Renegotiating A Municipal Franchise During Electricity Restructuring and Deregulation

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Introduction

Local government officials often overlook the power of the city's franchising authority to improve local electric rates and service. But today in light of the restructuring and deregulation of the electric power industry, it is vitally important for municipalities to explore ways to maximize the leverage that comes from the city's franchising authority.[1] Communities with franchises that expire in the next few years have a once-in-a-generation opportunity to re-examine their options for providing electric services to citizens.

The reasons for using the city's fundamental local powers are clear. In the new world of electricity restructuring large commercial and industrial customers are using their expertise and buying power to take advantage of opportunities in the marketplace. In contrast, residential consumers and small businesses that are not bound together in some cooperative purchasing arrangement are being shut out of many of the benefits of restructuring. It is generally agreed that these consumers will have to aggregate in order to gain benefits. As a result city officials are recognizing their obligation to find ways to provide reasonably priced electricity for residential and small business consumers because it is essential to the quality of life and the economic health of the community.

Today local officials recognize that they have a fiduciary responsibility to their citizens and taxpayers to explore the city's rights, limitations and obligations under the existing franchise. Municipal officials are rediscovering their franchise documents and the bargaining power their terms do and should afford. Cities have a wide range of options beginning with simply using the leverage of the franchise to obtain concessions from the investor-owned utility in a new franchise agreement. At the other end of their options, cities are considering self-franchising --- that is forming a municipal electric utility, often called a "public power" utility.

Franchise Privileges and Renewal Expectations

A franchise is a privilege granted by a local governing body to a specific investor-owned utility (e.g., electric, natural gas, telecommunications, etc.) that that allows the utility to have facilities on public property (e.g., poles and wires in alley easements, etc.). The electric franchise contract allows the investor-owned franchisee to operate exclusively within the boundaries of the local government and outlines conditions of service,

[1] In this article the words "municipality," "town," "city" and "community" will be used interchangeably to refer to local jurisdictions with franchising authority.

construction standards, and terms of compensation (a franchise fee) for the use of public right-of-way.

The tendency of many cities to not take their franchises seriously is in sharp contrast to how franchise agreements are viewed in the private sector. Many for-profit companies, like fast food outlets, take the attitude that a franchise is a valuable privilege. Corporations use franchises to obtain two things from franchisees: a significant share of the profits and control over their activities. However, in a typical electric franchise arrangement neither the local government nor its citizens derive much financial benefit from their franchise. Typically the franchise does not contain any significant provisions regulating the investor-owned utility.

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However, the electric franchise grants the investor-owned utility some very important privileges. In addition to granting the right to use public streets and roadways for private profit, the franchise also:

- May facilitate a monopoly market of customers;
- Aggregates customers in close enough proximity to one another so as to be easily and profitably served; and
- Enables the investor-owned utility to earn additional revenue from the leasing of utility poles and underground conduits to telecommunications companies.

Many years ago investor-owned utilities began to add the annual franchise fee they were required to pay the city to the rates they charged their customers in the community. Instead of treating the franchise fee as a legitimate expense, a cost of doing business in the community, the investor-owned utility simply incorporated its franchise fee into its rates and passed the costs along to ratepayers. Consumers ended up paying the investor-owned utility's franchise fee instead of sharing in its profits. This practice of including the franchise fee in rates continues to this day in most communities.

The Right to Purchase as Leverage

Many municipal electric franchises contain a provision that is key to the city's current and future relationships with the utility franchisee. The contracts state that the city has the authority to offer itself as an alternative to the investor-owned utility. For example, the provision may specify that, upon appropriate written notice, the municipality may take over the investor-owned utility's operations within the city's borders. The city's power to seek an alternative to the current franchise holder or to own and operate a municipal utility puts "teeth" into the local government's franchising authority.

In their paper on franchises, attorneys Clint Vince and Cathy Fogel explain, "...an expiring franchise is analogous to an expiring contract. A utility should have no more expectation of obtaining renewal of a franchise than of obtaining renewal of a wholesale contract. This is particularly true where a municipality (or a wholesale customer) has been publicly searching for alternative power supply."

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The "right to purchase" is a critically important tool when local citizens are not satisfied with the rates, reliability and service provided by the investor-owned utility. Author and energy policy strategist Scott Ridley writes, " The municipal system option has long been regarded as a cornerstone of consumer leverage because it is commonly included in franchise contracts and places competitive pressure on the private utility to perform... It is important that this authority not be diminished or swept aside by blind pressures to 'clear market barriers.' Otherwise, consumers could become literally 'disenfranchised,' reduced to responding to marketers without the full ability to determine the competitive terms and standards under which they would be served."

A local government's ability to form its own utility has long been recognized by both the public and private sectors as a "yardstick" by which to measure rates and service provided by investor-owned utilities. It was given specific expression in Franklin D. Roosevelt's famous "birch rod in the cupboard" speech in 1932 in which he stated, "[T]he very fact that a community can, by vote of the electorate, create a yardstick of its own, will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility a birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where more scolding does any good."

Because of the city's right to self-franchise (own and operate a municipal electric utility), the incumbent investor-owned utility should not be allowed to rest on its laurels. Instead, the possibility that the investor-owned utility's franchise may not be renewed is a "club in the closet" for local officials to leverage on behalf of the community.

THE BIRCH ROD IN THE CUPBOARD
Franklin D. Roosevelt in a 1932 speech

"I therefore lay down the following principle: that where a community, a city, or county, or district is not satisfied with the service rendered or the rates charged by the private utility, it has the undeniable right as one of its functions of government…to set up…its own governmentally owned and operated service…the very fact that a community can, by vote of the electorate, create a yardstick of its own will, in most cases, guarantee good service and low rates to its population. I might call the right of the people to own and operate their own utility a birch rod in the cupboard, to be taken out and used only when the child gets beyond the point where more scolding does any good."

A city may gain concessions in rates or service just by announcing its intent to study the option of forming a municipal electric utility. If a city invites competitors to bid on the franchise (or portions of it such as power supply), the current franchisee might offer service improvements in order to retain its

lucrative franchise and service area. Also, the city may be in a strong position to negotiate more favorable terms in areas such as rate stabilization, service reliability upgrades, or the undergrounding of power line extensions in a community revitalization district. The city might challenge the franchisee's reduction in service, such as the closing of local, walk-in service centers.

Legal Implications of an Expiring Franchise

The city's ability to take more control over electric rates and service is determined largely by the type of electric franchise and the expiration date. Most states require municipal franchise contracts to designate the following: a specific date when the contract expires; the status of the contract should its expiration date lapse and be replaced by a new contract; and the manner in which the negotiation of an impasse is to be resolved (such as through arbitration).

Electric franchise agreement periods of 30, 40 or even 50 years have not been uncommon in the past. In some states franchises must be indeterminate, which means they are in effect until terminated by the community. With indeterminate franchises, the tenure of the utility company is to be conditioned on its performance. This is supposed to guarantee that the citizens, not the company, decide whether the utility is being operated in the public interest and whether its contract should be continued. In practice, this intent has been honored more in the breach, with many franchises being automatically renewed by the city council with little or no public airing of the electric service issues.

When a franchise expires, the franchisee may no longer have a legal basis to use the streets and other rights-of-way of a municipality, according to attorney Cathy Fogel. Therefore, a municipality may be able to oust an existing power supplier. While most jurisdictions adhere to the principle that the city has the ability to oust the franchisee, there may be a conflict between an expired franchise and an existing certificate of convenience and necessity, granted by a state public service commission and imposing an obligation to serve.

Another legal implication of an expiring franchise is that there is no longer a contractual relationship between the municipality and the franchisee. But according to Fogel, as long as electric service continues from the former franchisee, state courts seem to be in agreement that the municipality still has the right to charge a franchise fee based on reasonable value of rights bestowed to the franchisee. The former franchisee is obligated to pay such a fee to the extent it continues to enjoy franchise benefits.

Most franchisees are vertically integrated investor-owned utilities that own generation (power plants), transmission lines and local distribution systems and provide all three components of electric service to the community. However, if allowed by state and local law, the city may be able to exercise contractual authority to separate provision of these services,

. . . the city may be able to exercise contractual authority to separate provision of these services, giving its citizens a choice of wholesale power suppliers and contracting with the former franchisee for distribution services only.

giving its citizens a choice of wholesale power suppliers and contracting with the former franchisee for distribution services only. Similarly, the city might aggregate its customers and arrange to have a neighboring municipal utility or rural electric cooperative provide power supply and other non-distribution functions that were formerly provided by the investor-owned utility.

As described previously, another option is for the city to form a municipal electric system to take over the ownership and operation of the distribution system. The city could pursue this option if it were shown to be feasible after a technical, economic and legal evaluation.

The local government's authority to pursue these options is determined by a combination of federal and state law. Therefore, it behooves local officials to begin researching the various sources of its authority and the franchisee's rights at least one year ahead of the scheduled expiration date. This allows decision makers time to prepare to negotiate for improvements under a new more limited-term franchise arrangement or to pursue other options, such as self-franchising.

Local Government Opportunities Upon Franchise Expiration

As franchise expiration approaches, it is wise to identify alternative ways to achieve the community's goals for electricity service. Potential options for achieving these goals are:

1. Adopting a municipal government energy budget and audit program geared toward making investments in appropriate energy saving improvements identified in the audit.

2. Renegotiating the franchise with the investor-owned franchisee with provisions to improve the price, quality, and reliability of electric service or to achieve other community goals, such as undergrounding of portions of the power distribution system.

3. Contracting for the electric power supply portion of the existing franchisee's responsibilities through a competitive bidding process, while retaining the franchisee for local distribution services only.

4. Aggregating electricity demand among two or more local governments using bilateral or regional cooperative purchasing arrangements and contracting for a new power supply provider, while retaining the existing franchisee for local distribution service.

5. Initiating a "community choice" market aggregation program that consolidates the demand of the municipal government, residential,

institutional, small business, and possibly industrial electricity users, and arranges for power supply.

6. Performing a preliminary or comprehensive feasibility study for creating a municipal electric utility that would be owned and operated by the local government. Other options related to a new municipal utility might include:

    - Creating a new "muni-lite" municipal utility (with little or no distribution system and no generation capacity) that purchases electricity from wholesalers and then resells it to citizens and businesses using the existing franchisee's local distribution system.

    - Purchasing or condemning the current franchisee's distribution facilities and arranging for wholesale power supply from the franchisee or another power supply provider.

    - Constructing a new electric distribution system to replace that of the existing investor-owned franchisee.

    - Building or buying a generating facility to serve the community's electric load with the power to be delivered by the new municipal utility.

    - Contracting with a neighboring utility or an engineering and management company to manage the new municipal utility.

The City's Franchise Renegotiation Goals

A city's goal in electric franchise renewal or in the pursuit of other options is to provide its citizens with high quality, reliable electric service at reasonable, stable rates. Local officials should set parameters for franchise negotiations with the existing franchisee or alternative supplier, allowing enough flexibility to maximize their leverage in negotiations. The city should gather preliminary information before negotiations take place in order to evaluate the risks and benefits of various alternatives for providing electric service.

The city may increase its leverage by considering a franchise extension of one to two years or a new shortened franchise term of just 5-10 years in order to "buy time" for the city to assess other options given the rapid changes occurring in the electricity marketplace today. A shorter franchise period will allow time to gather more in-depth information on the technical and economic feasibility of competitive bidding for an alternative franchisee or energy service supplier, or the feasibility of the municipalization option.

If the city chooses to study municipalization, it may follow the Federal Energy Regulatory Commission's procedure for obtaining a "stranded cost" estimate from the investor-owned utility that would be replaced. "Stranded cost" is a sort of exit fee that the investor-owned utility may claim. It is supposed to be a payment for certain generating plants and transmission facilities that the utility maintains were built to serve the city's electricity requirements (even if those facilities are located far from town and not included in the assets to be taken over). Stranded cost claims are generally based on the investor-owned utility's expectation that it will continue service for some period in the future.

The city should establish that the current franchisee would not necessarily continue to hold the franchise at the expiration of its term.

Such claims of stranded costs make it even more important to put a bound on the franchisee's expectation to continue service into the future. The city should establish that the current franchisee would not necessarily continue to hold the franchise at the expiration of its term. This is important because, if the city decides to end the franchise, the franchisee may attempt to use the legal argument that it had an "expectation of continuation" for a longer period. This argument is used frequently by franchisees to undermine the city's pursuit of alternative suppliers or self-franchising. Because the Federal Energy Regulatory Commission looks at "expectation to continue" at the time the costs were incurred, such notification by the city may not help with those claims. However, notice of intent to end the franchise may be a factor in disposing of claims for costs incurred after the notification is made.

When the city has completed its studies, it may conclude that its citizens are best served by continuing with the present franchise holder. If so, much of the work and analysis done examining its options can form the basis for improving its existing franchise arrangements. Armed with a better understanding of alternatives and its economic and legal leverage, the municipality is in a strong position to reassert its control over the community's electricity costs and service.

Again, to exercise effectively its bargaining power in difficult franchise negotiations, the city must be prepared to take control of the ownership and operation of the electric system. Local officials must be committed politically and financially to following through on one or more of the options. Without this commitment, the formation of a municipal electric utility will be seen as an idle threat and will be discounted by the existing franchisee in negotiations.

Key Franchise Negotiation Objectives for Local Government

In addition to engaging in the study of alternatives, the city should pursue a specific set of objectives during its franchise negotiations in accordance with state and local laws. For example, it might decide to:

- Increase the municipality's revenue from the franchise fee;
- Achieve modification in the rate structure;

- Obtain more favorable rates under the existing rate structure;
- Increase technical assistance from the investor-owned utility in order to obtain lower electricity bills and improved service through more balanced load management, consolidated metering, net metering, implementation of energy efficiency and demand-side management recommendations, renewable energy or other programs;
- Improve electricity reliability;
- Improve customer service (e.g., simplified billing, prompt outage restoration, special programs for low-income customers);
- Gain commitment for more active community involvement and charitable contributions;
- Establish a program to pay for the undergrounding of portions of the local distribution lines; and
- Agree on method for allocating joint costs (e.g., undergrounding).

Key Franchise Provisions Identified

In addition to standard contractual provisions, there are other key provisions within state and local law that may be helpful for the city to have in future dealings with the franchisee. These are related to the franchise fee, franchise expiration and termination, right to purchase, asset valuation, and geographical limits of the franchise, electric rates and service, and choice of wholesale power supplier. Some key provisions are listed below.

Franchise fee provisions to:

- Permit modifications in franchise fee during the term of the franchise;
- Use a formula that allows franchise fee to be increased during franchise period;
- Distinguish between franchise award and franchise fee for the use of city property;
- Base franchise fee on gross receipts rather than power usage;
- Relate franchise fee to reasonable and appropriate municipal maintenance and regulatory costs; or
- Require franchisee to continue to pay fee even if franchise agreement has expired and the city has expressed its intent not to renew, as long as the investor-owned utility continues to operate on the city's property, provides electric service to the community, collects the franchise fees from ratepayers, and reports those fees as an allowable expense to state regulators.

Franchise expiration and termination provisions to:

- Allow the city to re-open or terminate the franchise contract during the franchise period;
- Allow for renewal of the franchise for a maximum period of one to ten years;
- Allow contract extension for up to 90 days to revise or finalize new contract;

- Eliminate the right of the franchisee to expect an automatic contract renewal or to assume that the contract legitimizes the franchisee as a "going concern;"
- Eliminate an "in perpetuity" franchise term or contract language that implies the franchise is in perpetuity; and
- Avoid granting an exclusive franchise unless required to do so under state law.

Right to purchase provisions to:

- Give city the absolute right to buy the local electric distribution system and generating facilities that serve the community during the franchise period or upon its expiration;
- Stipulate that the city has the right, but not the obligation, to form a municipal electric utility at the end of the franchise term (and maintains this provision even in the case of a shorter franchise period, such as 5 or 10 years);
- Stipulate that areas subsequently annexed are subject to the same "right of purchase" terms as those areas within the municipality's boundaries;
- Enable the city to conduct feasibility studies for municipalization while the franchise agreement is in effect or being renegotiated; and
- Define the types of severance costs associated with discontinuation of the franchise agreement and the purchase of the franchisee's assets.

Asset valuation and acquisition provisions to:

- Contain precise legal language as to what is meant by "fair market value;"
- Describe in detail the basis for the valuation of the franchisee's assets, including such terms as "stranded costs," "damage by taking," "severance damages" to the extent that these are recognized as legitimate costs by the municipality and include a description of the process for resolving disputes over these items; and
- Establish a specific process and timetable for valuing assets to be acquired by the city, including the process for condemnation, appeal rights, and dispute resolution (e.g. arbitration, jury).

Geographical limits of the franchise provisions to:

- Stipulate whether the franchisee has the exclusive right to serve customers solely within the municipality's boundaries and whether competition is permitted for customers in newly annexed areas;
- Stipulate whether the franchisee has the exclusive right to extend service beyond the city's corporate boundaries without the city's approval; and
- Describe the manner in which service will be extended to newly annexed areas or areas outside the municipal boundaries.

Electric rates and service provisions to:

- Enable the city to aggregate its electric power purchases with other governmental and private sector customers to the extent allowed under law;
- Require the franchisee to offer a program to pay residential, small business, and large commercial and industrial customers to use less electricity during peak demand periods (peak load reduction incentives);
- Create a minimum renewable portfolio standard;
- Create a minimum system benefit fund for investments in energy efficiency, renewable energy, and low-income energy assistance;
- Incorporate detail standards of electric service performance;
- Include penalties for consistent "service degradation" such as slow response to outages, intermittent or frequent power outages;
- Require realistic emergency plans with utility employees trained in their implementation;
- Require enhanced street light options, such as replacement program of light emitting diode lighting; and
- Require a community enhancement fund equal to a fixed percentage of the prior year's gross revenue that would be available for under grounding of electric lines and other community purposes.

Choice of electricity supplier provisions to:

- Entitle the city to bid competitively its electric power supply business, if authorized by state law to do so.

The Advantages and Disadvantages of Renewing a Franchise Agreement

Renewing the franchise agreement with the investor-owned utility that currently serves the community requires the least amount of money in consulting and legal fees, causes the least political upheaval, and results in the least amount of change for the community. The new franchise may contain certain benefits such as an increase in the franchise fee if it has been undervalued. Also, it can give the community time to explore its alternatives under state law and to study the economic feasibility of various options. A new franchise gives local officials time to monitor changes in the electricity industry that result from restructuring and deregulation.

However, there are also disadvantages from entering into another traditional franchise agreement with the investor-owned utility. For the most part, it leaves the franchisee in control of decisions regarding electric rates and service in the community. Electric service continues without direct accountability to the citizens and an open decision making process that involves citizens and customers. If there are problems with electricity prices, power quality or service reliability, these many not improve during the contract period, except perhaps if the city has structured the new agreement to limit the franchisee's expectation to continue service indefinitely. Signing the new franchise may limit the city's flexibility in taking full advantage of the opportunities in the increasingly competitive electricity marketplace.

Benefits in Considering the Formation of a Publicly Owned Electric Utility

As mentioned previously, the evaluation of forming a municipal electric utility as an alternative to another franchise may give the city considerable leverage in franchise negotiations. The investor-owned utility may make concessions in the new franchise agreement rather than to lose the franchise and a profitable market. Also, a municipalization study will provide valuable information on an alternative model by focusing on such issues as:

- Cost competitiveness of the new public entity versus the projected rates from the current franchise holder.
- Reliability of service to customers
- Impact on local government agencies if a new entity replaces the investor-owned utility. (This includes potential loss of property taxes and franchise fees, which may be replaced by payments-in-lieu-of-taxes made by the public entity).
- Form of governance for the new public power entity.

The evaluation should consider the benefits of forming a publicly owned electric utility, which may include:

- Improvement in the quality and reliability of electric service;
- Greater responsiveness to customer needs and concerns;
- Local control over electric service policies and programs;
- Quicker response time from crews located in the community;
- Greater portion of electric revenues stays in the community;
- Lower electricity prices for residents, businesses and the municipality;
- Greater emphasis on community goals, such as energy efficiency, renewable resources, assistance to low income customers; and aesthetic design of facilities;
- Increase in financial contributions to the city through tax equivalent payments;
- Greater stability and accountability in electric operations; and
- More citizen involvement as every consumer-owner has a say in policies through local governance.

The city 's investigation may demonstrate that forming a municipal electric utility is in the best interest of the community. Cities that pursue this option typically form the new utility by acquiring the investor-owned utility's distribution (and sometimes generation) facilities either through a negotiated purchase or through condemnation. However, a few cities have formed a public power utility by constructing new distribution or generation facilities.

Typically the first step in forming a municipal utility is a feasibility study to determine the costs and benefits of the public ownership. A municipalization initiative might also include funding a public awareness campaign, responding to legal challenges, and if required, conducting a citizen referendum. The formation of a municipal utility requires considerable time and money, especially if the investor-owned utility fights the acquisition, but many communities have found the investment well worth the effort.

State and Local Laws Determine the Municipalization Process

According to utility attorney Cathy Fogel, many communities, such as those in Florida, already have franchises that include beneficial provisions, such as 30-year or lesser terms and, often, a right to purchase the distribution system of the current supplier with value to be set by arbitration. These Florida electric franchises demonstrate the benefits of setting forth the right to form a municipal utility and procedures for doing so.

In states where there are no restrictions on franchise terms many municipalities have entered into perpetual franchises with the local electricity supplier. Perpetual franchises normally do not provide an opportunity for periodic renegotiation. To the extent that franchises are exclusive, however, they may not be exclusive against formation of a municipal electric utility, but may be exclusive against a non-municipal electric supplier.

Historically a majority vote of the municipal council was sufficient to terminate a franchise in most communities. As investor-owned utilities grew in economic and political strength, they moved to prevent such easy reclamation of the services they were providing. Some utility-driven franchises place greater burdens on the community that tries to form a municipal utility. For example, they see that rules are instituted to:

- Require large numbers of signatures on a petition to consider investor-owned utility termination;
- Give veto power to the mayor or city council over such citizen-led efforts to reclaim this function for their municipality;
- Require extraordinary majorities of voters to ratify the decision; or
- Combine these and other hurdles.

By far the most serious threat to cities interested in pursuing the public power alternative comes from the investor-owned utilities' efforts to change state laws in order to fix service territories or otherwise make it more difficult to form a municipal electric system. For instance, in 1980 the Indiana legislature fixed the territorial boundaries of all electric utilities providing retail service and eliminated the authority of municipalities to take over investor-owned utility operations. Such laws tie the hands of a community that wants local ownership, reversing the historical relationship between the community and the utility that it serves. In these circumstances, the investor-owned utility is no longer constrained either by competition or even indirectly by the power of community's franchise.

With the emergence of competition in the retail power arena under state deregulation, more municipalities are seriously considering municipal ownership as a less costly alternative than the traditional franchise arrangement. Public power utilities are a major pro-competitive force in the marketplace today, serving as a benchmark of price and service against which the investor-owned utilities can be compared. This helps hold down electric rates for all consumers and sets standards for transparency in pricing and decision-making.

Conclusion

During the franchise renewal period local officials have a "once-in-a-generation" opportunity to learn about alternatives to the current franchise arrangement. A review of electric service options, which is crucial during this time of electricity restructuring, should begin well in advance of the franchise expiration date, preferably at least one year before expiration. A thorough study of the options will put the community in the best possible position to begin negotiations on a new franchise or to pursue alternatives. Local officials will earn the trust of the community as they become well informed about the most promising options for providing citizens with reliable, customer-oriented electric service at a reasonable price.

Sources

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For Source Papers and Other Resources Contact:

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