

Regulator's Involvement in the Concession-granting Mechanisms

C. Robert Wallis
Director, Administrative Law Division
Chief Administrative Law Judge

Concessions in Utility Regulation

- **Definition:** Concession is approval (conditioned on performance) to enter a business for which authority is exclusive or entry is restricted.
 - These restrictions are common in regulated industries, including electric companies, in many jurisdictions.
- Regulator involvement in concession-granting mechanisms is essential, to ensure that the purposes of the concession are achieved.

Washington Concessions

- Washington requires concessions for
 - Natural gas distribution systems,
 - Large energy facilities, and
 - Some transportation businesses, but
 - Not for electricity providers.
- Transportation businesses include:
 - ferry boats, garbage collection,
 - bus service, and household goods movers.

Entry Tests for Concessions

- PC&N – Required by the public convenience and necessity
 - Test for natural gas distribution systems and transportation businesses
 - A demonstrated public need
 - Persons or businesses can't get the service when and where they reasonably need it
- Balancing of Interests
 - Test for large energy facilities, weighing need against environmental effects

Concession Review

- The law may require a hearing
 - In all cases,
 - When contested, or
 - When needed for information

- Extent of review depends on significance of authority
 - Application may be checked for accuracy
 - Time for review may vary with complexity and sensitivity
 - Energy facility may require two or more years
 - Transportation authority may clear in 45 days

Conditions on Authority to Operate

- Typical conditions include restrictions on
 - Sale or assignment
 - Overlapping authority
 - Other conditions when needed

Violations; Revocation

- Remedies for Violations
 - Penalty assessment
 - Order improved service
 - Prosecution for a misdemeanor (minor crime)
- Revocation, suspension, amendment
 - Hearing required; Commission and judicial review
 - Grounds: willfully violated or refused to observe any commission orders or rules
 - Very serious violations are required

Regulation through Contractual Arrangements

- Major Washington energy facilities are regulated by contract.
 - Economic regulation (UTC):
 - PC&N test is not used
 - A “Prudence” test applies for recovery of costs in rates
 - Was the decision to invest in the facility prudent at the time it was made?
 - If not, the expense may not be recoverable in rates
 - Environmental regulation (EFSEC)
 - The sponsor of major energy facilities must enter a site certification agreement with the State of Washington

Regulation by Contract

- EFSEC, Washington State's Energy Facility Site Evaluation Council, is the regulator
 - EFSEC is comprised of state agencies, including the UTC.
 - EFSEC reviews construction of facilities on specific sites for compliance with environmental requirements.
 - The EFSEC review can take two years or more to complete and cost millions of dollars
 - » State costs of the review are paid by the applicant for the facility
- EFSEC makes a recommendation to the Governor, who signs the SCA for the State

Regulation by Contract

- The Site Certification Agreement (SCA) between the project sponsor and the state, with specific detailed requirements and limitations for use of the site.
 - Major environmental issues are addressed under SEPA (State Environmental Policy Act)
 - The agreement is tailored to the project and to the site.
 - The agreement is detailed in terms of
 - » Construction requirements
 - » Operation requirements
 - » Site restoration after usable life
 - » Funding of operations, siting requirements, and restoration

Economic v. Environmental Regulation

- EFSEC considers need in balancing environmental risk
 - Does not decide whether a particular utility's investment in the project is prudent
 - An SCA does not guarantee a profit or regulate rates for the electricity that is produced
- Example
 - EFSEC finds that energy is needed and an electric company may build a project on a certain site. Construction is very expensive. The company has enough energy at lower cost.
 - Even though EFSEC allowed the project, and found the power needed, the Commission could find that investment in this project by this company was imprudent.

Contract Enforceability

- Each of the contract terms is enforceable by the state.
- Monitoring, inspection, and review are important activities to ensure that contract terms are obeyed
- Penalties, closure and loss of the license to operate may result from violations

Operational Framework

- Operations under a contract can differ from a permit
 - The contract is unique
 - Special attention is needed to ensure knowledge of terms by operators and regulators
 - Enforcement staff must take care to remain independent
 - Regulators must be strict when critical issues are at stake
 - If the operator pays the regulator's expenses, care must be taken to ensure that expenses are detailed and supported as reasonable