



1975

## Energy Facility Siting in North Dakota

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### Recommended Citation

Greenwood, Richard (1975) "Energy Facility Siting in North Dakota," *North Dakota Law Review*. Vol. 52: No. 4, Article 4.

Available at: <https://commons.und.edu/ndlr/vol52/iss4/4>

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## NOTE

# ENERGY FACILITY SITING IN NORTH DAKOTA

### I. INTRODUCTION

North Dakota is estimated to have over 350 trillion tons of low sulfur lignite underlying the western half of the state.<sup>1</sup> Increasing national demand for energy<sup>2</sup> will place increasing pressure on the state to develop this resource. Conversion of the lignite to immediately usable forms of energy will have immense sociological, environmental, and economic impacts.<sup>3</sup> Increasing concern over the effects of massive energy development in the state led to a Legislative Council<sup>4</sup> study of the problems associated with power plant siting<sup>5</sup> and transmission line routing.<sup>6</sup> The result of that study, the North Dakota Energy Conversion and Transmission Facility Siting Act,<sup>7</sup> [hereinafter referred to as Siting Act] was passed as an emergency measure and became law on April 9, 1975.

The location of energy facilities<sup>8</sup> in North Dakota has tradi-

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1. *Hearings on Environmental Effects of Producing Electric Power Before the Joint Commission on Atomic Energy*, 91st Cong., 1st Sess., pt. 1, at 444-445 (1969).

2. In 1971 the United States used 69 x 10<sup>15</sup> BTU's of energy. The consumption in 1980 is estimated to be 96 x 10<sup>15</sup> BTU's and in 2000 191.9 x 10<sup>15</sup> BTU's. COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT figure 2 at 3 (1973). This represents increases of 36% and nearly 180% respectively, over the 1971 level of consumption.

3. See COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT 9-11 (1973); Luken, *Economic and Social Impacts of Coal Development in the 1970's for Mercer County, North Dakota* (prepared for the Old West Regional Commission, 1974) [hereinafter cited as Luken]; Miller, *Environmental Impacts of Alternative Conversion Processes for Western Coal Development* (prepared for the Old West Regional Commission, 1974) [hereinafter cited as Miller]; Vol. II, Tab 3 Joint Application of Michigan Wisconsin Pipe Line Co. and ANG Coal Gasification Co. before the Federal Power Comm., Docket No. CP75-278, pts. 5 & 7, at 17 & 21 (1975) (Environmental Impact Report) [hereinafter cited as Application of Michigan Wisconsin].

4. The Legislative Council is an arm of the Legislative Assembly which considers problems of statewide importance that arise between sessions of the legislature. The Council is made up of members of the legislature and a permanent staff. At the discretion of the legislature it conducts studies, drafts legislation and makes recommendations for legislative action.

5. N.D.S. Con. Res. 4005, [1973] Laws of N.D. 1499. The resolution called for a study of land use planning. Power plant siting was one of a number of aspects to be considered.

6. N.D.S. Con. Res. 4006, [1976] Laws of N.D. 1501. The resolution cited the proliferation of transmission lines and their effect on farming. The Legislative Council ultimately combined the two studies because of their close connection and concluded that regulation was needed. REPORT OF THE NORTH DAKOTA LEGISLATIVE COUNCIL, 44TH LEGISLATIVE ASSEMBLY 165 (1975).

7. N.D. CENT. CODE §§ 49-22-01 to 23 (Supp. 1975).

8. Throughout this paper reference will be made to energy facilities. The term is taken from the Siting Act and includes electric generating plants, coal gasification plants, liquid hydrocarbon refining (oil) or manufacturing (coal liquifaction) plants, uranium enrichment plants and the devices used to transport the products of these plants (i.e. power lines and pipelines). See N.D. CENT. CODE § 49-22-03(5), (11) (Supp. 1975).

tionally been decided by industry with little governmental control.<sup>9</sup> The Siting Act is a comprehensive scheme regulating the location and operation of energy facilities within the state. To properly understand the operation of this law it is necessary to be familiar with the nature of the problems with which it deals and the legal difficulties involved in local regulation of a regional industry.<sup>10</sup> This note will first survey the environmental and social-economic problems involved with energy facility siting and will then outline the Siting Act and examine its operation.<sup>11</sup>

9. Prior to 1975, the Public Service Commission had authority only to regulate the location of transmission lines to prevent interference with a communication signal line. N.D. CENT. CODE § 49-20-02 (1960). The State Department of Health also exercised some control over plant siting through pollution control regulations. N.D. CENT. CODE Ch. 61-23 and Ch. 23-25 (Supp. 1975).

10. Because energy production is a regional industry, one of the major legal difficulties to be faced is the constitutionality of the Siting Act under the commerce clause of the federal constitution. Since any prediction of constitutional validity is speculative, the text will not discuss this issue. However, brief comment will be made here outlining the probable constitutional attack on the statute.

Under the federal commerce clause two broad avenues of challenge are open. First the argument can be made that federal legislation has preempted the states from acting in a particular area. Second, the argument can be made that the state regulation places an undue burden on interstate commerce. The first is a challenge under the necessary and proper clause, the second under the commerce clause itself.

The preemption question will not arise in the case of lignite fired electric power plants, since the federal government currently has licensing power only over hydroelectric plants. See *Chemehuevi Tribe of Indians v. FPC*, —U.S.—, 95 S. Ct. 1066 (1975). Nor is there direct federal regulation or licensing of the siting of gasification plants or electric power transmission lines other than those emanating from federally licensed nuclear or hydroelectric plants. For a discussion of proposed federal statutes in this area see *Journey, Power Plant Siting—A Road Map of the Problem*, 48 NOTRE DAME LAWYER 273 (1972). However, interstate transportation and sale of natural gas is heavily regulated through the Federal Power Commission. See 15 U.S.C. § 717 (1970) and 18 C.F.R. §§ 2.52-78, parts 152-160, 201-225, 250, and 260 (1975). It could be argued that this extensive regulation has left no room for state regulation of pipelines transporting natural gas for interstate sale. Natural gas companies also have the power of eminent domain under the Natural Gas Act, 15 U.S.C. § 717 f(h) (1970), and it is unclear to what extent local zoning and land use laws may interfere with the exercise of that power. The Supreme Court has not yet spoken on the conflict but has stated that the states are not prevented from regulating interstate gas companies and that in passing the Natural Gas Act, Congress intended to regulate only what had previously been beyond the power of the individual states to regulate because of the commerce clause. *Panhandle Eastern Pipe Line Co. v. Public Service Comm. of Indiana*, 332 U.S. 507 (1947) (upholding state regulation of direct sales to industrial customers by an interstate pipe line carrier). Lower courts considering the conflict between federal eminent domain and local laws are not in agreement on the analysis of the problem. Compare *Rassl v. Trunkline Gas Company*, 240 N.E.2d 49 (Ind. 1968) (a certificate of public convenience and necessity issued by the FPC is the sole authority required for the exercise of eminent domain by an interstate gas company) with *New York State Natural Gas Corp. of Town of Elma*, 182 F. Supp. 17 (W.D.N.Y. 1960) (the court analyzed the problem in terms of an undue burden on interstate commerce).

If federal jurisdiction is not exclusive, either because Congress has not acted or because existing statutes do not preempt state action, the constitutionality of the Siting Act would appear to hinge on whether it is unduly burdensome on interstate commerce. The current test seems to involve three parts: first, does the statute burden interstate commerce; second, are the ends sought by the statute within the scope of legitimate legislative power and the means chosen reasonably adapted to the ends sought; and third, once the legislation is determined to be legitimate, does the local interest to be protected outweigh the effect of the burden on interstate commerce. See *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Rock Island & Pacific R.R.*, 393 U.S. 129 (1968); *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959); *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945); and *South Carolina Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938). No prediction of the outcome is offered should a court be called upon to apply this test to the Siting Act.

11. No attempt will be made to examine the laws of other states or to give a comprehensive study of energy facility siting in general. For general discussion of the area and comments on the regulatory schemes of other states see Best, *Recent State Initiatives on*

## II. SOME PROBLEMS ASSOCIATED WITH ENERGY DEVELOPMENT

To a large extent, the type of facility employed will determine the environmental problems associated with energy development. Since it appears that the greatest problem in North Dakota will be with lignite development, this discussion will concentrate on coal gasification and electric power generation, the two primary processes projected for use in the immediate future.<sup>12</sup> The environmental problems of each process will be treated separately and the social-economic considerations will be discussed together.

### A. COAL GASIFICATION

Coal gasification is the process of converting coal into substitute natural gas by chemical reaction. The process requires power,<sup>13</sup> water,<sup>14</sup> and lignite.<sup>15</sup> The use of each will contribute to environmental problems.

#### 1. Water Pollution

Water pollution which will occur as the wastewater from a plant is returned to the environment through evaporation, seepage, leakage from settling ponds and runoff from spoil piles. The water not consumed in the conversion process<sup>16</sup> will not generally be returned

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*Power Plant Siting: A Report and Comment*, 5 NAT. RES. LAWYER 668 (1972); *Journey, Power Plant Siting—A Road Map of the Problem*, 48 NOTRE DAME LAWYER 273 (1972); Stone, *Power Plant Siting: A Challenge to the Legal Process*, 36 ALBANY L. REV. 1 (1971); Tarlock, Tippy, & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 SO. CAL. L. REV. 502 (1972); Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257 (1972); Comment, *Power Plant and Transmission Line Siting: Improving Arizona's Legislative Approach*, 1973 LAW AND THE SOCIAL ORDER 518 (Ariz. State Univ.); Note, *Power and the Environment: A Statutory Approach to Electric Facility Siting*, 47 WASH. L. REV. 35 (1971).

12. Lebak, *Estimated North Dakota Lignite Coal Production Projections for 1981, Present and Proposed Development Facilities* (February, 1975) (report prepared for North Dakota State Planning Division, on file in the North Dakota Law Review office, University of North Dakota). The report lists six new facilities scheduled for operation between 1977 and 1981. These include four electric plants and two gasification plants. *Id.*

13. The power will probably be furnished by auxiliary coal fired steam generating units. One plant proposed for North Dakota will have four steam boilers each capable of producing 1/3 of the needed steam. These will use approximately 2,872 tons per day of lignite. 1 Application of Michigan Wisconsin, *supra* note 3, exhibit Z-6 at 12, exhibit Z-6 figure 15. A plant proposed by the Western Gasification Company in New Mexico will have coal fired boilers burning 3,760 tons per day of coal. WESTERN GASIFICATION COMPANY, COAL GASIFICATION: A TECHNICAL DESCRIPTION 14 (1974) (promotional literature published by the Western Gasification Company in connection with the proposed Navajo plant in New Mexico [hereinafter cited as WESTERN GASIFICATION COMPANY]).

14. Estimates of water usage range from 3,200 to 13,000 acre feet/year. The lower figure is taken from Miller, *supra* note 3, at 46-51. The Michigan Wisconsin plant in Mercer County will use approximately 8,000 gallons per minute, or nearly 13,000 acre feet/year. 8 Application of Michigan Wisconsin *supra* note 3, at 1-52. However, as much as 17,000 acre feet/year will be drawn. *Id.*, at 7-3. The Western Gasification Company plant will use slightly over 7,600 acre feet/year. WESTERN GASIFICATION, *supra* note 13, at 13.

15. The Michigan Wisconsin plant will consume 33,400 tons of lignite per day. 3 Application of Michigan Wisconsin, *supra* note 3, at 1-20. The Western Gasification plant will use 21,860 tons per day. WESTERN GASIFICATION, *supra* note 13, at 10.

16. Western Gasification estimates 11% or 836 acre feet/year will be consumed in manufacturing hydrogen for the gasification process. WESTERN GASIFICATION, *supra* note 13, at 13. Miller estimates the consumption at 1,500 acre feet/year. Miller, *supra* note 3, at 47.

to the source from which it was drawn but will require some alternate method of disposal.<sup>17</sup> One estimate is that a single gasification plant is capable of producing 1600 acre feet/year of waste water containing 16,900 tons of waste.<sup>18</sup>

## 2. Air Pollution

Gasification plants have several potential sources of air pollution including the plant itself, incinerators used for waste disposal, evaporation ponds, and production of auxiliary power and steam. The Old West Regional Commission study identifies various sulfur compounds as the cause of major concern.<sup>19</sup> The majority of the sulfur in the coal will react during gasification to form hydrogen sulfide which can be treated to remove elemental sulfur; but the process is not 100% effective and in addition some sulfur dioxide will be emitted into the atmosphere after the recovery process.<sup>20</sup>

## 3. Land Disturbance and Solid Waste

The major land disturbance associated with gasification is, of course, the strip mine. The siting of strip mines is beyond the scope of the Siting Act and of this note except that it might be pointed out that any major lignite conversion facility inevitably is accompanied by a strip mine. Disposal of ash or char from the gasification process and the sludge from scrubbers used to remove sulfur dioxide from the atmospheric emissions presents perhaps the greatest solid waste problem.<sup>21</sup> Ash will probably be buried in the mine as reclama-

17. Both the Western Gasification Company and Michigan Wisconsin will use extensive recovery and recycling procedures for water, but some of the water is not amenable to recovery processes. Michigan Wisconsin will dispose of waste water in deep wells. 3 Application of Michigan Wisconsin, *supra* note 3, at 1-57 and 58. Western Gasification anticipates disposing of the water in the coal mine. WESTERN GASIFICATION, *supra* note 13, at 13.

18. This total is drawn from the estimates given by Miller, *supra* note 3, at 68-70. The waste products will consist of 5,000 tons of phenols, 7,000 tons of tars and oils, and 4,900 tons of ammonia. These figures assume a plant with 99% efficiency in removing the waste products.

19. Miller, *supra* note 3, at 84-85.

20. The Lurgi gasification process which will be used in the proposed Michigan Wisconsin plant, converts approximately 1% of the sulfur in the coal to carbyonyl sulfide and carbon disulfide, which cannot presently be treated and will be emitted into the atmosphere in that form or incinerated to form sulfur dioxide before emission. A plant burning 25,000 tons/day of .7% sulfur coal would produce 5.5 tons of these products which, if incinerated, would emit approximately 5.9 tons per day of sulfur dioxide into the atmosphere. *Id.* Western Gasification Company estimates the total atmospheric sulfur emissions will be slightly under 7 tons per day (1.4 tons from the gasifier, 4.7 tons from the coal fired auxiliary boilers, and .86 tons from a superheater used in connection with steam generation). WESTERN GASIFICATION, *supra* note 13, figure 7 at 14.

No tonnage figures were available for the Michigan Wisconsin plant, but the company states that emissions will meet federal and state standards. 3 Application of Michigan Wisconsin, *supra* note 3, at 1-58. The plant is expected to produce 118 tons per day of elemental sulfur. If the removal rate is 95% efficient this represents about 6 tons per day entering the atmosphere in various compounds of sulfur. *Id.*, at 1-67.

21. A plant burning 25,000 tons/day of .7% sulfur coal, removing 95% of the sulfur as a commercial by-product, and utilizing limestone scrubbers on the remaining 5% of sulfur, would produce 23,000 tons of sludge a year. Miller, *supra* note 3, at 103.

tion takes place. Unless adequate precautions are taken, this is a potential source of ground water pollution.<sup>22</sup>

## B. ELECTRIC POWER GENERATION

This paper will discuss lignite fired steam electric plants to the exclusion of other types of electric generation, such as nuclear and hydroelectric.<sup>23</sup> An uncontrolled 1000 megawatt (MW) coal fired steam electric plant and the associated strip mine are capable of affecting annually 34,268 acres of land, dumping 40,486 tons of waste into water, emitting 383,201 tons of waste into the air, and accumulating 3,266,892 tons of solid waste requiring disposal.<sup>24</sup>

### 1. Air Pollution

Sulfur oxides, nitrous oxides, carbon monoxide and particulates are the major types of air pollutants emitted by fossil fuel electric plants. The effects of these pollutants on human, animal, and plant health are not fully understood, but the consensus is that in concentrations, the effects are harmful. Sulfur dioxide can cause irrita-

22. The Michigan Wisconsin plant will produce 2,500 tons of ash daily, which will be buried in the mine. 3 Application of Michigan Wisconsin, *supra* note 3, at 3-125. In addition a small land fill with impervious walls and floor will be used to dispose of the solid chemical waste produced in sulfur recovery. *Id.*, at 3-126.

The Western Gasification Company Navajo plant will bury 550 tons per hour of ash in the mine. WESTERN GASIFICATION, *supra* note 13, at 23.

23. Location and availability of local fuel supply is not as large a consideration in locating atomic power plants. ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, CONSIDERATIONS AFFECTING STEAM POWER PLANT SITE SELECTION at 9 (1968). [Hereinafter cited as OST 1968]. However, the tendency in the past has been to locate nuclear facilities in low population areas as a safety factor in the event of an accident. It is anticipated that in the future, nuclear plants will be located closer to major centers of consumption. *Id.* at 23. It is probable that North Dakota's electric needs will be met with lignite fired plants, given the availability of fuel.

Some of North Dakota's lignite contains radio-active material, and it is possible that uranium enrichment plants could be built in the future. There are no publicly announced plans to do so at the present time, and the particular problems associated with such a facility will not be discussed.

Geothermal generation of power has been mentioned as a source of energy, but probably is not widely usable in the near future, and perhaps not usable at all in North Dakota. See COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT 23-24 (1973).

Hydro electric power is another possibility. The only hydro plant currently in operation in North Dakota is the Garrison plant, operated by the Army Corps of Engineers, with a generating capacity of 400,000 kilowatts. North Dakota Public Service Comm., 1974 Annual Report (unpublished). The primary problems associated with hydro electric facilities concern the disruption of the landscape during construction, the land flooded by the reservoir and the aesthetics of the site selected. While in operation the generating stations do not produce air or water pollution but can have a significant effect on aquatic life. The possibilities of significant hydro electric development in North Dakota, however, appear small.

24. COUNCIL ON ENVIRONMENTAL QUALITY, ENERGY AND THE ENVIRONMENT, table A-2 at 42 (1973). This may not be entirely accurate for North Dakota because of the assumptions underlying the Council's estimates. For example, the land area includes the amount devoted to transporting the coal 300 miles by rail (2,213 acres) from mine to plant. It is unlikely that North Dakota coal would have to be shipped such distances. Similarly, the air pollution estimates are based on a sulfur content of 2.85% ; most North Dakota coal has a sulfur content of 1.5% or less. See note 1 *supra*. The figures do serve to illustrate the magnitude of the pollution problems that accompany large scale electricity production from coal.

tion of the upper respiratory tract and increased respiratory disease.<sup>25</sup> Particulate concentrations in conjunction with sulfur dioxide in the air can lead to chronic bronchitis, emphysema, and lower respiratory illness.<sup>26</sup> High levels of carbon monoxide in the air can affect the ability to exercise, cause difficulty for heart patients, and may affect fetal development.<sup>27</sup> Nitrogen oxides present problems of increased danger for heart patients, kidney disease, chronic bronchitis, and tests on laboratory animals have shown reduced resistance to bacterial infection after continued, intermittent exposure to nitrogen dioxide.<sup>28</sup> One of the most damaging effects of sulfur in the air is the production of "acid rain." Sulfur oxides in the air combine with water to form sulfuric acid. This acid is washed from the atmosphere by rainfall and can have severe effects on the health of plants and animals, and on buildings.<sup>29</sup>

## 2. Water Pollution

The major use of water in coal fired steam electric generation is for cooling. This produces two types of pollution<sup>30</sup>—chemical and thermal.<sup>31</sup> The chemical pollution occurs when the water is treated to prevent the naturally occurring salts in the cooling water from being deposited on the walls of the boiler and cooling apparatus. If cooling towers or silting ponds are used to dispense the waste heat, the water must be treated to prevent algae formation, probably with chlorine. When this treated water eventually returns to surface streams and lakes it may have adverse effects on aquatic life.<sup>32</sup> If cooling ponds and towers are used the waste heat is dissipated into the atmosphere. If they are not used the heat is returned to the water source, which results in raising the temperature of the water. This process can have adverse effects on aquatic life, particularly where the water temperature is already at critically high levels.<sup>33</sup>

25. Miller, *supra*, note 3 at 114.

26. *Id.*, at 115.

27. *Id.*, at 119. SENATE COMMITTEE ON PUBLIC WORKS, 93RD CONG., 1ST SESS., SUMMARY OF PROCEEDINGS, NATIONAL ACADEMY OF SCIENCES CONFERENCE ON HEALTH EFFECTS OF AIR POLLUTION 15-6 (Comm. Print. 1973) [hereinafter cited as SUMMARY OF PROCEEDINGS].

28. SUMMARY OF PROCEEDINGS, *supra* note 27, at 20-24.

29. Miller, *supra* note 3, at 120-24. See also Lillie, AIR POLLUTANTS AFFECTING THE PERFORMANCE OF DOMESTIC ANIMALS, AGRICULTURE HANDBOOK No. 380 (U.S. Dept. Agriculture 1970).

30. Another potential source of pollution is the leaking of chemical pollutants into ground water from the ash disposed in the mine. Control of this problem might fall under reclamation laws, N.D. CENT. CODE Ch. 38-14 (Supp. 1975), rather than the Siting Act, but both are supervised by the Public Service Commission.

31. The term "thermal pollution" is not universally used. The excess heat entering the environment from the cooling water is also known as "thermal enrichment" or simply "waste heat." Because it can present environmental problems, it will be referred to here as "thermal pollution."

32. Miller, *supra* note 3, at 151-153; OST 1968, *supra* note 23 at 47.

33. As the temperature of water rises, the supply of dissolved oxygen decreases. At the same time the need for oxygen by aquatic life increases with the rise in temperature. When the water reaches a critical temperature for a given species mortality is high due to

### 3. Land Disturbance and Solid Waste

The amount of land required for a generating plant varies with, among other things: the cooling system used; the type of pollution control devices; the type of fuel used; and the generating capacity. As with gasification, the major land disturbance associated with a generating plant is the accompanying strip mine. The solid wastes generated by an electric plant are ash and the sludge from pollution control devices. For example, a 1,000 MW power plant burning 10,000 tons/day of .7% sulfur coal and using a sulfur dioxide scrubber with 90% removal efficiency will produce about 184,000 tons of sludge and 365,000 tons of ash per year.<sup>34</sup>

#### C. TRANSMISSION FACILITIES<sup>35</sup>

Transmission facilities can easily be broken into two categories—electric power lines and pipelines. Because they are located underground, pipelines are compatible with nearly all surface uses of the land.<sup>36</sup> Aesthetic considerations are minimal, but consideration must be given to the effect of a pipeline on wilderness areas. The major concerns with pipelines are surface disruption during construction and the possibility of rupture during operation.

The proliferation of electric transmission lines was one of the original motivating forces which led to the enactment of the Siting Act.<sup>37</sup> The routing of transmission lines presents problems of interference with agriculture, disruption of communication signals, and aesthetic considerations. Disruption of communication signals seems to be the most manageable problem since interference can be controlled through proper design and maintenance of the line.<sup>38</sup>

oxygen starvation. OST 1968 at 42; ENERGY POLICY STAFF, OFFICE OF SCIENCE AND TECHNOLOGY, ELECTRIC POWER AND THE ENVIRONMENT 3-4 (1970). A change in water temperature may also result in a change in the species located in a given area. Up to a certain point, warmer water results in more rapid reproduction and development of certain types of fish. Depending on temperature ranges, this may result in less desirable and more temperature-tolerant species, such as carp, increasing in population, and a decrease in the more desirable species, such as trout. OST 1968 at 42.

34. Miller, *supra* note 3, at 102-103. This is with a limestone scrubber. Other scrubbing methods do not produce solid wastes. *Id.* at 103.

35. As defined by the Siting Act transmission facilities are:

- a. An electric transmission line and associated facilities with a design of two hundred kilovolts or more;
- b. An electric transmission line and associated facilities with a design of sixty-nine to two hundred kilowatts, if the facility does not follow quarter section lines, section lines, property lines, roads, highways, or railroads; or
- c. A gas or liquid transmission line and associated facilities designed for or capable of transporting coal, gas, liquid hydrocarbon products, or water from or to an energy conversion facility described in subsection 5. [See note 8 *supra*].

N.D. CENT. CODE 49-22-03(11) (Supp. 1975).

36. One exception is the placing of high voltage electric lines near pipelines. The inductive current surrounding electric lines tends to enhance corrosion of the pipeline.

37. See note 6 *supra*.

38. Testimony of Leigh Morrow before the North Dakota Legislative Council Committee on Natural Resources "A," MINUTES OF THE COMMITTEE ON NATURAL RESOURCES "A," April 2-3, 1974, at 4. [hereinafter cited as MINUTES]; testimony of Jack Krueger before

The aesthetic problems involved with power transmission lines are most apparent in scenic or wilderness areas. The scenic beauty of an area is hardly enhanced by gigantic steel or wooden towers marching in a straight line toward the horizon. The most obvious method of correcting this visual annoyance, undergrounding, is not technically or economically feasible at present for high voltages and long distances.<sup>39</sup> Other methods must be considered, such as using natural terrain to camouflage the lines where possible and selective use of undergrounding in scenic and recreation areas where overhead lines are most objectionable.

The interference with agriculture is of prime importance to North Dakota. Power transmission lines may prevent central pivot irrigation, result in a loss of tillable land, interfere with weed and insect control by preventing aerial crop spraying, and present a hazard to machinery. Some of these problems are created by the practice of running power lines diagonally across sections and quarter sections of land.<sup>40</sup>

Other areas of controversy surrounding power lines are the possible effects of the ozone produced by a high voltage line and the electric field induced in the area of a high voltage line. Little is known about either of these effects, but some sources believe much more must be determined before extra high voltage transmission lines are allowed to become commonplace.<sup>41</sup>

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the Legislative Council Committee on Natural Resources "A," *Id.*, at 6. See also POWER TECHNOLOGIES, INC., POWER TRANSMISSION TECHNOLOGY UNDERGROUND AND OVERHEAD B-3 (1975) (report prepared for the Connecticut Power Facilities Evaluation Council).

39. Testimony of Morrow, MINUTES, *supra* note 38, at 5; testimony of Krueger, *Id.*, at 6-7. The cost of underground transmission ranges from 10 to 40 times the cost of overhead transmission in rural areas, and from 1 to 20 times in urban areas. OST 1968, *supra* note 23, at 68. The distance drawback is due partially to insulation requirements. Overhead lines use air as an electrical insulator and to dissipate heat. Underground cables must rely on other methods, which are not as effective. As the voltage increases in a line, the heat produced increases. As the heat increases, the resistance of the line increases, and more and more "line loss" is experienced in overcoming the resistance.

40. Most fields are arranged to run parallel with section lines. By running the power line diagonally across the field the utility prevents effective aerial crop spraying, forecloses the possibility of central pivot irrigation and increases the machinery hazards. Because utilities have the power of eminent domain, N.D. CENT. CODE § 32-15-02 (1960), the farmer has, in the past, had no method of successfully preventing such practices. This has led to much resentment, and has done little to endear electric utilities to the farmers whose land is taken. See, e.g., testimony of Richard Anderson before the Legislative Council Committee on Natural Resources "A," MINUTES, *supra* note 38, at 7 (eliminate the need for transmission lines by shipping coal out of state, rather than electricity); testimony of Duncan Warren before Legislative Council Committee on Natural Resources "A," MINUTES, *supra* note 38, January 29-30, 1974, at 14 (called for joint planning of routes by farmers, elected officials, and utility companies and limiting the power of eminent domain to the government).

41. See, e.g., Young, POWER OVER PEOPLE *passim* (paperback ed. 1973); 59 SIERRA CLUB BULLETIN, October, 1974, at 21. Some research indicates that the effects of exposure to low levels of ozone may be minimal and reversible, but exposure to higher levels (10-11 parts per million) may have severe effects. SUMMARY OF PROCEEDINGS, *supra* note 27, at 29. The same source indicates that ozone and sulfur dioxide present in the air together (as could occur near a generating plant) could produce more harmful effects than if either chemical appeared alone. *Id.*

#### D. ECONOMIC AND SOCIAL IMPACTS

Lignite development in North Dakota will have economic and social impact through the influx of money and workers into areas that are now essentially rural. The siting of energy facilities will have some effect in controlling the population increase and its resulting disruptions by determining where the impact will be centralized. However, the location of many plants will be determined by the location of the coal deposits, which the siting decision cannot alter.

The construction time for a gasification plant is projected to be between two and one-half and three years, with peak construction force estimates ranging from 1500 to 3000 workers.<sup>42</sup> The operating and maintenance crew is expected to be from 560 to 900 per gasification plant, depending on the conversion process used.<sup>43</sup> A coal fired electric generating plant of 1000 MW capacity requires a peak construction force of 1800 to 2000 and a maintenance and operation crew of 150 to 250 workers.<sup>44</sup> This does not include the work force of the mine supplying the plant with coal.

An example of the effect this development will have on rural areas can be seen in one study of the impact of population increases associated with one gasification plant and two electric generating facilities of 440 MW each in Mercer County, North Dakota.<sup>45</sup> The study estimates that 300 workers will be required to mine the needed coal for the gasification plant and 75 mine workers for each of the two electric plants.<sup>46</sup> The total anticipated permanent increase in the labor force is estimated to be 1,376,<sup>47</sup> an increase of 23% in the population of Mercer County from 1970 to full operation of the facilities in the late 1970's. Combined with the additional secondary employment (retail employees, service workers, etc.) and dependents, the population will increase by 7200, or more than double the 1970 population of the county.<sup>48</sup> This will have an enormous impact on local institutions such as schools, housing, police and the like.

Environmental and social-economic impacts cannot be avoided, but they may be mitigated through control of the size, location and method of operation of energy facilities. The Siting Act contains an apparatus designed to deal with these problems.

42. Miller, *supra* note 3, Table III-1 at 40. Michigan Wisconsin estimates a construction period lasting from 1976 to 1980 peaking at 2,394 employees in 1976. 3 Application of Michigan Wisconsin, *supra* note 3, at 3-13.

43. Miller, *supra* note 3, at 45. Michigan Wisconsin estimates a plant work force of 640. 3 Application of Michigan Wisconsin, *supra* note 3, at 3-95.

44. Miller, *supra* note 3, at 40, 42-43.

45. Lukin, *supra* note 3.

46. *Id.*, at 50-51. Michigan Wisconsin estimates 360 workers employed in the mine. 3 Application of Michigan Wisconsin, *supra* note 3, at 3-95.

47. Lukin, *supra* note 3, at 55.

48. *Id.*, at 75.

### III. THE SITING ACT

#### A. OUTLINE OF THE LAW

The form of the law is fairly straight forward. The Public Service Commission (PSC), using a public planning process,<sup>49</sup> is to develop standards and criteria for site selection and designation consistent with the factors set out in the law.<sup>50</sup> Once the criteria are established the PSC must assemble and publish an inventory of potential sites and corridors.<sup>51</sup> The inventory must be continually updated to determine if the inventoried sites continue to comply with the established criteria.<sup>52</sup> No quantity of potential sites is specified.

The utilities must file with the PSC two plans each year. The ten year plan required by the Siting Act must identify the general size, type and location of all facilities to be owned or operated by the

49. The method of public planning is not specified; it is left to the PSC. See notes 78-80 *infra*, and accompanying text.

50. N.D. CENT. CODE § 49-22-05(1) (Supp. 1975). The 12 factors required to be considered are set forth in § 49-22-09 (Supp. 1975):

The commission shall be guided by, but is not limited to, the following considerations to aid the study, research, evaluation, and designation of sites and corridors for energy conversion facilities and transmission facilities and the approval of specific transmission facilities and their routes:

1. Evaluation of research and investigations relating to the effects of energy conversion facilities and transmission facilities on land, water, and air resources and the effects of water and air discharges from such facilities on public health and welfare, vegetation, animals, materials, and aesthetic values, including baseline studies, predictive modeling, and monitoring of the water and air mass at proposed sites and sites of operating energy conversion facilities, evaluation of new or improved methods for minimizing adverse impacts of water and air discharges, and other matters pertaining to the effects of energy conversion facilities on the water and air environment.

2. Environmental evaluation of energy conversion facility sites and transmission facility corridors and routes proposed for future development and expansion and their relationship to the land, water, air, and human resources of the state.

3. Evaluation of the effects of new energy conversion and transmission technologies and systems designed to minimize adverse environmental effects.

4. Evaluation of the potential for beneficial uses of waste energy from proposed energy conversion facilities.

5. Evaluation of adverse direct and indirect environmental effects which cannot be avoided should the proposed site, corridor, or route be accepted.

6. Evaluation of alternatives to the proposed site, corridor, or route.

7. Evaluation of irreversible and irretrievable commitments of resources should the proposed site, corridor, or route be approved.

8. Analysis of the direct and indirect economic impact of proposed energy conversion facilities and transmission facilities.

9. Analysis of existing plans of the state, local government, and private entities for other developments at or in the vicinity of the proposed site, corridor, or route.

10. Evaluation of the effect on existing scenic areas, historic sites and structures, or archaeological sites at or in the vicinity of the proposed site, corridor or route.

11. Evaluation of the effect on areas unique because of biological wealth or because they are habitats for rare and endangered species at or in the vicinity of the proposed site, corridor, or route.

12. Where appropriate, consideration of problems raised by federal agencies, other state agencies, and local entities.

51. "Site," "corridor," and "route" are the terms used by the Siting Act to designate the location of an energy conversion facility, the general location of a transmission facility, and the specific location of a transmission facility within a corridor, respectively. See N.D. CENT. CODE §§ 49-22-03(10), (4), (9) (Supp. 1975). Occasionally the term "site" will be used in the text to refer to the location of energy facilities in general.

52. N.D. CENT. CODE § 49-22-05(2) (Supp. 1975).

utility within the following ten years.<sup>53</sup> To be included in the ten year plan is a projection of demand for services provided by the utility, a description of environmental planning used by the utility in its planning process and a description of the utility's efforts to coordinate its plans with those of other utilities within the region.<sup>54</sup>

Each utility must also file a facility development plan containing a description of the utility's plans for facilities to meet the needs projected in the ten year plan.<sup>55</sup> The report is to be filed by utilities which own or operate, or plan within the succeeding five years to construct, own, or operate a facility. The plan must identify all facilities to be owned and operated by the utility, all facilities to be removed from service, and the tentative site of corridors proposed for the facilities with at least one alternative for each site or corridor. The proposed site or corridor may be drawn from the PSC inventory, but it need not be. If the utility proposes a site not within the inventory, the utility must give its reasons for its selection and provide an evaluation of the site or corridor using the criteria established by the PSC for selection of sites and corridors.<sup>56</sup>

This provides the framework for the actual designation of a site or corridor by the PSC. When a utility decides to construct a new facility it must obtain a certificate of site compatibility from the PSC before commencing construction or exercising the power of eminent domain.<sup>57</sup> The PSC then evaluates the site or corridor, holds public hearings if necessary, and designates a site for the proposed facility along with a finding of reasons for the designation.<sup>58</sup> After the site is designated, the PSC issues a certificate of site compatibility and the utility may proceed with construction if all other required permits have been obtained from state and local agencies.<sup>59</sup> If the commission refuses to issue a certificate, it must give its reasons and indicate what changes must be made before a designation will be made and a certificate issued. The Commission may condition or limit a certificate as it sees fit in order to insure that the designated site and proposed facility meet the standards and criteria established for site compatibility.<sup>60</sup>

If the designation is for a corridor the utility must apply for designation of a specific route for the transmission facility within the corridor within two years of issuance of the original certificate. Following study and evaluation a permit will be issued for construc-

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53. N.D. CENT. CODE § 49-22-04(1) (Supp. 1975).

54. N.D. CENT. CODE § 49-22-04(4), (3), (2) (Supp. 1975).

55. N.D. CENT. CODE § 49-22-06 (Supp. 1975).

56. *Id.*

57. N.D. CENT. CODE § 49-22-07 (Supp. 1975).

58. N.D. CENT. CODE § 49-22-10 (Supp. 1975).

59. The PSC certification process does not preempt permit requirements of other state agencies. N.D. CENT. CODE § 49-22-16 (Supp. 1975).

60. N.D. CENT. CODE § 49-22-10 (Supp. 1975).

tion of the facility within the corridor. Again, the permit may be limited or conditioned as the PSC sees fit.<sup>61</sup>

## B. TIME LIMITS

One problem faced by regulatory laws of this nature is the treatment of facilities already planned or under construction when the law is first enacted.<sup>62</sup> The North Dakota Legislature solved this problem by failing to provide for facilities under construction at the effective date of the law, thereby excluding such facilities from coverage.<sup>63</sup> However, beginning December 23, 1975,<sup>64</sup> all utilities must obtain a certificate of site compatibility prior to commencing construction or exercising the power of eminent domain. The PSC must act on applications for site designation within one year for applications filed prior to July 1, 1977, and within six months for applications received after July 1, 1977. The time limit for designation of a corridor is six months until July 1, 1977, and three months after that date. The time for designation of a site may be extended six months by the PSC for "just cause."<sup>65</sup>

The statute also provides for emergency, stepped-up certification upon a finding by the Commission that a demonstrable emergency exists and the utility's electric power system would be jeopardized by adherence to the timetable and procedures specified in the act.<sup>66</sup> The application for emergency certification must be acted upon within six months. This section of the law will have some effect initially, when the time period for acting on applications is one year. However, after July 1, 1977, when the time limit is shortened to six months, the only effect of the emergency clause will be to prevent the PSC from granting extensions beyond the initial six month period.<sup>67</sup>

Once the utility has obtained the certificate of site compatibility for a conversion facility or a construction permit for a transmission facility, it may then begin construction any time up to four years after the date of issuance. After four years the utility must certify

61. N.D. CENT. CODE § 49-22-11 (Supp. 1975).

62. See, e.g., *People's Counsel, Public Service Comm. v. Public Service Comm.*, 259 Md. 409, 270 A.2d 105 (1970). For a detailed account of this controversy see Bronstein, *State Regulation of Powerplant Siting*, 3 ENV. L. 273 (1973).

63. The certification provision of the Act reads as follows:

No utility shall begin construction of an energy conversion facility or transmission facility in the State on or after either January 1, 1976, or the date of promulgation of criteria and standards under subsection 1 of section 49-22-05, which ever date is earlier, or exercise the right of eminent domain in connection with such construction without first having obtained a certificate of site compatibility. . . .

N.D. CENT. CODE § 49-22-07 (Supp. 1975).

64. The criteria and standards were promulgated effective December 23, 1975. See N.D. Pub. Serv. Comm. Reg. R49-22-1 to 14.

65. N.D. CENT. CODE § 49-22-10 (Supp. 1975).

66. N.D. CENT. CODE § 49-22-12 (Supp. 1975).

67. N.D. CENT. CODE § 49-22-10 (Supp. 1975).

to the PSC that the site or route continues to meet the conditions on which the permit or certificate was issued.<sup>68</sup>

Although the Siting Act specifies time limits for PSC action on applications, nowhere does the law specify what the consequences would be should the PSC fail to meet the deadlines.

### C. PENALTIES

The penalties prescribed by the law are a mixture of civil and criminal sanctions. A permit or certificate can be revoked or suspended for the falsification of an application and accompanying data, for failing to comply with the conditions of a permit, or for violations of the Act or regulations issued by the PSC.<sup>69</sup> Failure to obtain a permit before construction or operating a facility, operating a facility not in compliance with the conditions of the certificate or permit, willful violation of PSC regulations, and willful tampering with monitoring devices are class A misdemeanors.<sup>70</sup> In addition, the PSC is empowered to recover a civil penalty of not more than \$10,000 for failure to obtain a permit or certificate, or for operating a facility not in compliance with the conditions of a permit or certificate.<sup>71</sup> The PSC is also empowered to seek injunctive relief against violations of the Act.<sup>72</sup>

### D. JUDICIAL REVIEW

PSC procedure and judicial review of PSC action are generally governed by the Administrative Agencies Practice Act,<sup>73</sup> but certain procedures are specifically spelled out by the Siting Act.<sup>74</sup> For example, the Act states that any person who is aggrieved by the issuance of a certificate of permit or any final order of the PSC may request a rehearing.<sup>75</sup> There is also a right to appeal to district court from any adverse ruling by the PSC.<sup>76</sup> This seems to modify the requirements of the Administrative Agencies Practice Act somewhat, since under that law appeal to district court can be had only from final orders or decisions, or orders substantially affecting the rights of the parties. The Siting Act states that "there shall be

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68. N.D. CENT. CODE § 49-22-17 (Supp. 1975).

69. N.D. CENT. CODE § 49-22-20 (Supp. 1975).

70. N.D. CENT. CODE § 49-22-21 (Supp. 1975). Class A misdemeanors are punishable by up to one year imprisonment and/or up to \$1000 in fines. N.D. CENT. CODE § 12.1-32-01 (Interim Supp. 1975). In addition, an organization (any legal entity, whether or not a corporation or unincorporated association) may be fined up to \$5000, N.D. CENT. CODE § 12.1-32-01.1 (Interim Supp. 1975), and may be required to give notice by mail or advertising to the person or persons injured by the infraction. N.D. CENT. CODE § 12.1-32-03 (Interim Supp. 1975).

71. N.D. CENT. CODE § 49-22-21 (Supp. 1975).

72. *Id.*

73. N.D. CENT. CODE ch. 28-32 (1974).

74. N.D. CENT. CODE § 49-22-19 (Supp. 1975).

75. *Id.*

76. *Id.*

a right of appeal to the district court from any adverse ruling by the Commission.<sup>77</sup> This could be interpreted to mean that evidentiary rulings and interlocutory orders are appealable and not just reviewable.

### E. PUBLIC PARTICIPATION

The law mandates broad public participation in the planning process and in formulating the rules which govern procedure and selection of sites and corridors.<sup>78</sup> The law requires the PSC to use a public planning process in developing criteria and standards to be used in preparing the inventory of potential sites. To implement this requirement a citizens advisory committee was selected by the PSC from a cross section of the state, both in geographical location and in individual interests.<sup>79</sup> The committee was made up of 40 citizens representing among others: agriculture, wildlife interests, historical preservation, and industry. The committee was broken into two subcommittees headed by state senators, one for plant siting and one for transmission line routing. The two committees studied the data compiled by the PSC, held public meetings throughout the state, and made recommendations to the PSC concerning criteria to be used.<sup>80</sup>

The law also provides for the establishment of citizens advisory committees to assist the PSC in carrying out the provisions of the act. The law does not require that such a committee or committees be appointed, and does not specify the size of each committee. However, if a committee is appointed, the law requires that it include a majority of public representatives and at least one representative each from the state department of agriculture, a public or municipally owned utility, a private investor owned utility, a cooperatively owned utility, and one representative from each county and city in which a facility is proposed to be located.<sup>81</sup> The duties of these advisory committees are not spelled out in the law, but presumably

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77. *Id.*

78. N.D. CENT. CODE § 49-22-15(1) (Supp. 1975):

The commission [PSC] shall adopt broad spectrum citizen participation as a principle of operation. The form of public participation shall not be limited to public hearings and advisory committees and shall be consistent with the commission's rules and regulations established pursuant to this chapter.

79. Telephone interview with Thomas F. Kelsch, legal consultant to the PSC, June 23, 1975.

80. The plant siting meetings were to be held in Beulah, North Dakota, on July 9, 1975, in Dickinson, North Dakota, on August 23, 1975, and in Mott, North Dakota, on August 6, 1975. The transmission line corridor meetings were to be held in Jamestown, North Dakota on July 16, 1975, and in Minot, North Dakota, on August 13, 1975. The plant siting meetings were concentrated in the western part of the state, on the assumption that most plants would be located there. The transmission corridor meetings were held in the eastern half of the state for similar reasons. Statement by Laverne Zink, President of Technical Planning Information, Inc., Technical Consultant to the PSC, at a public meeting of advisory committee held in Bismarck, North Dakota, June 27, 1975.

81. N.D. CENT. CODE § 49-22-14 (Supp. 1975).

they would study applications for proposed sites, discuss it with the constituent group each represents, and recommend action to the PSC.

The Commission must hold public hearings regarding its inventory of potential sites and corridors to give interested persons an opportunity to be heard.<sup>82</sup> When a utility makes application for a certificate of site compatibility the PSC must hold public hearings regarding the sites or corridors under consideration.<sup>83</sup> At least one hearing must be held in each county where a site or corridor is proposed, but if more than one county is involved the PSC may consolidate the county hearings and hold one hearing at a place designated by the PSC.<sup>84</sup> If a utility applies for emergency certification, a public hearing must be held within 90 days.<sup>85</sup> Notice of each public hearing<sup>86</sup> held by the PSC must be made by publication in the official newspaper in the county where the meeting is to be held and by mailed notice to specified local officials.<sup>87</sup>

#### F. THE SITING ACT AND LOCAL GOVERNMENT

The Siting Act contemplates extensive local involvement in the siting process. Notice must be given to local officials when an area within their jurisdiction is being considered for a facility or for inclusion in the inventory of potential sites and corridors.<sup>88</sup> In evaluating proposed sites, corridors and routes, the PSC must consider problems raised by local governments and analyze local plans for the area.<sup>89</sup>

The largest grant of local control of the siting decision is contained in section 16. That section provides that:

A certificate of site compatibility for an energy conversion facility shall not supercede or preempt any county or city land use, zoning, or building rules, regulations, or ordinances and no site shall be designated which violates local land use, zoning, or building rules, regulations or ordinances.<sup>90</sup>

The law then makes the same statement for transmission facility

82. N.D. CENT. CODE § 49-22-13 (Supp. 1975).

83. *Id.*

84. *Id.*

85. N.D. CENT. CODE § 49-22-12 (Supp. 1975). As with time limits on PSC action on applications, the consequences of a failure to meet the deadline are not indicated in the law.

86. All meetings and hearings are open to the public. N.D. CENT. CODE § 49-22-15(2) (Supp. 1975).

87. N.D. CENT. CODE § 49-22-13 (Supp. 1975). The local officials are specified by cross reference to § 49-22-08 (application for designation of site or corridor). These officials are the chairman of the board of county commissioners and the chief executive officer of each city in every county in which a portion of the facility is primarily or alternatively proposed as well as the head of each agency in charge of environmental protection or land use planning in the area where the facility is primarily or alternatively proposed.

88. N.D. CENT. CODE § 49-22-08(2) (Supp. 1975). See also note 87 *supra* and accompanying text.

89. N.D. CENT. CODE § 49-22-09(9), (12) (Supp. 1975).

90. N.D. CENT. CODE § 49-22-16(2) (Supp. 1975).

permits, however, here an exception was written into the act allowing pre-emption upon a specific finding by the PSC that the local law is unreasonably restrictive in view of technology, cost, and needs of the consumers.<sup>91</sup> The law thus places a great deal of negative authority in the hands of the local government. Those communities which favor development of coal and other energy resources can throw open the doors if they so desire, while those which oppose it can maintain an effective veto.<sup>92</sup>

### G. THE SITING ACT AND OTHER STATE AGENCIES

The relationship between the PSC and other state agencies under the act is less than clear. The law states that the PSC certificate or permit is the sole site approval required by any applicant, but the Act goes on to require that an applicant "obtain state permits that may be required to construct and operate [facilities]."<sup>93</sup> Two agencies of prime concern to any utility wishing to construct and operate a conversion facility are the State Department of Health and the State Water Conservation Commission. The State Health Department is charged with enforcement of air,<sup>94</sup> water<sup>95</sup> and noise<sup>96</sup> pollution laws. The State Water Conservation Commission controls unappropriated water within the state<sup>97</sup> and, through the state engineer, appropriates water for industrial and other uses.<sup>98</sup> In issuing any permit, other state agencies are bound by the PSC siting decision and "with respect to other matters for which authority has been granted to the Commission by this act."<sup>99</sup> This potential conflict is partially resolved through the provision that any agency with authority to issue a permit for the construction or operation of any facility shall appear in PSC proceedings to present the agency position and state whether the proposed facility on the proposed site, corridor, or route will be in compliance with agency regulations.<sup>100</sup> Further, the PSC is prohibited from designating a site or corridor which violates agency regulations.<sup>101</sup>

91. *Id.*

92. For a further expansion of arguments favoring local control of energy facilities, see Note, *The Proper Role of the Public in Nuclear Power Plant Licensing Decisions*, 15 *ATOMIC ENERGY L.J.* 34, 50-59 (1973).

93. N.D. CENT. CODE § 49-22-16(3) (Supp. 1975).

94. N.D. CENT. CODE Ch. 23-25 (Supp. 1975).

95. N.D. CENT. CODE Ch. 61-28 (Supp. 1975).

96. N.D. CENT. CODE § 23-01-17 (Supp. 1975).

97. N.D. CENT. CODE § 61-02-29 (1960).

98. N.D. CENT. CODE Ch. 61-04 (Supp. 1975).

99. N.D. CENT. CODE § 49-22-16(3) (Supp. 1975).

100. N.D. CENT. CODE § 49-22-16(4) (Supp. 1975).

101. *Id.* It should be noted that no problem would arise if the PSC sets standards more stringent than those required by another agency. See N.D. CENT. CODE § 49-22-07. The problem occurs when action approved by the PSC is disapproved by another state agency. The issue of non-compliance by the PSC with other agency regulations may be raised by persons other than the agency. See North Dakota Environmental Law Enforcement Act, N.D. CENT. CODE Ch. 32-40 (Supp. 1975).

In operation the requirement that utilities obtain permits from other state agencies will require close cooperation between the PSC and the other state agencies. The law sets no priority in time for application or issuance of permits. Unless there is cooperation so that the various agency permits are effectively considered concurrently, regardless of date of issuance, an applicant may find himself caught up in a maze of agency proceedings and endless rounds of re-applications and adjustments in permit conditions. For example, unless the PSC can interpret the other agency regulations without error, it is possible for the PSC to issue approval and to then have another agency deny required permits. In resolving this conflict the PSC functions somewhat as a "lead agency"<sup>102</sup> with power of overall review and coordination of siting decisions.<sup>103</sup>

#### IV. CONCLUSION

The policy behind laws such as the Siting Act is twofold. First, such laws allow public input into what has been a private decision making process. Second, such laws provide a forum for those who wish to propose or oppose a given project. Once it is accepted that the public should be allowed some say in the siting process, most commentators are in general agreement that comprehensive siting laws are desirable.<sup>104</sup> However, the supporting rationales for the general agreement differ. Environmentalists generally are in favor of siting laws as a means of protecting environmental resources and of providing a forum for public debate over the policy issues involved in plant siting.<sup>105</sup> Faced with a jungle of permit and

102. The "lead agency" concept was developed by the Council on Environmental Quality to aid federal agencies in the implementation of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970). See 40 C.F.R. § 1500.7(b) (1975). The purpose of a lead agency is to have one body responsible for the overall evaluation of the proposed project and its effects, rather than to have piecemeal and possibly conflicting determinations by several agencies. *Cf.*, Calvert Cliff's Coordinating Committee v. AEC, 449 F.2d 1109, 1122-1127 (D.C. Cir. 1971).

103. *Cf.* N.D. Pub. Serv. Comm. Reg. R49-22-7(B)(2), -8(B)(2) (1975).

104. See, e.g., Journey, *Power Plant Siting—A Road Map of the Problem*, 48 NOTRE DAME LAWYER 273 (1972) [hereinafter cited as Journey]; Luce, *Power for Tomorrow: The Siting Dilemma*, 1 ENVIRONMENTAL L. REV. 60 (1970) [hereinafter cited as Luce] (the author was the then chairman of the board of Consolidated Edison Electric Company of New York); Ramey, *Old and New Concepts in Siting and Licensing Nuclear Power Plants*, 9 THE FORUM 211 (1973) [hereinafter cited as Ramey] (the author was the then chairman of the Atomic Energy Commission); Tarlock, Tippy, & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 SO. CAL. L. REV. 503 (1972) [hereinafter cited as Tarlock]. But see Like, *Multi-Media Confrontation—The Environmentalist's Strategy for a "No Win" Agency Proceeding*, 13 ATOMIC ENERGY L. REV. 1 (1971) [hereinafter cited as Like], wherein it was suggested that the administrative hearing process should be used as a method of harrasing the utility wishing to site a project. From this point of view the more tangled the administrative process the better. See also testimony of Garry Bye before the Legislative Council Committee on Natural Resources "A," MINUTES, January 29-30, 1974, *supra* note 38 at 12 (Mr. Bye, testifying on behalf of Central Power Electric Cooperative, stated that specific legislation dealing with transmission line routing is not needed in North Dakota).

105. See, e.g., Journey, note 104 *supra*; Like, note 104 *supra*; Tarlock, note 104 *supra*; Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257 (1972); Lippek, *Power and the Environment: A Statutory Approach to Electric Facility Siting*, 47 WASH. L. REV. 35 (1971).

license requirements, utility proponents favor comprehensive siting laws when the laws will help prevent delays in the siting process.<sup>106</sup>

The siting of an energy facility involves two aspects—technical and political. The technical aspect is within the realm of the utilities. The engineering problems, physical requirements, choice of process, capital investment, and the like are decisions that to a great extent must be left to the utilities. However, other questions such as allocation of non-renewable resources, preservation of environmental quality, economic growth, and choice of life style of the inhabitants of the state, are policy decisions which the public<sup>107</sup>—has an interest and should have a voice. Because of this interrelation between complex technical and political decisions, the public can be discouraged from participating.<sup>108</sup>

At the same time the utility industry is in a quandary. Faced with a mandate from the federal government to develop energy resources in the United States and the statutory requirement of producing a reliable source of power as economically as possible,<sup>109</sup> the utilities are at the same time meeting with increasing opposition from local people and environmentalists.<sup>110</sup> Each day of

106. See, e.g., Luce, note 104 *supra*; Nassikas, *Centralizing Decisional Authority*, 24 ADMIN. L. REV. 15 (1972) (Mr. Nassikas was the then chairman of the Federal Power Commission); Ramey, note 104 *supra*; and Testimony of Paul Heim, Director of the Mid-Continent Area Power Pool, before the Legislative Council Committee on Natural Resources "A," MINUTES July 30-31, 1974, *supra* note 38, at 9.

107. As used here the term "public" includes nearly everyone except the utilities and governmental bodies. Such a broad classification causes problems since there are many diverse groups, interests, and concerns within the major classification "public." The point is that there are individuals and groups whose interests are affected and who, in the past, have not participated in siting decisions. See Williams, *An Evaluation of Public Participation* 24 ADMIN. L. REV. 49 (1972).

108. As usual, public participation varies with the issue, but in general is good. Often the minor projects draw more interest because they hit closer to home and are more comprehensible to the average man. There is often a feeling, in my view, that the average man can't compete with the lawyers and experts when it comes to refineries and power stations.

Letter from Henry E. Warren, Director, State of Maine Department of Environmental Protection, to the author, June 19, 1975, on file in North Dakota Law Review office, University of North Dakota (commenting on the operation of Maine's siting law, ME. REV. STAT. ANN. tit. 38, §§ 481-488 (Supp. 1973)).

The Council has encouraged public participation in establishing regulations. We find that interest is lacking, except from people from an area where an application for construction of a transmission line has been submitted.

Letter from William C. Joram, Jr., Executive Director, State of Connecticut Power Facility Evaluation Council, to the author, July 11, 1975, on file in North Dakota Law Review office, University of North Dakota (commenting on the operation of Connecticut's siting law, CONN. GEN. STAT. ANN. §§ 16-50(g) to (y) (Supp. 1975)).

Public Participation: has been generally limited; depending on the magnitude of the project involved, public participation tends to be centralized in the area affected.

Letter from Donald D. MacIntyre, Legal Council to the Montana Department of Natural Resources and Conservation, to the author, July 14, 1975, on file in North Dakota Law Review office, University of North Dakota. (commenting on the operation of the Montana siting law, MONT. REV. CODES ANN. § 70-801 to -829 (Interim Supp. 1975)).

109. E.g., N.D. CENT. CODE §§ 49-04-01, 02 (1960).

110. See, e.g., *Scenic Hudson Preservation Conference v. FPC*, 453 F.2d 463 (2d Cir. 1971); *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). These two cases involve the decision by Consolidated Edison Co. of New York to build an electricity generation facility near Storm King Mountain on the Hudson River. The decision to build the facility was made public after substantial in-

delay increases costs of construction and potentially affects the system reliability of a utility enhancing the possibility of another blackout similar to that experienced in the northeastern United States in 1965.<sup>111</sup>

Regulation of siting should then strive to allow public participation in the decision while at the same time simplifying the licensing process to minimize delays. To some extent, North Dakota has accomplished this in the Siting Act. But the major device for elimination of delay, the inventory of potential sites and corridors, will perhaps not be completely successful. Public participation in the process also poses some problems which require comment. The conclusion to this note will concentrate on these two aspects of the Siting Act.

### A. THE INVENTORY AND SITE SELECTION

Delay in siting and construction of energy facilities occurs when the public becomes involved with the process after a utility has invested a significant portion of its resources in planning a particular project to be located on a particular site. If significant opposition develops after the utility is irreversibly committed to the project, the results are legal battles and delay.<sup>112</sup>

The use of an inventory should prevent delay in the siting process by identifying in advance those areas suitable for use as facility sites. Any opposition to a particular site would be identified before a utility is irretrievably committed to a project, and any delay caused by controversy over a site would occur early enough in the planning process to prevent significant economic waste. Ideally an inventory would provide construction sites before they are needed. That is, site selection would occur before any other phase of planning for a new facility, and perhaps even before the need for a particular facility is known.

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vestment and planning by Consolidated Edison. Completion was projected for 1968. As of March, 1975, construction had not begun. 77 AUDUBON, March, 1975, at 126. Calvert Cliff's Coordinating Committee v. AEC, 449 F.2d 1109 (D.C. Cir. 1971). See also comments by Joram and MacIntyre, note 108 *supra*.

111. In the words of Judge Kaufman, discussing the *Scenic Hudson* controversy:

[N]either Con Ed, the power consumer nor the people of Cornwall can be said to have won. All these parties have borne significant losses. While it would be easy to tote up the cost in expert testimony and legal fees expended by the public interest groups that intervened in the proceeding after the first remand, it would be much more difficult to calculate the cost incurred because of the decade of delay between 1968, the date originally set for completing the project, and the earliest completion date now possible which must be close to 1978.

Kaufman, *Power For the People—And By the People: Utilities, the Environment and the Public Interest*, 24 ADMIN. L. REV. 3, 6-7 (1972). See also Tarlock, *supra* note 104, at 505 & n.8 (long delays in siting process brought about by multiple licensing challenges are not desirable).

112. See notes 62 and 110 *supra* and sources cited therein. A broad chronology of en-

However, the value of the North Dakota Siting Act inventory as a method of pre-selection of facility sites is doubtful for at least two reasons. First, utilities are not required to select potential sites and corridors from the inventory.<sup>113</sup> Unless the inventory is assembled to meet the particular needs of utilities intending to construct facilities within the state, it is possible that inventoried sites would never be used. Second, inclusion of a site in the inventory has no binding effect.

When a utility applies for a certificate or license, the PSC designates a suitable site or corridor. Before this designation takes place the Commission must conduct studies, hold hearings and make evaluations of the proposed site in view of the statutory criteria and the particular plant size and type.<sup>114</sup> The procedures are the same whether the proposed site is selected from the inventory or not. All the study, planning, and comment that goes into the making of the inventory is redone, or at least reviewed. Anyone opposed to the site designation can challenge it and raise whatever issues he desires. The process of site selection is not simplified except to the extent that the site has been evaluated previously by the PSC.<sup>115</sup> The Act does not even establish a presumption that a site or corridor chosen from the inventory will be suitable.<sup>116</sup>

The result of these objections is to make the benefits of including specific sites in an inventory illusory. It does not prevent delay prior to construction; it does not allow future planning on the basis that a specific site will be available when required; and it does not allow planning on the basis that an area not in the inventory will not be a site.<sup>117</sup>

The PSC has, in its regulations, attempted to make the statutory scheme workable. Along with designating an inventory of potential sites, it has designated exclusion and avoidance areas.<sup>118</sup> That is, certain areas are designated as not suitable for sites

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vironmental opposition to the siting of power plants can be found in Young, *Power Plant Siting and the Environment*, 26 OKLA. L. REV. 193 (1973).

113. N.D. CENT. CODE § 49-22-13 (Supp. 1975). See text accompanying notes 55 to 59 *supra*.

114. N.D. CENT. CODE § 49-22-10 (Supp. 1975).

115. Even this may not be an advantage over a non-inventory site, since the utility proposing such a site must make an evaluation of the site using the criteria established by the PSC for siting and routing. *Id.*

116. Conversely, giving binding effect to inclusion of a site in the inventory poses other problems. An individual facility may present difficulties not foreseen when the original designation was made; a person who did not participate in the original decision to include the site in the inventory may have objections; or local sentiment concerning the desirability of construction of a facility may have changed. The longer a site remains unused in the inventory, the greater the chances of this occurring. Even though the PSC is under a duty to update the inventory, N.D. CENT. CODE § 49-22-50(2) (Supp. 1975), there would be little incentive to do so for a particular site until a facility was proposed for it.

117. For an example of an alternative method of using an inventory, see MD. NAT. RES. CODE ANN. §§ 3-301 to 3-307 (1974). Under this scheme the state acquires sites and sells or leases them to utilities as the need arises.

118. N.D. Pub. Serv. Comm. Reg. R49-22-10 (1975).

or corridors. This has the advantage of giving some binding effect to inventory designating. Once an area is designated as unsuitable, it is doubtful that a utility would propose the area as a site, knowing the opposition it would face. If the utility is interested in the area as a site, it can put forth its case at the time of designation. If it is unsuccessful, future planning can take place with the knowledge that the area is not a potential site. There is less chance of a later battle over the designation, and the area will not be a future source of delay in energy development.<sup>119</sup>

### B. PUBLIC PARTICIPATION IN PSC ACTIVITY

The other major element for preventing delay in the siting of energy facilities is tied directly to public participation. Early public awareness of a proposed project allows early public input. Objections to a project can be met or the project can be abandoned before significant economic waste occurs.<sup>120</sup> An analysis of the North Dakota law shows that the opportunity for public participation<sup>121</sup> is present, but in practice the involvement may not be as extensive as the law contemplates.

The role of the private individuals and public interest groups under the Siting Act is somewhat nebulous. Beyond citizen advisory committees, no public involvement is specified, although the Act calls for "broad-spectrum citizen participation."<sup>122</sup> Citizens who wish to participate in the siting process will encounter many of the same problems they face when dealing with any other regulatory agency.<sup>123</sup> Most people do not have the time or the money to become heavily involved, and usually become aroused only when the project affects them directly. However, for those

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119. These arguments apply more to conversion facilities than to transmission facilities since location is a prime cost factor in construction of transmission facilities. If a utility can save substantial construction costs by routing a facility through an exclusion or avoidance area, the utility is more apt to attempt to get the area designation changed. In addition transmission facilities are more apt to be proposed in exclusion or avoidance areas because they will be located in more areas in the state than conversion facilities. Conversion facilities will probably be concentrated in an area near the lignite fields.

120. Significant public involvement in the process, by definition, meets the other policy objective of the law.

121. Public participation is used to mean involvement in the siting process by individuals and groups other than utilities or governmental agencies.

122. See N.D. CENT. CODE §§ 49-22-05, -13, -14, and -15 (Supp. 1975).

123. See Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972) for a discussion of three major problems facing public interest groups intervening in federal agency proceedings: scope of intervention, cost of participation (multiple copy requirements for all documents filed, transcript costs, expert witness costs, access to industry and agency data, and cost of attorneys), and effective notice to interested parties (citing the Federal Register as an unworkable attempt to provide the citizen with notice of proceedings). Many of these problems will be faced by any person or group attempting to participate in PSC regulation of energy facilities. Because of the smaller size of state government, some problems will not be as severe as they are on the federal level. See also Sive, *Some Thoughts of an Environmental Lawyer in the Wilderness of Administrative Law*, 70 COLUM. L. REV. 612 (1970).

with the requisite time, money and interest, the Act and other North Dakota laws do provide some tools to make the job easier than it might be.

One of the most helpful aspects of the Act for a citizen wishing to participate in the process is the inventory of potential sites and the development plans which must be filed by the utilities. Anyone has access to these records<sup>124</sup> and can, if he wishes, keep abreast of developments. In this respect the Act meets one criticism made of past siting decisions. The utility cannot announce to the public its intention to construct a facility long after the decision has been made with the concomitant commitment of money and resources.

Once a person decides to oppose a project or to take part in the regulatory process, he may be faced with several problems. To understand the nature of the obstacles confronting one wishing to participate, it is necessary to examine procedure before the PSC. The Administrative Agencies Practice Act (AAPA)<sup>125</sup> governs procedure before the Public Service Commission,<sup>126</sup> but neither that law nor the Siting Act specifies who may intervene in the licensing process. The Siting Act does state that "any person aggrieved" may petition the PSC for a rehearing of the issuance of a license or certificate, promulgation of a final order or failure of the Commission to act.<sup>127</sup> The law also specifies that any adverse ruling by the PSC is appealable to the district court.<sup>128</sup> Taken literally this would mean that any person,<sup>129</sup> regardless of prior participation, could petition the PSC for a rehearing, and appeal the denial or outcome of the rehearing. Should the PSC or the courts limit the extent of participation in original application procedures, this could be the result. Perhaps a better view would be that anyone who wished to spend the time and money to participate in original proceeding should be allowed to do so, traditional standing doctrines notwithstanding.

Another ambiguity latent in the Act is the precise form of the hearings. Rulemaking is governed by AAPA<sup>130</sup> which does not provide for a hearing except on petition for reconsideration and then

124. N.D. CENT. CODE § 49-22-15(2) (Supp. 1975) reads in part:

All books, records, files, and correspondence of the Commission shall be available for public inspection at any reasonable time.

In addition, the Commission must publish the inventory of potential sites and corridors. N.D. CENT. CODE § 49-22-05(2) (Supp. 1975).

125. N.D. CENT. CODE Ch. 28-32 (1974). Some portions of the AAPA may be overridden by the more specific language of the Siting Act, *e.g.*, the application service requirements set forth in N.D. CENT. CODE § 49-22-08(2) (Supp. 1975).

126. Petition of Village Board of Wheatland, 77 N.D. 194, 42 N.W.2d 321 (1950).

127. N.D. CENT. CODE § 49-22-19 (Supp. 1975).

128. *Id.*

129. N.D. CENT. CODE § 49-22-03(8) (Supp. 1975), defines "person" as including: any individual, partnership, firm, association, cooperative, corporation, or any department, agency, or instrumentality of the state or any subdivision thereof.

130. N.D. CENT. CODE § 49-22-18 (Supp. 1975).

only on the terms and conditions prescribed by the PSC.<sup>131</sup> A petition for reconsideration can only be made by a person "substantially interested" in the effect of the rule or regulation.<sup>132</sup> The inventory designation process seems to be neither an adjudicative process nor a rule making process. Hearings must be held to allow comment on the inventory,<sup>133</sup> but the form of the hearings are not prescribed. They will probably take the form of non-adversary proceedings which allow comment, but not cross examination of witnesses.<sup>134</sup> Since the inclusion of a site or corridor in the inventory has no binding effect on subsequent siting decisions,<sup>135</sup> there is no real objection to such procedure.

The major question is the form of hearing when designation of an actual site or corridor for a particular facility is involved. The hearing will probably be a full blown adversary process if the proposed facility meets with any objection.<sup>136</sup> The question will then become the extent of intervention allowed parties not directly involved.<sup>137</sup> Public interest group intervention seems desirable, given the stated purpose of the Act<sup>138</sup> and the mandate for public participation contained in the Act.<sup>139</sup>

The North Dakota Environmental Law Enforcement Act<sup>140</sup> may also provide a basis for argument that the standing requirements for intervention should be relaxed. The law itself does not provide for intervention in state agency proceedings, but it does allow anyone aggrieved<sup>141</sup> by violation of any environmental statute, rule, or regulation to bring an action in district court for the enforcement of the statute, rule, or regulation.<sup>142</sup> Thus a person not a party to the hearing and determination of the PSC who is dissatisfied with the outcome of the hearing or determination can get the entire matter into district court anyway. The process of siting will be more orderly and the PSC

131. N.D. CENT. CODE §§ 28-32-02 to -04 (1974). However, the Siting Act may be read to require hearings during the rule making process.

The commission shall hold public hearings . . . in order to afford interested persons an opportunity to be heard regarding . . . any other aspects of the commission's activities, duties, or policies arising under or set forth in this chapter.

N.D. CENT. CODE § 49-22-13 (Supp. 1975).

132. N.D. CENT. CODE § 28-32-04 (1974). There are no cases in North Dakota defining "substantially interested."

133. N.D. CENT. CODE § 49-22-13 (Supp. 1975).

134. The form of the hearing is not prescribed by regulation. See N.D. Pub. Serv. Comm. Reg. R49-22-3(B)(2) (1975).

135. See text accompanying notes 114-16 *infra*.

136. Cf. N.D. Pub. Serv. Comm. Reg. R49-22-4, -7(C), and -8(C) (1975).

137. "Directly involved" is used in the sense that the utility, a local government or another state agency with licensing power is directly involved.

138. See N.D. CENT. CODE § 49-22-02 (Supp. 1975).

139. See N.D. CENT. CODE §§ 49-22-05, -14, and -15 (Supp. 1975).

140. N.D. CENT. CODE Ch. 32-40 (Supp. 1975).

141. The Act's definition of "aggrieved" results in a standing requirement similar to that outlined in *Sierra Club v. Morton*, 405 U.S. 727 (1972). The subsequent case of *United States v. SCRAP*, 412 U.S. 669 (1973), illustrates how relaxed this standing requirement may be.

142. N.D. CENT. CODE § 32-40-06 (Supp. 1975).

will have more control over the issues and parties if it does not greatly limit participation by individuals and groups.

Assuming widespread interest by the people of North Dakota and by public interest groups, the PSC is going to be met with the procedural task of managing multi-party hearings including individuals, interest groups, local government, and other state agencies. The greater the number of parties involved, the more complex will be the task of maintaining an orderly and useful hearing. The greater the number of parties, the more voluminous the record is apt to become. The more parties present, the greater the chances of error or objection giving rise to appeals from commission rulings.<sup>143</sup> The danger is that the purpose of the hearings may be forgotten in the battle. The hearings should serve as a method of information transfer between the people affected or interested in a particular project and the PSC and vice versa. It should not be a forum for the PSC to justify a previously made decision and it should not be used as a delaying or harassing tool by persons opposed to a particular project.

Some of the problems associated with complexity and delay can be solved by consolidation of parties with substantially the same interest, by providing that repetitious testimony be given in written, rather than oral form, and by taking care that witnesses be competent in the area under consideration in order to testify. Limited appearance may also be useful if the party is particularly concerned or competent in only one area of dispute and not others.<sup>144</sup> These types of difficulties must of necessity be worked out on a case by case basis.

More difficult is the problem of the individual, who will be affected by the proposed project, but lacks the technical expertise to participate fully or even to understand all of the issues. If a hearing becomes a battle of experts testifying on highly technical matters, the average<sup>145</sup> individual may lose interest or decide that the issues are beyond his comprehension. Therefore, some effort must be made to identify and separate the technical from the political issues.

A partial solution to the mixing of the technical discussion with the policy discussion may be to split the hearing process. Soon after the application is submitted, a local non-adversary hearing could outline the proposal and the PSC could summarize the available data on the project. The hearing would be informative; designed to acquaint the public with the issues. This hearing would not include de-

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143. N.D. CENT. CODE § 42-22-19 (Supp. 1975) states that there shall be a right to appeal any adverse ruling by the Commission. Unless judicially limited, this would appear to include interlocutory as well as final rulings and orders. See text accompanying note 77 *supra*.

144. *E.g.*, a wildlife group may not be particularly competent to present or challenge testimony on the effect of the proposed facility on nearby farming operations.

145. The word "average" is used guardedly. Deciding who is an "average" member of a community is as nebulous as attempting to define "public interest."

bate between proponents and opponents but would be a short meeting to determine public interest. It might also be used to determine the issues of particular interests to the locality. Later in the process, after interested people have had the opportunity to become informed, a full adversary hearing governed by the Administrative Agencies Practice Act could be held. Full debate of the policy issues and informed participation by a larger segment of the public would be possible.

This is also an area where an advisory committee<sup>146</sup> might be useful to the PSC. It would serve as a sounding board for interested parties and could define the areas of dispute to a great extent prior to the adversary hearing.

Another problem associated with public participation is access to information concerning the project prior to the local hearing. All records and correspondence of the PSC are open to inspection by statute, but few people will have the time to travel to the state capital to examine the records. Therefore, once the location of the local hearing has been decided,<sup>147</sup> an information center should be established at that location. The center should contain the information on the proposed project which the PSC has accumulated, and should receive copies of information later submitted to the PSC. This would enable easy access to information by those interested and affected.

By relaxing traditional standing doctrines for participation in the administrative process and by taking affirmative steps to insure that those interested have an opportunity to become well informed, the PSC can do much to ensure that the objectives of the law are met. The public will have a say in the siting of energy facilities and needed facilities will not be unnecessarily delayed.

The Siting Act is a sweeping departure from prior North Dakota law and represents a step in the right direction.<sup>148</sup> The current national energy crisis, combined with North Dakota's abundance of lignite, will mean inevitable energy development.<sup>149</sup> In addition, the vast unpopulated areas and the relatively pollution free environment make the state attractive for energy development. Therefore, laws

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146. See text accompanying note 81 *supra*.

147. The location will be the county of the facility in the case of conversion facilities. Since transmission facilities will likely cross many counties, the PSC will probably consolidate hearings to save time and money. See N.D. CENT. CODE § 49-22-13 (Supp. 1975).

It should be noted that the law does not specify that a consolidated hearing must be located in the affected area. In the interests of furthering the manifest intent of the Act—to make the hearing accessible to local people—the PSC should insure that the consolidated hearing is held in the affected area or centrally located near the affected area, and not held, for example, in the state's capital city, merely because it would be more convenient for the PSC and (probably) the applicant.

148. Not all commentators agree that such legislation is desirable or constitutional. Cf. Hall, *Montana Coal: The Alamo of Interstate Commerce*, 51 N.D. L. Rev. 439 (1974).

149. This assumes, of course, that other competitive and practical energy sources, such as wind or solar energy, will not be developed in the near future. Such an assumption may not be warranted in view of current research. But, until proven wrong, this assumption must guide the state in planning for the future.

such as the Siting Act,<sup>150</sup> which attempt to control the development of energy resources and retain the agricultural nature of the state are to be encouraged. North Dakota coal, like Mid-East oil, will not last forever. The time to prepare for the problems of energy development is now, before they become overwhelming.

In addition, the Act serves the purpose of environmental preservation. Energy development will have adverse environmental effects that will be best handled by comprehensive advance planning and preparation. By forcing utilities and government to open the decision making process to public scrutiny and participation, whatever decisions are made should be more democratic.

There are problems with the law, particularly with the inventory aspect, but these can be remedied as experience is gained by the people, the regulators and the regulated in making decisions under the Act. On the whole, the law is designed to provide for the orderly, advance siting of energy facilities with public disclosure and participation. If the law operates in a manner consistent with these goals it may well be one of the most significant pieces of legislation passed in North Dakota for many years.

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150. North Dakota has recently enacted a number of statutes designed to control and lessen the impact of lignite exploitation. *See* N.D. CENT. CODE Ch. 38-14 (1972) (Reclamation of Strip-Mined Lands), Ch. 38-6 (Supp. 1975) (Surface Mining Reports), Ch. 38-17 (Supp. 1975) (Coal Leasing Practices Act), Ch. 38-18 (Supp. 1975) (Surface Owner Protection Act), and Ch. 32-40 (Supp. 1975) (Environmental Law Enforcement Act).