

TRANSMISSION LINE SITING: LOCAL CONCERNS VERSUS STATE ENERGY INTERESTS

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Despite the current national emphasis on conservation, there is an increasing dependence on electricity.¹ To satisfy this increased demand, utility companies must expand their transmission facilities.² Over 427,000 miles of transmission lines presently exist, and by 1984 this will have increased by 61,000 miles.³ Since the extension of transmission facilities mars an area's scenic beauty and reduces resi-

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1. The increment of energy requirements satisfied by electric power has steadily increased for many years. If current projections prove correct, electric utilities may need to build as many as 1500 new electric generating facilities during the next 25 years. This continued expansion will very possibly increase public interest in electric generating facility siting. See Cronin and Turner, *Article VIII of the Public Service Law—The Brave New World of Power Plant Siting in New York: A Critique and Suggestion for an Alternative Approach*, 42 ALB. L. REV. 537, 538-39 (1978).

Electricity has become the primary source of energy in the United States. The electric utility industry's further development depends largely upon the government's substitution of coal and nuclear power to conserve oil and natural gas resources. See Special Committee on Energy Law, *Report*, 10 NAT. RESOURCES LAW 655 (1978).

2. Note, *Interstate Public Use: An Issue Occurring in Condemnation for Interstate Power Lines*, 52 NOTRE DAME LAW 563, 563 (1976).

3. SENATE COMM. ON COMMERCE, SCIENCE AND TRANSPORTATION AND SENATE COMM. ON ENERGY AND NATIONAL RESOURCES, NATIONAL ENERGY TRANSPORTATION VOLUME I—CURRENT SYSTEMS AND MOVEMENTS, 95th CONG., 1ST SESS. 347-75 (1977). Utility companies will have to compete with other developers for precious land, since 15 to 20 acres are required per mile of transmission line.

dential property values,⁴ homeowners are reluctant to allow the intrusion of these facilities into their neighborhoods.⁵ Municipalities attempt to prevent this intrusion by enacting restrictive zoning and building ordinances.⁶ The municipal desire to control land use conflicts with the increasing demand for utility services requiring facility expansion.⁷

This Note discusses the transmission facility siting conflict and the various approaches taken toward its resolution. Judicial resolution of the conflict occurs when utility companies seek exemptions from restrictive municipal ordinances.⁸ Many states seek legislative solutions by vesting exclusive control in state or municipal governments.⁹ This Note will conclude by focusing on the progressive solution adopted by Ohio through its Hot Wires Act.¹⁰

I. STATE CONTROL OVER UTILITY FACILITY SITING

A utility company must go through numerous reviews to obtain the necessary permits and licenses for each transmission line.¹¹ From the

4. Scarring a community's landscape raises a number of environmental problems, including a decrease in property values adjacent to or near the transmission line's right-of-way, and the obstruction of historical or scenic views. See Vaubel, *Of Concern to Painesville — Or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L.J. 257, 274 (1972).

Courts increasingly find that community appearance directly affects the stability of the community and the well-being of the residents. See 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 14.01 (4th ed. 1979).

5. Population growth in urban areas, especially in the suburbs of large metropolitan areas, produces a variety of land use problems. Community residents insist on a wide spectrum of commercial and governmental services. They demand the provision of these services without injury to the peace and quiet of their neighborhoods. This growth in population has created an increasing demand for gas, electric, water and other utility company services. Although consumers desire these services, they are reluctant to permit the expansion or installation of the facilities which are essential to providing them. See 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 12.28 (2d ed. 1976).

6. *Id.* § 12.29. See also notes 31 and 32 *infra* and cases cited therein.

7. See generally Note, *Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited*, 47 CONN. B. J. 249 (1973).

8. See 2 R. ANDERSON, *AMERICAN LAW OF ZONING* § 12.28 (2d ed. 1976).

9. See legislation cited in notes 72-76, 81 and 82 *infra*.

10. OHIO REV. CODE ANN. § 4905.65(B) (Anderson 1977).

11. See SPECIAL COMMITTEE ON ELECTRIC POWER AND THE ENVIRONMENT, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, *ELECTRICITY AND THE ENVIRONMENT: THE REFORM OF THE LEGAL INSTITUTION 66-67* (1972) [hereinafter cited as *ELECTRICITY AND THE ENVIRONMENT*]. At the state level, licensing or approval

outset, public utilities have had to comply with the police power regulations exercised by state governments.¹² States delegate this regulatory power to a public service or utilities commission.¹³ Although these commissions' scope of jurisdiction varies from state to state, their main purpose is to assure adequate service at reasonable rates.¹⁴

The public utility must secure approval from the appropriate state commission before beginning operation in a given service area.¹⁵

from the following agencies may be required: Environmental Protection Agency, Department of Natural Resources, Highway Commission, Public Utilities Commission, State Planning Commission, and Department of Transportation. At the municipal level, a utility company is subject to the requirements of the Fire Department, Department of Sanitation, Pollution Control Agency, Health Authority, and Zoning Board.

12. "Police power" is the term used to describe the inherent right of a state and local government to enact legislation protecting the safety, morals, health or general welfare of the people within its jurisdiction from the unrestrained liberty of some individuals. See J. NOWAK, R. ROTUNDA AND J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 389 (1978).

Transmission facilities are subject to the laws passed in the exercise of these police powers. The relevant laws are those generally applicable to any large industrial installation, such as building codes. See ELECTRICITY AND THE ENVIRONMENT, *supra* note 11, at 54.

Transmission line routes directly connected with a proposed nuclear project need approval from the Nuclear Regulatory Commission. Those lines connected to a hydro-electric plant need approval from the Federal Power Commission. There is, however, no general federal review of transmission line routes. See Willrich, *The Energy-Environment Conflict: Siting Electric Power Facilities*, 58 VA. L. REV. 257, 298-99 (1972). See also Luce, *Power for Tomorrow: The Siting Dilemma*, 1 ENV'T L. 60, 66 (1970).

13. The basis for state regulation of utilities is the "right of the public, through the state, to obtain adequate service, at reasonable rates from a responsible public utility agency, in return for a grant of authority to such agency to operate in a given territory." Note, *State Regulation of Nuclear Power Plant Construction: The Iowa Model*, 63 IOWA L. REV. 124, 130 (1977), quoting F. WELCH, CASES AND TEXT ON PUBLIC UTILITY REGULATION 82 (1961).

State authority to regulate certain industries was first constitutionally established in *Munn v. Illinois*, 94 U.S. 113 (1876). Before 1907, electric utilities were regulated primarily by municipal governments. Wisconsin established a state utilities commission with broad powers in 1907. This legislation served as a model for the many states that enacted public utility laws in the next decade. The Wisconsin law requires a certificate of convenience and necessity of new companies and of existing companies wishing to expand operations. It also authorizes the state commission to establish service standards and to set the prices of electricity. Thus, regulatory power over the electric utility industry was removed from the numerous municipal governments and placed with a single state commission. See Jarrell, *The Demand for State Regulation of the Electric Utility Industry*, 21 J. L. ECON. 269, 270-71 (1978).

14. I. A. PRIEST, PRINCIPLES OF PUBLIC UTILITY REGULATION 32 (1969).

15. By requiring certification of new utility companies by the state commission,

The company must demonstrate its ability to deliver adequate service at reasonable rates to receive a certificate of convenience and necessity allowing it to operate.¹⁶ An existing utility company must also obtain a certificate for new facility construction.¹⁷ It must show the investment in the facility is in the public interest and will provide satisfactory rates and services in the future.¹⁸

II. LOCAL CONTROL OVER UTILITY FACILITY SITING

Local zoning regulations allow municipalities to control the siting of transmission lines.¹⁹ Land use regulation through zoning traditionally rests with local government, the closest government to local problems and needs.²⁰ Local officials determine the acceptability of

the state retains right control over entry into the electric utility industry. *See* Jarrell, *supra* note 13, at 271.

The Supreme Court approved the use of certificates of convenience and necessity by state commissions in *Stanley v. Public Comm'n*, 295 U.S. 76, 78 (1935).

16. The purpose of certification is to improve rates and service by preventing harmful competition and duplication of service in the electric utility industry. *See* Note, *State Regulation of Nuclear Power Plant Construction: The Iowa Model*, 63 IOWA L. REV. 124, 132 (1977).

17. *Id.*

18. *Id.* at 133.

19. *See, e.g.,* *Detroit Edison Co. v. City of Wixom*, 10 Mich. App. 218, 159 N.W.2d 230 (1968), *rev'd on other grounds*, 382 Mich. 673, 172 N.W.2d 382 (1969) (local zoning ordinance regulating the height of transmission towers); *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480 (Mo. 1973) (municipal ordinance prohibiting all above ground construction of transmission lines); *New York State Elec. and Gas Corp. v. McCabe*, 32 Misc.2d 898, 224 N.Y.S.2d 527 (Sup. Ct. 1961) (local ordinance requiring there be access from a street or highway to any proposed line).

20. The municipality's power to zone derives from the state's police power through a general enabling act. All 50 states have adopted zoning enabling legislation. *See* 1 R. ANDERSON, *AMERICAN LAW OF ZONING* §§ 2.20, 2.21, 2.22 (2d ed. 1976).

The present statutory basis for local comprehensive planning and land use controls originated from model legislation proposed by the United States Department of Commerce in the 1920s. These two major model acts are the Standard City Planning Enabling Act, containing statutory authority for planning and subdivision control, and the Standard State Zoning Enabling Act, containing statutory authority for planning and subdivision control, and the Standard State Zoning Enabling Act, containing statutory authority for zoning. *See* Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulation*, 74 MICH. L. REV. 899, 901 (1976).

The legality of municipal zoning ordinances was upheld in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This case established municipal planning and regulation of land use as a valid exercise of state police powers.

Local governments consider themselves entirely capable of regulating land use and

proposed land uses and their effect on community character and municipal growth.²¹ Municipal zoning ordinances regulate and protect the health and welfare of the citizens, the land value in residential neighborhoods, and the aesthetic nature of the area.²²

Transmission facility construction raises unique zoning problems.²³ Rather than deal with just one or two municipalities, the utility company, when constructing a generating facility, must comply with the zoning regulations of all the local governments within whose jurisdiction it will construct portions of the transmission line.²⁴ A single line may need dozens of permits from several municipalities.²⁵ Coordination of regulation across jurisdictions is rare, thereby

envision these decisions as a method of preserving property values and maintaining the "tone" of the community. Local governments decide relatively quickly and are most responsive to the local voter. See Note, *State Land Use Regulation—A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869, 870 (1972). See also Note, *Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited*, 47 CONN. B. J. 249 (1973).

21 Ninety percent of government land use decisions are made at the local level by officials who are familiar with the community environment. See Schifflett and Zuckerman, *Solar Heating and Cooling: State and Municipal Legal Impediments and Incentives*, 18 NAT. RESOURCES J. 313, 318 (1978).

Land use control has never rested wholly within an expert agency. Zoning traditionally involves the use of citizen boards. Board qualifications usually consist of residence requirements and not training or experience. See 3 R. ANDERSON, AMERICAN LAW OF ZONING § 21.05 (2d ed. 1976).

22. *Naylor v. Salt Lake City Corp.*, 17 Utah 2d 300, 303, 410 P.2d 764, 765 (1966) (zoning objectives include enhancing aesthetic values and promoting the health, safety, morals and general welfare of the city and its inhabitants); *Southern Ry. v City of Richmond*, 205 Va. 699, 708, 139 S.E.2d 82, 88 (Va. 1964) (zoning ordinances must bear a reasonable or substantial welfare); *State v. Harper*, 182 Wis. 148, 157, 196 N.W. 451, 455 (1923) (zoning regulations stabilize property value and promote the permanence of desirable home surroundings, thereby promoting the general welfare).

23. The utility company must transmit its product to each user and it must constantly maintain supply to meet minute-by-minute changes in demand. The consumer has no alternative source and the company has no other means of delivery. See 2 R. ANDERSON, AMERICAN LAW OF ZONING §§ 12.28, 12.29 (2d ed. 1976).

24. Construction of a 25-mile transmission line through New York and New Jersey required permits from eight municipalities, the Hudson River Valley Commission, the Federal Aviation Agency, the Corps of Engineers, the New York State Highway Department, the East Hudson Parkway Authority, and the Palisades Interstate Park Commission. A 4-year delay resulted from litigation commenced by New Jersey property owners living along the line. See Luce, *Power for Tomorrow: The Siting Dilemma*, 1 ENV'T'L L. 60, 66-67 (1970).

25 Case and Schoenbrod, *Electricity or the Environment: A Study of Public Regulation Without Public Control*, 61 CAL. L. REV. 961, 970-71 (1973).

subjecting the company to possibly conflicting requirements.²⁶

Since local governments use their zoning power to protect local interests, the zoning ordinances often exclude what some consider negative land uses.²⁷ This results in exclusion or relocation of transmission lines because of their undesirable effect on property values and the environment.²⁸ While an ordinance may not expressly prohibit the installation of these lines,²⁹ compliance may make it impractical or not economically feasible for the utility company to build within the municipality's boundaries.³⁰ These ordinances may subject utility facilities to stringent construction standards³¹ or may re-

26. *Id.* Many local requirements address themselves to the construction and operation of transmission lines, such as zoning and building costs, safety regulations, planning requirements, and permits for street openings. The transmission facility is always subject to a veto from a town zoning board or county highway department.

In *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 483 (Mo. 1973), the court noted that if the municipality could specify how the company should install its transmission lines, then the other 99 municipalities served by the company would have like authority. The divergent construction requirements would impose increased costs on the company. The problem of conflicting municipal requirements was also discussed in *In re Public Serv. Elec. and Gas Co.*, 35 N.J. 358, 373, 173 A.2d 233, 241 (1961). If each municipality through which a transmission line passed was free to impose its own specifications, chaos would result. Neither the company nor the public utilities commission could adequately "fulfil its obligations of furnishing safe, adequate and proper service to the public in all areas."

27. Municipalities deem certain facilities for garbage disposal, corrections, and low-income housing undesirable in spite of their necessity. A frequently litigated instance of zoning restrictiveness has involved hospitals, facilities of obvious importance to the public health and well-being. A municipality attempting to exclude hospitals must invariably overcome the judicial attitude that hospitals directly promote a major zoning objective of protecting the public welfare. In *Sisters of Bon Secours Hospital v. City of Grosse Pointe*, 8 Mich. App. 342, 154 N.W.2d 644 (1967), the Michigan Court of Appeals concluded that enforcement of an ordinance restricting hospital expansion would adversely affect the city; the ordinance was therefore unenforceable. In *American University v. Prentiss*, 113 F.Supp. 389 (D.D.C. 1953), the court struck down an ordinance prohibiting the construction of a hospital. In its decision, the court particularly noted both the shortage of hospital beds within the District of Columbia, and that Congress had made grants-in-aid to encourage new hospital construction. See Feiler, *Metropolitanization and Lane-Use Parochialism — Toward a Judicial Attitude*, 69 MICH. L. REV. 655, 698 (1971). See also Note, *Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited*, 47 CONN. B. J. 249 (1973).

28. 4 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 72-5 (Supp. 1977).

29. *Id.*

30. R. ANDERSON, *supra* note 23, at § 12.29.

31. See, e.g., *Detroit Edison Co. v. City of Wixom*, 10 Mich. App. 218, 159 N.W.2d 230 (1968), *rev'd on other grounds*, 382 Mich. 673, 172 N.W.2d 382 (1969) (local zoning ordinance regulating height of transmission towers); New York State

quire underground construction of transmission lines.³² By requiring underground lines, a municipality avoids the unsightliness of overhead poles and wires.³³ Since the cost of underground lines far exceeds that of overhead lines, however, the company will often rescind its planned route and seek an alternative overground route elsewhere.³⁴

Thus, while increased demand for electricity requires construction of additional transmission lines, local governments deter construction through restrictive zoning ordinances.³⁵ Utility companies object to these ordinances since they interfere with energy provision in the resisting municipalities and surrounding areas.³⁶ Nevertheless, municipalities have legitimate concerns about the facilities' effect on their land values and the community environment.³⁷ Withdrawal of local

Elec. and Gas Co. v. McCabe, 32 Misc.2d 898, 224 N.Y.S.2d 527 (Sup.Ct. 1961) (local ordinance requiring access from a street or highway to any proposed line).

32. See, e.g., *Benzinger v. Union Light, Heat and Power Co.*, 293 Ky. 747, 170 S.W.2d 38 (1943) (ordinance requiring utility companies to place lines underground and remove all poles and wires from the streets); *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 280 (Mo. 1973) (municipal ordinance prohibiting all above ground construction of transmission lines); *Long Island Lighting Co. v. Horn*, 23 A.D.2d 583, 256 N.Y.S.2d 690 (1965) (grant of special use permit to utility company conditioned on underground construction of lines); *Cleveland Elec. Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 159 N.E.2d 756 (1959) (ordinance requiring that all transmission lines carrying greater than 33,000 volts be placed underground).

33. See *Vaubel, Of Concern to Painesville — Or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L. J. 257, 274 (1972).

34. Several cases illustrate the substantial cost increase imposed on a utility company by an underground ordinance. See *Cleveland Elec. Illuminating Co. v. Mayfield*, 53 Ohio.App.2d 37, 47, 371 N.E.2d 567, 575 (1977) (city's ordinance requiring underground construction would increase costs from \$400,000 a mile for overhead lines to \$2,140,000 a mile for underground lines); *In re Baltimore Gas and Elec. Co.*, 64 P.U.R.3d 473, 477 (Md. P.S.C. 1966) (municipal ordinance requiring underground construction would increase costs from \$687,000 to \$1,202,000). See also FEDERAL POWER COMM'N, NATIONAL POWER SURVEY 156 (1964); Miller, *Electric Transmission Lines — To Bury, Not to Praise*, 12 VILL. L. REV. 497 (1967).

35. See cases cited notes 31, 32 *supra*.

36. See, e.g., *Pereira v. New England LNG Co., Inc.*, 364 Mass. 109, 120, 301 N.E.2d 441, 448 (1973) (a single municipal ordinance could deny vital services to any and all other municipalities); *In re Public Serv. Elec. and Gas Co.*, 35 N.J. 358, 378, 173 A.2d 233, 242 (1961) (if municipality prohibited overhead lines, the utility could not meet increased demand within the next few years); *Duquesne Light Co. v. Upper St. Clair Township*, 377 Pa. 323, 340, 105 A.2d 287, 297 (1954) (utility company contended that without approval of the proposed transmission line, customer service would be curtailed).

37. See I A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 14.01 (4th ed. 1975).

control over transmission line location may result in facility expansion without regard to local interests.³⁸

III. JUDICIAL REACTION TO THE SITING CONFLICT

Utility companies have brought their contentions before the courts, seeking exemptions from municipal ordinances.³⁹ Such litigation requires a court to reconcile municipal zoning power with the community's need for the company's services.⁴⁰ Many courts emphasize the essential nature of utility services when reviewing local regulations that limit facility expansion.⁴¹ Some courts hold, as in *In re Public Service Electric and Gas Co.*,⁴² that the zoning ordinance, no matter how beneficial to the citizens of the municipality, must yield to the interest of the larger population served by the utility company.⁴³ Other courts, however, refuse to exempt the utility company from a local ordinance, stating that an exemption would eliminate the necessary control at the local level.⁴⁴ In *Porter v. Southwestern Public Service Co.*,⁴⁵ a Texas court stated that exclusion of local control would

38. When a public utility engineer proposes a location for a transmission structure, he will probably consider the company's interests before those of the general public. The location may be designated so the utility will save money, but the surrounding neighborhood will suffer a depreciation in value. There could be no orderliness to city plans if each utility company were its own judge as to where it would construct facilities.

The rationale for municipal zoning is the local government's familiarity with local problems and needs. This familiarity enables city officials to accurately assess local land uses' compatibility with community property, impact on land values, and effect on community growth. Utility companies should remain subject to orderly regulation by those authorities who are concerned with the civic plan for the whole community. See Haller, *Zoning and the Utilities*, 56 PUB. UTIL. FORT. 231, 234 (1955); Note, *Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited*, 47 CONN. B. J. 249 (1973).

39. See 2 R. ANDERSON, AMERICAN LAW OF ZONING § 12.28 (2d ed. 1976).

40. See cases cited notes 41-45 *infra*.

41. See, e.g., *Long Island Water Corp. v. Michaelis*, 28 A.D.2d 887, 888, 282 N.Y.S.2d 22, 23 (1967) (zoning board may not exclude a utility where the company has shown the necessity for its facilities); *Spring Valley v. Southwestern Bell Tel. Co.*, 484 S.W.2d 579, 581 (Tex. 1972) (local ordinance exempts telephone company since proposed construction is essential to supplying telephone service).

42. 100 N.J. Super. 1, 241 A.2d 15 (1968).

43. *Id.* at 12, 241 A.2d at 23.

44. See, e.g., *Csensch v. Public Util. Comm'n*, 35 Ohio St. 2d 187, 190, 299 N.E.2d 283, 285 (1973) (determinations dealing with public safety must remain at the local level).

45. 489 S.W.2d 361 (Tex. Civ. App. 1973).

leave a hiatus in the protection of community health and welfare.⁴⁶

The impracticality of a local ordinance often leads to judicial invalidation. If an underground transmission line ordinance is disputed, the court may invalidate it for economic reasons alone, since compliance would result in a substantial cost increase to the utility company.⁴⁷ Courts rarely find the increased costs warranted by the aesthetic benefits that accrue to the municipality.⁴⁸ In *Union Electric Co. v. City of Crestwood*,⁴⁹ the court stated that if each municipality enforced its own installation requirements, the divergent construction methods would impose an unwarranted financial burden on a utility company.⁵⁰

State preemption is often the basis for a court's invalidation of a local ordinance.⁵¹ Decisions such as *County of Bergen v. Department of Public Utilities*⁵² stress the need for state-wide regulation to assure

46. *Id.* at 365.

47. *See* note 34 *supra*.

48. In first fully considering transmission line aesthetics, the New York Public Service Commission concluded that the advantages of underground lines weighed against the additional expense, and did not justify the increased cost. *Property Owners and Residents of Westchester County v. Westchester Lighting Co.*, 1932C P.U.R. 503 (N.Y. Pub. Serv. Comm'n 1932). In a more recent case, the Connecticut Public Utilities Commission found an overhead transmission line costing \$600,000 preferable to underground construction at \$2,000,000. It held that the marked impact on rates was not warranted by any aesthetic advantages of underground lines. *Re United Illuminating Co.*, 71 P.U.R.3d 257 (Conn. Pub. Util. Comm'n 1967).

The aesthetic advantages of underground lines were also considered by the court in *Scenic Hudson Preservation Conference v. F.P.C.*, 453 F.2d 463, 477 (2d Cir. 1971). Aesthetic considerations were of major importance in this case since the transmission lines attendant to the plant would pass through an area of "major historical significance." It was estimated that the construction and maintenance costs of underground lines would be 16 time more expensive than overhead lines. The court held that underground lines were not required since it was not in the public interest to burden consumers with the additional costs.

49. 499 S.W.2d 480 (Mo. 1973).

50. *Id.* at 483.

51. *See, e.g.*, *Graham Farms, Inc. v. Indianapolis Power and Light Co.*, 249 Ind. 498, 510, 233 N.E.2d 656, 666 (1968) (when local regulation attempts to control an activity in which the whole state is interested, the local regulation must fall); *Consolidated Edison Co. v. Village of Briarcliffe Manor*, 208 Misc. 295, 302, 144 N.Y.S.2d 379, 384 (Sup.Ct. 1955) (local ordinance cannot override the state law and policy as to utility service); *Commonwealth v. Delaware and Hudson Ry. Co.*, 19 Pa. Commw. Ct. 59, 61, 339 A.2d 155, 157 (1975) (utility companies must submit only to state regulation rather than to a myriad of local government regulations).

52. 117 N.J. Super. 304, 284 A.2d 543 (App. Div. 1971).

uniformly safe and adequate service.⁵³ Even though the matter is of local concern, local exclusion of transmission lines may have significant extraterritorial effects.⁵⁴ At this point, courts may find the matter one of state-wide concern and therefore beyond local regulation.⁵⁵

State legislation may expressly grant the public utilities commission power to exempt utility companies from local ordinances.⁵⁶ Where there is no express legislation, the existence of a state commission overseeing utility operations may lead to a judicial finding of implied state preemption of utility regulation.⁵⁷ A substantial body of case law, however, asserts that the simple vesting of control over utility companies in a state commission does not usurp local zoning powers.⁵⁸ Although the commission is responsible for state-wide utility operations, this does not necessarily imply a delegation of author-

53. *Id.* at 309, 284 A.2d at 547.

54. See D. MANDELKER AND D. NETSCH, *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 254 (1977).

55. See, e.g., *Township of Marlboro v. Village Water Co.*, 72 N.J. 99, 108, 367 A.2d 1153, 1158 (1976) (state commission grants final approval to utility company for use of municipal streets); *In re Public Serv. Elec. and Gas Co.*, 35 N.J. 358, 371, 173 A.2d 233, 240 (1961) (utility regulation requires uniform treatment and therefore not a proper subject for municipal legislation); *City of Canton v. Whitman*, 44 Ohio St.2d 62, 66, 337 N.E.2d 766, 769 (1975) (city may exercise police power within its borders, but state regulation prevails in direct conflicts with municipal authority); *City of S. Burlington v. Vermont Elec. Power Co., Inc.*, 133 Vt. 483, 489, 344 A.2d 19, 24 (1975) (where state and local control of a utility company furnishing state-wide service clash, local control must fall).

56. See N.J. STAT. ANN. § 40:55-50 (West 1967). If a utility company finds it necessary to use municipal property to furnish service, it may petition the public utilities commission for relief from a municipal zoning ordinance. See, e.g., *Application of Jersey Cent. Power and Light Co.*, 130 N.J. Super. 394, 327 A.2d 437 (1974); *In re Public Serv. Elec. and Gas Co.*, 100 N.J. Super. 1, 241 A.2d 15 (1968).

57. See Tarlock, Tippy and Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. CAL. L. REV. 502, 541-42 (1972).

58. See, e.g., *Wolf v. Village of Mt. Prospect*, 314 Ill. App. 23, 25, 40 N.E.2d 778, 779 (1942) (statute vesting commission with control over utility companies does not take from municipalities powers conferred by zoning statutes); *Detroit Edison Co. v. City of Wixom*, 10 Mich. App. 218, 224-26, 159 N.W.2d 230, 232 (1968), *rev'd on other grounds*, 382 Mich. 673, 172 N.W.2d 382 (1969) (utility commission's regulation of power transmission does not preclude municipal enactment of reasonable regulations); *Cleveland Elec. Illuminating Co. v. Mayfield*, 53 Ohio App.2d 37, 50, 371 N.E.2d 567, 575 (1977) (requiring municipal zoning commission approval before granting a variance to utility company constitutes reasonable regulation); *City of Richmond v. Southern Ry. Co.*, 203 Va. 220, 225, 123 S.E.2d 641, 645 (1962) (vesting of control over utility companies in the commission does not, without more, take from local governments the powers conferred upon them by zoning statutes).

ity to locate facilities without regard to municipal zoning ordinances.⁵⁹ Other courts, however, have found that since the commission coordinates the energy interests of the state as a whole, local regulation in this area must fall.⁶⁰ Placing centralized control in a state agency with continually developing expertise assures uniformly adequate service by the utility companies.⁶¹ In *Graham Farms, Inc. v. Indianapolis Power and Light Co.*,⁶² the court explicitly stated the utility commission was created to relieve the utility companies from the burden of local regulations.⁶³

Requiring a certificate of public convenience and necessity from the utility commission⁶⁴ further encourages judicial recognition of the preemptive effect of the commission.⁶⁵ The granting of the certificate implies that the commission, as an agent of the state, has determined public convenience and necessity requires that the company

59. Note, *Governmental Immunity from Local Zoning Ordinances*, 84 HARV. L. REV. 869, 878-79 (1971); see note 58 *supra*.

60. See, e.g., *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115, 120 (Alaska 1970) (by vesting regulatory power in the commission, the state has implicitly carved out an area that is out of bounds to the city); *Harbor Carriers, Inc. v. Sausalito*, 46 Cal. App.3d 773, 775, 121 Cal. Rptr. 577, 578 (1975) (state commission's issuance of public convenience certificate supercedes municipal attempt to regulate public utility installations through zoning restrictions); *Duquesne Light Co. v. Monroeville Boro.*, 449 Pa. 573, 579, 298 A.2d 252, 256 (1972) (borough may define reasonable underground wiring districts, but state commission has ultimate authority in determining particulars of implementation); *Duquesne Light Co. v. Upper St. Clair Township*, 377 Pa. 323, 332, 105 A.2d 287, 291-92 (1954) (the state, by entrusting the commission with regulation and supervision of utility companies and by specifically excluding municipalities from modifying public utility law, precluded any municipal regulation absent express authority).

61. See, e.g., *Pereira v. New England LNG Co., Inc.*, 364 Mass. 109, 121, 301 N.E.2d 441, 448 (1973) (state empowered commission to take action necessary to insure provision of a reasonable measure of vital services); *Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 482-83 (Mo. 1973) (centralized control in one state commission assures uniformly safe, proper and adequate service by utility companies throughout the state); *Township of Marlboro v. Village Water Co.*, 72 N.J. 99, 108, 367 A.2d 1153, 1158 (1976) (in approving utility company franchise, state commission imposes conditions which in its expertise it deems the public convenience requires); *Daaleman v. Elizabethtown Gas Co.*, 142 N.J. Super. 531, 535, 362 A.2d 70, 73 (1976) (commission is entrusted with centralized control over utilities to assure uniformly safe, proper and adequate service).

62. 249 Ind. 498, 233 N.E.2d 656 (1968).

63. *Id.* at 516, 233 N.E.2d at 666.

64. ELECTRICITY AND THE ENVIRONMENT, *supra* note 11, at 65.

65. STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM, *supra* note 54, at 253.

furnish electric service in the requested area.⁶⁶ Courts refuse to allow a municipality to thwart this determination through enactment of a zoning ordinance that prevents the transmission line's construction.⁶⁷ Other courts express concern that municipal interference with the utility commission's judgment could severely impair the commission's proper functioning.⁶⁸

IV. LEGISLATIVE REACTION TO THE SITING CONFLICT

Many states have recently sought legislative solutions to the transmission line siting conflict through siting statutes. These statutes generally reflect a legislative determination that a single state agency should bear the responsibility for siting decisions.⁶⁹ These agencies must not only consider power needs, but also the environmental and health ramifications of a particular site.⁷⁰

Some state statutes place siting responsibility with the existing public utilities commission.⁷¹ The statute may grant preemptive authority to the commission, thereby rendering any local regulation inapplicable.⁷² For example, a Minnesota statute explicitly states

66. A utility company, because it is state-regulated, enjoys special zoning treatment. Since the state has granted a certificate of convenience and necessity, a municipal prohibition against the utility's location would conflict with the state's sovereign power. *See* A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 72-1 (4th ed. 1975).

67. *See, e.g.*, *Chugach Elec. Ass'n v. City of Anchorage*, 476 P.2d 115, 120 (Alaska 1970) (municipal ordinance must yield to commission's determination that public convenience and necessity requires utility company's furnishing electricity within the certified service area); *In re* *Petition of Pub. Serv. Elec. and Gas. Co.*, 100 N.J. Super. 1, 11, 241 A.2d 15, 20 (1968) (zoning enabling act provides that municipal ordinance shall not apply to structures used by utility companies to furnish service where commission has determined that such proposed structure is reasonably necessary for the service, convenience, or welfare of the public).

68. *See In re* *Petition of S. Lakewood Water Co.*, 115 N.J. Super. 352, 358-59, 279 A.2d 874, 877-78 (1971) (municipalities not vested with authority to veto every request for extension of service submitted to the commission); *Consolidated Edison Co. v. Village of Briarcliffe Manor*, 208 Misc. 295, 301, 144 N.Y.S.2d 379, 384 (Sup. Ct. 1955) (where utility company was mandated by state law to furnish adequate service, village was without authority to interfere with state policy through its zoning ordinance).

69. *See* Note, *State Land Use Regulation — A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869, 886-87 (1972).

70. *Id.*

71. *Id.* at 885.

72. *See, e.g.*, MD. NAT. RES. CODE ANN. § 3-306.1 (Supp. 1979); VA. CODE § 56-46.1 (Supp. 1979); WIS. STAT. ANN. § 196.491 (3)(i) (West Supp. 1979).

that commission approval of transmission line construction preempts the enforcement of any local zoning regulations.⁷³ Other states, however, have legislatively reinforced the traditional grant of zoning power to local governments.⁷⁴ Nevada has passed such a statute, stating that the commission may not grant a permit for facility construction unless it finds that the location of the facility conforms to applicable local laws.⁷⁵

Several states have passed legislation establishing separate commissions to oversee the orderly resolution of transmission line siting questions.⁷⁶ Siting commissions provide a single forum for expeditious resolution of all matters concerning power plant and transmission line location.⁷⁷ These special agencies must balance environmental concerns and state energy needs.⁷⁸ When exclusive control over facility siting vests in one commission, utility companies avoid the inconsistent regulatory requirements inherent in a multiple permit system.⁷⁹

The various state siting commissions do not deal uniformly with the local regulation problem.⁸⁰ Several states, such as Connecticut,

73 MINN. STAT. ANN. § 116C.61(1) (1977). "Such certificate or permit [for the construction of the transmission line] shall supercede and preempt all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local and special purpose government." *Id.*

74. *See, e.g.*, KY. REV. STAT. ANN. § 278.040(2) (Baldwin 1979); OR. REV. STAT. § 469.400(6) (1978).

75 NEV. REV. STAT. § 704.890(1)(d) (1977).

The commission may not grant a permit for the construction, operation or maintenance of a utility facility, either as proposed or as modified by the commission, unless it finds and determines . . . [t]hat the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder. . . .

Id.

76. *See, e.g.*, ARIZ. REV. STAT. §§ 40-360.00-22 (1956 & Supp. 1979); MASS. ANN. LAWS ch. 164, §§ 69G-69S (Michie/Law Co-op 1979).

77. *See Note, Power Plant and Transmission Line Siting: Improving Arizona's Legislative Approach*, 1973 L. SOC. ORD. 519, 524.

78. Traditionally, public utility commissions are responsible for assuring cheap, reliable electric power. The new siting commissions, however, must consider the environmental effects of a proposed site to avoid unreasonable burdens on the natural environment. *See Best, Recent State Initiatives on Power Plant Siting: A Report and Comment*, 5 NAT. RESOURCES LAW 668, 673-74 (1972).

79. Stone, *Power Siting: A Challenge to the Legal Process*, 36 ALB. L. REV. 1, 6-8 (1971).

80. *See STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM, supra* note 54, at 254-56.

preserve the local zoning power to regulate power line location.⁸¹ Other states, however, expressly provide that the siting commission's decision precludes the enforcement of any local laws.⁸²

Although these legislative approaches provide clear answers when a dispute occurs, they do not satisfactorily resolve the conflict between municipal land use concerns and electric service demand.⁸³ These statutes reflect a polarized view of the possible solutions by either allowing a local regulation to control,⁸⁴ or conversely, providing complete local zoning immunity to utility companies.⁸⁵ While local regulation may interfere with vital utility growth, this growth cannot occur without meaningful local participation.⁸⁶ Consideration of a transmission line's effect on local aesthetics and land values is essential.⁸⁷ Nonetheless, the present expansion of urbanization, increased inter-relationships between municipalities, and uncertain future energy supplies require some restrictions on local government zoning powers.⁸⁸

81. CONN. GEN. STAT. § 16-50x(d) (1979). *See also* OR. REV. STAT. § 469.400(6) (1978).

82. *See, e.g.*, WASH. REV. CODE ANN. § 80.50.110 (West Supp. 1978). *See also* MASS. ANN. LAWS ch. 164 § 69K (Michie/Law Co-op 1979).

83. There are "costs" to the community, both economic and environmental, which motivate these municipal zoning ordinances restricting transmission line construction. These costs must be evaluated in monetary terms and also in safety and aesthetic terms. Where appropriate, these costs should be balanced against the more obvious expenses incurred by the utility companies. *See* Vaubel, *Of Concern to Painesville — Or Only to the State: Home Rule in the Context of Utilities Regulation*, 33 OHIO ST. L.J. 257, 274 (1972).

84. *See* notes 72 and 73 *supra*.

85. *See* notes 74 and 75 *supra*.

86. *See* Note, *State Land Use Regulation — A Survey of Recent Legislative Approaches*, 56 MINN. L. REV. 869, 870 (1972).

87. *See* 1 A. RATHKOPF, *THE LAW OF ZONING AND PLANNING* § 14:01 (4th ed. 1975).

88. Total municipal autonomy in land use control is contrary to existing economic and social realities. Local zoning is not necessarily detrimental; in fact, it is highly desirable. The critical issue is the extent of local zoning control as to land use, since there are frequently regional or state interests that predominate over these local interests. The appropriate allocation of land use control should exist as a means of complementing municipal authority rather than usurping it. *See* Note, *Local Versus State and Regional Zoning: The Tragedy of the Commons Revisited*, 47 CONN. B. J. 249, 262-63 (1973). *See also* Note, *Regional Planning and Local Autonomy in Washington Zoning Law*, 45 WASH. L. REV. 593 (1970).

V. A PROGRESSIVE SOLUTION TO THE SITING CONFLICT

The Ohio state legislature enacted a statute that coordinates the conflicting interests involved in transmission line location. The Hot Wires Act⁸⁹ provides for local control over matters relating strictly to the locality, but removes local authority over intrastate and inter-city transmission of electricity.⁹⁰ The Act declares that municipalities can reasonably restrict construction and location of transmission lines unless the utility demonstrates that the line fulfills three statutory conditions.⁹¹ These conditions are that the line be an inter-city facility; that its construction comply with generally accepted safety standards; and that it not unreasonably affect the welfare of the public.⁹²

The adoption of the Hot Wires Act reinforces the Ohio legislature's intent that determinations dealing with public safety remain with local governments.⁹³ Neither the Hot Wires Act nor any other Ohio statute authorizes the utility commission to regulate the location of transmission lines.⁹⁴ A municipal ordinance is valid and effective un-

89. OHIO REV. CODE ANN. § 4905.65(B) (Anderson 1977):

To the extent permitted by existing law a local regulation may reasonably restrict the construction, location or use of a public utility facility, unless the public utility facility:

- (1) Is necessary for the service, convenience, or welfare of the public served by the public utility in one or more political subdivisions other than the political subdivision adopting the local regulations; and
- (2) Is to be constructed in accordance with generally accepted safety standards; and
- (3) Does not unreasonably affect the welfare of the general public.

Nothing in this section prohibits a political subdivision from exercising any power which it may have to require, under reasonable regulations not inconsistent with this section, a permit for any construction or location of a public utility facility proposed by a public utility in such political subdivision.

Id.

90. *See* Cleveland Elec. Illuminating Co. v. City of Painesville, 15 Ohio St. 2d 125, 129-30, 239 N.E.2d 75, 78 (1968). To determine whether the matter is within the regulatory powers of local government, the court must consider the result of the regulation. If the result affects only the municipality with no extraterritorial effects, the subject is clearly within the power of local government regulation. If the result is not so confined, however, it becomes a matter for state regulation. *Id.*

91. *See* note 89 *supra*.

92. *Id.*

93. *See* Csensich v. Public Util. Comm'n, 35 Ohio St. 2d 187, 189-90, 299 N.E.2d 283, 285 (1973).

94. 35 Ohio St. 2d at 188, 299 N.E.2d at 284. *See also* State v. Ohio Power Co., 163 Ohio St. 451, 462, 127 N.E.2d 394, 402 (1955) (no statutory provision vests the

til proven otherwise.⁹⁵ Therefore, the utility company must establish that the proposed line complies with each of the three conditions set forth in the act to obtain an exemption from the local ordinance.⁹⁶

Two cases based on the Hot Wires Act illustrate the application of this legislation. In *City of Rocky River v. Cleveland Electric Illuminating Co.*,⁹⁷ the municipal ordinance required underground installation of all proposed lines with greater than 33,000 volts.⁹⁸ Although Rocky River initially granted a permit to Cleveland Electric for extension of 33,000-volt conductors through the city,⁹⁹ Rocky River revoked the permit upon discovering that the line's actual potential was 138,000 volts.¹⁰⁰ The city filed for injunctive relief when the company ordered its employees to commence construction.¹⁰¹

The court upheld the city's revocation of the permit, concluding that it would not have consented to the permit if it had known the true size and voltage of the proposed transmission line.¹⁰² The court

commission with jurisdiction over acquisition of land for construction of transmission lines).

95. *See* Cincinnati Motor Transp. Ass'n v. City of Lincoln Heights, 25 Ohio St. 2d 203, 204, 267 N.E.2d 797, 798 (1971) (municipalities have broad powers with respect to streets and highways within their limits; those opposing the ordinance must establish the ordinance's unreasonableness); *Miesz v. Village of Mayfield Heights*, 92 Ohio App. 471, 478, 111 N.E.2d 20, 25 (1952) (presumption of validity applicable to legislative acts in general applies equally to zoning ordinances until the contrary is shown).

96. *See* *City of Rocky River v. Cleveland Elec. Illuminating Co.*, 40 Ohio Misc. 17, 24, 318 N.E.2d 455, 460 (Cuyahoga County Ct. 1973). The court held that Cleveland Electric had the burden of establishing by a preponderance of the evidence that its proposed line would comply with the act's requirements in order to qualify for an exemption from Rocky River's ordinance requiring underground line construction. *Id.*

97. *Id.*

98. *Id.* at 18, 318 N.E.2d at 457. The Rocky River City Council enacted Ordinance 46-67, requiring underground installation of any electric power line carrying more than 33,000 volts. It also required a permit from the city council prior to any underground construction. *Id.*

99. *Id.*

100. *Id.* at 18-19, 318 N.E.2d at 457. A city official discovered that the application contained misrepresentations. The city further learned that Cleveland Electric intended to increase voltage through the line to the 138,000-volt level. This increase could occur without any alteration to the poles and conductors. *Id.*

101. *Id.* at 19, 318 N.E.2d at 457. Shortly thereafter, the city enacted an additional ordinance, 19-72, requiring underground installation of lines carrying more than 250 volts, if located within a railroad right-of-way or within 100 feet thereof. *Id.*

102. *Id.* at 21, 318 N.E.2d at 457. At the time it granted the permit, the city was not aware that the line, running through the center of the city and in close proximity

then applied the Hot Wires Act to Cleveland Electric's proposed line to determine if it complied with the Act's provisions so as to allow an exemption from the underground ordinance.¹⁰³ The first condition, that the proposed line be an inter-city facility, was the most troubling issue since the line would serve two municipalities.¹⁰⁴ The other municipality, however, had also adopted an underground ordinance similar to Rocky River's.¹⁰⁵ Concluding that it was not the Act's intent to require communities to unwillingly accept massive electric facilities designed solely for their use,¹⁰⁶ the court held that the proposed line did not meet the first condition.¹⁰⁷

Applying the second condition of the Act, which requires construction in accordance with generally accepted safety standards, the court noted that the proposed line would run through a densely populated residential area and next to a playground.¹⁰⁸ Although the proposed line complied with the National Electric Safety Code,¹⁰⁹ the court

to a playground, would reach as high as 110 feet and carry 138,000 volts of electricity.
Id.

Cleveland Electric argued that once the city issued a permit, it was estopped from revoking it. The court stated, however, that estoppel could not arise from words or conduct resulting from deceit or misrepresentation. Given the subsequent events in the controversy, the court held that knowledge of these facts would have resulted in a denial of Cleveland Electric's application. *Id.* at 21, 318 N.E.2d at 459-60.

103. *See* note 89 *supra*.

104. 40 Ohio Misc. at 25, 318 N.E.2d at 461. The proposed line would also serve the city of Lakewood.

105. *Id.* Lakewood had also enacted an ordinance requiring underground construction of transmission lines.

106. *Id.*

If the line were designed so that it would serve only the residents of Rocky River, there would be no question that under the Hot Wires Act the City would have the right to require underground construction. If the line were designed to serve only Lakewood's residents, that community could, under the Hot Wires Act, require underground construction. The legal result should not change because the line will serve portions of these two communities.

Id. at 25-26, 318 N.E.2d at 461.

107. *Id.* at 26, 318 N.E.2d at 461.

108. *Id.* at 27, 318 N.E.2d at 462. The proposed placement of the poles was also within 35 feet of railroad tracks and thus subject to the possibility of railroad accidents. The evidence established that if one of the conductors fell, it would energize upon any contact with a grounded object. *Id.* The portion of the tracks running through Rocky River was already the scene of one substantial derailment which might have caused the proposed line to topple had it been in place at that time. *Id.*

109. *Id.* at 26, 318 N.E.2d at 461. Ten years had passed since the last revisions to the National Electric Safety Code guidelines were made. *Id.* The city also introduced the testimony of a registered electrical engineer stating that these guidelines did not

stated this satisfied only minimum construction safeguards. The court concluded that compliance with the requisite safety standards in this case required underground construction.¹¹⁰

The *Rocky River* Court also found that the proposed lines unreasonably affected the welfare of the general public in several respects. The line would have an adverse impact upon the environment by depressing neighborhood property values, causing general deterioration throughout the community, and disrupting its plans for future development.¹¹¹ The court then held that since the proposed line did not meet the conditions of the Act, it was subject to Rocky River's ordinance requiring underground construction.¹¹²

A different result was reached by an Ohio court in *Cleveland Electric Illuminating Co. v. Village of Mayfield*.¹¹³ Here, Cleveland Electric obtained a variance from Mayfield to construct a transmission line that would serve customers county-wide.¹¹⁴ Subsequently, the city enacted an ordinance requiring underground construction of transmission lines.¹¹⁵ Since compliance with this ordinance would substantially increase Cleveland Electric's construction costs, the company instituted an action to have the ordinance declared invalid.¹¹⁶

Applying the Hot Wires Act, the court held that the transmission line was an inter-city facility since the line was necessary for municipalities other than Mayfield.¹¹⁷ As in *Rocky River*, Cleveland Electric contended that the facilities met the requirements of the National

meet the requirements of safety in all areas or under all conditions. *Id.*, 318 N.E.2d at 461-62.

110. *Id.*, 318 N.E.2d at 462.

111. *Id.* at 27-28, 318 N.E.2d at 462. The court stated that the transmission line's effect on the environment warranted great attention. It was concerned about the city's plans to maintain the neighborhood's single-family character. The line would also interfere with the city's efforts to maintain an existing park and develop an additional park along the scenic Rocky River. *Id.*

112. *Id.* at 28, 318 N.E.2d at 462-63.

113. 53 Ohio App.2d 37, 371 N.E.2d 567 (1977).

114. *Id.*

115. *Id.* at 39, 371 N.E.2d at 570.

116. *Id.*

117. *Id.* at 43-44, 371 N.E.2d at 572. Although the village argued that there was no construction in any adjacent municipality, Cleveland Electric introduced evidence that the proposed line would serve many other municipalities in the near future. *Id.* at 43, 371 N.E.2d at 572.

Electric Safety Code.¹¹⁸ The court found that this satisfied the Act's provision of construction in accordance with generally accepted safety standards.¹¹⁹ Since Mayfield originally granted the variance for the facility because it was compatible with the general intent of the city's zoning ordinances, the court determined that the facility did not unreasonably affect the general public.¹²⁰ Based on compliance with these three conditions, the court held that Mayfield's ordinance was unreasonable, and therefore unenforceable with regard to Cleveland Electric's proposed facility.¹²¹

VI. SUGGESTED IMPROVEMENTS IN THE HOT WIRES ACT

The different conclusions arrived at in *Rocky River* and *Mayfield* point out some of the problems left unresolved by the Hot Wires Act. The inter-city facility exemption from municipal ordinances weighs heavily against local retention of zoning power over transmission facilities. An unqualified application of this provision allows frequent exemptions, since few lines traverse only one municipality.¹²² Hopefully, courts will choose to subject an inter-city facility to a local ordinance, as in *Rocky River*, when an exemption would contravene the legislative intent to consider local interests.¹²³ Such a situation would arise, for example, when all municipalities affected by construction of a line require undergrounding.¹²⁴

Certainly the additional cost incurred through underground placement greatly influenced the *Mayfield* court in determining that the ordinance was unreasonable.¹²⁵ The increasing trend towards such municipal requirements, however, suggests that citizens are conscious

118. *Id.* at 44, 371 N.E.2d at 572.

119. *Id.* The court briefly considered this requirement. It simply stated that since numerous states accepted the code as a safety standard, and since it was nationally known and recognized, it satisfied the act's requirement. *Id.*

120. *Id.* The court also based its determination on the fact that Mayfield had not attacked the variance during the litigation. *Id.*

121. *Id.* at 49, 371 N.E.2d at 575.

122. See ELECTRICITY AND THE ENVIRONMENT, *supra* note 11, at 90. See also Luce, *Power for Tomorrow: The Siting Dilemma*, 1 ENV'T'L L. 60, 66 (1970).

123. See *City of Rocky River v. Cleveland Elec. Illuminating Co.*, 40 Ohio Misc. 17, 26, 318 N.E.2d 455, 460 (Cuyahoga County Ct. 1973).

124. *Id.* at 25, 318 N.E.2d at 458.

125. 53 Ohio App.2d 37, 49, 371 N.E.2d 567, 575 (1977). "In light of the evidence that underground installation would increase substantially the cost per mile, we hold the ordinance to be unreasonable as applied to the project." *Id.*

of harm to the environment.¹²⁶ They are willing to pay higher rates to avoid this harm, especially when faced with a threatened decrease in property values.¹²⁷ In this context, courts may view an underground ordinance as a reasonable protection of property interests.

Since the potential hazards of the proposed line in *Rocky River* were readily discernible, the court did not hesitate in its determination that the local ordinance was reasonable.¹²⁸ If, however, the hazards to aesthetics, municipal planning, property values, and the environment are not as evident, are they then outside the bounds of municipal control? If a high probability of concrete harm is necessary to uphold a local ordinance as reasonable, it seems that the utility company's mere compliance with minimum safety standards is all that is necessary to bypass the ordinance.¹²⁹

The diverse standards applied by these two courts in determining the facility's compliance with safety standards demonstrates the problematic vagueness of this requirement. The *Rocky River* court appropriately considered the specific circumstances of the line's location when reviewing the adequacy of the safety precautions.¹³⁰ Where, however, a court determines safety in the absence of the particular circumstances, as in *Mayfield*, the Act's requirement is but a formality. Should the same minimum guidelines, as provided by the National Electric Safety Code,¹³¹ satisfy the safety requirement with no allowance for the distinct risks involved in a particular construction site? A provision establishing stringent safety standards for a line

126. Generally, it is difficult to state that underground zoning ordinances are clearly unreasonable. Due to technological problems, they are presently unreasonable with respect to very high voltage transmission. Except for such lines, however, the conclusion of unreasonableness is not quite so applicable. This is especially true when the safety hazards and the environmental damage due to overhead transmission lines are significant. See Vaubel, *Of Concern to Painesville — Or Only to the State*, *supra* note 83, at 277.

127. See Haller, *Zoning and the Utilities*, *supra* note 38, at 234.

128. 40 Ohio Misc. 17, 27, 318 N.E.2d 455, 460 (Cuyahoga County Ct. 1973). The court held that since the proposed line would run through a residential neighborhood and in close proximity to a playground, underground installation was the only acceptable method of constructing the proposed line. *Id.*

129. See Vaubel, *Of Concern to Painesville — Or Only to the State*, *supra* note 83, at 280.

130. 40 Ohio Misc. at 27, 318 N.E.2d at 460.

131. NATIONAL BUREAU OF STANDARDS, NATIONAL ELECTRIC SAFETY CODE, SAFETY RULES FOR ELECTRIC SUPPLY AND COMMUNICATION LINES (1963).

constructed in a residential or commercial area would better protect local safety interests.

VII. CONCLUSION

The Hot Wires Act apparently does not sufficiently protect municipalities when a utility company proposes transmission line construction.¹³² Responsibility for resolution of the conflict rests with the courts. Application of the Act too easily allows for a judicial determination that the local ordinance is unreasonable.¹³³ It is an improvement, however, from the polarized legislative approaches of exclusive state or exclusive local regulation mentioned earlier.¹³⁴

Strengthening the Act with more detailed provisions will avoid an immediate invalidation whenever additional costs accrue to the utility company. Undoubtedly monetary cost is an important factor, but consideration of all "costs," including those imposed on the safety, environment, and land values of the community is a necessary part of this evaluation.¹³⁵ Safety standards that account for the specific surroundings of each proposed line would prevent construction of a truly dangerous line and yet allow construction when no possible hazards exist. With these modifications, the Hot Wires Act could serve as model legislation for states that need to resolve this conflict between municipal land use control and utility service expansion.

132. One author asserts that the act does not protect municipal interests any more than a grant of exclusive regulatory authority to the state. See Vaubel, *Municipal Home Rule in Ohio*, 3 OHIO N. L. REV. 1099, 1152 (1976).

133. See 53 Ohio App.2d 37, 371 N.E.2d 567. The *Village of Mayfield* court summarily granted Cleveland Electric an exemption from the city's ordinance upon a simple showing of increased costs to the company and compliance with the National Electric Safety Code.

134. See notes 72-76 and 81-82 *supra*.

135. A court can resolve the question of whether a local ordinance restricting transmission line construction is reasonable on the basis of economics. It is impossible, however, to reduce some considerations to a monetary figure. Courts must not dismiss local concerns over public safety and community environment, at least where appreciably affected, solely because of increased financial costs to a utility company. See Vaubel, *Of Concern to Painesville — Or Only to the State*, *supra* note 83, at 273.

COMMENTS

