UPPER MIDWEST TRANSMISSION DEVELOPMENT INITIATIVE

REPORT OF THE UMTDI LEGAL FRAMEWORK STUDY GROUP

EXECUTIVE SUMMARY

AUGUST 6, 2009

The Upper Midwest Transmission Development Initiative (UMTDI) represents a multi-state effort to (a) promote additional electric transmission infrastructure, (b) promote economical development of alternative renewable energy sources, (c) reduce grid congestion, and (d) improve overall reliability of the grid. In this report of the UMTDI Legal Framework Study Group, the term "UMTDI Project," or simply, the "Project," refers to that group of transmission lines that the initiative proposes to link resources with load within the boundaries of the five states.

The Legal Framework Study Group is comprised of legal staff from agencies in the five UMTDI states. It proceeded on the assumption that its task was not about the details of each state's application process for the construction of any part of the UMTDI Project, but rather about a regional strategic perspective: Assuming the public articulation of the UMTDI Project as a joint goal of the five states, what are existing legal avenues for facilitating the authorization, siting, and allocation of costs of the UMTDI Project in a coordinated fashion within each state and among the five states collectively? Thus, the study group looked at indirect and direct means by which a state could advance the Project for purposes of construction and cost allocation (a) within each state, and (b) in coordination with the other states or by use of federal agency venues. The cost allocation analysis did not look at the ability to influence or require participation by non-Midwest Independent Transmission System Operator ("Midwest ISO") members or beneficiaries.

I. Transmission Construction and Siting.

Within the States---Construction and Siting. From the stance of acting upon transmission construction applications, the Iowa Utilities Board (IUB), the Minnesota Public Utility Commission (MPUC), and the Public Service Commission of Wisconsin (PSCW) have the ability to inject the Project, where clearly relevant, into the calculation of the public interest or public need test for purposes of approving and/or siting a high-voltage transmission line. However, the existence of the UMTDI Project is not an exclusive factor that would secure approval of the components of the UMTDI Project within each of the five states. A proposed transmission project's relationship to the UMTDI project would be one of several public interest factors (specified in detail in Minnesota, more generally in Iowa and Wisconsin) considered.

In contrast, the North Dakota Public Service Commission (NDPSC) and the South Dakota Public Utilities Commission (SDPUC) do not have specific construction approval

authority. They do have authority to site routes, and a project's congruence with the UMTDI Project may or may not be an evidentiary element in siting only. Those states take a different, more formal approach, as discussed more below.

All five states have formal mechanisms under which, within limitations, they could effectively "order" the construction of the UMTDI Project components in their states. There are distinct differences and limitations that must be acknowledged. Under traditional public utility law, the IUB, MPUC, and the PSCW have authority to assure adequate utility facilities, but none of those states has in recent memory seen fit to specifically order a utility to construct transmission lines. The PSCW has in addition specific authority to compel construction of transmission lines if the construction is necessary to relieve system constraints and would materially benefit wholesale market buyers of electricity.

Taking a different tack, both North Dakota and South Dakota have created transmission development agencies, the North Dakota Transmission Authority (NDTA) and the South Dakota Energy Infrastructure Authority (SDEIA), respectively, to actively plan, promote, finance, own and operate transmission lines. The powers of those agencies differ somewhat in the details, but both the NDTA and SDEIA appear to be capable of coordination with other states and authorized to take "direct action" to initiate transmission construction, subject to working with their respective state utility commissions and other planning stakeholders.

States Together—Interstate Compacts. At the highest level, the states may create a compact to coordinate the development of the UMTDI Project. Each state's legislature can consent to a common agreement on how to develop the UMTDI Project. When all the states have agreed, the additional consent of Congress will also be needed to make the compact effective. The MPUC and the governor of Wisconsin each have powers, with varying requirements, to seek interstate compacts specifically dealing with transmission facilities. Iowa and the Dakotas do not have similar statutes.

Congress has also created a compact mechanism in § 216(i) of the Federal Power Act (FPA), 16 U.S.C. § 824p, to allow three or more states, subject to Congressional approval, to establish regional transmission siting agencies to "facilitate siting of future electric energy transmission facilities" and "carry out the [states'] electric energy transmission siting responsibilities." If a compact is approved, the FERC may not approve construction of any facilities in the compact states under its "backstop" authority in § 216(b) unless a dispute among the states in the compact necessitates use of a procedure for intervention in the dispute by the Secretary of the Department of Energy. The FPA compact mechanism does not address the issue of cost allocation, nor does it address the issue of need, and therefore may not by itself be an appropriate vehicle for UMTDI Project purposes.

Another little-used mechanism for cooperative state actions is a FERC-sponsored "joint board," composed of members from each "affected" state, as determined by the FERC, and to which the FERC has referred "any matter arising" under the FPA. *See* FPA § 209, 18 U.S.C. § 824h. It is understood that the FERC has usually limited the joint boards to advisory functions. Notwithstanding that practice, the joint board can handle virtually any subject matter related to the interstate character of an UMTDI Project, including cost allocation. Those advantages might warrant seeking a joint board, but governance issues would likely have to be well-defined among the states in advance of any request to the FERC for a joint board. It may be possible to coordinate use of an interstate compact under § 216(i) for transmission siting, with a joint board for cost allocation under § 209.

States Together—Coordination by Executive Agencies and State Commissions. In this subject area, the study group looked at cross-boundary means of state coordination to facilitate the UMTDI Project *without* resort to the cumbersome and time-consuming interstate compact mechanism. This research looked at executive agencies and then to existing informal and formal processes to effect coordination as available to the state commissions.

Formal Coordination—Executive Agencies. As noted above, North Dakota and South Dakota have created state authorities to facilitate the planning, financing, ownership, and operation of transmission facilities, with various powers to coordinate with other agencies and in regional transmission planning. The Wisconsin governor has authority to enter compacts dealing with transmission lines on specified terms and conditions.

Overall, however, a significant disparity exists among the five states as to executive agency coordination authority. This is evidenced by the very different approach taken by the Dakotas. Those states treat transmission facility issues from a proprietary or economic development perspective, while the other three states, at present, address transmission issues largely (but with limited exceptions) from an independent regulatory commission perspective. In addition, despite having general powers, a commission or board directly ordering the development of a specific electric transmission facility that a utility or transmission company has not itself proposed is arguably an unusual and novel proposition in Iowa, Minnesota and Wisconsin.

Informal Coordination—State Commissions**.** All five state commissions have no express barriers to informal staff consultations, even consultations that could lead to non-binding memoranda of understanding (MOU) to facilitate coordinated action. Apart from the distinct jurisdictional differences, the one important limit for each state commission is that *ex parte* communication rules differ in some particulars, such as the recording of contacts, and may be triggered at different points in any formal proceedings regarding UMTDI Project components.

Formal Coordination—State Commissions. Each of the five state commissions, IUB, MPUC, NDPSC, SDPUC, and PSCW, has a general authority to coordinate and cooperate with other agencies in different states. The extent of that cooperation, however, does not clearly extend to joint hearings (except for the MPUC), or the intervention in another state's proceedings (except in the case of the PSCW). The transmission development authorities in the Dakotas have the authority to "consult" with their state commissions and other relevant government authority, but that does not suggest authority to join another state's proceedings at the tribunal level, though intervention as a party would be authorized if needed to pursue the authorities' objectives.

All the state commissions have power to intervene before the Federal Energy Regulatory Commission (FERC).

II. Transmission Facility Cost Allocation.

Within the States—Cost Allocation. There is no ready mechanism to bind state commissions as to any cost allocation formula associated with the UMTDI Project when establishing retail rates intended to include recovery of transmission line construction costs. One jurisdictional restraint for all five states is the lack of state commission rate jurisdiction over electric cooperatives. Some states also do not have rate jurisdiction over municipal utilities or elective cooperatives. The IUB, MPUC, NDPSC, SDPUC, and PSCW usually adjust rates for

the recovery of pass-through transmission construction costs in general utility rate cases. However, there are some special treatments available with respect to transmission facilities. The MPUC and SDPUC have specific transmission cost rider request procedures that a utility might use for recovery of transmission construction costs. The NDPSC has a mechanism under which a utility may obtain an advance determination of prudence with respect to transmission construction costs that the utility might incur. The PSCW construction approval procedures typically include an overall cost limit that in practical effect makes project costs a recoverable element of the utility's next retail rate case. And, where the PSCW directly orders a utility to construct specific transmission facilities, the PSCW is also expressly authorized at the same time to allow a recovery of costs in the next rate case of the utility or transmission company.

If the UMTDI Project were to develop as a transmission-only facility for the interstate transmission of electricity in the wholesale market only, the governing cost allocation would be subject to the exclusive jurisdiction of the FERC. In that case, whatever cost allocation is approved in the § 205 rates for the furnishing of transmission of power determines the Project's costs assigned to load-serving local electric utilities in a state. These wholesale electric market supply costs may not be denied recovery in retail utility rates set by a state commission. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 966 (1986).

Before the FERC. The state commissions could jointly pursue cost allocation for an interstate transmission line's cost before the FERC, indirectly through use of the Midwest ISO procedures for a tariff rate filing at the FERC under § 205 of the FPA, or by a direct complaint under § 206 of the FPA to the FERC to affirmatively order a "just and reasonable" cost allocation formula in the Midwest ISO tariff. The former method benefits from the likely cooperation of the Midwest ISO, and the statutory time limit on the FERC's consideration of a § 205 tariff change. In contrast, a resort to a § 206 filing would place a heavy burden upon the states to prove that the current cost allocation formula as applied to the UMTDI Project would be unjust and unreasonable, and that a different allocation as proposed in the complaint—for which the burden of proof is on the complainant states—is the just and reasonable cost allocation formula to apply going forward. The FERC consideration of such case would not be time-limited, and the replacement cost allocation formula need not be limited to cost recovery from electric wholesale sales within the five states, especially if a case can be made of material benefits to other states. If, however, the formula for cost recovery does not burden other states, chances of approval by the FERC may be substantially enhanced as the five states that must address the effects on retail rates would only be imposing transmission facility costs on themselves.

III. Conclusion

The states do have means for coordination for the construction approval and siting of the UMTDI project, if the differences between the states, especially between the economic development and regulatory perspectives can be bridged. Arguably, much informal coordination may be had among the state commissions at this time and could be effectively supplemented by minor legislative changes, even temporary in character, to effect significant coordination. As for cost allocation concerns, the smoothest path clearly lies in coordination with the Midwest ISO.

PRINCIPAL REPORT

I. Legal Framework for Authorization and Construction of the 5-State UMTDI Project

A. State Commission (or other agency) in-state authority to advance the UMTDI Project

1. Commission authority (if any) as to Line Construction.

a. "Indirect" power—testing of a construction application's consistency with public convenience and necessary as "manifested" by UMTDI Project.

Iowa

Iowa Code chapter 478 governs the Board's authority over transmission and transmission siting. The Board's authority extends to any person who builds transmission, thus covering not only traditional utilities but also transmission-only companies that do not provide retail electric service to end-use consumers. For purposes of chapter 478, transmission is defined as any line capable of operating at 69 kV or more; lines that are less than 69 kV are not subject to the franchise process. The person seeking siting authority must establish, among other things, that the proposed line represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. The Board would have the authority to site any transmission line (assuming it was operating at 69 kV or more) that was part of an UMTDI plan, but the Board does not have the authority to predetermine the need for such a line; those decisions are made in the siting proceeding.

There is no specific authority in Iowa Code chapter 478 (the electric transmission line chapter) granting the Iowa Utilities Board authority to coordinate siting activities with other states or the federal government, but there is nothing to preclude it. As part of the determination of need (which the Board must make before granting a franchise to construct a line), the Board must decide whether the proposed project represents a reasonable relationship to an overall plan of transmitting electricity in the public interest. §§ 478.3 and 478.4. (emphasis added). The Iowa Utilities Board does have the authority to include regional transmission considerations in its decision, and not just public interest considerations specific to Iowa customers. Iowa Code § 478.3(3) specifically provides that: "For the purpose of this section, the term 'public' shall not be interpreted to be limited to consumers located in this state." In Iowa, there is no predetermination of need—all siting issues (route, need, etc.) are determined in the same proceeding.

Minnesota

A company proposing to build a high voltage transmission line in Minnesota must obtain two major, prior approvals from the Minnesota Public Utilities Commission ("MPUC"): a Certificate of Need and a Route Permit. Both permits are often referred to as 'siting' approvals. These two approvals have separate statutory tracks. Certain limited exceptions exist in each track.

Certificate of Need - Minn. Stat.§ 216B.243, Minn. Rules 7849.0010

A) A certificate of need is required for: i) any high-voltage transmission line with a capacity of at least 200 kV and which is more than 1,500 feet in length, and ii) any high-voltage transmission line with a capacity of at least 100 kV with more than ten miles of its length in Minnesota or that crosses a state line. Minn. Stat. §216B.2421, Subd. 2; Minn.

Stat. §216B.243, Subd. 2. Certain limited exemptions exist. Minn. Stat. §216B.243, Subd. 8.

B) The MPUC can only grant a certificate of need if the Applicant i) shows that the demand for electricity to be served by the line cannot be met more cost effectively through energy conservation and load-management measures and ii) otherwise justifies the need. In assessing need, the MPUC is to evaluate a number of factors including:

> (1) the accuracy of the long-range energy demand forecasts on which the necessity for the facility is based;
> (2) the effect of existing or possible energy conservation programs under sections 216C.05 to 216C.30 and this section or other federal or state legislation on long-term energy demand;
> (3) the relationship of the proposed facility to overall state energy needs, as described in the most recent state energy policy and conservation report prepared under section 216C.18, or, in the case of a high-voltage transmission line, the relationship of the proposed line to regional energy needs, as presented in the transmission plan submitted under section 216B.2425;
> (4) promotional activities that may have given rise to the demand for this facility;
> (5) benefits of this facility, including its uses to protect or enhance environmental quality, and to increase reliability of energy supply in Minnesota and the region;
> (6) possible alternatives for satisfying the energy demand or transmission needs including but not limited to potential for increased efficiency and upgrading of existing energy generation and transmission facilities, load-management programs, and distributed generation;
> (7) the policies, rules, and regulations of other state and federal agencies and local governments;
> (8) any feasible combination of energy conservation improvements, required under section 216B.241, that can (i) replace part or all of the energy to be provided by the proposed facility, and (ii) compete with it economically;
> (9) with respect to a high-voltage transmission line, the benefits of enhanced regional reliability, access, or deliverability to the extent these factors improve the robustness of the transmission system or lower costs for electric consumers in Minnesota;
> (10) whether the applicant or applicants are in compliance with applicable provisions of sections 216B.1691 and 216B.2425, subdivision 7, and have filed or will file by a date certain an application for certificate of need under this section or for certification as a priority electric transmission project under section 216B.2425 for any transmission facilities or upgrades identified under section 216B.2425, subdivision 7;
> (11) whether the applicant has made the demonstrations required under subdivision 3a, which provides that if the transmission line is designed to transmit power from a non-renewable generating source, the applicant must

show that the demand cannot be met more cost-effectively through renewable alternatives; and

(12) if the applicant is proposing a nonrenewable generating plant, the applicant's assessment of the risk of environmental costs and regulation on that proposed facility over the expected useful life of the plant, including a proposed means of allocating costs associated with that risk.

C) In evaluating whether a proposed line meets the need criteria set forth in Minn. Stat. §216B.243, the Commission could consider whether the line is consistent with the UMDTI Project. However, to approve a line the MPUC would need to consider all of the factors listed in Minn. Stat. §216B.243, which are set forth above. Further, the MPUC would need to find that the Applicant has met the requirements of the statute. The MPUC could not find that the Applicant has demonstrated a need solely on the basis that the proposed line is consistent with the UMTDI project because the law requires a showing of need that goes beyond UMTDI considerations.

D) Finally, a project that is certified by the MPUC pursuant to Minn. Stat. §216B.2425 as a priority transmission project and placed on the state transmission list satisfies the certificate of need requirements of section 216B.243. To be certified as a priority project, the project must meet the need criteria under section 216B.243, maintain or enhance reliability of electric service to Minnesota consumers, and be in the public interest.

Routing Permit - Chapter 216E

A) The MPUC has authority over route selection for large electric power facilities. Minn. Stat. §216E.02. Large electric power facilities include high voltage transmission lines, which in turn are defined as transmission lines of 100 kilovolts or more, and greater than 1,500 feet in length. Minn. Stat. §§216E.01.

B) Minn. Stat. §216E.03 states that "[n]o person may construct a high-voltage transmission line without a route permit from the commission. A high-voltage transmission line may only be constructed along a route approved by the commission."

C) This statute also provides that the MPUC's routing decisions are to "be guided by the state's goals to conserve resources, minimize environmental impacts, minimize human settlement and other land use conflicts, and ensure the state's electric energy security through efficient, cost-effective power supply and electric transmission infrastructure." Minn. Stat. §216E.03.

D) Minn. Stat. §216B.04 provides an abbreviated review process before the MPUC for certain high voltage transmission line proposals. High voltage transmission line projects that qualify for the alternative review process include:

(1) high-voltage transmission lines of between 100 and 200 kilovolts;

(2) high-voltage transmission lines in excess of 200 kilovolts and less than five miles in length in Minnesota;

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

E) In addition, for certain high voltage transmission projects, the applicant can opt to seek approval from the local unit of government with jurisdiction over the route. If local approval is granted, a route permit is not required from the MPUC. Minn. Stat. §216B.05. Applicants may seek approval from local units of government to construct the following transmission projects:
(1) high-voltage transmission lines of between 100 and 200 kilovolts;
(2) substations with a voltage designed for and capable of operation at a nominal voltage of 100 kilovolts or more;
(3) a high-voltage transmission line service extension to a single customer between 200 and 300 kilovolts and less than ten miles in length; and
(4) a high-voltage transmission line rerouting to serve the demand of a single customer when the rerouted line will be located at least 80 percent on property owned or controlled by the customer or the owner of the transmission line.

F) In evaluating whether the route of a proposed line meets these criteria set forth in Minn. Stat. §§216E.03-.04 set forth above, the Commission could consider whether the line is consistent with the UMDTI Project. However, to approve a line the MPUC would need to consider all of the evidence presented and factors set forth in Minn. Stat. §216E.03, not just whether the route is consistent with the UMTDI Project.

North Dakota

A public utility that plans to construct a transmission line greater than 115 kV must obtain a certificate of corridor compatibility and a route permit from the commission. A certificate of public convenience and necessity is also required before a public utility can begin construction or operation of a public utility plan or system, or an extension of plant or system. N.D. Cent. Code §49-03-01. These two approvals are separate processes and a certificate of public convenience and necessity is not required for every sited project.

Certificate of Public Convenience and Necessity

A certificate of public convenience and necessity is required before a public utility can begin construction or operation of a public utility plant or system, or an extension of plant or system. N.D. Cent. Coe §49-03-01. North Dakota Century Code chapter 49-03 outlines the certificate of public convenience and necessity process. As used in this chapter, an electric public utility means a privately owned supplier of electricity offering to supply or supply electricity to the general public. N.D. Cent. Code §49-03-01.5.

The primary application of this chapter is to resolve territorial issues involving distribution system extensions. There are no formal certificate of public and convenience and necessity application guidelines for transmission lines. The applicant needs to file an original and seven copies of the application intending to provide that public convenience and necessity require the proposed facilities. The matter can then be set for hearing, or the commission can instead issue a notice of opportunity for hearing and can decide the matter without hearing.

Siting

Under North Dakota Century Code section 49-22-03 (12) the North Dakota Public Service Commission has authority over an electric transmission line and associated facilities with a design in excess of one hundred fifteen kilovolts. A utility may not begin construction of a transmission facility in the State of North Dakota or exercise eminent domain in connection with construction, without first having obtained a route permit from the Commission. N.D. Cent. Code § 49-22-07. Every utility that plans to construct a transmission facility must submit a letter of intent prior to construction and in accordance with state law. N.D. Cent. Code § 49-22-07.1. The Commission has authority to waive certain procedures and time schedules upon application from the utility for waiver. N.D. Cent. Code § 49-22-07.2.

The transmission siting process is a two step process. A corridor is the area within which the facility will be routed. The width of the corridor must be at least ten percent of the length of the transmission line, but not less than one mile or greater than six miles. N.D. Admin. Code § 69-06-04-02. A route permit is requested for the proposed route within the corridor. N.D. Cent. Code § 49-22-08.1. The Commission may also consolidate the process for corridor and route. N.D. Cent. Code § 49-22-07.2. After the filing of a completed application, the Commission issues a notice of filing and notice of hearing that is published twice, once at least twenty days prior to the hearing and a second time within twenty days prior to the hearing, and served on certain state agencies and officers designated in section 69-06-01-05 of the North Dakota Administrative Code. N.D. Cent. Code §§ 49-22-08 and 49-22-08.1. A hearing must be held in each county containing a portion of the proposed corridor and route, except that the Commission may combine hearings for one or more counties. N.D. Cent. Code § 49-22-13. The Commission has three months after the filing of a completed application to designate a corridor and six months after the filing of a completed application to designate a route. N.D. Cent. Code §§ 49-22-08 and 49-22-08.1. The Commission may extend the time for designation for just cause. Id.

The Commission considers exclusion areas, avoidance areas, selection criteria, policy criteria, and alternatives to the proposed route or corridor in its siting process. N.D. Cent. Code § 49-22-09 and N.D. Admin. Code Ch. 69-06-08.

South Dakota

The South Dakota Public Utilities Commission ("SDPUC" or "Commission") has the authority to site certain electric transmission facilities as set forth below. (The law was changed in the 2009 legislative session so the references will be to the "law before July 1, 2009" and the "law as of July 1, 2009.")

Small Transmission Facilities

Law before July 1, 2009: All electric transmission lines and associated facilities with a design of 115 to 250 kV, if more than one mile in length of the line does not follow section lines, property lines, roads, highways or railroads, or is not reconstruction or modification of existing transmission lines and existing associated facilities located on abandoned railroad rights-of-way. *See* SDCL 49-41B-2.1.

Law as of July 1, 2009: All electric transmission lines and associated facilities with a design of more than 115 kV and less than 250 kV. *See* SDCL 49-41B-2.1.

Large Transmission Facilities

Large transmission facilities are electric transmission lines and associated facilities with a design of 250 kV or more.

The SDPUC does not determine need for the project in the siting process. The SDPUC is also prohibited from choosing the route of the project. The Commission considers the following in its siting process:

> (1) The proposed facility will comply with all applicable laws and rules;
>
> (2) The facility will not pose a threat of serious injury to the environment nor to the social and economic condition of inhabitants or expected inhabitants in the siting area;
>
> (3) The facility will not substantially impair the health, safety or welfare of the inhabitants; and
>
> (4) The facility will not unduly interfere with the orderly development of the region with due consideration having been given the views of governing bodies of affected local units of government.

If a proposed facility was part of an UMTDI project, the applicant could introduce that fact as evidence. But the Commission would still need to evaluate the project based on the four criteria listed above. If a proposed facility did not follow the route set forth by an UMTDI project, the Commission could not consider that as a factor and deny the project or order that the route be changed to be consistent with an UMTDI project.

Wisconsin

Implementation of the UMTDI Project is principally a matter of PSCW initiative to (a) directly recognize the UMTDI Project as part of the public interest in general and/or (b) evaluate any large scale transmission project applications against the public interest as represented by the UMTDI Project where it is a relevant factor.

The PSCW has jurisdiction over public utilities and "any person" under Wis. Stat. §§ 196.49 and 196.491, respectively, for purposes of securing authority for the construction and siting of transmission facilities.

Construction Authority for Public Utility Construction

Wis. Stat. § 196.49(3)(b) provides that no public utility construction project may proceed until the commission has certified that public convenience and necessity require the project." Supporting that certification authorization (CA) power, the PSCW may require of the public utility "plans, specifications, and estimated costs of any proposed project which the commission finds will materially affect the public interest." Wis. Stat. § 196.49(3)(a). The PSCW "may attach to the issuance of its certificate such terms and conditions as will ensure that the project meets the requirements of this section." Wis. Stat. § 196.49(3)(c). These latter two criteria, upon either formal or informal direction from the PSCW, can be used, within limits, to seek advancement of or coordination with the UMTDI. Under Wis. Stat. § 196.49(3)(b)3. the PSCW could refuse to grant a CA application on the grounds that the applicant's failure to fit its project into the multi-state UMTDI Project means that the proposal does not provide value in proportion to its cost.

Wis. Admin. Code ch. PSC 112 interprets and implements the above statutory requirement by identifying the types of electric generation and transmission facilities that require a CA, and specifying the contents of CA application. With respect to transmission facilities, a transmission line project requires a CA if the line's design capacity is 40 kV or higher, per Wis. Admin. Code § PSC 112.02(8), and exceeds 10 miles in length and whose cost exceeds certain cost thresholds, per Wis. Admin. Code § PSC 112.05(1m).[1]

Certificate of Public Convenience and Necessity for Large Transmission Facility Construction by "Any Person."

Wisconsin's large facility statute, Wis. Stat. § 196.491, applies to high-voltage lines and would appear to be the most relevant statute to the testing of private investment initiatives for coordination with an UMTDI Project.

Wis. Stat. § 196.491 applies to defined large "facilities," specifically "large electric generating facilities" and "high-voltage transmission lines" having a transmission capacity of 100kV or higher. Wis. Stat. § 196.491(3)(a) states that "no person" may commence the construction of a defined "facility," which includes a high-voltage transmission line, "unless the person has applied for and received a certificate of public convenience and necessity [CPCN] under this section." The PSCW may only grant the certificate if it determines, among several criteria, that the "design and location or route is in the public interest considering alternative . . . locations or routes, individual hardships, engineering, economic, safety, reliability, and environmental factors, ..." Wis. Stat. § 196.491(3)(d)3.

In addition, specific CPCN criteria apply to larger transmission line projects that affect regional importation of electricity into Wisconsin or seek to promote economic benefits in a line at least 345 kV in nominal voltage. Subdivision pars. 3r. and 3t. in Wis. Stat. § 196.491(3)(d)

[1] Wis. Admin. Code § PSC 112.05(3) defines the cost thresholds. If the electric utility seeking to build had operating revenues of less than $5 million in the prior year, then a CA is required if the cost exceeds $100,000. The threshold is 2 percent of the prior year's operating revenues if the electric utility's prior year revenues were between $5 million and $250 million. If the electric utility's prior year revenues exceeded $250 million, then any project whose cost would exceed $5 million would require a CA. Since 2000, as provided by the rule, these thresholds have been adjusted for inflation in the cost of electric utility construction, as calculated under the "Handy-Whitman Index."

provide that the PSCW may approve a project as consistent with the public interest only if, among other criteria, the PSCW determines that:

> 3r. For a high-voltage transmission line that is proposed to increase the transmission import capability into this state, existing rights-of-way are used to the extent practicable and the routing and design of the high-voltage transmission line minimizes environmental impacts in a manner that is consistent with achieving reasonable electric rates.
>
> 3t. For a high-voltage transmission line that is designed for operation at a nominal voltage of 345 kilovolts or more, the high-voltage transmission line provides usage, service or increased regional reliability benefits to the wholesale and retail customers or members in this state and the benefits of the high-voltage transmission line are reasonable in relation to the cost of the high-voltage transmission line.

Wis. Stat. § 196.491 thus allow the PSCW to refuse to declare a CPCN application to be complete until the applicant provides information about how the proposed project advances (or not) the UMTDI Project. Wis. Stat. § 196.491(3)(a)1.

The PSCW engages in a broad consideration of the public interest. The PSCW could refuse to grant a CPCN because a proposed project, if factually related to transmission or renewable energy goals, does not comply with the public interest as manifested by the UMTDI Project. Wis. Stat. § 196.491(3)(d)3. The PSCW could refuse to grant a CPCN application for a 345 kV transmission line that has not been shown to fit into the multi-state UMTDI Project, on the grounds that the project does not provide cost-effective usage, service or increased regional reliability. In other words, the project may be considered too short-sighted or too narrow in focus to be cost-effective. Wis. Stat. § 196.491(3)(d)3t. Finally, under the CPCN provisions of Wis. Stat. § 196.491(3)(d)5., as under the CA statute, the Commission could deny certification to a project that did not fit into the UMTDI Project on the grounds that the project would, for that reason, provide insufficient value in relation to its cost.

The PSCW acts as a lead agency to coordinate transmission line construction projects with the Wisconsin Department of Natural Resources (WDNR), the Wisconsin Department of Transportation (WDOT), and the Department of Agriculture, Trade and Consumer Protection (DATCP).

b. “Direct ” power—state commission power to order parts of UMTDI Project within state.

Iowa

The Iowa Utilities Board does not have direct authority under Iowa Code chapter 478 to order utilities or others to build transmission lines. Under Iowa Code chapter 476, the public utilities chapter, utilities have the obligation to provide reasonable and adequate service. There is an argument that if transmission facilities were determined to be needed to provide adequate and reliable service, the Board could order that transmission be built. The Board has not used this argument and has not attempted to require any public utility to build specific transmission.

Minnesota

The MPUC has the authority to "order public utilities to make adequate infrastructure investments and undertake sufficient preventative maintenance with regard to generation, transmission, and distribution facilities." Minn. Stat. §216B.79. Public utilities are defined as investor-owned utilities. Minn. Stat. §216B.02, Subd. 4. The MPUC's authority under section 216B.79 also applies to any transmission company that owns or operates electric transmission lines in Minnesota. To date, the MPUC has not used its authority under this provision to require the construction of specific facilities. Whether the MPUC could order a specific line to be built to advance the UMTDI project would depend on whether that transmission line was found to be necessary for the utility "to make adequate infrastructure investments."

North Dakota

Whenever the commission shall find, "after hearing, that the rules, regulations, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it" are inadequate or insufficient, the commission shall determine the reasonable practices or equipment, facilities, or services to be constructed or employed. N.D. Cent. Code §49-02-04. The commission has not used this law to order a public utility to construct transmission. Whether the commission could order a specific line to be built under this law as part of an UMTDI project would depend on whether the existing transmission was found, after hearing, to be inadequate or insufficient.

As a related matter, every utility that owns or operates, or plans within the next ten years to own, operate, or start construction on any facility shall annually develop a ten year plan as specified by North Dakota Century Code section 49-22-04. The ten year plan must be submitted to the commission on or before July 1 of each year. N.D. Cent. Code §49-22-04.

South Dakota

The Commission sites certain transmission facilities as outlined above. It does not have any express statutory authority to order that specific transmission facilities be constructed.

Wisconsin

The PSCW has a general duty to enforce the statutory requirement in Wis. Stat. § 196.03(1) to enforce the adequacy of the facilities and services of a public utility. No case in recent times has used this statute for the purposes of ordering transmission facility construction.

The PSCW has the authority under Wis. Stat. § 196.494(3) to affirmatively order construction of transmission facilities, if such construction is necessary to relieve a constraint on a transmission system and will materially benefit the wholesale market buyers of electricity:

> (3) The commission shall, under this subsection, issue an order requiring the transmission company, as defined in s. 196.485(1)(ge), or an electric utility to construct or procure, on a competitive basis, the construction of transmission facilities specified by the commission in its order if the commission determines that such construction is necessary to relieve a constraint on a transmission system and the construction will materially benefit the customers of the transmission company or electric utility or other electric utilities or of an independent system

operator, as defined in s. 196.485(1)(d), or independent transmission owner, as defined in s. 196.485(1)(dm).

The PSCW also has a "backstop" authority to order a public utility or a transmission company to "make adequate investment s in its facilities that are sufficient to ensure reliable electric service." Wis. Stat. § 196.487(2). This statute might afford authority to the PSCW to order implementation of parts of the UMTDI Project where service reliability required additional transmission and the UMTDI Project could satisfy that transmission need.

2. Commission authority as to cost recovery/sharing.

a. "Indirect" or "Informal" (if any)–e.g. staff consultations with companies, etc.

Iowa

Staff is able to consult with utilities, the Consumer Advocate, and any other interested persons about various issues or proposals regarding cost recovery or sharing. This ability is limited once it becomes an issue in a contested case because of limitations on ex parte contacts in Iowa law. Staff may not communicate to the Board members or administrative law judge information they receive about a case that is not part of the evidence in the record. To guard against ex parte contacts, Board staff working on a particular contested docket generally refrains from conversations about the case with outside persons unless a representative from each party to the proceeding is present.

While staff has engaged in informal discussions with other agencies, it has not used any non-binding memorandums of understanding in working with other state commissions or other state agencies. Such memorandums of understanding, in contested case settings, could conflict with Iowa's ex parte rules.

Minnesota

The MPUC's consideration of a UMTDI cost sharing agreement would arise when a utility seeks to recover costs incurred for new transmission facilities through its retail rates. The MPUC only regulates the rates of "public utilities" (defined as investor owned utilities under Minnesota law), and one municipal utility that has opted to have its rates regulated by the MPUC. The MPUC has no authority over the rates or allocation of costs for infrastructure built by cooperative utilities and all other municipal utilities.

With regard to utilities whose rates are regulated by the MPUC, the extent to which the MPUC may consider a UMTDI cost sharing approach for regional transmission infrastructure costs depends on the statutory framework under which the utility seeks to recover costs. Under existing Minnesota law, the recovery of transmission infrastructure costs is allowed under two different mechanisms: 1) a transmission cost rider and 2) general retail rates through a rate case.

When authorized by the MPUC, certain transmission costs can be recovered through a rider. The applicable law provides:

> (a) Notwithstanding any other provision of this chapter, the commission may approve a tariff mechanism for the automatic annual adjustments of charges for the Minnesota jurisdictional costs of (i) new transmission facilities that have been separately filed and reviewed and approved by the commission under section 216B.243 or are certified as a priority project or deemed to be priority transmission project under 216B.2425; and (ii) charges incurred by a utility that accrue from other transmission owners' regionally planned transmission projects that have been determined by the Midwest Independent System Operator to benefit the utility, as provided for under a federally approved tariff.

Minn. Stat. §216B.16, Subd. 7b(a). This provision gives the MPUC the discretion to approve a tariff authorizing a line item for recovery of certain transmission infrastructure costs. The next part of the statute prescribes fairly specifically the costs and charges that are to be recovered. Minn. Stat. §216B.16, Subd. 7b(b). Nothing in the statute requires consistency with any multi-state cost sharing agreement that might be developed through the UMTDI process. However, if a UMTDI cost sharing agreement is approved by MISO and incorporated into a federally approved tariff, charges passed along to Minnesota customers pursuant to paragraph (a)(ii) of this statute would be set according to the UMTDI cost sharing agreement.

Transmission infrastructure costs not recovered pursuant to Minn. Stat. §216B.16, Subd. 7b are subject to the general rate case provisions in the remainder of Minn. Stat. §216B.16. These provisions do not expressly allow for cost recovery as provided in a multi-state cost sharing agreement. Instead, this section provides that the MPUC is to set just and reasonable rates giving due consideration to "the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service, including adequate provision for depreciation of its utility property used and useful in rendering service to the public, and to earn a fair and reasonable return upon the investment in such property. In determining the rate base upon which the utility is to be allowed to earn a fair rate of return, the commission shall give due consideration to evidence of the cost of the property when first devoted to public use, to prudent acquisition cost to the public utility less appropriate depreciation on each, to construction work in progress, to offsets in the nature of capital provided by sources other than the investors, and to other expenses of a capital nature." In determining just and reasonable rates, the MPUC could consider the extent to which a multi-state cost sharing agreement is consistent with the requirements of Minn. Stat. §216B.16, but that agreement would not be binding on the MPUC in its ratemaking decisions.

North Dakota

Commission staff can informally consult with utilities about cost recovery or sharing.

South Dakota

Commission Staff can informally consult with utilities about cost recovery or sharing.

Wisconsin

Commission staff can informally consult with utilities and other persons about cost sharing for multi-state transmission line projects, especially in the pre-application process.

b. "Direct" or "Formal"—proceedings that determine cost share and cost recovery method.

Iowa

Cost recovery is determined in a rate case, and cost recovery cannot be pre-approved for transmission costs outside of a rate case (there is a process for determination of advance ratemaking principles for certain types of generation). There are no mechanisms in place for an enforceable cost sharing arrangement among various states, although the Iowa Utilities Board could agree to support, for example, a cost sharing tariff filed at the Federal Energy Regulatory Commission by the Midwest Independent System Operator, Inc. or some other entity.

Minnesota

There is no provision in current Minnesota statutes that would make a multi-state UMTDI cost sharing agreement binding on the MPUC or Minnesota utilities proposing to build new transmission lines.

North Dakota

The North Dakota Century Code does not contain any provisions that would make a multi-state cost sharing agreement binding on the commission.

The commission would consider an UMTDI cost sharing agreement when the utility makes an application for a rate increase under the law. N.D. Cent. Code § 49-02-03. The commission only regulates the rates of public utilities. N.D. Cent. Code § 49-02-01.1. A public utility proposing to construct, lease, or make improvements to an energy conversion facility, renewable energy facility, transmission facility, or proposed energy purchase contract from another entity or person for the purpose of ensuring reliable electric service to its customers may file an application with the Commission for an advance determination of prudence regarding the proposal. N.D. Cent. Code § 49-05-16.

South Dakota

With respect to costing, the SDPUC makes no determination as to how the project will be paid for in its siting docket. Also, the SDPUC has rate jurisdiction only over investor-owned public utilities. The SDPUC does not have rate jurisdiction over cooperative or municipal electric utilities. For those investor-owned public utilities, if the utility seeks to put the transmission line into its rate base it has three options:

(1) The utility can wait until its next general rate case;

(2) The utility can seek to recover its investment from ratepayers by applying for a transmission cost rider pursuant to SDCL 49-34A-25.1. Under that statute, the commission may approve a tariff mechanism for the automatic annual adjustment of charges for the jurisdictional costs of new or modified transmission facilities

with a design capacity of thirty-four and one-half kilovolts or more and which are more than five miles in length;

(3) The utility may apply for rate increases pursuant to a rate stability plan. Under SDCL 49-34A-73, if a utility plans major capital additions or new power purchases that are expected to have a material impact on rates, the utility may apply for a rate stability plan to provide for the phase-in of rate increases prior to the commercial operations of the major capital additions or new power purchases.

There are no statutory provisions that allow the Commission to enter into a cost-sharing agreement with other states at the state level. The Commission could only consider the recovery of costs in conjunction with the three options above, limited to the specified statutory considerations for approval or denial. The Commission could weigh-in on tariffs proposed by MISO.

Wisconsin

The PSCW has no rate jurisdiction over electric cooperatives under Wis. Stat. § 196.01(5)(b)1.

In a CA or CPCN proceeding, the PSCW will typically authorize construction costs up to a total dollar cost limit. In turn, this cost may be considered for treatment in the utility's next rate case for both AFUDC (Allowance for funds used during construction) and CWIP (Construction work in progress) recovery, as well as cost recovery upon completion. Where the PSCW orders construction of a transmission facility that will relieve a constraint or materially benefit the system, the PSCW is expressly authorized to allow a recovery of costs in the next rate case of the utility or transmission company. Wis. Stat. § 196.494(3).

B. State power to act across state boundaries to advance the UMTDI Project.

1. Government Transmission Development Agencies.

North Dakota

The North Dakota Transmission Authority is governed by the North Dakota Industrial Commission. N.D. Cent. Code § 17-05-02. The Industrial Commission is comprised of the Governor, the Attorney General, and the Agriculture Commissioner. The authority is created is to diversify and expand the North Dakota economy by facilitating development of transmission facilities to support the production, transportation, and utilization of North Dakota electric energy. N.D. Cent. Code § 17-05-04. The authority has all powers necessary to carry out the purposes of Chapter 17-05, including the power to:

1. Make grants or loans and to provide other forms of financial assistance as necessary or appropriate for the purposes of this chapter;
2. Make and execute contracts and all other instruments necessary or convenient for the performance of its powers and functions under this chapter;

3. Borrow money and issue evidences of indebtedness as provided in this chapter;

4. Receive and accept aid, grants, or contributions of money or other things of value from any source, including aid, grants, or contributions from any department, agency, or instrumentality of the United States, subject to the conditions upon which the aid, grants, or contributions are made and consistent with the provisions of this chapter;

5. Issue and sell evidences of indebtedness in an amount or amounts as the authority may determine, but not to exceed eight hundred million dollars, plus costs of issuance, credit enhancement, and any reserve funds required by agreements with or for the benefit of holders of the evidences of indebtedness for the purposes for which the authority is created under this chapter, provided that the amount of any refinancing shall not be counted toward such eight hundred million dollar limitation to the extent it does not exceed the outstanding amount of the obligations being refinanced;

6. Refund and refinance its evidences of indebtedness;

7. Make and execute interest rate exchange contracts;

8. Enter lease-sale contracts;

9. Pledge any and all revenues derived by the authority under this chapter or from a transmission facility, service, or activity funded under this chapter to secure payment or redemption of the evidences of indebtedness;

10. To the extent and for the period of time necessary for the accomplishment of the purposes for which the authority was created, plan, finance, develop, acquire, own in whole or in part, lease, rent, and dispose of transmission facilities;

11. Enter contracts to construct, maintain, and operate transmission facilities;

12. Consult with the public service commission, regional organizations, and any other relevant state or federal authority or persons as necessary and establish reasonable fees, rates, tariffs, or other charges for transmission facilities and all services rendered by the authority;

13. Lease, rent, and dispose of transmission facilities owned pursuant to this chapter;

14. Investigate, plan, prioritize, and propose corridors of the transmission of electricity;

15. Participate in and join regional transmission organizations; and

16. Do any and all things necessary or expedient for the purposes of the authority provided in this chapter.

N.D. Cent. Code § 17-05-05

The authority shall coordinate its plans for transmission facilities with regional organizations having transmission planning responsibilities for the project area.

South Dakota

South Dakota has created the South Dakota Energy Infrastructure Authority (SDEIA). Its purpose is as follows:

> SDCL 1-16I-2. South Dakota Energy Infrastructure created--Purpose. The South Dakota Energy Infrastructure Authority is created as a body corporate and politic to diversify and expand the state's economy by developing in this state the energy production facilities and the energy transmission facilities necessary to produce and transport energy to markets within the state and outside of the state.

The SDEIA does have the power to enter into intergovernmental agreements. The statute provides:

> SDCL 1-16I-33. Intergovernmental agreements. The authority may enter into intergovernmental agreements with any governmental agency.

In addition, the SDEIA has been given a number of powers. These powers include:

> (1) Make and execute contracts and all other instruments necessary or convenient for the performance of its duties and the exercise of its powers and functions under this chapter;
>
> (2) Borrow money and issue bonds as provided by this chapter;
>
> (3) Procure insurance, letters of credit, guarantees, or other credit enhancement arrangements from any public or private entities, including any department, agency, or instrumentality of the United States or the state, for payment of all or any portion of any bonds issued by the authority, including the power to pay premiums, fees, or other charges on any such insurance, letters of credit, guarantees, or credit arrangements;
>
> (4) Receive and accept from any source financial aid or contributions of moneys, property, labor, or other things of value to be held, used, and applied to carry out the purposes of this chapter subject to the conditions upon which the grants or contributions are made, including, gifts or grants from any department, agency, or instrumentality of the United States for any purpose consistent with the provisions of this chapter;
>
> (5) To make loans and grants to, and enter into financing agreements with, any governmental agency or any person for the costs incurred in connection with the development, construction, acquisition, improvement, maintenance, operation, or decommissioning of electric transmission facilities, or for the maintenance of the physical or structural integrity of real or personal property incorporated or which may be incorporated into such facilities, in accordance with a written agreement

between the authority and such governmental agency or person. However, no such loan or grant may exceed the total cost of such facilities as determined by the governmental agency or person and approved by the authority;

(6) Cooperate with and exchange services, personnel, and information with any governmental agency;

(7) Enter into agreements for management on behalf of the authority of any of its properties upon such terms and conditions as may be mutually agreeable;

(8) Sell, exchange, lease, donate, and convey any of its properties whenever the authority finds such action to be in furtherance of the purposes for which it was organized;

(9) Acquire, hold, lease, and dispose of real and personal property, and construct, develop, maintain, operate, and decommission electric transmission facilities;

(10) After consultation with the Public Utilities Commission and any other relevant governmental authority, establish and charge reasonable fees, rates, tariffs, or other charges for the use of all facilities administered by the authority and for all services rendered by it;

(11) Investigate, plan, prioritize, and establish corridors for the transmission of electricity; and

(12) Acquire by condemnation, in accordance with chapter 21-35, within the state any properties necessary or useful for the authority's purposes. However, the authority may not condemn any existing facilities.

Thus, it would appear that the SDEIA would have some authority to work with other states on the development of transmission lines. However, it would not have authority over siting or rates of facilities that are subject to the PUC's jurisdiction.

2. Compacts

a. Requirements in state statutes.

Iowa

The Iowa General Assembly has the authority to enter into interstate compacts. The Iowa Utilities Board itself does not have the authority to enter into a compact, although it could recommend a compact to be approved by the General Assembly. Iowa is a party to several compacts.

Minnesota

The MPUC has express authority under Minn. Stat. §216E.02 to enter into high level state agreements and interstate compacts but *only* for siting and routing purposes. The statute specifically provides:

> The MPUC may negotiate and enter into any agreements or compacts with agencies of other states, pursuant to any consent of Congress, for cooperative efforts in certifying the construction, operation, and maintenance of large electric power facilities in accord with the siting and routing purposes of Chapter 216E and for the enforcement of the respective state laws regarding such facilities.

There is no statutory authority for the MPUC to enter into high level state agreements or interstate compacts regarding need or cost allocation.

North Dakota

There is no defined compact power in the Century Code. However, a specific bill authorizing ratification of a compact may be passed by the legislature.

South Dakota

With respect to compact authority, we are not aware of any current statute that gives the Governor the authority to enter into a compact regarding transmission facilities with other states. Statutory authority could be passed, subject perhaps to federal approval depending on the nature of the interstate compact.

Wisconsin

Wis. Stat. § 196.494(5) authorizes the Wisconsin governor to enter interstate transmission line compacts, but only compacts that address environmental and siting standards, regional need, and dispute resolution mechanisms:

> (5) The governor may, on behalf of this state, enter into an interstate compact that establishes a joint process for the states in the upper Midwest region of the United States to determine the need for and siting of regional electric transmission facilities that may affect electric service in this state. The governor may not enter into a compact under this subsection unless the compact includes requirements and procedures for establishing each of the following:
>
> (a) Compliance with each state's environmental and siting standards for transmission facilities.
>
> (b) A regional need determination for transmission facilities.
>
> (c) A mechanism for resolving conflicts between the states.

For a PSCW approval to have exterritorial effect, that is, to be binding on non-residents, an interstate compact made pursuant to Wis. Stat. § 14.76(2)-(4) is a mechanism:

> (2) Any state agency may agree by compact with other states to apply existing standards for residents to nonresidents if the laws or regulations of the states with

which such compacts are made are similarly applied to Wisconsin residents. The compact shall be effective when approved by joint resolution adopted by the legislature.

(3) Any state agency may negotiate compacts with similar agencies in other states relating to the treatment of nonresidents on subjects within its delegated powers but on which no legislation providing standards has been enacted. Such compacts shall be submitted to the legislature and shall be effective when approved as are bills.

(4) Each compact shall as nearly as possible set forth:

(a) The statutory authority for the delegated power under which the agency is proceeding.

(b) The legal effect of the compact as shown by the amendments to statutes and rules in the applicable states required to accomplish the objectives of the compact.

(c) The objectives of the compact.

(d) The precise reasons for the compact.

(e) The standards established by the compact.

(f) The procedures contemplated by the compact.

(g) The effective date of the compact.

(h) The effect of the compact upon:

1. Public finances.
2. Public policy.

3. Executive-type (governor level) or executive agency cooperation agreements.

a. Requirements

Iowa

Iowa agencies of government, including the Iowa Utilities Board, have the authority to enter into what are called 28E agreements with other public or private agencies for joint or cooperative action. These may be agencies from other states or the federal government. Chapter 28E

Minnesota

See I.B.2.a. above.

North Dakota

There are no requirements in North Dakota State statute.

South Dakota

As a state agency, there are general statutes that allow for the exercise of the agency's powers with a public agency of another state. SDCL 1-24-2. However, any joint exercise of such powers is limited to the powers granted to the state agency.

Wisconsin

See I.B.2.a. above.

4. Commission-level authority/powers

a. "Informal" means---staff collaborations across state lines, memoranda of understandings (MOU) and relevant ex parte communication rules.

Iowa

Board staff has collaborated with other states on various issues, but staff does not have the authority to bind the Iowa Utilities Board and would not be able to utilize such things as a memorandum of understanding.

Minnesota

The MPUC has the authority to "cooperate with similar commissions of other states …." Minn. Stat. §216B.19. While this statutory language is broad enough to give the Commission authority to enter into a non-binding MOU, the Commission has not done so to date.

Commission staff can informally consult with utilities and other persons about proposals regarding cost sharing and cost recovery. Once there is a disputed formal petition or a pending contested case proceeding, staff contacts become subject to the ex parte rules.
[Note: Under Minnesota rules, staff contacts are not prohibited but must be recorded. Contacts with Commissioners, on the other hand, are prohibited in defined circumstances.]

North Dakota

Commission staff can work with and collaborate with other states on siting issues. This would not bind the commission.

There is no direct authority for non-binding memoranda of understanding and there is nothing to preclude the commission from entering into non-binding memoranda of understanding.

Ex parte communications are defined in North Dakota Century Code § 28-32-37 and are strictly prohibited. The commissioners may not communicate, directly or indirectly, regarding any issue in a proceeding, while the proceeding is pending, with any party, with any person who has a direct or indirect interest in the outcome of the proceeding, with any other person allowed to participate in the proceeding, or with any person who presided at a previous stage of the proceeding, without notice an opportunity for all parties to participate in the communication. N.D. Cent. Code § 28-32-37(1). If, before being assigned, designated, or appointed to preside in an adjudicative proceeding, a person receives an ex parte communication, the person, after being assigned, designated, or appointed, shall disclose the communication. N.D. Cent. Code § 28-32-27(5).

South Dakota

Commission Staff could informally discuss projects with other states. Staff could probably enter into a non-binding memorandum of understanding with other state commission staffs. However, Staff would not be able to bind the Commission.

SDPUC SDCL 1-26-26 sets forth the restrictions on ex parte communications. During a contested case, the Commissioners may not communicate, directly or indirectly, in connection with any issue of fact with any person or party, and may not communicate, directly or indirectly, regarding any issue of law with any party, except upon notice and opportunity for all parties to participate. Therefore, as soon as a siting case is filed, the ex parte restrictions apply.

Wisconsin

Under the administrative powers of the PSCW Chair, and the Commission's general powers in Wis. Stat. § 196.02(1) to "do all things necessary and convenient to its jurisdiction" to "supervise and regulate every public utility" in Wisconsin, the PSCW's staff is often directed to engage in cooperation work with agencies of other states.

The PSCW may create non-binding memoranda of understanding with agencies in Wisconsin government, or with agencies in other states.

Ex parte communications by parties or interested persons to PSCW Commissioners are barred once a notice of proceeding is issued in a docket that is a "contested case" or made subject to contested case procedures. The prohibition expires once the period for petitioning for judicial review expires 30 days after final administrative action. *See* Wis. Stat. §§ 227.01(3), 227.50, and 227.53. The commissioners' executive assistants are subject to the same prohibition, with the one modification that the prohibited contact period begins only when a notice of hearing is issued in a docket. The commissioners' assigned advisory staff in a docket are not subject to the ban on ex parte communications.

b. "Formal" means---commission interventions in other state proceedings or requirements affecting out-of-state applications.

Iowa

The Iowa Utilities Board has not, to our knowledge, intervened in proceedings in other states, but has intervened in federal dockets. However, Iowa Code section 476.2(3) provides that the board "may intervene in any proceeding before the federal energy regulatory commission or any other federal or state regulatory body when it finds that any decision of that tribunal would adversely affect the costs of any public utility service within the state of Iowa." The Board's broad powers under chapter 476 might support intervention in a proceeding where the statutory standard for intervention was not satisfied.

Minnesota

Minn. Stat. § 216B.19 authorizes the MPUC to hold joint hearings and make joint investigations with other commissions. In addition, Minn. Stat. § 216E.02, Subd. 3 specifically addresses state coordination for interstate routes. This law provides that if a route is proposed in two or more states, the MPUC shall attempt to reach agreement with affected states on the entry and exit points prior to designating a route. The MPUC, in discharge of its siting and routing duties, may make joint investigations, hold joint hearings within or without the state, and issue joint or concurrent orders in conjunction or concurrence with any official or agency of any state or of the United States.

North Dakota

North Dakota Century Code section 49-22-14.1 allows and encourages the commission to cooperate with and receive exchange technical assistance and with any department, agency, or officer of any state or of the federal government to eliminate duplication

of effort, to establish a common database, or for any other purpose relating to the energy conversion and transmission facility siting act.

There is no direct authority permitting or prohibiting the commission from engaging in joint proceedings or to intervene in a proceeding. The commission has general jurisdiction over public utilities and the siting process. N.D. Cent. Code § 49-02-01. The commission has the power to investigate all methods and practices of public utilities. N.D. Cent. Code § 49-02-02. This general power would likely include the power to engage in joint proceedings and intervene as necessary.

South Dakota

The Commission routinely intervenes in FERC proceedings but has not intervened in other states' proceedings. The Commission does not have any specific statutory authority to consult or work with other states. However, as noted previously, there are general statutes that allow for the exercise of the agency's powers with a public agency of another state, with such powers limited to those granted to the state agency. *See* SDCL chapter 1-24. Given that the SDPUC is limited to considering the merits of an application based on the four criteria listed above, does not determine whether there is a need for the proposed facility, and cannot dictate the route, it is doubtful that any exercise of joint powers would be beneficial.

Also, since some of the other states' siting laws vary considerably from South Dakota's laws, there would likely be legal problems with holding a joint hearing. For example, evidence that would be admissible under one state's siting laws may not be admissible or relevant under South Dakota's siting laws. In addition, the Commission has no statutory authority to consider the siting of facilities in other states.

Wisconsin

The PSCW has the authority to coordinate with other state commissions or jurisdictional agencies regarding large, region-wide transmission projects under the PSCW's general powers. Wis. Stat. § 196.02(1) is noted above. In addition, Wis. Stat. § 196.02(12) authorizes the PSCW to sue and be sued and to "confer with or participate in any proceedings before any regulatory agency of any other state or of the federal government."

At this time, Wis. Admin. Code § PSC 112.05(2) requires notice to the PSCW and, potentially an application by a utility, for any construction out-of-state that may involve an allocation of a significant portion of the project cost to Wisconsin for ratemaking purposes:

> (2) A Wisconsin electric utility proposing to construct, install or place in operation any of the utility facilities listed in sub. (1) in another state in which it serves shall notify the commission at least 60 days before beginning construction. The notification shall include a description of the project, its location, the estimated cost, a discussion of need, permits or approvals required by the other state or local governments, and the approximate jurisdictional allocation of the cost between Wisconsin and the other state. Notwithstanding sub. (3), if a significant portion of the cost of the project will be allocated to Wisconsin for ratemaking purposes, the commission may require that the utility submit an application under s. PSC 112.06, for commission authorization prior to construction, installation or operation.

C. Federal Requirements, if any, respecting compacts.

1. Federal Power Act

Federal Power Act Compacts

16 U.S.C.A. 824p(i) explicitly allows three or more contiguous states to enter into an interstate compact, subject to approval by Congress, establishing regional transmission siting agencies to facilitate siting of future transmission facilities within those states and to carry out the electric energy transmission siting responsibilities of those states. These regional transmission siting agencies shall have the authority to review, certify, and permit siting of transmission facilities, including facilities in the national interest transmission corridors (except on property owned by the United States).

While the section specifically gives the states Congressional consent to enter into a compact establishing a regional transmission siting agency, the section also provides that Congressional approval of the resulting compact is required. The section also appears to limit the compact to siting responsibilities, and may not be broad enough to cover cost allocation agreements among the states. As of yet, no states have formed such a compact.

FERC State Boards

16 U.S.C. § 824h allows the Federal Energy Regulatory Commission (FERC) to create state boards "to be composed of a member or members, as determined by the Commission, from the States or each of the States affected or to be affected by any such matter." The members are appointed by the state PUCs (or, if a state has no PUC, the governor), but FERC can reject any nominee. If a state's nominee is rejected, the state authority appoints another one.

In theory, FERC can refer any matter arising under the Federal Power Act to a state board. In practice, they have been used only to provide advice to FERC, such as the recent joint state boards that provided advice and recommendations to FERC on economic dispatch.

It is doubtful these joint state boards would ever be granted decision-making authority by FERC. Also, many matters "affect" many or all states, and each "affected" state is entitled to a member. The size of the boards would be cumbersome if they had decision-making authority.

2. Other Federal requirements if any.

Interstate compacts can best be thought of as a contract between two or more states and are similar to treaties between nations. Compacts are agreements that bind states to the compacts' provisions, just as contracts bind private parties. States are therefore bound to observe the terms of these agreements, even if they conflict with other state laws. However, unlike a treaty, compacts may not be unilaterally renounced by a state, except as provided by the terms of the compact. Generally, compacts are considered the most effective means of ensuring interstate cooperation. Compacts have covered almost every conceivable subject, and some compacts have authorized the establishment of multistate regulatory bodies, such as the New

York Port Authority, which arose from a 1921 compact between New Jersey and New York. "Interstate Compacts," Michael H. McCabe, The Council of State Governments (1997).

Because compacts are contracts between the states, negotiations generally proceed between two or more states regarding the terms of the compact. One state adopts the compact by statute and other states join in by adopting identical compact language. Generally, the compact is not effective until a certain number of states have adopted the compact. For example, the Midwest Energy Compact adopted by Iowa (Iowa Code Chapter 473A) provides that it is effective when adopted by five eligible states. Article V, subsection b. To date, Iowa is the only state that has adopted this compact.

Other than the states agreeing on the various terms and conditions of the compact, the key issue is whether Congressional approval is required. Article I, Section 10 of the Constitution provides, in part, that "no state shall, without the consent of Congress, enter into any agreement or compact with another state." However, the Supreme Court in *Virginia v. Tennessee*, 148 U.S. 503 (1893), held that in fact not all compacts require Congressional approval. The Court said only those compacts that affect the political balance within the federal system or affect a power delegated to the national government must be approved by Congress.

Compacts where state authority is clearly preeminent do not require congressional consent. For example, compacts that are designed to facilitate interstate communication or promote cooperative studies generally do not require congressional consent. However, compacts that impose substantive obligations generally require consent, particularly if the compact relates to an area of mutual state-federal concern, or threatens to interfere with the doctrine of federal preemption. "The Law and Use of Interstate Compacts," Zimmerman and Wendell (1976).

A compact that, for example, merely facilitates the gathering of reliability, generation planning, and transmission information between the states would probably not require congressional approval. However, if the compact does more than gather information or study the issues, but imposes substantive obligations on the states, Congressional approval might be required because of the interest both the federal government and the states have in transmission issues.

There are more than 200 interstate compacts in existence and, on average, a state belongs to 25 of them. There are generally three types: border compacts, advisory compacts, and regulatory compacts. Regulatory compacts include regional planning and development, crime control, flood control, child support, and so forth. Regulatory compacts create ongoing administrative agencies and regulations that may be binding on the member states. Many regulatory compacts require congressional consent to be effective because they regulate areas that impact on of congress's enumerated powers, such as interstate commerce.

One cautionary note on compacts: it can be a long process from beginning to end. In general, it appears that it takes at least three years to negotiate and obtain the necessary approvals for an interstate compact.

II. Cost Allocation for UMTDI Project.

A. MISO—Cooperative approach for using its OATT tariff to establish FERC-approved ratification of cost sharing

The Midwest Independent Transmission System Operator, Inc. (MISO) operates under FERC tariffs, one of which, the FERC Electric Tariff, First Revised Rate Schedule No. 1, Appendix K (Appendix K), is relevant to the cost allocation of the UMTDI Project.

Though not binding, the expression was made* that MISO prefers to operate cooperatively with respect to the tariff creation of a cost allocation scheme for the UMTDI Project in the Midwest ISO Open Access and Transmission Tariff (OATT). Appendix K, Art. II. E.2. provides that both the MISO and Transmission Owners (TOs) who established MISO, "shall possess the right to submit filings under FPA [Federal Power Act] section 205 with regard to the allocation of costs associated with transmission upgrades and new transmission facilities affecting multiple Transmission Tariff zones," subject to Art. III. governance provisions, and Art. IV. required coordination.

*Source: Telephone interview with MISO General Counsel Stephen Kozey.

MISO's procedures are complex. From review, it appears that engagement of the planning process, because of the impact upon other stakeholders, especially transmission owners, is a critical first step to procurement of a MISO § 205 rate filing for cost recovery for any UMTDI Project.

Facility Planning

The Midwest Transmission Expansion Plan (MTEP) is the vehicle for identifying transmission projects intended to have cost allocation and recovery via MISO's FERC tariff. MTEP is intended to be a consensus product. If, however, MISO and a TO do not agree on any element of MTEP, the dispute may be resolved through alternative dispute resolution or by FERC or the pertinent state regulatory authorities. (For further information on the development of the MTEP, see Section VI of Appendix B of the MISO Transmission Owners Agreement.)

Baseline reliability projects are typically reviewed through the annual MTEP study process, and targeted studies can be proposed for evaluating special-case transmission projects. The UMTDI Project is potentially classifiable as this latter type of project.

The annual MTEP study process is a "bottom-up" process. Transmission owners, but other stakeholders as well, can propose to MISO projects and alternatives for reliability needs. Non-Transmission Owner members are allowed to propose alternatives during Sub-regional Planning Meetings (SPMs) or other open stakeholder meetings that MISO coordinates. All submitted projects are evaluated for their reliability merits. The evaluation and approval of a project is through various steps in the MISO planning process including MISO technical studies, SPM review, Planning Sub-committee (PS) review and Planning Advisory Committee (PAC) review. The MISO board performs a final review of all projects to be approved within an MTEP cycle. These projects are included in MTEP Appendix A after MISO board approval.

Targeted studies can address needs involving economics, regional generation outlet, grid stability, or other factors. There are a number of targeted studies going on within each annual MTEP cycle. One targeted study can last more than one MTEP cycle. Each study is reviewed by the Technical Review Groups (TRG), SPM, PS and PAC. After board approval, such projects are listed in MTEP report Appendix A.

Section 205 filing

Art. III. of Appendix K provides that TOs will only engage in joint § 205 filings on the basis of a majority vote on the "one TO-one vote" basis. However, a minority of TOs may submit a § 205 filing provided the minority consists of at least three TOs with a combined gross transmission plan exceeding $2.5 billion as reported on the most recent FERC Form No. 1 filing, or its equivalent for those TOs that do not file that form.

Art. IV of Appendix K requires TOs and MISO to coordinate if they are both planning § 205 filings with the FERC, and to give one another at least 30 days' advance notice of a filing, except in extraordinary situations.

Getting the UMTDI Project into the MISO process can be effected by a TO advancing a proposal under its reserved § 205 filing rights, or more likely by action initiated by the Advisory Council, through the promptings of a member such as the Organization of Midwest ISO States, Inc. (OMS). The Advisory Council would likely present the project to the executive officers of MISO for its cooperative advancement of the UMTDI Project under MISO's shared § 205 filing rights. *See* Appendix K, Art. II.E.2.

There are advantages in the using the MISO route in that the FERC under § 205(d) has to issue an order to prevent a tariff change for the UMTDI project from taking effect.

B. FERC—Formal approach challenging MISO rates as unjust and unreasonable under federal law without inclusion of UMTDI cost sharing mechanism.

If MISO were not willing to cooperate, the UMTDI Project could be advanced by the five state commissions (assuming a likely scenario) on behalf of their respective states to the FERC in a complaint under § 206 of the FPA. The essence of the complaint would be that the MISO tariff without the UMTDI Project included for cost allocation, would cause rates and charges and practices to become "unjust, unreasonable, and unduly discriminatory or preferential," and that the proposed UMTDI Project and its cost allocation should be ordered going forward as the just and reasonable rate and practice. *See* § 206(a) of FPA. The hazard of this approach is that the FERC is under no set time frame to decide such a complaint.

It should also be noted that § 209 of the FPA authorizes the FERC to "refer any matter" under the FPA to a board composed of members of each affected state as determined by the FERC. Such a board would have the same "duties and liabilities as in the case of a member of the [FERC] when designated by the [FERC] to hold any hearings."