

# Electric Transmission Siting Processes in Selected Western and Midwestern States

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# TABLE OF CONTENTS

<b>Summary of Research Paper and Identification of Trends .....</b>	<b>1</b>
<b>Selected State Processes .....</b>	<b>5</b>
Iowa.....	5
Kansas.....	9
Michigan.....	13
Minnesota .....	16
North Dakota.....	21
Oklahoma.....	24
South Dakota.....	26
Texas .....	28
Wisconsin .....	31
<b>Analysis of Relevant Federal Statutes .....</b>	<b>35</b>

## Summary of Research Paper and Identification of Trends

This analysis in this section is based in part on a White Paper prepared by James A. Holtkamp and Mark A. Davidson, dated August, 2009 and titled “Transmission Siting in the Western United States” (the “**H&H White Paper**”). Additional information is drawn from research conducted by Faegre & Benson regarding transmission siting requirements in certain states in addition to those discussed in the H&H White Paper, as well as relevant federal law. All references to laws in states reviewed and summarized in the H&H White Paper are based on summaries included in the H&H White Paper. The states covered in the H&H White Paper are: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. Analysis and review of federal laws and certain states was conducted for this paper. Faegre & Benson analyzed the laws of Iowa, Kansas, Michigan, Minnesota, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin.

### *Summary of Key Points from the H&H White Paper.*

Need for Expanding and Updating Transmission Facilities. There is a pressing need to expand the capacity of interstate electric transmission facilities. The primary driver of this need is the rapid development of renewable energy sources, particularly wind and solar. Unlike traditional electric generation facilities, such as coal and gas powered facilities, renewable resources are site specific. Only certain geographic locations will support wind and solar electric generation facilities. Typically, optimal sites for renewable energy facilities are located away from the population dense urban areas with the greatest demand for electricity. The location specific nature of renewable energy generation facilities often dictates that electricity generated at such facilities be transmitted several hundred miles, and across state lines.

Impact of Increased Renewable Energy Demand and Green Energy Considerations. The increase in development of renewable energy generation facilities is driven by political initiatives like renewable portfolio standards, as well as social concerns about climate control, green energy and reducing reliance on fossil fuels. States not geographically situated to produce significant amounts of solar or wind energy may need to rely on renewable resources developed outside their borders and adequate interstate transmission facilities to achieve portfolio standards.

Siting Challenges and the Lack of Recognition of Regional and National Interests. Concurrently with the need for more transmission lines, there is increasing sensitivity to the siting of transmission lines close to population centers, and also in more remote areas which may include fragile habitat, scenic and historic trails, and parks. Siting issues are particularly difficult when involving transmission facilities that will pass through a

particular state, but will not provide electric service to the state. The extent of this problem ranges from a reluctance to base decisions on regional and national interests, to statutory prohibitions against approving projects that are not needed to address the needs of the approving state. Long term planning and development can also be stymied by statutory restrictions that limit expansion of transmission facilities to capacity that is reasonably anticipated to be needed in the near future.

Conflicts Between State and Local Governments and Laws. In many of the states studied, local governments have the ability to delay or prohibit transmission projects that have been deemed necessary by state government. States have adopted a variety of means to counteract this situation. Some states allow an appeal of an adverse local government ruling to the state agency that initially determined the need for the project. Other states have centralized the decision making on transmission facilities at the state level, and preempt local government regulation.

Western Governors' Association Siting Protocol. Some effort has been made to address multistate transmission developments on a regional level. The Western Governors' Association created a Siting Protocol in 2002. The Siting Protocol addresses means of enhancing interagency cooperation, however, it does not include substantive siting provisions. The federal Energy Policy Act of 2005 authorizes three or more contiguous states to enter into an interstate compact to facilitate siting of transmission facilities within the states. The authors note that this authorization has led to discussions, but has not led to any meaningful regional siting mechanism. The H&H White Paper also observes that in order to have effective interstate cooperation it will be necessary to obtain support from legislative bodies as well as governors.

Federal Laws. The H&H White Paper does not undertake an extensive analysis of federal laws. The authors do, however, note that certain federal statutes have introduced the potential for federal regulation and permitting of interstate transmission projects. For instance, it is noted that the Energy Policy Act of 2005 gave new authority to the U.S. Department of Energy (“**DOE**”) and the Federal Energy Regulatory Commission (“**FERC**”) over electric transmission. The Act granted the DOE authority to designate National Interest Electric Transmission Corridors (“**NIETCs**”) and provided FERC with backstop siting authority in designated NIETCs. It is noted, however, that since passage of the Act, only two NIETC Corridors have been designated and those designations have been the subject of litigation, which is ongoing.

The authors of the H&H White Paper suggest, without much discussion on the topic, that state regulation of transmission siting is preferable to federal regulation. The authors urge states to be proactive in addressing the problems inherent in the current system, to avoid losing control of the process to federal agencies.

*Trends Observed in the Analysis of the Regulatory Schemes of States Covered by the H&H White Paper and Additional Research Performed by Faegre & Benson.*

- Many states have attempted to address the potential inconsistency between siting decisions made by various state and local agencies. Numerous states have a central agency, such as a public utilities commission that is involved in siting decisions. There are a variety of regulatory schemes that define the role of the central agency and the impact of its decisions. For instance, in Wisconsin, siting decisions for major transmission line projects are made by the Public Service Commission of Wisconsin. The Commission is required to coordinate with the Department of Natural Resources and local governments have input in the decision-making process as well. Local governments may appeal the state agency's decision, but may not require a separate approval process, or impose requirements or limits on projects for which a CPCN has been issued by the Commission. A significant feature of the Wisconsin process is that transmission project proponent that obtains a CPCN is not required to apply for permits on the local level. In California, local authorities are preempted from regulating electric transmission projects, but the California Public Utilities Commission is required to consult with local land use agencies when siting projects. Similar schemes apply in Oregon and Montana. In contrast, in Michigan, an electric utility may avoid the application of local zoning ordinances that would prohibit or restrict its project, provided the utility includes a description of the conflicting ordinances in its application to the state permitting agency.
- Certain states grant a state agency final authority on the applicability of local government regulations, but nonetheless require the proponent of the project to apply for permits, licenses and approvals by the local government. The state agency is given authority to override the local government bodies under certain circumstances. The process in Colorado recognizes local land use regulation, but permits a utility to appeal a local agency's decision that would prohibit or restrict a transmission facility. Wyoming follows a similar process; this being said, the process has not been extensively utilized in Colorado. There is a multi-level approval process in Arizona, which generally requires compliance by the applicant with all applicable local land use laws. However, the Arizona Transmission Line Siting Committee can override a local ordinance if it finds that compliance with the requirement is unreasonably restrictive or is not feasible in view of available technology.
- There is a broad range of criteria used by the states to determine whether a particular transmission project requires state approval, or in some instances qualifies for state preemption of the need determination and siting review process. Criteria include the capacity of the line, the length of the corridor, the cost of the facility, or a combination of these and other factors. In some states, there is not a clear statement

regarding whether the state processes for determination of need and route selection only apply to regulated utilities, independent transmission companies, cooperatives and municipal owned utilities. There are also many definitions of “public utility” and “electric utility.”

- Some states require a limited review, or waive review, of transmission facilities which are an upgrade of existing facilities, or which lie within or adjacent to existing transmission corridors. For instance, Oregon exempts from state review, a transmission project which is within five hundred (500) feet of a corridor occupied by lines 230kV or higher, or lines 57kV or higher which are upgraded to no more than 230kV along the same right of way. A point to consider, however, is that typically, only projects that have received state review benefit from state preemption of land use and zoning laws. As a result, projects that avoid state level review may be subject to local regulation in each jurisdiction the line traverses.
- Certain states seek to regulate the source of electricity imported into the state. In California, SB 1368 imposes carbon emission performance standards for long-term contracts for imported electricity. The Minnesota Public Utilities Commission has conditioned approval on a transmission line from South Dakota on carbon dioxide reductions at the South Dakota generating facility. (H&H White Paper, p. 8; See also Minnesota discussion below).
- Some states have adopted statutes which recognize federal siting approval authority. For example, Michigan allows an expedited review process for transmission of electricity generated by wind power located within identified resource zones. One of the requirements for the expedited process is that the line has received approval from a regional transmission organization or FERC.
- Many states dictate time frames for review and decision making. The effectiveness of some of these provisions is questionable unless the law provides a consequence for failure to act. Some states go beyond dictating a time frame and provide that approvals are deemed given if the applicable agency does not act within the allotted amount of time.
- Michigan mandates that investor owned utilities join a regional transmission organization, or divest their transmission assets. Other states, such as Wisconsin, authorize involvement in a multi-state compact. However, there is no clear indication of an impact on siting processes that has evolved out of these collaborations.

## Selected State Processes

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### Iowa

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**Siting.** In Iowa, the Iowa Utilities Board (“**IUB**”) and municipalities share authority for approving applications for the construction of transmission lines. The IUB has the power to franchise transmission lines 69kV or greater that are located outside of any Iowa city, and Iowa municipalities are authorized to franchise transmission lines and other electric utility projects within their boundaries.

Under Iowa law, “[a] person shall not construct, erect, maintain, or operate a transmission line, wire, or cable that is capable of operating at an electric voltage of sixty-nine kilovolts or more along, over, or across any public highway or grounds outside of cities for the transmission, distribution, or sale of electric current without first procuring from the [Iowa] utilities board . . . a franchise . . .”<sup>1</sup> Despite this broad definition, the regulations exempt lines constructed entirely on property that is owned by a party engaged in transmission or distribution of electric power, or entirely within the property of the end-user of the electric power.<sup>2</sup> Further, lines that connect an electric generating plant to a power transmission system, an interconnected primary transmission system, or both are approved as part of the certification process for the plant and do not require a separate franchise.<sup>3</sup> For lines less than 69kV, no franchise is required, but the IUB retains jurisdiction over the lines, wires, or cables once constructed.<sup>4</sup>

Any person authorized to transact business in Iowa can file a verified petition for the right to construct a transmission line.<sup>5</sup> At least thirty (30) days prior to petitioning the IUB, the proponent of a transmission line project must hold informational meetings in each county in which real property or rights will be affected, at locations reasonably accessible to all impacted individuals.<sup>6</sup> Prior to such a meeting, the applicant must provide notice to every landowner whose property will be affected by the transmission line project, and every individual residing on property that will be involved in the project.<sup>7</sup> This notice must include: a description of the proposed project, the route of the proposed project, the right-of-way desired by the proponent, a statement that the route may be acquired using eminent domain, a description of the process the IUB will use to decide whether to grant the franchise or authorize the use of eminent domain, a statement that affected landowners can file objections with the IUB, and the time and place of the

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<sup>1</sup> IOWA CODE § 478.1(1).

<sup>2</sup> IOWA CODE § 478.1(2).

<sup>3</sup> IOWA CODE § 476A.1(5).

<sup>4</sup> IOWA CODE § 478.1(3).

<sup>5</sup> IOWA CODE § 478.2(1).

<sup>6</sup> IOWA CODE §§ 478.2(2)(b), 478.2(2).

<sup>7</sup> IOWA CODE § 478.2(2)(b).

informational meeting.<sup>8</sup> The proponent of the project is not permitted to begin negotiating for, or purchasing, easements or other property interests until the public informational meeting has been held.<sup>9</sup>

Thirty (30) days after the public informational meeting, the project's proponent can petition for a franchise from the IUB. All transmission line petitions must identify the party seeking to construct the transmission line, as well as the starting point, route, and ending point. In addition, the petition must contain a description of the affected land, the proposed materials, the manner of construction, the maximum voltage the line will carry, and an allegation that the proposed construction is necessary to serve a public use.<sup>10</sup> Iowa's laws authorize the IUB to grant the power of eminent domain to petitioners, provided petitioners request the power in their petition.<sup>11</sup> For proposed transmission lines capable of operating at 69kV or more and extending a distance of one mile or longer across privately owned real estate, the petitioner must further allege that the proposed construction "represents a reasonable relationship to an overall plan of transmitting electricity in the public interest..."<sup>12</sup> The petitioner must substantiate this final allegation by showing, at a minimum:

- a. the relationship of the proposed project to the present and future economic development of the area;
- b. the relationship of the proposed project to comprehensive electric utility planning;
- c. the relationship of the proposed project to the needs of the public presently served and future projections based on population trends;
- d. the relationship of the proposed project to the existing electric utility system and parallel existing utility routes;
- e. the relationship of the proposed project to any other power system planned for the future;
- f. possible alternative routes and methods of supply;
- g. the relationship of the proposed project to the present and future land use and zoning ordinances; and
- h. the inconvenience or undue injury which may result to property owners as a result of the proposed project.<sup>13</sup>

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<sup>8</sup> IOWA CODE § 478.2(3)(b).

<sup>9</sup> IOWA CODE § 478.2(4).

<sup>10</sup> IOWA CODE § 478.3(1).

<sup>11</sup> IOWA CODE §§ 478.2(3), 478.3.

<sup>12</sup> IOWA CODE § 478.3(2).

<sup>13</sup> *Id.*

However, the utilities board may waive any of these showings that are not applicable to the proposed project.<sup>14</sup>

Any party whose rights may be affected has the right to file an objection with the IUB.<sup>15</sup> The IUB will consider the petition and all objections received in response.<sup>16</sup> If the petition involves taking land by eminent domain, or if affected parties file objections, the IUB is required to hold a public hearing prior to making its decision.<sup>17</sup> In all other cases, the IUB has discretion to determine whether or not to hold a hearing regarding the petition.<sup>18</sup>

The IUB is authorized to grant a petition for franchise in whole or in part, or subject to any restrictions or modifications it deems appropriate, provided it makes a finding “that the proposed line or lines are necessary to serve the public use and represents a reasonable relationship to an overall plan of transmitting electricity in the public interest.”<sup>19</sup> However, where practicable, the IUB is directed to order the construction of the transmission line “near and parallel to roads, to the right of way of the railways of the state or along the division lines of the lands....”<sup>20</sup> Any person aggrieved by the IUB’s decision to grant or refuse to grant a franchise is entitled to petition for a rehearing in front of the IUB or seek judicial review of the decision.<sup>21</sup>

In addition to its typical franchise process, Iowa law provides two alternatives for project proponents. First, a party seeking to construct a transmission line that is less than one mile in length and not requiring the use of eminent domain may petition for a temporary construction permit, which allows construction to commence before the IUB decides whether to grant a franchise for the installation and operation of utility lines.<sup>22</sup> To apply for a temporary permit, the proponent must file an application including all the information that is required to petition for a franchise.<sup>23</sup> In addition, the applicant must allege that it is the nearest electric utility to the proposed point of service.<sup>24</sup> A single member of the IUB can approve a temporary permit, and the IUB is not required to consider public need before issuing such a permit. A temporary permit is not, however, a

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<sup>14</sup> *Id.*

<sup>15</sup> IOWA CODE § 478.2(3).

<sup>16</sup> IOWA CODE § 478.4.

<sup>17</sup> IOWA CODE § 478.6.

<sup>18</sup> *Id.*

<sup>19</sup> IOWA CODE §§ 478.4, 478.6.

<sup>20</sup> IOWA CODE § 478.18.

<sup>21</sup> IOWA CODE §§ 478.32, 476.12.

<sup>22</sup> IOWA CODE § 478.31.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

guarantee that a franchise will be granted. The petitioner must still complete the full franchise process and the IUB retains discretion to deny a franchise or modify the project specifications.<sup>25</sup>

Iowa law also provides an abbreviated franchise process for proponents seeking to replace an existing 34.5kV line with a 69kV line.<sup>26</sup> The abbreviated process is available if the new line will be located within or substantially within the existing right-of-way, and will have substantially the same effect on the underlying properties as the existing line.<sup>27</sup> If these requirements are met, the petitioner must still apply to the IUB and obtain a franchise, but is not required to submit as much information during the process.<sup>28</sup>

**Local Governments.** Within their boundaries, Iowa municipalities are specifically vested with the power to grant “any person a franchise to erect, maintain, and operate plants and systems for electric light and power [and] heating...for a term of not more than twenty-five (5) years.”<sup>29</sup> Like the IUB, municipalities may use this power to grant, amend, extend, or renew a franchise, or may require proponents of transmission line projects to comply with certain requirements as a condition of the franchise. Municipalities may also grant petitioners the power of eminent domain to acquire rights of way.<sup>30</sup> Municipalities may not, however, grant, amend, extend or renew an exclusive franchise to any entity.<sup>31</sup>

Municipalities may only grant franchises to construct transmission lines by ordinance following a public hearing.<sup>32</sup> Following such a hearing, an ordinance can be adopted either by public vote or approval of the city council.<sup>33</sup> The proposal must be submitted to the voters if the proponent of the transmission line proposal requests a vote, or if a citizens group submits a valid petition to put the measure on the ballot.<sup>34</sup>

If a franchise is approved, the municipality may assess a franchise fee against the company as a condition of its construction and operation of the transmission line.<sup>35</sup> The fee cannot exceed five percent (5%) of the gross revenue generated from sales of

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<sup>25</sup> *Id.*

<sup>26</sup> IOWA CODE § 478.1(5).

<sup>27</sup> IOWA ADMIN. CODE § 199-11.1(9).

<sup>28</sup> IOWA ADMIN. CODE § 199-11.2.

<sup>29</sup> IOWA CODE § 364.2(4)(a).

<sup>30</sup> IOWA CODE § 364.2(4)(e).

<sup>31</sup> *Id.*

<sup>32</sup> IOWA CODE § 364.2(4)(a); (b).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> IOWA CODE § 364.2(4)(f).

electricity within the city, but the fee need not reflect the city's actual costs in approving, considering, or managing the transmission line franchise.<sup>36</sup>

## Kansas

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**Siting.** The Kansas Corporation Commission (“**KCC**”) has primary authority for regulating public utilities in Kansas, including the power to approve the siting of new transmission lines.<sup>37</sup> Construction of a new transmission line cannot begin without a certificate of public convenience and necessity (“**CPCN**”) from the KCC, and public utilities proposing large transmission projects must obtain an additional permit from the KCC prior to commencing construction.<sup>38</sup>

Kansas law defines “public utility” to include “all companies for the production, transmission, delivery or furnishing of heat, light, water or power.”<sup>39</sup> However, there are a number of exceptions to this broad definition. A municipally owned or operated utility, located within the corporate limits of the municipality or within three (3) miles of the municipality is not a “public utility” for purposes of regulation by the KCC.<sup>40</sup> Member owned nonprofit public utilities with less than 100 members are also excluded.<sup>41</sup> In addition, the KCC does not have jurisdiction over nonprofit membership cooperatives whose operations are primarily conducted out-of-state.<sup>42</sup> To qualify for the out-of-state exemption, the costs expended to construct the cooperative’s facilities in Kansas must account for less than twenty-five percent (25%) of the total costs expended on all the cooperative’s facilities, the cooperative’s headquarters must be located out-of-state, the cooperative must be subject to the jurisdiction, regulation, and control of another state, and the cooperative must offer Kansas customers the same rates and services that it offers to similarly-situated customers in other states.<sup>43</sup> Finally, Kansas law provides the option for owners of certain facilities that would otherwise be regulated as public utilities to “opt-out” of regulation. Owners of facilities that were constructed or placed into service after January 1, 2001 can elect to opt-out of regulation if their facilities are not in the rate base of any electric public utility, any non-stock member-owned cooperative corporation

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<sup>36</sup> *Id.*

<sup>37</sup> *See, e.g.*, KAN. STAT. ANN. §§ 66-131, 66-1, 178.

<sup>38</sup> *Id.*

<sup>39</sup> KAN. STAT. ANN. § 66-104(a).

<sup>40</sup> KAN. STAT. ANN. § 66-104(b).

<sup>41</sup> KAN. STAT. ANN. § 66-104c.

<sup>42</sup> KAN. STAT. ANN. § 66-104b.

<sup>43</sup> *Id.*

incorporated in Kansas, or any municipally owned or operated electric utility.<sup>44</sup> A cooperative can also opt-out after a vote by its members.<sup>45</sup>

Companies that meet the definition of “public utility” cannot conduct business in the state of Kansas without first obtaining a CPCN from the KCC.<sup>46</sup> Unlike some other states, a CPCN is not required for each individual transmission line project; rather public utilities seek a certificate to conduct business in the state, then the utilities’ individual projects are evaluated under other regulatory processes.<sup>47</sup>

Public utilities seeking to construct electric transmission lines at least five (5) miles in length and with a capacity greater than 230kV or more may not commence site preparation or use eminent domain to acquire land for the project without first acquiring a siting permit from the KCC.<sup>48</sup> Any portion of an electric transmission line to be constructed outside any municipality and on the same easement as an existing line is exempt from the siting permit requirement, as is any line that will be adjacent to the right-of-way of a four-lane controlled access highway.<sup>49</sup>

To apply for a siting permit from the KCC, the utility must submit the proposed location of the transmission line, the name and addresses of all landowners whose land is proposed to be acquired or whose land is located within six hundred-sixty (660) feet of the center line of the proposed transmission line easement, and any other information requested by the KCC.<sup>50</sup> Following notice, the KCC must hold a public hearing in one of the affected counties within ninety (90) days after receipt of the application.<sup>51</sup> Within one hundred-twenty (120) days of receiving the application, the KCC must make a decision regarding the transmission line permit application.<sup>52</sup> The KCC has discretion to grant, withhold, or condition the permit in any way it deems just, reasonable, and adequate for the protection of the rights of all interested persons and the general public.<sup>53</sup> In reaching its decision, however, the KCC is required to evaluate “the necessity for and the reasonableness of the location of the proposed electric transmission line, taking into

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<sup>44</sup> KAN. STAT. ANN. § 66-104(e).

<sup>45</sup> KAN. STAT. ANN. § 66-104d.

<sup>46</sup> KAN. STAT. ANN. § 66-131.

<sup>47</sup> *Id.*

<sup>48</sup> KAN. STAT. ANN. §§ 66-1, 177, 66-1, 178(a).

<sup>49</sup> KAN. STAT. ANN. § 66-1, 182(a)(1), 66-1, 182(a)(2). These projects are also exempt from regulation by any city or county. KAN. STAT. ANN. § 66-1, 182(b).

<sup>50</sup> KAN. STAT. ANN. §§ 66-1, 178(a)(1)-(3).

<sup>51</sup> KAN. STAT. ANN. § 66-1, 178(b) 66-1, 179.

<sup>52</sup> KAN. STAT. ANN. §§ 66-1, 180, 66-1, 178(d).

<sup>53</sup> KAN. STAT. ANN. §§ 66-1, 180.

consideration the benefit to both consumers in Kansas and consumers outside the state and economic development benefits in Kansas.”<sup>54</sup>

Judicial review is available to any party aggrieved by at a decision of the KCC.<sup>55</sup> To be eligible for judicial review, the party challenging the decision must first petition the KCC for reconsideration and, if reconsideration is denied or the original decision upheld, may then proceed to the courts.<sup>56</sup>

**Local Government.** In addition to the requirement for statewide approval of certain projects and operations, Kansas law gives municipalities the power to regulate public utilities located entirely or primarily within their jurisdiction.<sup>57</sup> Municipalities have the authority to grant franchises up to thirty-five (35) years to any public utility for “any public utility purposes for which they are or may be incorporated,” including the construction of transmission lines.<sup>58</sup> Municipalities can also enact resolutions and ordinances that dictate the quality and character of each product or service to be rendered by a public utility, require or permit a public utility to construct new facilities, designate the location or nature of any new construction, and penalize a public utility for non-compliance.<sup>59</sup>

Any party aggrieved by a municipal ordinance or resolution related to public utilities can complain to the KCC within fifteen (15) days of publication of such ordinance or resolution.<sup>60</sup> After receiving a complaint, the KCC will hold a hearing on the matter.<sup>61</sup> If the KCC decides the regulation is unreasonable, contrary to public welfare or public interest, or illegal, the agency will advise the municipality of its finding within ten (10) days and suggest changes to the regulation.<sup>62</sup> The municipality then has twenty (20) days to revise the resolution or conform to the KCC’s recommendations.<sup>63</sup> If it fails to do so, the KCC may bring a suit against the municipality to set aside the ordinance or resolution, or any portion thereof.<sup>64</sup>

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<sup>54</sup> *Id.*

<sup>55</sup> KAN. STAT. ANN. § 66-1, 181.

<sup>56</sup> KAN. STAT. ANN. § 66-1, 181, 66-118b.

<sup>57</sup> KAN. STAT. ANN. § 66-104(c).

<sup>58</sup> KAN. STAT. ANN. § 12-824(a).

<sup>59</sup> KAN. STAT. ANN. § 66-133.

<sup>60</sup> KAN. STAT. ANN. § 66-133(3).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

**Interstate Transmission Planning.** Kansas law authorizes the statewide agencies responsible for overseeing public utilities to engage in interstate transmission planning with regional transmission organizations. Particularly, the KCC is permitted to participate in any regional transmission organization (“**RTO**”) recognized by the Federal Energy Regulatory Commission (“**FERC**”) of which one or more Kansas electric public utility is a member.<sup>65</sup> Similarly, the Kansas Electric Transmission Authority (“**KETA**”), discussed below, has the power to participate in reliability and transmission planning with the Southern Power Pool (“**SPP**”). Whether or not KETA is involved in SPP planning, the agency may only exercise its rights and powers to facilitate projects approved by the SPP.<sup>66</sup>

**Kansas Electric Transmission Authority.** In 2005, the Kansas legislature enacted HB 2262 to create KETA.<sup>67</sup> KETA is charged with ensuring the reliable operation of the transmission system in Kansas, as well as diversifying and expanding the Kansas economy and facilitating consumption of Kansas energy through improvements in the state’s electric transmission infrastructure.<sup>68</sup> In particular, KETA is authorized to plan, construct, develop, acquire, own, or dispose of electric transmission facilities, either on its own or through contracts with public utilities, municipal utilities, and cooperative utilities.<sup>69</sup> However, KETA is not authorized to operate or maintain transmission lines in Kansas.<sup>70</sup>

One of KETA’s primary functions has been to facilitate the planning and permitting of transmission lines.<sup>71</sup> KETA cannot bypass municipal or statewide regulatory processes for siting new transmission lines, but helps to guide other agencies’ discretionary functions.<sup>72</sup> KETA may intervene in KCC permitting proceedings regarding the siting of transmission lines or may assist a regulated body in navigating the

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<sup>65</sup> KAN. STAT. ANN. § 74-633.

<sup>66</sup> KAN. STAT. ANN. §§ 74-99d07, 74-99d14.

<sup>67</sup> KAN. STAT. ANN. § 74-99d01, *et seq.*

<sup>68</sup> KAN. STAT. ANN. § 74-99d01(b).

<sup>69</sup> KAN. STAT. ANN. § 74-99d14(a)(1).

<sup>70</sup> KAN. STAT. ANN. § 74-99d14(c).

<sup>71</sup> *See, e.g.*, KANSAS ELECTRIC TRANSMISSION AUTHORITY, 2009 ANNUAL REPORT TO THE GOVERNOR & LEGISLATURE (Jan. 11, 2010).

<sup>72</sup> *Id.*

permit process successfully.<sup>73</sup> KETA also works with interstate and renewable energy initiatives to advance Kansas’s goals in these areas.<sup>74</sup>

## Michigan

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**Siting.** The Michigan Public Service Commission (“MIPSC”) has general oversight of electric utilities in Michigan. The Michigan Electric Transmission Line Certification Act<sup>75</sup> (“METLCA”) governs the permitting of transmission lines for any “electric utility,” “affiliated transmission company,”<sup>76</sup> or “independent transmission company.”<sup>77</sup> Michigan statutes define “electric utility” as a person, partnership, corporation, association, or other legal entity whose transmission or distribution of electricity is regulated by the MIPSC, but exclude municipal utilities, affiliated transmission companies and independent transmission companies.”<sup>78</sup> Any electric utility with 50,000 or more residential customers in the state, any affiliated transmission company and any

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<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> MICH. COMP. LAWS § 460.561, *et seq.*

<sup>76</sup> MICH. COMP. LAWS § 460.562(a) "Affiliated transmission company" means a person, partnership, corporation, association, or other legal entity, or its successors or assigns, which has fully satisfied the requirements to join a regional transmission organization as determined by the federal energy regulatory commission, is engaged in this state in the transmission of electricity using facilities it owns that were transferred to the entity by an electric utility that was engaged in the generation, transmission, and distribution of electricity in this state on December 31, 2000, and is not independent of an electric utility or an affiliate of the utility, generating or distributing electricity to retail customers in this state.

<sup>77</sup> MICH. COMP. LAWS § 460.562(f) "Independent transmission company" means a person, partnership, corporation, association, or other legal entity, or its successors or assigns, engaged in this state in the transmission of electricity using facilities it owns that have been divested to the entity by an electric utility that was engaged in the generation, transmission, and distribution of electricity in this state on December 31, 2000, and is independent of an electric utility or an affiliate of the utility, generating or distributing electricity to retail customers in this state.

<sup>78</sup> MICH. COMP. LAWS § 460.562(e) "Electric utility" means a person, partnership, corporation, association, or other legal entity whose transmission or distribution of electricity the commission regulates under 1909 PA 106, MICH. COMP. LAWS § 460.551 to 460.559, or 1939 PA 3, MCL 460.1 to 460.10cc. Electric utility does not include a municipal utility, affiliated transmission company, or independent transmission company.

independent transmission company that plans to construct a “major transmission line”<sup>79</sup> within five (5) years after planning commences, must submit a construction plan to the MIPSC.<sup>80</sup> “Major transmission line” means a transmission line of five (5) miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at system bulk supply voltage of 345kV or more.<sup>81</sup> Any electric utility with fewer than 50,000 residential customers in the state, an affiliated transmission company or an independent transmission company may opt to file an application for a certificate for a transmission line<sup>82</sup> other than a major transmission line and may opt to submit a construction plan for such line.<sup>83</sup>

A certificate of public convenience and necessity must be obtained prior to the construction of a major transmission line.<sup>84</sup> With some exceptions, a certificate is not required for construction of a new transmission line that is not a major transmission line. A qualified applicant that opts to submit an application for a certificate for a transmission line other than a major transmission line may not commence construction on such line until the MIPSC issues the certificate. The procedures for certificates for all transmission lines are the same, whether or not the line is deemed a major transmission line except for the required plan that must be submitted for major transmission lines.

- a. Major transmission lines. An electric utility that has 50,000 or more residential customers in this state, an affiliated transmission company, or an independent transmission company must apply to the MIPSC for a certificate for a proposed major transmission line.<sup>85</sup> The application must contain certain detailed information, including a detailed description of the proposed major transmission line and its proposed route, and a description and evaluation of one or more

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<sup>79</sup> MICH. COMP. LAWS § 460.562(g) "Major transmission line" means a transmission line of 5 miles or more in length wholly or partially owned by an electric utility, affiliated transmission company, or independent transmission company through which electricity is transferred at system bulk supply voltage of 345kv or more.

<sup>80</sup> MICH. COMP. LAWS § 460.564 (2009).

<sup>81</sup> MICH. COMP. LAWS § 460.562(g).

<sup>82</sup> MICH. COMP. LAWS § 460.562(k) "Transmission line" means all structures, equipment, and real property necessary to transfer electricity at system bulk supply voltage of 100kV or more.

<sup>83</sup> MICH. COMP. LAWS § 460.569 (2009).

<sup>84</sup> MICH. COMP. LAWS § 460.565 (2009).

<sup>85</sup> MICH. COMP. LAWS § 460.567(1) (2009).

alternative routes.<sup>86</sup> Public notice and an administrative hearing must be held prior to issuance of the certificate.<sup>87</sup>

- b. Expedited siting certificate. The MIPSC may issue an expedited siting certificate for a transmission line to a qualified applicant in order to facilitate transmission of electricity generated by wind power located within identified “wind energy resource zones”<sup>88</sup> (a “**WERZ**”). The expedited process is a maximum of one hundred-eighty (180) days from the time the application is submitted to the MIPSC. However, prior to submitting an application for an expedited certificate, the applicant must have obtained any required approvals from the “applicable regional transmission organization”<sup>89</sup> for the proposed transmission line.<sup>90</sup> The applicant must give at least sixty (60) day’s notice to the MIPSC of its intent to seek approval from the applicable RTO.<sup>91</sup> The MIPSC may only issue a certificate under the expedited process if it determines that (among other things) the proposed transmission line has received federal approval.<sup>92</sup> “Federal approval” means approval by the applicable [RTO] or other FERC approved transmission planning process.<sup>93</sup> The applicant must also provide information showing that the proposed transmission line will comply with all applicable state and federal environmental standards, laws and rules.<sup>94</sup>

**Local Government.** Prior to application with the MIPSC for a certificate for a major transmission line, the applicant must schedule and hold a public meeting in each

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<sup>86</sup> MICH. COMP. LAWS § 460.567(2) (2009).

<sup>87</sup> MICH. COMP. LAWS § 460.568 (2009).

<sup>88</sup> MICH. COMP. LAWS § 460.1013(f) “Wind energy resource zone” or “wind zone” means an area designated by [MIPSC] under [MICH. COMP. LAWS § 460.1147].

<sup>89</sup> MICH. COMP. LAWS § 460.1003(e) “Applicable regional transmission organization” means a nonprofit, member-based organization governed by an independent board of directors that serves as the federal energy regulatory commission-approved regional transmission organization with oversight responsibility for the region that includes the provider’s service territory. A “provider” includes an “electric provider,” which is defined at MICH. COMP. LAWS §460.1005(a) and includes “any person or entity that is regulated by the commission for the purpose of selling electricity to retail customers in [Michigan],” “a municipally-owned electric utility” in Michigan, and a “cooperative electric utility” in Michigan.

<sup>90</sup> MICH. COMP. LAWS § 460.1149(3) (2009).

<sup>91</sup> MICH. COMP. LAWS § 460.1149(4) and (5) (2009).

<sup>92</sup> MICH. COMP. LAWS § 460.1153(3) (2009).

<sup>93</sup> Codified at MICH. COMP. LAWS § 460.1005(k) (2009).

<sup>94</sup> MICH. COMP. LAWS § 460.1151(e) (2009).

municipality through which the proposed line would pass.<sup>95</sup> If any portion of the proposed route under the application is prohibited or regulated by a local zoning ordinance, the applicant must include in the application a description of the location and manner in which that zoning ordinance prohibits or regulates the location or construction of the proposed route.<sup>96</sup> If the MIPSC issues a certificate (either under the normal process or under the expedited process for a transmission line from a WERZ), the certificate takes precedence over conflicting local ordinance, law, rule, regulation, policy, or practice that would prohibit or regulate the location or construction of a transmission line for which the MIPSC issued the certificate.<sup>97</sup> Changes in zoning ordinances enacted after the applicant has filed an application for a certificate for a transmission line are not effective to limit or impair the approved transmission line's construction, operation, or maintenance.<sup>98</sup>

***Interstate Transmission Planning*** Michigan requires investor owned utilities to join a FERC approved regional transmission organization or other FERC approved multistate independent transmission organization, or divest its interests in transmission facilities.<sup>99</sup>

## Minnesota

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***Siting.*** Under the Minnesota Power Plant Siting Act,<sup>100</sup> general oversight of the siting and routing of “large electric power facilities” is vested with the Minnesota Public Utilities Commission (“**MNPUC**”).<sup>101</sup> Large electric power facilities include “high-voltage transmission lines” defined as lines that are capable of operation at a nominal voltage of 100kV or more and are greater than fifteen hundred (1,500) feet in length.<sup>102</sup> Construction of a high-voltage transmission line requires a route<sup>103</sup> permit from the MNPUC. The approved high-voltage transmission line may only be constructed along the approved route.<sup>104</sup> For interstate routes, the MNPUC must attempt to come to agreement with affected states as to the entry and exit point of the proposed route, prior

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<sup>95</sup> MICH. COMP. LAWS § 460.566 (2009).

<sup>96</sup> MICH. COMP. LAWS § 460.567(2)(d) (2009).

<sup>97</sup> MICH. COMP. LAWS §§ 460.570 and 460.1153(4)(2009).

<sup>98</sup> *Id.*

<sup>99</sup> MICH. COMP. LAWS § 460.10w.

<sup>100</sup> MINN. STAT. § 216E.001 *et seq.* (2009).

<sup>101</sup> MINN. STAT. § 216E.02 (2009).

<sup>102</sup> MINN. STAT. § 216E.01(4) (2009).

<sup>103</sup> MINN. STAT. § 216E.01(8) "Route" means the location of a high voltage transmission line between two end points. The route may have a variable width of up to 1.25 miles.

<sup>104</sup> MINN. STAT. § 216E.03 (2009).

to designating the route.<sup>105</sup> In connection with interstate routes, the MNPUC may hold joint hearings, conduct joint investigations and issue joint or concurrent orders with the agencies of the affected states and may negotiate and enter into compacts with agencies of other states (pursuant to consent of the United States Congress).<sup>106</sup>

Each public utility, municipal utility, cooperative electric association, generation and transmission organization and transmission company must submit a transmission projects report to the MNPUC before November 1 of each odd-numbered year.<sup>107</sup> By June 1 of each even-numbered year, the commission must adopt a state transmission project list and either certify, certify as modified, or deny certification of the projects proposed under the submitted transmission projects report.<sup>108</sup>

Any person who proposes construction of a large energy facility must apply for and obtain a certificate of need and a route permit.<sup>109</sup> Minnesota statutes define a “large energy facility” in the context of transmission facilities to be a high voltage transmission line with a capacity of 200kV or more at least fifteen hundred (1500) feet in length, a line with a capacity of 100kV or more, at least ten miles in length”, or a high voltage line that crosses a state line.<sup>110</sup> Concurrent review of the separate applications is permissible.<sup>111</sup> The applicant must show there is no more cost effective means or effective method (e.g.,

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<sup>105</sup> *Id.* at (3).

<sup>106</sup> *Id.*

<sup>107</sup> MINN. STAT. § 216B.2425 (2009).

<sup>108</sup> *Id.*

<sup>109</sup> MINN. STAT. § 216B.243(4) (2009).

<sup>110</sup> MINN. STAT. § 216B.2421(2) "Large energy facility" means:

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(2) any high-voltage transmission line with a capacity of 200kV or more and greater than fifteen hundred 1,500 feet in length;

(3) any high-voltage transmission line with a capacity of 100kV or more with more than ten (10) miles of its length in Minnesota or that crosses a state line.

The MNPUC rules regarding certificates of need for a large high-voltage transmission line (MINN. R. 7849.0010 – 7849.0400 (2009)) defines a “large high voltage transmission line” (or LHVTL) as is defined above in MINN. STAT. § 216B.2421, subdivision (2), clause (2) and associated facilities necessary for the normal operation of the conductor, such as insulators, towers, substations and terminals. The rules pertaining to any high voltage transmission line project (MINN. R. 7849.1000 - 7849.2100 (2009)) for which a certificate of need is required under MINN. STAT. §§ 216B.243 or 216B.2425, define a “high voltage transmission line” (or HVTL) as “any high-voltage transmission line with a capacity of 200kV or more and any high-voltage transmission line with a capacity of 100kV or more with more than ten miles of its length in Minnesota or that crosses a state line.”

<sup>111</sup> *Id.*

through energy conservation and load management measures) to meet demand.<sup>112</sup> In assessing the need the MNPUC must evaluate (among other things):<sup>113</sup>

- Concerning a high-voltage transmission line, the relationship of the proposed line to regional energy needs, as set forth in the applicant's transmission projects report submitted to the MNPUC;
- Alternatives for satisfying transmission needs through other methods (e.g., increased efficiency and upgrading of existing facilities, load-management programs, and distributed generation);
- Policies, rules, and regulations of other state agencies, the federal government and local governments; and
- The benefits of an enhanced transmission system or lower costs for electric consumers in Minnesota.

The MNPUC may not issue a certificate of need for a large energy facility that transmits electricity generated via a nonrenewable energy source, unless the applicant can demonstrate that it has explored renewable energy sources and that the selected source is less expensive (including environmental costs) than power generated by a renewable energy source.<sup>114</sup> Other state agencies authorized to issue permits for siting, construction or operation of large energy facilities, and those authorized to participate in matters before the MNPUC involving utility rates and adequacy of utility services, are required to present their positions and participate in the public hearing process.<sup>115</sup> The certification of a project submitted in the applicant's transmission projects report satisfies the requirement for a certificate of need.<sup>116</sup>

- a. Standard Route Review.<sup>117</sup> A route permit is required for any high-voltage transmission line.<sup>118</sup> At least ninety (90) days prior to filing the application for a route permit, the applicant must provide notice to each local governmental

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<sup>112</sup> MINN. STAT. § 216B.243(3) (2009).

<sup>113</sup> *Id.*

<sup>114</sup> MINN. STAT. § 216B.243(3a) (2009). "Renewable energy source" includes hydro, wind, solar, and geothermal energy and the use of trees or other vegetation as fuel.

<sup>115</sup> MINN. STAT. § 216E.243(7) (2009).

<sup>116</sup> *Id.*

<sup>117</sup> Both the standard review and the alternative review process (below) are subject to rules promulgated by the MNPUC at MINN. R. 7850.1000 *et seq.* (2009).

<sup>118</sup> MINN. STAT. § 216E.03 (2009). Under MINN. R. 7850.1000 (2009) "High voltage transmission line" or "HVTL" is defined as "a conductor of electric energy and associated facilities designed for and capable of operating at a nominal voltage of 100kV or more either immediately or without significant modification. Associated facilities shall include, but not be limited to, insulators, towers, substations, and terminals."

unit where the route is proposed.<sup>119</sup> Within thirty (30) days of receipt of a proposed route, the local governmental units may request a consultation meeting with the applicant.<sup>120</sup> At least two routes must be proposed as a part of the application.<sup>121</sup> An environmental impact statement conducted by the Minnesota Department of Commerce is required.<sup>122</sup> Following notice, a public hearing before an administrative law judge is required.<sup>123</sup> The MNPUC must make its final decision within sixty (60) days following the MNPUC's receipt of the administrative law judge's report. The final decision must be made within one (1) year after the application for the route permit is deemed complete. The MNPUC's decision on the route permit must be guided by Minnesota's goals of conserving resources, minimizing environmental impacts, minimizing human settlement and other land use conflicts and ensuring the state's electrical energy security through an efficient and cost effective transmission infrastructure.<sup>124</sup>

b. Alternative Route Review. An alternative review process<sup>125</sup> is available for:

- transmission lines between 100 and 200kV;
- transmission lines in excess of 200kV and less than five (5) miles in length in Minnesota;
- transmission lines in excess of 200kV if at least eighty percent (80%) of the distance of the line in Minnesota will be located along existing high-voltage transmission line right-of-way;
- a transmission line service extension to a single customer between 200kV and 300kV and less than ten (10) miles in length; and
- a high-voltage transmission line rerouting to serve the demand of a single customer when the rerouted line will be located at least eighty percent (80%) on property owned or controlled by the customer or the owner of the transmission line.<sup>126</sup>

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<sup>119</sup> MINN. STAT. § 216E.03 (2009).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* An environmental impact statement is defined in Minn. R. 7850.1000 (2009) as a detailed written statement that describes proposed high voltage transmission lines and satisfies the requirements of MINN. STAT. §116D.04.

<sup>123</sup> MINN. STAT. § 216E.03 (2009).

<sup>124</sup> *Id.* at subdivision 7.

<sup>125</sup> The alternative review process is subject to rules promulgated by the MNPUC at MINN. R. 7850.2800 – 7850.3900.

<sup>126</sup> MINN. STAT. § 216E.04 (2009).

Under the alternative review process, the applicant may be required to submit additional information as requested by the MNPUC, but is not required to submit a second route for the proposed project.<sup>127</sup> However, the applicant must identify alternate routes that were rejected by the applicant and the MNPUC may identify additional routes to consider during processing of the application.<sup>128</sup> An environmental assessment<sup>129</sup> conducted by the Minnesota Department of Commerce is required.<sup>130</sup> Following notice, a public hearing must be held where the facility is to be located, conducted in accordance with procedures established by the MNPUC.<sup>131</sup> A final decision from the MNPUC must be issued within sixty (60) days of holding the public hearing, which must also be within six (6) months after the MNPUC the application is deemed complete.<sup>132</sup>

c. Local Route Review. In lieu of the standard and alternative review processes, an applicant may seek local approval for:

- transmission lines between 100 and 200kV;
- a transmission line service extension to a single customer between 200 and 300kV and less than ten (10) miles in length; and
- a high-voltage transmission line rerouting to serve the demand of a single customer when the rerouted line will be located at least eighty percent (80%) on property owned or controlled by the customer or the owner of the transmission line.<sup>133</sup>

If local approval is granted, a route permit is not required from the MNPUC.<sup>134</sup> If the applicant files an application with the MNPUC, its right to seek local approval for the project is deemed to have been waived.<sup>135</sup>

***Interagency Collaboration.*** State agencies authorized to issue permits required for the construction or operation of a high-voltage transmission line must participate during at public hearings regarding siting or routing of lines.<sup>136</sup>

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<sup>127</sup> MINN. STAT. § 216E.04, subdivision 3 (2009).

<sup>128</sup> *Id.*

<sup>129</sup> Under MINN. R. 7850.1000 "Environmental assessment" means "a written document that describes the human and environmental impacts of a...high voltage transmission line and alternative routes...and methods to mitigate such impacts."

<sup>130</sup> MINN. STAT. § 216E.04 (2009).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> MINN. STAT. § 216E.05 (2009).

<sup>134</sup> MINN. STAT. § 216E.05 (2009).

<sup>135</sup> *Id.*

**Local Government.** Issuance or denial of certificates of need are the sole and exclusive prerogative of the MNPUC and are binding upon other state departments and agencies, regional, county, and local governments and special purpose government districts, with some exceptions.<sup>137</sup> The issuance of a site or route permit is the sole approval required for the utility and the permit supersedes and preempts all zoning, building or land use rules, regulations or ordinances promulgated by any regional, county, local and special purpose governmental body.<sup>138</sup>

**Other.** If the proposed project will impact cultivated agricultural lands,<sup>139</sup> the applicant is required to notify the Minnesota Commissioner of Agriculture.<sup>140</sup> The Commissioner of Agriculture may advise the MNPUC as to whether to grant the permit and options for mitigating impacts.<sup>141</sup> The Department of Agriculture is the lead agency on development of any mitigation plan related to agricultural lands.<sup>142</sup>

## North Dakota

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**Siting.** The North Dakota Public Service Commission (“**NDPSC**”) is charged with siting energy transmission facilities under the North Dakota Energy Conversion and Transmission Facility Siting Act (“**NDSA**”). Every utility must annually develop a ten-year plan.<sup>143</sup> The NDPSC must review and approve route permits for transmission facilities to produce minimal adverse effects on the environment and upon the welfare of the citizens of North Dakota.<sup>144</sup> Any utility planning to construct a transmission facility must file a letter of intent with the NDPSC at least one (1) year before filing the application for a certificate of corridor compatibility (discussed below).<sup>145</sup> A certificate of necessity must be obtained prior to filing an application for a certificate of corridor compatibility.<sup>146</sup>

The routing process in North Dakota is a two-step process. The first step is to obtain a corridor designation and the second step involves route designation within the

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<sup>136</sup> MINN. STAT. § 216E.10 (2009).

<sup>137</sup> MINN. STAT. § 216E.243(7) (2009).

<sup>138</sup> MINN. STAT. § 216E.10 (2009).

<sup>139</sup> As defined in MINN. STAT. § 216G.01, subdivision 4 (2009).

<sup>140</sup> MINN. STAT. § 216E.10, subdivision 3(b) (2009).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> N.D. CENT. CODE § 49-22-04 (2009).

<sup>144</sup> N.D. CENT. CODE § 49-22-02 (2009).

<sup>145</sup> N.D. ADMIN. CODE 69-06-03-01 (2009).

<sup>146</sup> N.D. CENT. CODE § 49-03

designated corridor. A utility may not begin construction of a transmission facility or exercise the right of eminent domain in connection with that construction without first having obtained a route permit from the NDPSC.<sup>147</sup> Certain criteria<sup>148</sup> are applied in the siting process including “avoidance criteria,”<sup>149</sup> “exclusion criteria,”<sup>150</sup> and “selection criteria.”<sup>151</sup>

A utility seeking a route permit must first apply for a certificate of corridor compatibility.<sup>152</sup> The application must include information including the need for the transmission facility, the preferred corridor for the transmission facility and a description of the merits and detriments of the location and a comprehensive analysis of the reasons why the preferred location is best suited for the proposed facility.<sup>153</sup> The application must also provide an evaluation of environmental and social concerns; economic impacts; natural resource impacts; and issues raised by federal, state and local agencies or entities.<sup>154</sup> Notice of the application must be published after it is deemed complete.<sup>155</sup> Following a study and hearings,<sup>156</sup> the NDPSC may designate a corridor for a proposed

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<sup>147</sup> N.D. CENT. CODE § 49-22-07 (2009).

<sup>148</sup> "Criteria" means policy statements that guide and govern the preparation of the inventory of exclusion and avoidance areas, and the... transmission facility corridor and route suitability evaluation process. N.D. ADMIN. CODE 69-06-01-01 (2009). Route and corridor criteria are set forth further in N.D. ADMIN. CODE 69-06-08-02 (2009), which details certain exclusion areas, avoidance areas (and buffer zones applicable to the foregoing areas) and appropriate selection criteria.

<sup>149</sup> "Avoidance criteria" means criteria that remove areas from consideration for... transmission facility routes unless it is shown that under the circumstances there are no reasonable alternatives. N.D. ADMIN. CODE 69-06-01-01 (2009). *See also*, N.D. ADMIN. CODE 69-06-08-02 (2).

<sup>150</sup> "Exclusion criteria" means criteria that remove areas from consideration for... transmission facility routes. N.D. ADMIN. CODE 69-06-01-01 (2009). *See also*, N.D. ADMIN. CODE 69-06-08-02 (1).

<sup>151</sup> "Selection criteria" means criteria that guide and govern the selection of energy conversion facility sites and transmission facility corridors and routes in order to minimize adverse human and environmental impact after the exclusion and avoidance criteria have been applied. N.D. ADMIN. CODE 69-06-01-01 (2009). *See also*, N.D. ADMIN. CODE 69-06-08-02 (3).

<sup>152</sup> N.D. CENT. CODE § 49-22-08 (2009).

<sup>153</sup> *Id.*

<sup>154</sup> N.D. CENT. CODE § 49-22-09 (2009).

<sup>155</sup> N.D. CENT. CODE § 49-22-08 (2009).

<sup>156</sup> A hearing must be held in each county in which any portion of the proposed transmission facility corridor or route will be located. The NDPSC may consolidate hearings when more than one county is affected, subject to limitations if five or more

transmission facility if it finds that the proposed transmission facility meets the review criteria<sup>157</sup> and considerations.<sup>158</sup> The determination of corridor compatibility must be made no later than three (3) months after the filing of a completed application, subject to extension by the NDPSC for just cause.<sup>159</sup>

Within two (2) years following the issuance of the certificate of corridor compatibility, the utility must submit an application for a route permit within the designated corridor.<sup>160</sup> The application must provide an evaluation of the factors referenced above for the certificate of corridor compatibility. Notice of the application must be published after it is deemed complete.<sup>161</sup> Following a study and hearings, the NDPSC may issue a route permit for the proposed transmission facility if it finds that the proposed transmission facility meets the required review criteria and considerations.<sup>162</sup> The route permit application must be ruled on by the NDPSC no later than six (6) months following the filing of a complete application, subject to extension for just cause.<sup>163</sup>

***Interagency Collaboration.*** In order to promote efficiency and avoid duplication, the NDPSC is encouraged to cooperate with departments, agencies and officers of other states and the federal government.<sup>164</sup>

***Local Government.*** Subject to some limitations, the issuance of a route permit is the sole route approval that the utility must obtain.<sup>165</sup> No route designation may violate the rules of any state agency.<sup>166</sup> A permit for construction of a transmission facility within a designated corridor supersedes and preempts local land use, zoning and building rules, regulations or ordinances, but only if the NDPSC finds that as applied to the proposed project, those rules, regulations or ordinances are unreasonably restrictive, in light of current technology, economics and costs, and the needs of consumers regardless of location.<sup>167</sup> Utilities seeking corridor designation and route permitting must still obtain required state

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landowners affected by the proposed route or corridor file a timely petition. N.D. CENT. CODE §49-22-13 (2009).

<sup>157</sup> Set forth in N.D. CENT. CODE § 49-22-05.1 (2009).

<sup>158</sup> Set forth in N.D. CENT. CODE §49-22-09 (2009).

<sup>159</sup> N.D. CENT. CODE § 49-22-08 (2009).

<sup>160</sup> N.D. CENT. CODE § 49-22-08.1 (2009).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> N.D. CENT. CODE § 49-22-14.1 (2009).

<sup>165</sup> N.D. CENT. CODE § 49-22-16.1 (2009).

<sup>166</sup> N.D. CENT. CODE § 49-22-16.4 (2009).

<sup>167</sup> N.D. CENT. CODE § 49-22-16.2 (2009).

permits for the actual construction of the transmission facility, however, the issuing agency for any such permit is bound by the NDPSC's decision on the route designation.<sup>168</sup>

*Other.* If the proposed transmission facility will transmit energy produced outside of the United States that crosses any portion of the state of North Dakota, the proposed project must have the approval of the legislative body of North Dakota, in addition to meeting the requirements under the NDSA.<sup>169</sup>

## Oklahoma

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*Siting.* The Oklahoma Corporation Commission (“**OCC**”) has the authority to regulate public utilities within the state, including the power “to prescribe and promulgate rules, requirements and regulations, affecting their services, operation, and the management and conduct of their business....”<sup>170</sup> Despite the OCC's general authority over public utilities, Oklahoma statutes and regulations do not require public utilities to seek the OCC's approval prior to the siting of transmission lines within the state. In fact, there is no Oklahoma state agency that is charged with making siting determinations for major energy facilities. The OCC provides review and oversight of utilities' long-term strategic plans, but there is no permitting process specific to electric transmission line siting in Oklahoma.

Under Oklahoma regulations, utilities are required to present “integrated resource plans” to the OCC every three (3) years and must update their plans as market conditions change.<sup>171</sup> These plans are required because “[t]he practices and policies embodied in a utility's resource plan have direct, substantial effects on the costs and reliability of the electric supply....”<sup>172</sup> Accordingly, the OCC must periodically review utilities' resource plans to ensure that the utilities are making reasonable investment decisions. Prospective investments in transmission lines are one component of utilities' resource plans and thus must be submitted to the OCC as part of the integrated resource plan review process.

Oklahoma rules require a utility to notify the OCC at least thirty (30) days prior to the submission of its initial resource plan, and sixty (60) days prior to the submission of any

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<sup>168</sup> *Id.*

<sup>169</sup> N.D. CENT. CODE § 49-22-09.1 (2009).

<sup>170</sup> OKLA. STAT. tit. 17, § 152. The term “public utility” is defined to include every corporation, association, company, or individual that owns, operates, or manages any plant or equipment “[f]or the production, transmission, delivery or furnishing electric current for light, heat or power” to the public. Cities, towns, or other local government entities are excluded from the definition of “public utility.” OKLA. STAT. tit. 17, § 151.

<sup>171</sup> OKLA. ADMIN. CODE §§ 165:35-37-4(a), 165:35-37-4(b).

<sup>172</sup> OKLA. ADMIN. CODE §§ 165:35-37-1(a).

updated plan.<sup>173</sup> In addition, before submitting updates to an integrated resource plan, the utility must hold a technical meeting for all stakeholders and must provide a facilitator to coordinate and assist stakeholders at the meeting.<sup>174</sup>

Once these prerequisites are met, the utility must submit a plan to the OCC that includes, among other things:

- a. A description of the utility's transmission capabilities and needs during the forecast period;
- b. An assessment of the utility's need for additional resources;
- c. A description of the supply, demand, and transmission options available to the utility to address the identified needs;
- d. An analysis of the adequacy of the utility's existing transmission system and its ability to serve load over the next ten (10) years, including any planned proposed changes to existing transmission facilities.<sup>175</sup>

After receiving a utility's integrated resource plan, the OCC must conduct a public meeting regarding the plan and must hear comments regarding the plan's strengths and weaknesses.<sup>176</sup> The utility must consider all comments received and, where reasonable, make changes to its integrated resource plan reflecting those comments.<sup>177</sup>

***Retail Electric Supplier Certified Territory Act.*** In 1971, Oklahoma passed the Retail Electric Supplier Certified Territory Act requiring the OCC to divide the state into different territories, which were allocated among existing utilities in the state.<sup>178</sup> Once the state was divided, retail electric suppliers were given the exclusive right to provide electric services within their allocated area.<sup>179</sup>

***Regional Transmission Organizations.*** Although Oklahoma does not require its utilities to seek the approval of an RTO prior to the construction of a new transmission line, the state incentivizes such coordination by facilitating the recovery of expenses by utilities if such approval is obtained.<sup>180</sup> If a utility gets the approval of an RTO to which it belongs prior to constructing a transmission line, any costs the utility expends to construct the line are presumed to be recoverable through rates.<sup>181</sup> The presumption is rebuttable, and an audit

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<sup>173</sup> OKLA. ADMIN. CODE §§ 165:35-37-3(a), 165:35-37-5(a).

<sup>174</sup> OKLA. ADMIN. CODE § 165:35-37-5.

<sup>175</sup> OKLA. ADMIN. CODE § 165:35-37-4(c).

<sup>176</sup> OKLA. ADMIN. CODE §§ 165:35-37-3(a), 165:35-37-5(h).

<sup>177</sup> OKLA. ADMIN. CODE § 165:35-37-3(b).

<sup>178</sup> OKLA. STAT. tit. 17, § 158.21 *et seq.*

<sup>179</sup> OKLA. STAT. tit. 17, § 158.25.

<sup>180</sup> OKLA. STAT. tit. 17, § 286(A); OKLA. ADMIN. CODE §§ 165:35-38(1), 165:35-38-3(a).

<sup>181</sup> OKLA. ADMIN. CODE § 165:35-38-3(a).

or objection by a stakeholder may provide grounds for a denial of the rate increase, however the presumption nonetheless places preapproved transmission lines in a superior position to other utility projects.<sup>182</sup>

## South Dakota

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**Siting.** No transmission facility<sup>183</sup> may be constructed or operated in South Dakota without a permit from the South Dakota Public Utilities Commission (the “**SDPUC**”).<sup>184</sup> A “trans-state transmission facility” (defined as a facility originating outside of South Dakota<sup>185</sup>), requires not only a permit from the SDPUC, but the utility must also obtain approval by an act of the South Dakota legislative body.<sup>186</sup> “Utility” is broadly defined to include any person engaged in and controlling transmission of electric energy.<sup>187</sup> In order to obtain SDPUC approval of a trans-state transmission facility, certain criteria must be met, including a finding by the SDPUC that the proposed trans-state transmission facility is consistent with the public convenience and necessity, regardless of whether the recipients of the electricity are in South Dakota or another state.<sup>188</sup> Additionally, the applicant must provide a description of consumer demand (present and estimated) and estimated future energy needs of customers that will be directly served by the proposed transmission facility.<sup>189</sup>

Every utility that owns or operates, or plans within the next ten (10) years to own or operate, energy conversion facilities must develop and submit a ten-year plan to the

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<sup>182</sup> *Id.*; see also OKLA. STAT. tit. 17, § 152 *et seq.*

<sup>183</sup> S.D. CODIFIED LAWS § 49-41B-2.1. “Transmission facility” is defined to include an electric transmission line and associated facilities with a design of more than one hundred fifteen kV. “Associated facilities,” are facilities which transmission substations of two hundred fifty kV or more. S.D. CODIFIED LAWS § 49-41B-2.(2) (2009).

<sup>184</sup> S.D. CODIFIED LAWS § 49-41B-1 (2009).

<sup>185</sup> S.D. CODIFIED LAWS § 49-41B-2(11). “Trans-state transmission facility,” is an “electric transmission line and its associated facilities which originates outside the State of South Dakota, crosses this state and terminates outside the State of South Dakota; and which transmission line and associated facilities delivers electric power and energy of twenty-five percent (25%) or less of the design capacity of such line and facilities for use in the State of South Dakota.”

<sup>186</sup> S.D. CODIFIED LAWS § 49-41B-4.1 (2009). The criteria for approval of a Trans-state transmission facility is set forth in S.D. CODIFIED LAWS § 49-41B-4.2 (2009).

<sup>187</sup> S.D. CODIFIED LAWS § 49-41B-2(12) “Utility,” is any person engaged in and controlling the...transmission of electric energy.

<sup>188</sup> S.D. CODIFIED LAWS § 49-41B-4.2 (2009).

<sup>189</sup> S.D. ADMIN. R. 20:10:22:10 (2009).

SDPUC.<sup>190</sup> The plan must be updated every two (2) years following submission and must contain (among other things) a description of the general location, size, and type of transmission facilities of 250kV or more to be owned or operated by the utility during the next ten (10) years.<sup>191</sup> An energy conversion facility is a facility capable of generating 100 megawatts or more of electricity, but does not include a wind energy facility.<sup>192</sup>

No utility may begin construction of a transmission facility without first having obtained the permit issued by the SDPUC.<sup>193</sup> The permit application must contain a statement of the reasons for selecting the proposed location and environmental studies prepared relative to the facility.<sup>194</sup> The application must also set forth criteria used to select alternative sites to the proposed site, an evaluation of alternative sites, and an evaluation of the proposed transmission site and its advantages over alternative sites.<sup>195</sup> The applicant must provide detailed environmental information.<sup>196</sup> An environmental impact statement may be required by the SDPUC.<sup>197</sup> The SDPUC must issue findings and its decision on the permit application for a transmission line of 250kV or more within twelve (12) months of its receipt of the application.<sup>198</sup> For a transmission line of less than 250kV, the decision must be issued within six (6) months of receipt of the application.<sup>199</sup>

***Interagency Collaboration.*** As a part of the process, the SDPUC must also receive evidence presented by any state department, agency, or unit of local government concerning the environmental, social, and economic conditions and any projected changes relative thereto.<sup>200</sup>

***Local Government.*** In order to obtain SDPUC approval of a trans-state transmission facility, certain criteria must be met, including a finding by the SDPUC that the proposed trans-state transmission line and route will not interfere with the development of the region with consideration having been given to input from the local governing bodies.<sup>201</sup>

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<sup>190</sup> S.D. CODIFIED LAWS § 49-41B-3 (2009).

<sup>191</sup> *Id.*

<sup>192</sup> S.D. CODIFIED LAWS § 49-41B-2(6).

<sup>193</sup> S.D. CODIFIED LAWS § 49-41B-4 (2009).

<sup>194</sup> S.D. CODIFIED LAWS § 49-41B-11 (2009).

<sup>195</sup> S.D. ADMIN. R. 20:10:22:12 (2009).

<sup>196</sup> S.D. ADMIN. R. 20:10:22:13 (2009).

<sup>197</sup> S.D. CODIFIED LAWS § 49-41B-21 (2009).

<sup>198</sup> S.D. CODIFIED LAWS § 49-41B-24 (2009).

<sup>199</sup> S.D. CODIFIED LAWS § 49-41B-25(2009).

<sup>200</sup> S.D. CODIFIED LAWS § 49-41B-19 (2009).

<sup>201</sup> S.D. CODIFIED LAWS § 49-41B-4.2 (2009).

A permit for the construction of a transmission facility may supersede or preempt any county or municipal land use, zoning, or building rules, regulations, or ordinances if the SDPUC finds that such rules, or regulation, or ordinances, as applied to the proposed route, are unreasonably restrictive in light of existing technology, cost and economics, or the needs of parties.<sup>202</sup> Without such a finding the route must comply with applicable local land-use zoning or building rules, regulations or ordinances.<sup>203</sup> The application must include information concerning present and anticipated land use and conditions.<sup>204</sup> The applicant must provide a general description of local land use controls and an explanation of how the proposed facility will comply with the same.<sup>205</sup> If the proposed facility will violate local land use controls, a detailed explanation of the reasons why the proposed facility should be exempted from local land use controls must be included (the explanation must include a detailed description of the restrictiveness of the local land use controls in view of existing technology, factors of cost, economics, needs of parties, and any additional information to aid the SDPUC in determining whether a permit may supersede or preempt a local land use controls).<sup>206</sup>

*Other.* South Dakota's restrictions on corporate ownership of agricultural land<sup>207</sup> are implicated in connection with acquisition of a right-of-way for a trans-state transmission facility.<sup>208</sup>

## Texas

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*Siting.* The Public Utility Commission of Texas (“**TXPUC**”) is responsible for overseeing the terms for intra-state transmission service and for distribution service in certain areas of the state and has the jurisdiction as conferred under the Texas Public Utility Regulatory Act (“**PURA**”).<sup>209</sup> Under PURA, an electric utility<sup>210</sup> or other person may not provide

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<sup>202</sup> S.D. CODIFIED LAWS § 49-41B-28 (2009).

<sup>203</sup> *Id.*

<sup>204</sup> S.D. ADMIN. R. 20:10:22:18 (2009).

<sup>205</sup> S.D. ADMIN. R. 20:10:22:19 (2009).

<sup>206</sup> *Id.*

<sup>207</sup> Pursuant to S.D. CODIFIED LAWS § 47-9A-3 (2009).

<sup>208</sup> See, S.D. CODIFIED LAWS §§ 49-41B-4.4 - 49-41B-4.7 (2009).

<sup>209</sup> Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-66.017 (also known as PURA).

<sup>210</sup> TEX. UTIL. CODE ANN. § 31.002 (2009) "Electric utility" means a person... that owns or operates for compensation in [Texas] equipment or facilities to... transmit, distribute, sell, or furnish electricity in [Texas]. The term includes a lessee, trustee, or receiver of an electric utility.... The term has certain exclusions including: a municipal corporation; a corporation described by [TEX. UTIL. CODE ANN.] Section 32.053 to the extent the corporation

service to the public unless the utility or other person first obtains from the TXPUC a certificate of public convenience and necessity.<sup>211</sup> Any proposed transmission lines must be reported to the TXPUC in accordance with the TXPUC rules relating to Transmission Construction Reports.<sup>212</sup>

As a part of its application to the TXPUC, the applicant must file evidence to show the applicant has received the consent, franchise, or permit required by the proper municipal or other public authority.<sup>213</sup> Upon receipt of an application, the TXPUC must give notice of the application to interested parties; and (if requested) set a time and place for a hearing.<sup>214</sup> If in connection with separate applications it is apparent that the proposed transmission lines share a common point of interconnection, the TXPUC must consolidate the applications.<sup>215</sup> The TXPUC has one (1) year from the application filing date to either approve or deny the application for a certificate for a new transmission facility.<sup>216</sup> An uncontested<sup>217</sup> application for a certificate for a transmission line must be approved within eighty (80) days from the date of filing of a complete application.<sup>218</sup>

The proposed transmission line must be routed to moderate impacts on an affected a community and landowners (to a reasonable extent) unless considerations of grid reliability and security dictate otherwise.<sup>219</sup> The TXPUC's consideration of the application and the selection of the utility's preferred and alternate routes must also take into account the following factors (unless a route is otherwise agreed to by the utility, the landowners whose property is crossed by the proposed line, and certain owners of land in proximity to the proposed line):

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sells electricity exclusively at wholesale and not to the ultimate consumer; an electric cooperative; and a retail electric provider. However, for purposes of Chapter 37 of PURA, an "electric utility" includes an electric cooperative. TEX. UTIL. CODE ANN. § 37.001 (2009).

<sup>211</sup> Hammack v. Public Utilities Commission, 131 S.W.3d 713 (Tex. App. 2004); citing TEX. UTIL. CODE ANN. § 37.056 (2009).

<sup>212</sup> TEX. ADMIN. CODE §§ 25.83 and 25.101(b) (2009).

<sup>213</sup> TEX. UTIL. CODE ANN. § 37.053 (2009).

<sup>214</sup> TEX. UTIL. CODE ANN. § 37.054 (2009).

<sup>215</sup> TEX. UTIL. CODE ANN. §37.0541 (2009).

<sup>216</sup> TEX. UTIL. CODE ANN. §37.057 (2009).

<sup>217</sup> This essentially means that "no motion to intervene has been filed or the application is uncontested"; and "the [TXPUC staff] has determined that the application is complete and meets all applicable statutory criteria and filing requirements, including, but not limited to, the provision of proper notice of the application." TEX. ADMIN. CODE § 25.101(b)(3)(C) (2009).

<sup>218</sup> *Id.*

<sup>219</sup> TEX. ADMIN. CODE § 25.101(b)(3)(B) (2009).

- whether the routes utilize existing compatible rights-of-way, including the use of vacant positions on existing multiple -circuit transmission lines;
- whether the routes parallel existing compatible rights-of-way;
- whether the routes parallel property lines or other natural or cultural features; and
- whether the routes conform with the policy of prudent avoidance.<sup>220</sup>

**ERCOT.** Many electric utilities in Texas have voluntarily interconnected their transmission systems, providing enhanced reliability and opportunities to purchase power from one another. This interconnected network of transmission lines forms a grid within the state, known as the Electric Reliability Council of Texas (“**ERCOT**”). Although two other regional power grids serve parts of the state, ERCOT serves most of the state.<sup>221</sup> ERCOT is required to establish an Independent System Operator (“**ISO**”) charged with oversight of the transmission system in Texas.<sup>222</sup> The ISO's responsibilities include providing an annual report to the TXPUC, identifying existing and potential transmission constraints, system needs, and recommendations for meeting those needs.<sup>223</sup>

The TXPUC may grant a certificate to an electric utility or other person under this section for a facility that is part of the transmission system serving the ERCOT power region solely for the transmission of electricity.<sup>224</sup> In determining the need for a proposed transmission line, the TXPUC must consider the needs of a reliable and adequate interconnection network.<sup>225</sup> Deference must be given to the recommendation of a qualified independent organization<sup>226</sup> formed by a power region and documentation that the proposed transmission line is needed for the purpose of interconnecting new customers.<sup>227</sup>

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<sup>220</sup> “Prudent avoidance” is defined as “[the] limiting of exposures to electric and magnetic fields that can be avoided with reasonable investments of money and effort.” TEX. ADMIN. CODE. §25.101(a)(4).

<sup>221</sup> Hammack v. Public Utilities Commission, 131 S.W.3d at 713. Electric Reliability Council of Texas” or “ERCOT” means the area in Texas served by electric utilities, municipally owned utilities, and electric cooperatives that is not synchronously interconnected with electric utilities outside Texas. TEX. UTIL. CODE ANN. § 31.002 (2009).

<sup>222</sup> TEX. UTIL. CODE ANN. § 39.151 (2009); Hammack, 131 SW3d at 71.

<sup>223</sup> TEX. UTIL. CODE ANN. § 39.155(b) (2009).

<sup>224</sup> TEX. UTIL. CODE ANN. § 37.051(d) (2009).

<sup>225</sup> TEX. ADMIN. CODE § 25.101(b)(3) (2009).

<sup>226</sup> An organization that meets the requirements of PURA § 39.151.

<sup>227</sup> TEX. ADMIN. CODE § 25.101(b)(3) (2009).

The TXPUC may consider an application filed by a person not currently certificated as an electric utility for a certificate to construct transmission capacity that serves the ERCOT power region upon certain findings.<sup>228</sup>

**Local Government.** The TXPUC has exclusive original jurisdiction over the rates, operations and services of an electric utility outside of a municipality and for areas inside a municipality if that municipality has surrendered its jurisdiction to the TXPUC.<sup>229</sup> “Services” is intended to have a broad meaning and includes the facilities and equipment owned by the electric utility.<sup>230</sup> Furthermore, the TXPUC has exclusive appellate jurisdiction to review an ordinance of a municipality exercising its exclusive original jurisdiction.<sup>231</sup> By way of example, a local ordinance directing a utility to place its lines underground, dictating the types of poles to be utilized for overhead lines and requiring meters to be screened would be impermissible as an attempt to regulate the utility’s services to its customers.<sup>232</sup>

## Wisconsin

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**Siting.** Primary jurisdiction for approval of the construction and siting of an electric transmission line is vested in the Public Service Commission of Wisconsin<sup>233</sup> (“**PSCW**”). There is also significant involvement by the Wisconsin Department of Natural Resources (“**DNR**”). No person may commence the construction of an electric transmission line exceeding one mile in length with a nominal voltage of 100kV or more unless the person has applied for and received a CPCN from the PSCW issued not more than six (6) months prior to commencement of construction.<sup>234</sup> A public utility must also obtain a Certificate of Public Convenience and necessity (“**CPCN**”) for any transmission project that is 345kV or greater; or less than 345kV, but greater than 100kV, over one mile in length, and requiring new right of way.<sup>235</sup> A “public utility” includes private companies

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<sup>228</sup> *Id.*

<sup>229</sup> TEX. UTIL. CODE ANN. § 32.001(a) (2009).

<sup>230</sup> TEX. UTIL. CODE ANN. §§ 11.003(19) and 11.003(10) (2009).

<sup>231</sup> TEX. UTIL. CODE ANN. § 32.001(b) (2009). *See also, City of Allen v. PUC of Texas*, 161 S.W.3d 195 (Tex. App. 2005) (finding that directing line placement, pole type, and screening of electric facilities, a city’s ordinances adopted under the city’s police powers regulated the utility’s work performance and materials and thereby its service to its customers).

<sup>232</sup> *See City of Allen*, 161 S.W.3d at 207.

<sup>233</sup> WIS. STAT. § 196.491(3).

<sup>234</sup> WIS. STAT. § 196.491(3).

<sup>235</sup> WIS. STAT. § 196.491.

and municipal utilities, but does not include cooperatives.<sup>236</sup> All other transmission line projects (defined as an electric line designed and operated at 40kV or higher voltage) must obtain a Certificate of Authority from the PSCW if the project cost exceeds a certain percentage of the owner's gross revenues.<sup>237</sup>

During the CPCN process, the PSCW considers impacts to protected species, forests, waterways, community resources, aesthetics and historical sites.<sup>238</sup> For lines designed to operate at a nominal voltage of 345kV or more, the PSCW must also conclude that the line provides usage, service or increased regional reliability benefits and the benefits of the line are reasonable in relation to the cost.<sup>239</sup>

In considering the siting of new transmission facilities, the PSCW must implement state energy policy regarding transmission corridors.<sup>240</sup> The state energy policy mandates that to the extent consistent with economic and engineering considerations, reliability of the system and protection of the environment, the following corridors should be used in the stated order of priority:<sup>241</sup> (a) existing utility corridors; (b) highway and railroad corridors; (c) recreational trails, if facilities are constructed below ground and do not significantly impact environmentally sensitive areas; and (d) new corridors. A further siting consideration applies to a 100kV or higher line exceeding one mile in length located in the lower Wisconsin state riverway. To approve such a line, the PSCW must find, to the extent practicable, that the line will not impair the scenic beauty or natural value of the riverway, however, the PSCW may not require that the line be placed underground in order to approve an application.<sup>242</sup>

PSCW rules and procedures determine the necessity for an environmental impact statement.<sup>243</sup> The PSCW and the Wisconsin Department of Natural Resources are required to coordinate their respective review of the environmental impacts of a transmission project.<sup>244</sup>

The PSCW may refuse to certify a project if it appears that the project will provide facilities unreasonably in excess of the probable future requirements.<sup>245</sup>

The timing and steps for issuance of a CPCN are as follows:

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<sup>236</sup> WIS. STAT. §§ 196.01(5)(a);(b).

<sup>237</sup> WIS. ADMIN. CODE § PSC 112.05.

<sup>238</sup> WIS. STAT. § 196.491(3)(d)4.

<sup>239</sup> WIS. STAT. § 196.491(3)(d)3t.

<sup>240</sup> WIS. STAT. § 196.025(1m).

<sup>241</sup> WIS. STAT. § 1.12(6).

<sup>242</sup> WIS. STAT. § 196.491(3m).

<sup>243</sup> WIS. STAT. § 196.025(2).

<sup>244</sup> WIS. STAT. § 196.025(2m).

<sup>245</sup> WIS. STAT. § 196.49(3)(b).

- a. At least sixty (60) days prior to filing the application, the applicant submits a detailed project plan to the DNR.
- b. Within thirty (30) days after submission of detailed project plan the DNR notifies applicant of each department permit or approval which appears to be required.
- c. Within twenty (20) days after the DNR notifies the applicant of the necessary permits and approvals, the applicant must apply for such permits and approvals.
- d. The DNR must notify the applicant whether its application is complete within thirty (30) days after receipt. The application is deemed complete if the DNR fails to provide notice within thirty (30) days.
- e. The DNR must complete action on the application for any permit or approval within one hundred-twenty (120) days after the date on which the application is determined or considered to be complete.
- f. Within thirty (30) days following the filing of an application for a CPCN with the PSCW, the PSCW must notify the applicant whether the filing is complete, or it is deemed complete.
- g. The PSCW must take final action on the application within one hundred-eighty (180) days after the application is determined or deemed complete, unless the PSCW applies for and is granted an extension by the Dane County District Court. The Court may extend the period for an additional one hundred-eighty (180) days. If the PSCW fails to act within the period as extended, the PSCW is deemed to have issued a CPCN.

*Local Government.* Local ordinances may not prohibit or restrict testing activities undertaken by an electric utility for the purpose of determining the suitability of any site.<sup>246</sup> A local government may, however, petition the PSCW to impose reasonable restrictions on the activity. The Wisconsin legislature has withdrawn the power of local governments to regulate the siting of transmission lines once the PSCW has issued a CPCN.<sup>247</sup> An affected local government may participate in PSCW proceedings, and may seek judicial review of the PSCW decision.<sup>248</sup> Local governments may not enforce zoning laws or require the permits once a CPCN has been issued.<sup>249</sup>

*Strategic Planning.* Wisconsin requires the PSCW to prepare a biennial strategic energy assessment to evaluate the adequacy and reliability of the states' current and future

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<sup>246</sup> WIS. STAT. § 196.491(2r).

<sup>247</sup> WIS. STAT. § 196.491(3).

<sup>248</sup> WIS. STAT. § 196.491(3)(j).

<sup>249</sup> See, American Transmission Co. LLC v. Dane County, 772 NW.2d 731 (Wis. App. 2009).

electrical supply (“**SEA**”).<sup>250</sup> Among other things the SEA is required to: (a) identify and describe transmission lines in excess of 100kV on which an electric utility plans to commence construction within three (3) years;<sup>251</sup> and (b) identify and describe plans for assuring an adequate ability to transfer electric power into the state in a reliable manner.<sup>252</sup>

*Interstate Transmission Facilities.* The Governor of Wisconsin is authorized to enter into a compact with one or more states in the upper Midwest to create a joint process for member states to determine the need for and siting of regional electric transmission facilities that may affect electric service in Wisconsin. The compact, if formed, must require compliance with each state’s environmental and siting standards; a regional determination of need; and a mechanism to resolve transmission facility conflicts between states.<sup>253</sup> Facilities constructed to increase the capability to import transmission into Wisconsin shall use existing rights of way to the extent practicable.<sup>254</sup> Routing and design of such facilities must minimize environmental impacts in a manner consistent with achieving reasonable electric rates.

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<sup>250</sup> WIS. STAT. § 196.491(2).

<sup>251</sup> WIS. STAT. § 196.491(2)(a) 3m.

<sup>252</sup> WIS. STAT. § 196.491(2)(a) 3r.

<sup>253</sup> WIS. STAT. § 196.494.

<sup>254</sup> WIS. STAT. § 196.491(3)(D) 3r.

## Analysis of Relevant Federal Statutes

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*Federal Laws Governing Siting Review and Approvals.* Electric transmission, particularly in the western United States, has the potential to be sited on the hundreds of millions of acres of federally-owned lands that are managed by the Bureau of Land Management (“**BLM**”) and the United States Forest Service (“**USFS**”). Transmission right-of-way (“**ROW**”) approvals by those agencies may trigger a number of federal siting review and permitting laws. Other potential triggers include impacts to waters of the United States or to protected flora, fauna or historical landmarks. The implementation of those laws can be quite cumbersome given the breadth of some proposed transmission projects which can trigger a number of different environmental and other concerns, and may require the coordination of a large number of federal, state, local and tribal interests. Below is a brief summary of the major federal laws impacting siting, including a discussion of the delays and other obstacles that may be associated with their application to transmission siting. A uniform state law would not affect application of federal laws that impact siting.

- a. Federal Land Policy and Management Act<sup>255</sup> /National Forest Management Act.<sup>256</sup> The Federal Land Policy and Management Act requires the BLM to develop and maintain land use plans to manage public use of federal lands under its jurisdiction. The National Forest Management Act requires the USFW to do the same for federal lands under its jurisdiction. Both BLM and the USFW have included electric transmission lines in their land use plans, and have issued related permits and approvals. To apply for a ROW across federal lands, the applicant must apply to the federal agency(ies) with jurisdiction over the federal-land in question, which, in turn, often triggers a number of review and other permitting or approval laws discussed below. The applicant is required to submit all information that is reasonably related to the proposed use. The applicant must also submit plans for the construction, operation, and rehabilitation of the ROW. BLM and the USFS have broad discretion to establish stipulations, terms and conditions for ROW approval.
- b. National Environmental Policy Act.<sup>257</sup> The National Environmental Policy Act (“**NEPA**”) requires federal agencies to consider the environmental impacts of proposed actions, and reasonable alternatives to those actions. The Act does not

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<sup>255</sup> (43 U.S.C. §§ 1761-1771)

<sup>256</sup> (16 U.S.C. §§ 1600-1614)

<sup>257</sup> ( 42 U.S.C § 4321 et seq.)

mandate a particular result in terms of mitigating or lessening environmental impacts. It merely mandates a process to ensure that such impacts are considered by federal agencies in connection with their decision-making authority. NEPA only applies to “major federal actions,” which include the issuance of federal permits, licenses, or other approvals, as well as federal funding.

To meet the requirements of NEPA, federal agencies may undertake two levels of analyses: (1) preparation of a Categorical Exclusion (“**CE**”) if the action meets such an exclusion expressly set forth in the agency’s regulations; or (2) preparation of an Environmental Assessment (“**EA**”) as a screening tool to determine if the agency will need to either construct a Finding of No Significant Impact (“**FONSI**”), or if the preparation of an Environmental Impact Statement is required. A FONSI may be developed if the EA determines that the proposed action will not have a significant effect on the human environment. A FONSI must present the reasons for the finding, and also include the EA, or a summary of the EA in support of the determination.

If it is determined that a proposed federal action does not fall within a CE or qualify for a FONSI, the responsible agency must prepare an Environmental Impact Statement (“**EIS**”). The elements of an EIS include: the environmental impacts of the proposed action; the adverse environmental impacts that cannot be avoided if the proposed action is implemented; the reasonable alternatives to the proposed action; and any irreversible commitments of resources that would be involved in the proposed action if it is implemented. Under NEPA, a variety of potential impacts are reviewed, including those related to environmental protection, transportation, noise, and cultural resources.

The NEPA process is arguably the lengthiest, and most involved federal law governing the review of proposed federal actions. It has been criticized for causing significant delays and related cost increases to projects, as it may take multiple years for applicable federal agencies to complete their review. The NEPA process is also open to challenge from project opponents on a number of potential grounds, including the adequacy of the review, and the timeliness of the NEPA analysis. These challenges often further delay the proposed project.

- c. Endangered Species Act.<sup>258</sup> The Endangered Species Act (“**ESA**”) was enacted to prevent the extinction of threatened and endangered plant and animal species, and their habitats. The ESA is administered by the United States Fish and Wildlife Service (“**USFWS**”) (for non-marine species) and the National

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<sup>258</sup> (16 U.S.C. § 1531 et seq.)

Oceanic and Atmospheric Association (for marine species). The law requires federal agencies, in consultation with the USFWS or NOAA, to ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of any listed species or result in the destruction of critical habitat. The law also prohibits any action that could result in a “taking” of any endangered wildlife, except for “incidental takings” that may be authorized by a permit issued by the USFWS or NOAA. As with NEPA, the ESA process itself, along with possible litigation challenges, have been noted as causing significant delays and cost increases for projects.<sup>259</sup>

- d. Migratory Bird Treaty Act.<sup>260</sup> The Migratory Bird Treaty Act (“**MBTA**”) implements various treaties and conventions between the United States and Canada, Japan, Mexico, and Russia. It prohibits the taking, killing, and possession of migratory birds. Birds protected under the MBTA include songbirds, water fowl, hawks, owls, eagles, ravens, crows, doves, swifts, martins, swallows, and their nests and eggs. Projects that are likely to result in a take of migratory birds protected under the Act require a permit issued by the USFWS. A take is defined as “to pursue, hunt, shoot, wound, kill, trap, capture, or collect, or any attempt to carry out these activities.”

Executive Order 13186, a related authority to the MTBA, requires departments and agencies whose direct actions will result in the taking of migratory birds to develop and implement a Memorandum of Understanding with the USFWS that shall promote the conservation of bird populations. This Executive Order does not apply to projects by non-federal entities. However, those projects continue to be subject to the MTBA.

- e. Clean Water Act.<sup>261</sup> The dredging and filling of a navigable waters of the United States, is prohibited except under a permit issued by the United States Army Corps of Engineers under Section 404 of the Clean Water Act (“**CWA**”). The United States Environmental Protection Agency (“**EPA**”) is a consulting agency and it may veto a permit if it determines it is not reasonable.

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<sup>259</sup> There are at least three other federal laws that may pertain to the review and approval of actions or projects that could impact marine life and marine environments. Those include the Magnuson Stevens Fishery Conservation and Management Act, 16 U.S.C. §§ 1801-1884, Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., and the National Marine Sanctuaries Act, 16 U.S.C. § 1431 et seq. As they likely have limited application to our review of transmission siting concerns that are largely focused on the Midwest and western region of the United States, they are not included in this summary.

<sup>260</sup> (16 U.S.C. §§ (703-712)

<sup>261</sup> (33 U.S.C. §§ 1311, 1344 and 1362)

Permits may be one of two types: general and individual. General permits (called nationwide permits) cover broad categories of activities and are typically developed for activities that would result in minimal adverse effects to the environment. To comply, the permittee must comply with all conditions included in the general permit. Individual permits, on the other hand, are issued for activities not included in the broad categories covered by general permits. They are written specifically for the project in question and are subject to public notice and comment requirements. For these reasons, it takes a longer time to obtain coverage under an individual permit as compared with a general permit.

- f. Clean Air Act.<sup>262</sup> Under Section 309 of the Clean Air Act (“**CAA**”), EPA is required to review and publicly comment on the environmental impacts of major federal actions, including those that are the subject of an EIS. EPA’s review includes the adequacy of the analysis and the environmental impacts of the proposed action. The review is not limited to air issues. Rather, it includes all issues related to EPA’s “duties and responsibilities” which include all media. If EPA determines that the action is environmentally unsatisfactory, it is required to refer the matter to the Council on Environmental Quality (“**CEQ**”) for resolution.
- g. Bald and Golden Eagle Protection Act.<sup>263</sup> The Bald and Golden Eagle Protection Act prohibits anyone from taking covered eagles, including their nests and eggs, without a permit issued by the Department of Interior (“**DOI**”). The Act defines take as “pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, molest or disturb.” The term “disturb” is broadly defined in guidelines as “to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.”
- h. Fish and Wildlife Coordination Act.<sup>264</sup> The Fish and Wildlife Coordination Act authorizes the Secretaries of Agriculture and Commerce to provide assistance and cooperation with federal and state agencies to protect, rear, stock and increase the supply of game and fur-bearing animals, as well as to study the effects of polluting substances on wildlife. The Act also directs the Bureau of Fisheries to use impounded waters for fish-culture stations and migratory bird

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<sup>262</sup> (42 U.S.C. § 7609)

<sup>263</sup> (16 U.S.C. §§ 668-668c)

<sup>264</sup> (16 U.S.C. §§ 661-667e)

nesting areas. It also authorizes the development of plans to protect wildlife resources, the completion of wildlife surveys, and the acceptance of funds or lands for related purposes. To prevent damage to wildlife resources, the act requires consultation with the USFWS and state fish and wildlife agencies where any “waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted....or otherwise controlled or modified” by any agency under a federal permit or license.

- i. National Historic Preservation Act.<sup>265</sup> The National Historic Preservation Act was enacted to preserve historical and archaeological sites within the United States. It created the National Register of Historic Places and the list of National Historic Landmarks. Section 106 requires a review process to minimize the impact of all federally-funded and permitted projects on sites listed on, or eligible for listing on, the National Register of Historic Places. Any federal agency that may damage a historic property must consider alternative plans for their projects. If an adverse effect is expected, the agency is required to work with the local state historic preservation office to ensure that all interested parties have an opportunity to review and comment on the proposed project.

*Energy Policy Act of 2005.*<sup>266</sup> The siting of transmission lines has been burdensome on federal agencies, particularly with new mandates for the development of renewable energy sources. The demand for increased transmission siting has revealed some of the obstacles inherent in the myriad of federal laws governing siting reviews and approvals. Those include difficulties with coordination of agency reviews, conflicts with regional, state, and local interests, and inconsistent state requirements. In response, Congress enacted the Energy Policy Act of 2005 (“**EPAct**”), which established new federal mandates and authority to coordinate and streamline transmission line siting.

- a. Section 368 of EPAct—Designation of Corridors for Energy Transport on Western Lands. Section 368 of EPAct requires the coordination of the Departments of Energy, Transportation, Commerce, Defense, and Interior, together in consultation with state and tribal authorities to designate corridors for energy transportation on federal lands within eleven contiguous western states within two (2) years from enactment. These corridors are required to be included in the agency land use and resource management plans. Approximately 6000 miles of corridors were designated by those agencies based

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<sup>265</sup> (16 U.S.C. § 470 et seq.)

<sup>266</sup> (Pub. L. 109-58)

on demand and supply centers and congestion areas. Within the designated corridors, federal agencies have developed a streamlined process for agency coordination of environmental reviews and approvals. That process is documented in a Memorandum of Understanding that was prepared pursuant to Section 372 of EPAct and is discussed in Section b.3, below.

BLM and USFS determined that the designation of these corridors constituted a major federal action that triggered requirements under NEPA. Thus, those agencies, in cooperation with other federal agencies, developed a programmatic EIS to evaluate the potential impacts of developing transmission lines in the corridors identified by the agencies.<sup>267</sup> Several environmental groups recently challenged the programmatic EIS in multiple lawsuits.

- b. Section 1221 of EPAct—Designation of NIETCs. Section 1221 of EPAct amended the Federal Power Act (through new FPA section 216) by delegating authority to the Department of Energy (“**DOE**”) to study transmission congestion and designate National Interest Electric Transmission Corridors “**NIETCs**”. DOE must consult with states and conduct a study of electric transmission congestion within one (1) year of enactment and every three (3) years after that time. To date, DOE has designated two NIETCs, one in the mid-Atlantic area (New York to northern Virginia) and one located in Southern California and part of Western Arizona. The designation of those NIETCs has been challenged by certain state and environmental groups.

Section 1221 of EPAct also authorizes three or more contiguous states to enter into an interstate compact that establishes regional siting agencies to carry out those state’s siting responsibilities. Federal Energy Regulatory Commission (“**FERC**”) may not issue a permit for the construction or modification of a transmission facility within any state that is a member of a compact, unless disagreement among the compact parties exists. Although certain states have discussed the possibility of forming intrastate compacts for transmission siting, no such compacts have been officially formed.

The Act delegates to the FERC “backstop” permitting authority to expand transmission in those NIETCs. As a “backstop” authority, FERC may preempt state siting authorities in order to expand transmission. FERC’s authority is limited to the geographical area of the NIETCs. It is also limited to situations that meet a number of criteria. FERC can only override the state if the state

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<sup>267</sup> Programmatic EIS, Designation of Energy Corridors on Federal Lands in 11 Western States. Site-specific NEPA analyses must still be conducted. The agencies also adopted a Record of Decision that sets forth mitigation measures that may be adopted to address common impacts. Those measures are not mandatory, but are merely guidelines to attempt to achieve consistency with site specific reviews and decisions.

either: withholds approval for more than one (1) year; does not have authority to site transmission facilities; or, as part of its review authority, cannot consider the interstate benefits of a proposed project located in a national corridor. Even if FERC determines that one of these three criteria is satisfied, it may override a state commission only if additional conditions are present. Specifically, FERC must find that the proposed project:

- will be used in interstate commerce;
- is in the public interest;
- will significantly reduce transmission congestion and protect and benefit consumers;
- is consistent with sound national energy policy and will enhance energy independence; and
- will maximize the use of existing power towers or structures, to the extent reasonably and economically possible.

If the proposed transmission facilities are located in a state that has authority to approve siting of the facilities and to consider its interstate benefits, the project sponsor must file an application with that state. The Commission encourages applicants to complete the on-going state permit review process. However, the Act only requires the sponsor to be engaged in the state process for at least one (1) year prior to submitting pre-filing with FERC. In all other instances, the sponsor may request to initiate FERC pre-filing whenever sufficient project information is available.

If under FERC review, the applicant must comply with the federal review/approval authorities as described above, other than NEPA. It must also develop a number of environmental reports described in FERC's regulations.<sup>268</sup> Those reports serve as the basis for the project review under NEPA. Once those reports are completed, FERC builds upon that information in its preparation of an EA or EIS under NEPA.

- c. Section 372 of EPO Act—Development of Interagency Memorandum of Understanding. Section 372 of EPO Act required the Secretaries of Energy, Interior, Agriculture, and Defense to enter into a Memorandum of Understanding (“**MOU**”) to coordinate all applicable federal authorizations and environmental reviews relating to both proposed and existing transmission facilities. The current MOU, dated October 23, 2009, allows DOE to designate a lead agency for the coordination of all required federal authorizations. The lead agency consults with other federal agencies and establishes a project

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<sup>268</sup> 18 CFR 380.16

schedule. It also prepares a unified ROW form and unified environmental review document that represents a single, comprehensive, environmental record on which all federal agencies will base their permitting or review decisions. The MOU also sets for the duties of respective consulting federal agencies based on the nature of the proposed project.

*Other Attempts to Facilitate Coordination, Streamline and Expedite Transmission Siting at the Federal Level.* EPAct has been criticized as being too limited to effectively meet projected transmission needs. First, some believe that the Act does not adequately address transmission for renewable resources, which are located outside of NIETCs and require transmission from remote areas to populated areas for development. In addition, at least one court has read FERC's authority very narrowly.<sup>269</sup>

To address the increased demand for the siting of lines related to renewable energy development mandates and objectives, Secretary of the Interior, Ken Salazar issued an order, establishing renewable energy as an agency priority. Under the order, an inter-departmental task force was developed to prioritize the environmental review of transmission ROW applications related to renewable energy development.

In 2007, FERC also issued Order 890, which requires public utilities to participate in open transmission planning processes. The intent of the order was to mitigate conflict at the local and regional level by facilitating an open process and coordination.

Congress has also proposed a number of bills to expand federal siting authority even further than the EPAct. At least ten bills have been introduced in the past two years which address transmission siting. Some notable bills include:

- The American Clean Energy and Security Act of 2009 (also known as the Waxman-Markey bill), which was adopted by the House of Representatives, endorses a regional transmission planning mode that would include the expansion of federal "backstop" authority over transmission, by proposing regional planning entities for transmission and establishing a system of FERC review of plans for consistency with transmission principles, including the deployment of renewable and low-carbon sources. The bill would expand FERC authority in western states by allowing it to preempt a state action, if the state fails to approve the construction and routing within a year of application, rejects the application, or imposes unreasonable conditions on the project.
- The American Clean Energy Leadership Act, which cleared the Senate Energy and Natural Resource Committee in 2009, would overrule a prior holding by the

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<sup>269</sup> See *Piedmont Environmental Council v. FERC*, 558 F.3d 304 (4<sup>th</sup> Cir. 2009)(interpreting preemptive authority to apply only when a state siting authority fails to act on a siting application for more than a year, and not when a state issues a denial).

Fourth Circuit Court of Appeals, narrowly construing FERC preemptive authority. It would apply to all states, not just western states.

- A bill introduced by Senator Reid (D-NV) would allow DOE to designate “national renewable energy zones” based on locations that are capable of generating more than 1,000 megawatts of renewable energy. The bill would expand FERC’s backstop authority to these areas.
- A bill introduced by Representative Sensenbrenner (R-WI), entitled the Powering America for Tomorrow Act, would require the designation of regional transmission authorities to implement regional plans.
- The Waxman-Markey bill is still officially in consideration in the Senate, although the Senate has indicated that it will release an alternative bill. The other bills have either been referred to Committee, or have been placed on the Legislative calendar.

*Summary of Federal Involvement in Transmission Siting.* There is an extensive array of federal laws governing the siting and approval of transmission lines, each layering different review, coordination, oversight and approval criteria that may be applicable to such projects. All or some of these federal laws are likely to be triggered by most transmission line projects, as at least a portion of many transmission line projects will be sited, at least in part, on federal lands, and/or may impact a waters of the United States, or protected landmarks, historic structures, flora or fauna. These laws have the potential to greatly delay projects based on their own rigorous requirements and the opportunities for project opponents to challenge federal procedures and decisions under these laws.

Through EPOAct, Congress has attempted to streamline the coordination of these projects to expedite their review and approval. It has also provided FERC with limited preemption authority over state siting decisions. Although EPOAct is relatively new, it appears to be too limited to resolve all of the obstacles to the expansion of transmission lines, especially given the sharp increases in transmission demand (particularly related to renewable energy development), the typical breadth of these projects across a wide area, the broad scope of potential environmental and other concerns, and the diverse interests of federal, state, local and tribal governments and private citizens.

Given these constraints, Congress appears poised to attempt to further refine expand federal oversight and coordination of transmission line siting concerns. However, the form and timing of any new federal transmission laws is unclear at this time. What is clear is that many members of Congress believe that a comprehensive federal siting scheme may be necessary to ensure that transmission demand can be met. Thus, the federal government is likely to have an increasingly powerful role in transmission siting going forward.

*Possible Implications of Federal Law on Uniform State Law.* The primary goals of a uniform state law would be to: provide a consistent framework for siting approvals; avoid conflicts between states; streamline the siting process; and better overcome the Not In My Back Yard (“**NIMBY**”) opposition. The current scheme of federal laws may impact a model or uniform state law as follows:

- By potentially adding a myriad of complex federal review and approval requirements to projects, federal laws have the potential to undermine one of the key intended benefits to a uniform state law—particularly the streamlining of siting reviews and approvals through uniform state requirements. However, EPAct appears to be the first step in the development of a comprehensive federal transmission-siting scheme that may help to streamline federal review and approval processes going forward, but would also likely have a detrimental impact on local control.
- FERC’s preemptive authority is arguably consistent with the goal of streamlining the siting process, and combating the NIMBY syndrome by overturning state review decisions under certain circumstances.
- However, FERC’s preemption authority also triggers NEPA requirements. Although those NEPA requirements are made more efficient and streamlined under EPAct, some of the benefits to state preemption may be undermined by FERC’s involvement in the siting process and the triggering of NEPA.
- FERC’s preemption authority, even as it is currently limited, may also limit a state’s ability to control siting decisions outside of interstate compacts.
- Through the development of a uniform state law, state and local authorities may have greater ability to retain a voice in transmission siting decisions and the possible expansion of federal authority in the future.

In light of these potential impacts, the development of any model or uniform or model state law will likely have to include careful consideration of the federal laws discussed herein, and the role of the federal government in siting decisions. This may be particularly important when considering stakeholders, and when considering the scope and efficacy of any model or uniform state law provisions governing review timeframes and agency coordination.

Model or uniform or model state laws may also need to include express authority for the development of, and participation in, regional, interstate compacts. Such compact oversight of transmission line development, as authorized by EPAct, may be an effective way to ensure greater state control over transmission siting. It may also be an effective mechanism for the oversight and enforcement of the requirements of a model or uniform state law adopted by states within the compact region.

There likely is no way to avoid federal siting requirements through a model or uniform state law. However, the development of a model or uniform law may be joined with potential amendments to federal law to further centralize and coordinate the review and approval processes at the federal, regional and state level.

