyoming has adopted the uniform system of accounts established by the Federal Energy Regulatory Commission (FERC) for both gas and electric utilities.

No express provisions are contained in the Wyoming statutes concerning the authority of the Commission to prescribe or approve depreciation rates or procedures.

B. Ratemaking Procedures

All proposed rate changes are to be set forth in new tariffs filed with the Commission and kept open to public inspection.^{9/} Whenever an application proposing new rates is filed, the Commission may, either upon complaint or its own initiative, order a hearing concerning the lawfulness of the new rates.^{10/} Unless the Commission otherwise orders, no public utility can make any rate change except after thirty (30) days notice to the Commission and other interested persons.^{11/} The notice must plainly state the proposed changes in the rates, and the time when the changed rates will go into effect.

Pending its decision concerning the lawfulness of the proposed rates, the Commission may suspend such rates for an initial period not longer than 6 months.^{12/} If the Commission cannot reach a decision within 6 months, it may extend the period of suspension for an additional period

or periods not exceeding, in the aggregate, 3 months.^{13/}

Upon application by the public utility, the Commission may order such suspended rates, or any portion thereof, to be put into effect at any time under bond and subject to refund.^{14/}

C. Ratemaking Standards

The statute requires all rates to be just, reasonable and uniform.^{15/} When considering a utility's rates, the Commission may take into consideration depreciation of plant, obsolescence of equipment, expense of operation, physical and other values of the plant, system, business and properties of the public utility whose rates are under consideration.^{16/}

Further, no public utility can make or grant any undue or unreasonable preference or advantage to any person, or subject any person to any undue or unreasonable disadvantage or prejudice.^{17/} Beyond a general mandate that rates must be just, reasonable, uniform and non-discriminatory, the statutes do not contain any provisions governing the disposition of particular issues which may arise in a rate case.

II. RATE BASE DETERMINATION

A. Test Period

The Commission generally bases its decisions on a year-end rate base to offset the effects of attrition and regulatory lag.^{18/} However, the Commission will employ an average rate base, if "the record is clear that the use of

an average figure is required in the public interest."^{19/}
Thus, the Commission concluded in one case that the use of an average base approach was required in the public interest because the company's accounting procedures indicated that it included construction work in progress in net plant accounts, regardless of when such facilities were placed in service; the company had failed to substantiate the effects of attrition and inflation; and the company's projections of known and measurable changes proved to be highly suspect. In addition the Commission found that attrition was not a problem due to the timeliness of the data as well as the mitigating effect of the accounting procedures for CWIP.^{20/}

B. Rate Base Valuation

The Commission values a utility's rate base using original cost less depreciation.^{21/}

C. Rate Base Components and Adjustments

In order to determine whether or not a particular item of utility property is included in the rate base, the Commission looks to see whether the property is "used or useful" in the public service. Thus, the Commission has found that a gas storage program which accounted for 62 percent of the company's rate base was of limited benefit to existing rate-payers.^{22/} Portions of the gas held in storage were deemed to be property held for future use and excluded from the rate base.^{23/} The opinion does not reveal how the Commission arrived at the portion of storage invest-

ment allowed in the rate base.

Construction work in progress (CWIP) is generally excluded from rate base, but the Commission does permit capitalization of an allowance for funds used during construction (AFUDC). However, the Commission will permit adjustments to the rate base, if they occur by the time of the Commission's final order in the proceeding, where inflation and attrition effects are shown to be severe and are coupled with an unprecedented amount of construction activity. Thus, in Re Montana-Dakota Utilities Co.,^{24/} the Commission included CWIP, where the company demonstrated that it would place a large, nonrevenue-producing facility (a gas field) in service, within the rate case term.

The Commission had indicated that it is receptive to the inclusion of research and development costs incurred prior to the generation of revenue. In Re Northern Util. Inc.,^{25/} the company was permitted to include in its rate base an expenditure representing its allocation of exploration and drilling costs for participation in gas exploration ventures. The Commission determined such expenditures were necessary to insure future gas reserves.^{26/}

D. Rate Base Allocation

According to a Commission rate engineer, only two utilities in the state provide joint services. Those companies segregate plant on their books, and the issue of plant allocation between two utility operations has not arisen.

The Commission has discussed methods of allocation of rate base between utility operations in two states. In one case, the Commission accepted volumetric figures as the best evidence for allocating the company's major jointly-used interstate facilities. The Commission declined to use the demand allocation component of the Atlantic Seaboard formula because the in-state and out-of-state consumers represented the same type of joint use and the facilities were being used to the capacity of the available gas at all times.^{27/}

III. COST OF SERVICE

A. Allowed or Disallowed Expense

The Commission has not announced a general rule for determining what expenses will be allowed or disallowed for ratemaking purposes, however it appears that in general the Commission accepts the actual expenses incurred during a test year, adjusted to annualize changes during the year and to exclude or amortize unusual items. When questions have been raised regarding advertising expenses they have been excluded when the company demonstrated the expenditures were only three-fourths of one percent of its revenues.^{28/}

However the Commission did exclude promotional and institutional advertising expenditures where a critical gas shortage had resulted in a severe increase in rates.^{29/} The Commission has also excluded donations because the customers who are called upon to support charitable activities in their own right should not bear the cost of donations made by the

company.^{30/}

In addition, the Commission has excluded all expenses of merchandizing operations, recognized only one-half of a company's cost of liability insurance because the company was found to be responsible for the increased rates due to its poor experience record and allowed expenses associated with the purchase and resale of unused gas because it was in the public interest not to waste gas by flaring and to avoid the penalties which would have been incurred had the gas which had been produced, not been taken.^{31/}

B. Allocation of Expenses

Recent Commission decisions have not dealt with methods of allocating joint expenses, or the allocation of expenses between various customer classifications. Nor do these decisions discuss allocations of expenses to power pool operations or methods for determining charges for energy interchange with other utilities. However, according to a Commission rate engineer, the Commission generally allocates demand costs using the average and excess demand method. Many cases involve a double form of cost allocation, since most Wyoming utility companies engage in interstate operations. Thus, interstate costs may be allocated on a peak responsibility method and intrastate operating costs on an average and excess demand method.

IV. FEDERAL INCOME TAX ISSUES

The Commission practice has been to prefer normali-

zation of accelerated depreciation over the flow-through method. Under the normalization method, the Commission has generally required a reduction in the rate base to reflect the portion of accumulated deferred income taxes which is the result of using accelerated depreciation rather than straight-line depreciation.^{32/} However, in one case, deferred federal income taxes and unamortized tax credits were not deducted from the company's rate base in order to support its rural improvement plan.^{33/}

All major electric, gas, and telephone companies follow normalization accounting procedures for both liberalized depreciation tax benefits and investment tax credits.

Investment tax credits, like liberalized depreciation, are normalized. A corresponding reduction from the rate base is required except insofar as Congress has exempted tax credits from this treatment.^{34/}

In the only reported Commission decision which involved a request to normalize construction overheads (including pension costs, payroll taxes and AFUDC) which were regularly capitalized and flowed through to income, the Commission denied the company's request.^{35/} However, the Commission indicated that it might be receptive to the expansion of normalization. "The Commission does not feel the facts of this case support the expansion of normalization beyond the traditional basis at this time."^{36/} It should be noted that the company's request to switch to normalization

came at a time when it was requesting the most drastic increases to Wyoming users in its history. The Commission did not indicate what facts would support expansion or normalization.

V. METHODS OF DETERMINING RETURN TO BE ALLOWED A REGULATED UTILITY

The Commission has not adopted any single method for arriving at a reasonable return on equity. However, the Commission's decisions reflect a preference for the comparable earnings test, with reasoned and supported adjustments for differences in various risk elements. Those elements include: geographical location and area served, type and quality of business activity, dependency on oil products, environmental problems, bond and stock ratings, level of surplus, cyclical behavior of earnings, dividend payout policy, closeness of market to book, coverages, size of construction program, and regulatory climate.^{37/} The Commission has specifically rejected "discounted cash flow presentations as a scientific approach to determine equity cost, but will apply them as a comparison to the required comparable earnings presentations."^{38/}

The table in Appendix A lists what overall return and what return on equity have been allowed in recent rate cases.

The Commission has not enunciated any risk factors where it would feel compelled to grant a higher than normal return. However, the Commission has adjusted the return on

equity upwards to accommodate a company's market position which has been weakened by expansive investment as well as the need to obtain new gas supplies.^{39/}

In calculating a company's return on equity, the Commission will determine the subsidiary's own cost of capital to eliminate the effect of double leverage and provide the equity owner with a return commensurate with his investment.^{40/}

VI. RATEMAKING CRITERIA

The Commission has rejected the pure cost-of-service approach, as well as the strict averaging approach for rate-making purposes. The Commission considers the pure cost-of-service approach unworkable because:

(1) of the expense and complexity of determining costs for each individual customer and of devising the multitudinous rates that would result; (2) it does not consider established service or the utter dependency of service classes; and (3) it would virtually eliminate or encumber extension of service to residential and other small volume users and would eliminate or encumber extensions of service to almost any new customer ^{41/}

Conversely, the applications of a strict averaging method was rejected as it "would place an undue economic burden upon large quantity users."^{42/}

According to the Commission, the proper rate-making approach must be a compromise of the above rate-making elements with due regard for other relevant considerations, including value of service and customer demand for service, ability of customers to pay, types of customers

and nature of service area, competition, quality of service and facilities, areas or classes of customers requiring new investment, requirements concerning safety and the environment, utility responsibilities to serve all persons in the service area, existing unreasonable inequities, patterning rates to achieve authorized rate of return, a rate's function in maximizing efficient utilization of utility plant, and source of utility supply.^{43/}

Recent Commission decisions do not deal with the pricing of excess energy or the pricing of by-product services resulting from electrical or thermal generation. As most Wyoming utilities operate with a surplus, the Commission has never required a utility to purchase energy from another generator on a regular basis.^{44/} The Commission has summarily approved of the pricing of excess power at the cost of generating such power.^{45/}

VII. REGULATION OF SECURITIES AND CAPITAL STRUCTURE

A. Issuance of Securities

The right of every gas and electric corporation operating as a public utility in the state of Wyoming to issue securities is subject to the control of the Commission.^{46/} A public utility may issue securities payable at periods of more than 18 months after the date of authorization by the Commission for the following purposes: the acquisition of property; the construction, completion, extension or improvement of its facilities; the improvement or maintenance

of its service; the discharge or lawful refunding of its obligations; the reimbursement of monies actually expended for said purposes from income or other monies in the treasury not secured by or obtained from the issue of securities, within 5 years prior to the filing of any application with the Commission for the required authorization; or any other purpose approved by the Commission.^{47/}

The Commission can not authorize the issuance of securities if the proposed issue is inconsistent with the public interest or if the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility.^{48/}

B. Capital Structure

A reasonable capital structure for a natural gas company was found by the Commission in one case to consist of 62.19 per cent debt, 33.24 per cent common equity, and 4.57 per cent investment tax credit.^{49/} A debt to equity ratio of 53% to 47% was considered reasonable by the Commission for a gas company since it was in the line with the debt equity ratios of other utility companies.^{50/} A telephone company's capital structure consisting of 48.9 per cent long-term debt and 51.1 per cent common equity was determined to be reasonable for ratemaking purposes.^{51/} A reasonable capital structure for a power company was found to consist of 56.5 per cent debt and 43.5 per cent equity.^{52/}

APPENDIX A

<u>CASE</u>	<u>ALLOWED % RATE OF RETURN</u>	
	<u>OVERALL</u>	<u>ON COMMON EQUITY</u>
<u>The Northern Gas Co.,</u> <u>25 P.U.R.4th 317 (1978)</u>	8.58	10.00
<u>Re Northern Util., Inc.,</u> <u>25 P.U.R.4th 365 (1978)</u>	8.478	10.00
<u>Re Montana-Dakota Util., Co.,</u> <u>21 P.U.R.4th 65 (1977)</u>	9.50	13.90
<u>Re Mountain States Tel. & Tel.</u> <u>Co., 18 P.U.R.4th 347 (1976)</u>	9.00	10.40
<u>Re Black Hills Power & Light Co.,</u> <u>16 P.U.R.4th 369 (1976)</u>	9.25	11.75
<u>Re Kansas-Nebraska Nat. Gas Co.,</u> <u>9 P.U.R.4th 481 (1975)</u>	8.75	12.00

FOOTNOTES

1. Wyo. Stat. §37-2-112 (Michie 1977).
2. Id. §37-1-101(vi).
3. Id. §37-3-101 et seq. (Michie 1977 and Michie Supp. 1980).
4. Id. §37-5-103(viii) (Michie 1977).
5. Id. §37-5-106.
6. Id. §15-7-407. (Michie Supp. 1980).
7. Id. §37-2-203(c). (Michie 1977).
8. Ibid.
9. Id. §37-3-106(b).
10. Id. §37-3-106(c).
11. Id. §37-3-106(b).
12. Id. §37-3-106(c).
13. Ibid.
14. Id. §37-3-106(d).
15. Id. §37-3-101. (Michie Supp. 1980).
16. Id. §37-2-122(a). (Michie 1980).
17. Id. §37-3-104.
18. Re Mountain States Tel. & Tel. Co., 18 P.U.R.4th 347 (1976).
19. Re Northern Gas Co., 25 P.U.R.4th 317, 322 (1978).
20. Id. at 323.
21. Re Mountain States Tel. & Tel. Co., 94 P.U.R.3d 566 (1972).
22. Re Northern Gas Co., 25 P.U.R.4th 317 (1978).
23. Id. at 329.
24. 21 P.U.R.4th 65 (1977).
25. 25 P.U.R.4th 365 (1978).

26. Id. at 378.
27. Re Montana-Dakota Util. Co., 21 P.U.R.4th 65 (1975).
28. 14 P.U.R.4th 149 (1976).
29. Re Montana-Dakota Util. Co., 21 P.U.R.4th 65, 79.
30. Re Cheyenne Light, Fuel & Power Co., 79 P.U.R.3d 80, 88 (1969).
31. Re Cody Gas Co., 90 P.U.R.3d 239, 246 (1971).
32. Re Northern Gas Co., 25 P.U.R.4th 317, 331 (1978).
33. Re Mountain States Tel. & Tel. Co., 9 P.U.R.4th 518, 525 (1975).
34. Re Montana-Dakota Util. Co., 21 P.U.R.4th 65, 76 (1977).
35. Id. at 79.
36. Id. at 79.
37. Re Montana-Dakota Util. Co., 21 P.U.R.4th 65, 82 (1977).
38. Id. at 82, 83.
39. Id. at 83.
40. Re Northern Util. Inc., 25 P.U.R.4th 365, 385 (1978).
41. Re Lincoln Service Corp., 1 P.U.R.4th 511, 517 (1973).
42. Id. at 517.
43. Id. at 517.
44. Mr. Alex Eliopoulos, Commission Administrative Secretary and Chief Counsel, Telephone conversation.
45. Id.
46. Wyo. Stat. §37-6-101 (Michie 1977).
47. Ibid.
48. Id. §37-6-102.
49. Re Northern Util., Inc., 25 P.U.R.4th 365 (1978).
50. Re Petrolane-Wyoming Gas Serv., Docket No. 9613, Sub 2, (Dec. 20, 1974).

51. Re Mountain States Tel. & Tel. Co., 18 P.U.R.4th 347
(1976).
52. Re Cheyenne Light, Fuel & Power Co., Docket No. 9511,
Sub 11 (March 12, 1974).

CHAPTER 6

SUMMARY OF IMPEDIMENTS TO IMPLEMENTATION OF ICES

I. Types of Impediments

In order to analyze the extent to which the traditional public utility regulatory system may impede the implementation of ICES, one must first identify what is meant by the word "impediment." For the purposes of this analysis, four broad types of impediments can be identified. The first major category of impediment is the "no-subsidy impediment." This impediment consists of the failure of the government or the regulatory system to provide some desired degree of monetary or other encouragement of ICES. Such subsidies could take the form of grants or tax incentives. On the other hand, a subsidy could result from state public utility regulatory commission (PUC) departure from strictly cost-based rates for purchases and sales of electricity between an ICES and conventional electric utilities, thereby compelling the customers of the electric utility grid to subsidize ICES.

The second major category of impediment is the "uncertainty impediment." The absence of certainty with respect to the manner in which an ICES will be regulated will impose costs that must be borne by the ICES operator. Uncertainty impediments will appear in many forms. ICES will be faced with uncertainty because it represents a new concept which can be

expected to raise issues with which utility regulators are unfamiliar. Such uncertainties will be aggravated as a result of the fact that regulatory jurisdiction in the United States is decentralized. Thus, these uncertainties will have to be resolved largely on a jurisdiction-by-jurisdiction basis. In addition, ICES will necessarily be involved in the sale of excess electrical power to and the purchase of back-up electrical power from conventional electric utilities. These arrangements, however, can be altered by a PUC even though the ICES and utility initially agreed upon the terms. Therefore, ICES will face transactional uncertainties not normally encountered in doing business outside the utility field.

Another major category of impediment is the "discriminatory impediment." This type of impediment takes the form of rules or regulations which, for whatever reasons, affect ICES more harshly than competing energy technologies. These differences in impact may be the result of any number of factors including, but not limited to, ICES size, the type of customers it can be expected to serve and the manner in which it will do business.

The final general category of impediment is the "prohibition impediment." These impediments could be either regulations which impose so substantial a cost on the ICES that it cannot operate economically or regulations which would actually preclude operation of an ICES.

II. Regulatory Impediments to ICES Implementation

The degree and manner in which the existing regulatory system will impede the development of ICES will vary depending on the form of ownership, class of customer and method of doing business chosen by an ICES developer. The ICES type which can be expected to encounter the most serious impediments is the investor-owned ICES seeking to construct a new facility to serve customers in a community already being served by a conventional utility. Such an ICES will face impediments in the form of general PUC regulation, regulations relating to the siting of facilities and the granting of local franchise and regulations concerning rates charged for energy service.

A. General Regulatory Impediments

Public utility regulation probably is more pervasive and complex than any other form of government regulation of business. A businessman not engaged in the utility business may be reluctant to become involved in a business which will subject him to such pervasive governmental regulation. Some examples of areas of regulation which might discourage investors from becoming involved in ICES implementation are the requirement that a regulated utility maintain its books in conformity with a system of accounts prescribed by the PUC and PUC regulation and scrutiny of the financial affairs of the utility. When the ICES is operated in conjunction with a non-utility business, such regulation necessarily will extend beyond the operator's utility operations and involve PUC examination of

its non-utility business. Attempts at minimizing the effects of these types of impediments by setting up a subsidiary corporation to own and operate the ICES could subject the parent company to extensive Securities and Exchange Commission regulation pursuant to the Public Utility Holding Company Act of 1933.

Even if an ICES developer is willing to face the possibility of extensive PUC regulation, it will face a significant uncertainty in determining whether it will be deemed a public utility and therefore subject to PUC regulation. All states require that a utility provide service "to or for the public" before it becomes subject to the jurisdiction of the PUC. Few states, however, have provided any real guidance with respect to the meaning of the phrase "to or for the public." Thus, an ICES operator can expect very little guidance in determining whether its operations will be sufficient to bring it within the classification of "public utility."

Similarly, many states require that a utility "sell" utility service before it will be classified as a public utility. Again, statutes, administrative rules and caselaw provide very little guidance with respect to when a transaction will be classified as a "sale." Thus, the ICES operator must face another significant area of uncertainty with respect to PUC regulation of its operations.

Assuming that some aspects of the ICES operations will bring it within the classification of public utility, a

serious question remains with respect to whether sales of both of the ICES energy streams will be subject to PUC regulation and, if not, whether and by whom the non-PUC regulated energy stream will be regulated. This uncertainty arises because many state statutory schemes provide for the regulation of only certain enumerated utility services such as heat, electricity and gas. In such states, the provisions of refrigeration or motive power may not be within PUC jurisdiction. Regardless of whether these energy streams will be regulated by local governments, or left unregulated, such split regulation may raise significant problems with respect to the marketing of both energy streams at competitive rates.

State territorial assignment programs could present an impediment capable of precluding operation by ICES. Several states have enacted legislation which specifically provides that the PUC is to divide the state into a finite number of service areas and assign each of these service areas exclusively to a particular utility. Where such programs exist, service area assignments have been made and, generally, these programs make no provision for the assignment of service areas to new utilities unless there is some indication that customers are not being adequately served. Even where no specific statutory allocation scheme exists, PUCs generally have sought in granting certificates of public convenience and necessity to avoid what they viewed as wasteful duplication of facilities by granting the first utility serving a given area in effect an exclusive

right to serve that area so long as the utility provides adequate service. Thus, in many cases, an ICES may find that it is precluded from initiating operations as a result of these territorial assignment programs.

B. Siting Impediments

The siting of energy production facilities is regulated in some manner in all states. The types and degree of impediments presented will vary depending on the type of siting program in effect in a particular jurisdiction and the type of facility proposed to be constructed. In those states which have not adopted comprehensive one-stop siting programs, a utility desiring to construct an energy production facility generally must seek approval from a variety of state and local agencies. Because an ICES developer in such a state will be forced to obtain numerous approvals, the procedural requirements related to obtaining such multiple approvals could present significant impediments to the implementation of ICES. In those states which have attempted to minimize the procedural difficulties presented by the need to obtain multiple approvals by implementing one-stop comprehensive siting programs, an ICES operator may face significant impediments in the form of substantive requirements in obtaining the required approval.

C. Local Franchising Impediments

In addition to obtaining certificates of convenience and necessity from PUCs and siting approvals from one or more state agencies, ICES operators generally will be required to

obtain franchises from local governments to use public rights-of-way for transmission and distribution facilities. Because of the total lack of uniformity in the law and procedures governing local franchising, ICES operators will face many uncertainties in this area. One major uncertainty related to whether a franchise is needed or available and, if a franchise is not available, whether this will preclude the use of public rights-of-way in conjunction with the operation of the ICES. Many franchise enabling statutes list specific services which local governments are authorized to franchise. In addition, most statutes require that the franchisee be serving a public purpose in order to be eligible for a franchise. These types of restrictions raise the question of whether, if an ICES is providing a service which is not deemed to be serving a public purpose, a franchise may be granted. If a franchise cannot be granted, significant uncertainty exists with respect to whether the ICES may operate along public rights-of-way without a franchise. If not, it may be precluded from operating unless all facilities are maintained on private property with the permission of the property owners.

Assuming a franchise is available to an ICES, additional uncertainty exists with respect to the procedure pursuant to which the franchise will be granted and the standards which will be applied in determining whether the franchise should be granted. These procedures and standards vary substantially from state to state and from municipality to municipality within each state.

Finally, an ICES which might otherwise be eligible for a franchise may be unable to obtain the necessary franchise as a result of a prior grant of an exclusive franchise to another utility serving the area. Nearly one-half of the states have not resolved the issue of whether exclusive franchises are permissible.

D. Rate Regulation Impediments

Assuming that an ICES operator can overcome or operate in spite of the impediments described above and begin its operations, it must be able to market both energy streams at competitive rates in order to stay in business. Several areas of PUC rate regulation may impede the ICES' ability to operate profitably. For example, an ICES may find that the rates for one energy stream are regulated on a statewide basis by the PUC while the remaining stream is regulated by one or more local governments. With such split jurisdiction, there can be little assurance that rates will be regulated consistently and in such a way as to enable competitive marketing of both energy streams.

Even if both energy streams are regulated by the PUC, resolution of various cost and rate-base allocation issues could present serious issues unique to ICES. Depending on the method chosen to allocate costs and rate base between the two services being marketed, the ICES operator may find that it will be compelled to sell one energy stream at a rate too low for the whole ICES to be profitable while the second energy stream must be sold at a rate too high to be competitive.

In addition, PUCs traditionally have exercised rate-making authority only with respect to sales by conventional utilities operating in a monopoly market. Investment in these conventional utilities traditionally has been considered a low-risk investment and, therefore, the rates of return on equity permitted by PUCs have been commensurately low. Because ICES, as a new industry and as a utility operating in competition with other utilities, will be viewed as a more risky investment, PUC decisions with respect to allowable rates of return will have a significant impact on the ability of ICES to attract investors. Rates of return satisfactory to investors in conventional utilities are unlikely to attract investors to the more risky ICES operations.

Finally, ICES must be able to obtain reasonable rates for sales of excess electrical power to and purchases of back-up electrical power from conventional electric utilities. These rates also will be regulated by PUCs and the PUC determinations will substantially affect the ability of the ICES to operate profitably. The uncertainty surrounding the factors that will be considered by PUCs in establishing these rates is very likely to be perceived as an impediment by prospective ICES operators and investors.

CHAPTER 7

OVERCOMING IMPEDIMENTS TO ICES -- SUMMARY

The Chapter 6 analysis demonstrates that the traditional public utility regulatory system presents numerous impediments to the implementation of ICES. These impediments do not appear in the form of a list of individual statutory or rule provisions which can be easily modified to accommodate ICES. Rather, the impediments take the form of the existing regulatory system itself -- a system which is based largely on a set of assumptions and practices foreign to the ICES concept.

Because the existing regulatory system is, in effect, the major impediment to the implementation of ICES, there are only two available alternatives for dealing with this impediment. Advocates of ICES can attempt to change the system, or they can work within the system in order to demonstrate the value of the ICES concept. Because many of the regulatory provisions which appear to be impediments to the implementation of ICES are integral parts of the existing regulatory system, however, any effort to change the system sufficiently to encourage the widespread implementation of ICES will require changes so fundamental that traditional forces operating within the system would have little trouble blocking such changes. Thus, a widespread effort by the advocates of ICES to change the system may result in a substantial expenditure of resources while bringing about very little change.

There is no single configuration or form of ICES. While differences can result from employing different technologies to produce different energy streams, the most useful classifications for purposes of analyzing potential institutional impediments to the implementation of ICES are those based on type of owner/developer and the nature of the customer group served. The classification scheme used in the following analyses includes ICES-Utility -- an ICES owned and operated by a conventional electric utility, ICES-Complex -- an ICES designed to serve existing institutional complexes such as government, commercial, industrial, residential or medical centers, ICES-Heat Plant -- an ICES providing thermal service for its own use or the use of a limited class of customers and selling all electrical output to a conventional utility, ICES-Co-Op -- an ICES owned by its customers and serving only these member/customers and ICES-Entrepreneur -- an ICES owned and operated by any entity intending to sell or provide utility service at retail to all users within a particular service area. Obviously, additional types, of ICES can be developed by combining these various modes of ownership with the various available customer classes.

ICES may be established gradually in forms that will not encounter, or not be significantly affected by, many of the impediments discussed above. When the various types of ICES are compared against the existing regulatory framework, it is apparent that there is a wide range in the degree of compatibility

between that framework and the various ICES types. The degree to which the implementation of ICES will be impeded by the existing regulatory system varies greatly depending on the form of ownership of the ICES, the number and type of customers which it intends to serve and the manner in which it will conduct its utility operations. Therefore, if advocates of ICES seek implementation along the paths of least resistance, this gradual implementation will provide ICES technology with an opportunity to establish its viability and adapt to the existing regulatory system while permitting the existing system to become familiar with and adapt to the peculiar problems and benefits of ICES. The following may be the most appropriate sequence of implementation of ICES.

I. ICES-Utility

ICES-Utility would include any ICES owned by an existing electric utility and operated as a part of its existing utility business. The utility could either operate its own cogeneration equipment or operate equipment owned by another entity on behalf of the owner. The utility would carry on its electrical operations in the same manner as it had before becoming involved with the ICES, but the particular arrangements for the sale of thermal energy could vary. Thermal energy might be distributed by the ICES-Utility to individual customers or it could be sold in bulk to a single customer for use by that customer or for further distribution by it.

ICES-Utility, because it would be operated by an existing utility, would be least affected by the regulatory impediments discussed in Chapter 6. As an existing utility, the ICES operator would already be subject to PUC regulatory jurisdiction and would have the experience necessary to function within that system with a minimum of inconvenience. In addition, the ICES-Utility might be able to install and maintain its ICES equipment pursuant to existing franchises, certificates or other approvals or obtain minor modifications in these prior approvals so as to permit the ICES operations.

II. ICES-Complex, ICES-Heat Plant

A second approach would be to structure ICES so as to take advantage of traditional exemptions built into the existing regulatory scheme in most states. In all states, a utility must be providing service "to or for the public" before it will be subject to PUC regulatory jurisdiction. In about half of the states, a utility will be subject to PUC jurisdiction only if it is deemed to be making "sales" of energy service. If the ICES is structured so as to either not be deemed to be providing service "to or for the public" or not to be making "sales" of energy services, that ICES would not be subject to PUC regulatory jurisdiction. ICES-Complex and ICES-Heat Plant would be structured so that energy services would be provided only to a limited and clearly defined class of customers. In addition, in many cases, such ICES may be able to provide energy service

as a part of an over-all rental package rather than on an individual metered basis. Such ICES could, in many cases, avoid classification as public utilities. Examples of such ICES would be an ICES established to serve a residential, industrial, commercial, governmental or university complex.

A great deal of uncertainty exists with respect to what types of service can be provided and to how many customers before a utility will be deemed to be subject to PUC jurisdiction. These uncertainties, however, could be remedied by means of fairly simple legislative or administrative action.

By operating so as to avoid PUC regulatory jurisdiction, these ICES will also give up the protections afforded by the regulatory system. Thus, such ICES may be able to operate in competition with conventional utilities without having to obtain PUC approval, but they also must be capable of waging a competitive battle with the existing utilities in the area to be served because they would not enjoy the luxury of the traditional monopoly status of a public utility. Similarly, such ICES would not be subject to PUC rate regulation but would also possibly not receive adequate regulatory protection in their attempts to negotiate contracts to purchase back-up power from or sell surplus power to conventional utilities.

III. ICES-Co-Op

ICES-Co-Op, unlike the ICES discussed above, could lend itself to broad implementation of ICES. By operating as a

cooperative -- a utility which is owned by its customers and provides service only to these owner/customers -- the ICES-Co-Op could avoid many of the more troublesome aspects of the traditional regulatory system while still enjoying many of its benefits. For example, utility cooperatives are exempted from PUC rate regulation and regulation of financial affairs in many states. On the other hand, utility cooperatives often are subject to service area restrictions and, therefore, are afforded the protections of the various methods of territorial allocations utilized by PUCs.

This traditional utility concept could be utilized by, and modified to better serve, ICES projects intended to serve large numbers of customers. One area of possible modification would be to permit qualifying ICES-Co-Ops to commence operations in service areas of conventional utilities under certain circumstances. Qualifying ICES-Co-Ops could be allowed to serve only large concentrations of new customers or they could be allowed to serve existing concentrations of customers. The prejudicial effect of such an extension of the cooperative concept could be minimized by requiring ICES-Co-Ops to purchase those facilities of the conventional utility within the ICES service area which are necessary for serving the ICES customers and which would be rendered unnecessary to the utility.

IV. Exempt-ICES

By utilizing the ICES types discussed above, advocates of ICES can implement ICES in forms which will be least affected by regulatory impediments in order to establish showcase ICES designed to demonstrate the viability and special benefits of the ICES concept. After these showcase ICES have existed in peaceful coexistence with conventional utilities for a time, conventional utilities, utility regulators and legislators may be more amenable to the type of system modifications necessary to encourage widespread implementation of ICES in many forms. At this point, the advocates of an ICES might effectively petition PUCs and state legislatures to define certain categories of ICES which will be exempt from certain troublesome aspects of the traditional regulatory system while enjoying some of its benefits.

In order to qualify as an Exempt-ICES, the ICES must, of course, be required to establish that it would be a reliable, responsible supplier of energy. Once utility regulators are convinced that the ICES has the financial and technological ability to adequately serve its proposed customers, the ICES could be exempted from many traditional areas of regulation without jeopardizing the best interest of the customers.

The Exempt-ICES should be permitted to commence operations to appropriate groups of customers in the service areas of conventional utilities. However, like the ICES-Co-Op, it should be required to purchase any equipment owned by the conventional utility which is rendered useless as a result of

the ICES being permitted to serve customers within the conventional utility's service area. Once it has established its service area, the Exempt-ICES should receive the type of territorial protection traditionally afforded public utilities.

The Exempt-ICES could also be freed from traditional PUC rate regulation. Rather than establishing traditional cost-based rates, the Exempt-ICES could be permitted to market its energy package at any rate which does not exceed the rates for comparable service from conventional utilities. If the Exempt-ICES believed that it was, for some reason, entitled to higher rates, it should be compelled to submit to traditional rate-making procedures. This should assure that, if the ICES concept is in fact economically viable, investors will be able to achieve sufficient returns on their investment while ICES customers are guaranteed reliable energy service at reasonable rates.