

Transmission Siting in the Western United States:

Overview and Recommendations
Prepared as Information to the
Western Interstate Energy Board

August 2009

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THE LAW OUT WEST



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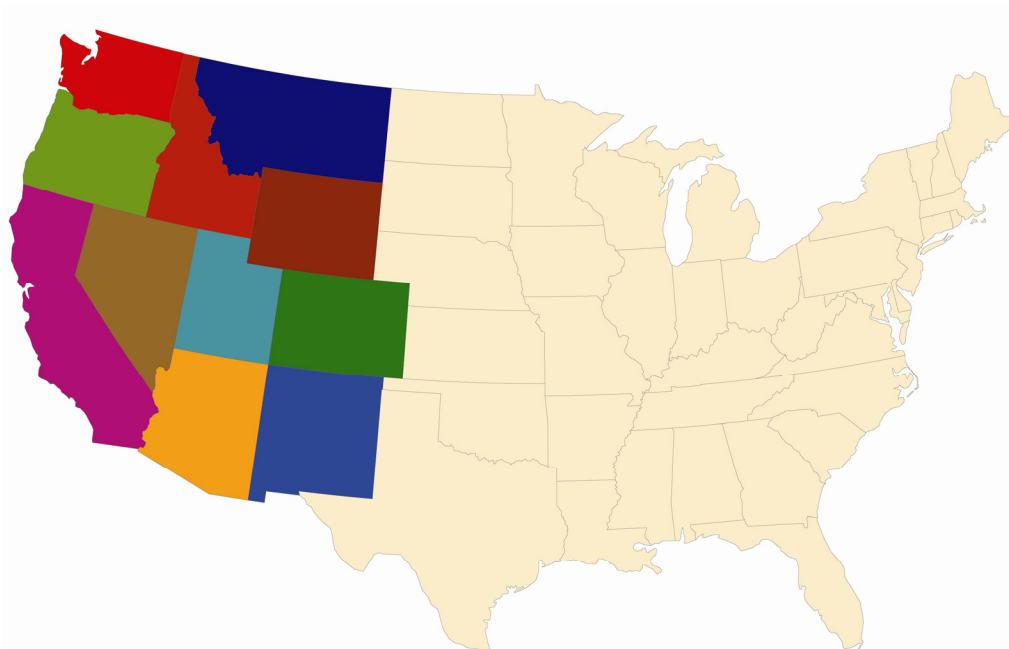
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The views expressed in this White Paper are those of the authors and should not be interpreted as reflecting those of the institutions with which the authors are affiliated or of any clients of Holland & Hart LLP.

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Executive Summary

The electric transmission system in the western United States is inadequate to meet future loads and to transmit energy derived from an increasing number and variety of renewable energy resources. The bewildering variety of federal, state, and local requirements governing siting, construction, and operation of transmission systems complicates expansion of the transmission.



Congress has enacted provisions in the Energy Policy Act of 2005 designed to give the federal government overriding authority over transmission line siting decisions in certain circumstances, and further legislation is being proposed that would broaden federal authority and potentially supersede state authority over the siting of all major transmission facilities.

The western states are uniquely positioned to assure that new transmission is optimally sited, environmentally responsible, economically feasible, and tailored to the needs of the region. However, to assure that the necessary infrastructure is developed, the states in the West will need to incorporate their best practices into a regional transmission siting regime. There are a number of examples of regional, multistate cooperation in the West that have facilitated uniform approaches to various issues by the participating states. These examples include the Grand Canyon Visibility Transport Commission established under the federal Clean Air Act Amendments of 1990 and its successor, the Western Regional Air Partnership; the Western Climate Initiative; and the various model statutes that have been incorporated by individual legislatures into law and which, because of their consistency across state borders, facilitate multistate approaches to particular issues.

The regulatory systems for siting new electric transmission facilities vary from state to state. Some states have a centralized siting authority that has jurisdiction over a proposed project regardless of whether the developer is a regulated public utility, a municipality, or an independent operator. Others have regulatory authority that is fragmented, depending on whether the proponent of a project is subject to state regulatory commission jurisdiction. Some states require the siting authority to consider regional needs for transmission development in connection with a proposal, while others only require that state and local interests be considered. Some state siting authorities not only preempt but actually make decisions

for the local governments affected by a proposed project, while other states reluctantly provide for a mechanism to appeal onerous local government requirements to the siting authority or another entity. This White Paper recommends the identification and adoption of the “best practices” of the various states into a regional transmission siting regime.

Introduction

The electric transmission system in the western United States is badly in need of upgrade and expansion. Little major transmission construction



has occurred in the West in last quarter century, while energy demand has increased dramatically. The demand for energy in the Western Electricity Coordinating Council (“WECC”) area increased 35 percent from 1992 to 2007.¹ Demand for electricity in the United States as a whole is projected to increase between 18 to 39 percent by 2030.² A major reason for the minimal expansion of the transmission system is the construction of natural gas power plants near load centers. As a result, little new transmission was needed to accommodate the added generation.

However, future generation additions will include large amounts of renewable generation located much further from load centers. New transmission will be needed to deliver renewable generation. Renewable energy includes electricity from geothermal, wind, solar, and other unconventional sources and is most often generated in areas remote from the transmission grid.

It is vitally important to assure that states have a major role in approving and siting transmission infrastructure and that affected stakeholders have input at critical junctures of the approval process. However, there is an equally critical need to coordinate state, multi-state, and federal approval processes and to provide a coherent roadmap for the developer of a multi-state transmission project.

This White Paper is both a survey of the various state and local requirements applicable to siting a major transmission project in the western United States and an analysis of how the processes could be changed to accommodate the 21st century’s growing appetite for low-carbon, efficiently generated, reasonably priced electric energy. This White Paper does not address rate incentives, financing considerations, or cost recovery or allocation of transmission investments. Those issues are critically

important to the viability of a given transmission project but do not pertain directly to the siting of projects.

The states discussed in this White Paper are the eleven contiguous western states of Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, and Wyoming. The area within WECC includes these states.

Challenges to Transmission Construction

The challenges faced by the developer of a major transmission project in the western United States are daunting and have been one of the reasons for the very slow pace of transmission enhancements.



Current state siting regimes reflect a system largely built to move power within local utility systems and to connect neighboring utilities to increase reliability. These regimes were not designed to address interstate and regional transmission siting on the scale required today. Like the grid itself, the substantive and procedural requirements for transmission infrastructure are in need of updating. The principal hurdles to transmission construction include:

Increased demand for location-constrained renewable energy to power-concentrated urban areas. Political initiatives like renewable portfolio standards and social concerns over climate change and green energy have spurred an unprecedented increase in demand for renewable energy generation. Unlike traditional energy sources, renewable energy is largely location specific, creating new challenges for the electric industry. Moving energy from traditional generating resources to major urban centers in the West often requires very long transmission lines traversing more than one state. For location-constrained renewable sources of generation to serve growing loads in western urban areas, new facilities will need to be constructed in resource-rich areas hundreds of miles away from the load centers. This will require the construction of thousands of miles of new transmission lines spanning the West.

The “Not in My Back Yard” (NIMBY) syndrome. Not only do many people object to the aesthetic and other impacts of a major power line in their own communities, but there is a growing number of objections to power lines on lands remote from population centers. Land use ob-

stacles are common as lines often traverse fragile habitat, recreational land, scenic and historic trails, and parks. The NIMBY syndrome has spawned numerous legal and political battles that encumber siting processes across the West.

Conflicts between local, statewide, and regional interests. Many state and local governmental entities are reluctant to base a decision on regional or national interests of a transmission project if there is no direct benefit to the state or local jurisdiction through which the transmission line will pass. In some cases, siting authorities are prohibited from approving projects that do not directly address state needs, though they may be responding to significant regional needs. In states where local governments have primary siting authority, a battle of wills often plays out as local needs trump state and regional needs. In the end, a myopic view of transmission siting can cause great delay or cancellation of a project.

Inconsistent and conflicting state and local regulatory requirements. The definition of “public utility” varies from state to state, which means that the degree and scope of regulation of an interstate transmission line will vary depending on the state. Also, local governments in some states can effectively halt a project, even if the requisite state authorizations have been secured.

Federal and state environmental reviews. The National Environmental Policy Act (“NEPA”), the Endangered Species Act, the Migratory Bird Treaty Act, the California Environmental Quality Act, and various other federal and state environmental review requirements create a daunting welter of lengthy, complicated processes which are fertile sources of litigation by project opponents. In addition, the shelf life of an environmental review may not last through the entire siting process, requiring new reviews or updates.

Federal land authorizations. Along with the NEPA review process, a major transmission project proponent in the West must navigate through a complex array of federal public land management requirements administered by the Bureau of Land Management (“BLM”), the Forest Service, the Fish and Wildlife Service, the National Park Service, and the Bureau of Reclamation. In addition, a major project often requires modifications to land use management plans, which trigger an expensive, time-consuming, and often litigious process.

Lack of timing coordination among siting entities. Timelines for completing environmental and other reviews associated with transmission line siting vary across siting authorities. It is often impossible to synchronize the siting process for an entire regional line. Because so much of the land in the West is federally owned, the federal government—mostly through the BLM—plays a central role in transmission line siting. Unfortunately, the federal government’s timelines for environmental reviews often exceed those of the siting processes of state and local siting authorities. As a result, project proponents often end up being forced to site portions of a line without any certainty about the final siting of the rest of the project.

Inconsistent state policies regarding greenhouse gas emissions and renewable portfolio standards. The California SB 1368 carbon emissions performance standard for long-term contracts for imported electricity has placed a severe constraint on the prospects for new coal-fired generation in states that might otherwise serve California markets.³ The Minnesota PUC’s recent decision conditioning approval of a transmission line from a proposed South Dakota coal-fired facility into Minnesota on carbon dioxide reductions at the South Dakota facility illustrates the potential reach of one state’s regulatory policy into that of another.⁴ In addition, not all states have renewable portfolio standard requirements, and those that do have differing definitions of “renewable energy” and differing goals and deadlines.

Short-term capacity v. long-term need. Due to siting and cost issues, many lines that may have been originally planned as extra high voltage lines (765 kVA, for example) will not be built at that size. This is due in part to the high risks involved with building such a large line. It is also due to the narrow definition of “need” used by many siting authorities. If the full capacity of the line is not going to be used in the near future, that extra capacity may be considered unnecessary and hence not permitted.

Uncoordinated siting of transmission lines and renewable generation. The siting of transmission lines is inextricably tied to the siting of renewable energy generation. However, renewable energy siting and transmission siting are often not considered together, which creates a significant barrier of risk that is difficult for a transmission proponent or siting entity to overcome.

Timing of “need” determination. The determination of need by siting entities often comes far too late in the siting process. This results in substantial expenditures of time and resources in project planning before the vital question of the need justifying that expenditure is answered. Because siting is only loosely tied to planning, the essential question of need is left to the end of the process, costing unnecessary time, money, and effort.

National Interest and the Approval Process

The number, complexity, and cost of state and local authorizations are often blamed for the lack of significant transmission development in the



West. The fundamental reasons for the difficulties in securing state and local authorizations for major transmission construction are not only the procedural requirements for permits but also the criteria used by the states and local entities to evaluate the need for and impacts of a transmission project. Few states explicitly require consideration of whether a particular transmission proposal is in the regional or national interest. Those states that do identify regional or national interests as a consideration do not necessarily give them a priority. Generally speaking, the paramount consideration is whether a project will directly benefit the state or local government from which it is seeking approval. When the interests of the siting authority do not coincide with the interests being served by the proposed line, the determination of benefit can be a major impediment to securing the authorizations necessary for a major transmission project to be developed.

Congress responded at least in part to the difficulties in securing state and local approvals by enacting Section 1221 of the Energy Policy Act of 2005,⁵ which gives to the Federal Energy Regulatory Commission (“FERC”) “backstop” authority to supersede state and local action or inaction in order to permit an electric transmission project in a designated National Interest Electric Transmission Corridor (“NIETC”). Only two NIETCs have been designated thus far by the U.S. Department of Energy—the Mid-Atlantic and Southwest Area NIETCs.⁶ The NIETC designations were immediately challenged by a number of states, members of Congress, and other groups, and litigation challenging the designations is pending.⁷ It remains to be seen whether the NIETC process will ultimately facilitate the development of transmission capacity enhancements or be so mired in legal and political controversy that it will never have any practi-

cal effect.⁸ Some proposals in pending federal transmission expansion legislation could extend FERC's authority to include the entire high voltage grid outside of NIETCs.⁹

This White Paper does not address federal authorizations in any detail; however, an important consideration in developing a transmission project in the West is the role of the federal government in the siting process. Because so much of the land in the West is federally owned, transmission proponents will have to deal with the federal land agencies during the siting process. In particular, the federal agencies must evaluate alternative routes in environmental impact analyses. While the federal agencies may consider the effects on private or state and local lands along the routes they study, they are not required to give those effects a priority. As the federal agency issues its permits and rights-of-way, it essentially creates a de facto route through private, state, and local lands. A developer must seek approval from the state or local authority to build those segments of the line between the federal segments.

Opposition to siting the line at the state and local level can affect the project by requiring changes to the federal environmental impact statement ("EIS"), expiration of the "shelf life" of the EIS, or any number of other delays and difficulties. In addition to the nexus between federal and state/local authority, a major transmission project proponent often finds that other federal considerations can override the national interest consideration. A recent example is that of the Navajo Transmission Project, which would carry electricity from generation in New Mexico 470 miles to load centers in Phoenix and Las Vegas. The project was proposed 18 years ago and for a variety of reasons still has not been constructed. The most recent setback is a decision by the Interior Board of Land Appeals holding that the federally required environmental studies for the project need to be redone to take into account designation of critical habitat for two endangered species that was made after the project was originally proposed.¹⁰

Regional Transmission Siting Options

There are a variety of options to address multistate transmission developments, which are not necessarily mutually exclusive. One is to create



a regional, multi-state approach to transmission siting approval. The Western Governors' Association and various federal agencies entered into a Siting Protocol in 2002 for "a systematic, coordinated, joint review process for siting and permit-

ting of interstate transmission lines in the Western Interconnection.”¹¹ The Siting Protocol sets forth procedures for interagency cooperation but does not contain uniform substantive siting provisions. It can, however, serve as a basis for a more detailed substantive accord between the states and the federal agencies containing uniform criteria and procedures for siting regional transmission facilities. Similarly, the Western Renewable Energy Zones joint initiative between the Western Governors’ Association and the U.S. Department of Energy could serve as the platform for development of a regional transmission siting regime. The current scope of the initiative contemplates the generation of conceptual transmission plans for delivering renewable energy to load centers in the western United States.¹²

The Energy Policy Act of 2005 authorizes three or more contiguous states to enter into an interstate compact to “facilitate siting of future electric transmission facilities within those States” and to “carry out the electric energy transmission siting responsibilities of those States.”¹³ The Energy Policy Act’s authorization of an interstate compact could be a powerful tool to maintain state control over the siting process while establishing regionally consistent policies and procedures. However, although there have been discussions between and among various western states and other regulatory entities regarding regional approaches to transmission siting, there is not yet a meaningful regional siting mechanism in place.

There are a number of interstate organizations in the western United States that illustrate the efficacy of a multistate approach. For example, the 1990 amendments to the Clean Air Act established the Grand Canyon Visibility Transport Commission for the purpose of addressing the degradation of visibility in the Grand Canyon.¹⁴ That Commission, consisting of several western states and tribes, extensively studied the sources of visibility degradation in the western United States and recommended measures to the Environmental Protection Agency to address visibility degradation, which were incorporated into federal regulations.¹⁵

Another example of a multi-state organization is the Western Climate Initiative (“WCI”), which is formulating a regional greenhouse gas regulatory program that will be applicable to each of the states that are members of the WCI.¹⁶ The implementation of the WCI program will require legislative authorization from each of the WCI participants; however, if and when that authorization is secured, each state will be participating in a program of uniform applicability throughout the region. It is important to note that one of the principal challenges to successful implementation of the WCI’s proposed program is that many of the WCI member legislative bodies are not enthusiastic about participation in the WCI. Although gov-

ernors are essential in articulating the goals of a multistate initiative and even in developing the proposed regulatory structure under an initiative, it is imperative to involve legislatures significantly at an early stage in the formulation of an initiative.

Another approach would be the development of uniform transmission siting guidelines for adoption by the various western states. These guidelines, perhaps in the form of a model Major Transmission Siting Act, would include provisions for evaluating the regional or national interests in considering a major interstate transmission facility and would also deal with critical corridor designations, environmental reviews, and the paramount role of the state in making overall siting determinations.

Absent a coherent multi-state regime for reviewing and permitting necessary transmission infrastructure developments, the states will likely be elbowed aside by federal legislation or regulation intended to supersede contrary state and local decisions on the siting and construction of major facilities. The FERC's section 1221 backstop authority is but the initial step toward a comprehensive federal transmission permitting regime. Congress is considering additional legislation that would give the federal government the final say in the approval process for major electric transmission development.¹⁷ A multi-state transmission siting initiative in the West would maintain the local control and stakeholder input that is a hallmark of an open process while assuring that necessary infrastructure is approved and built to bring energy to growing load centers.

This White Paper does not recommend that the federal government implement a comprehensive transmission siting process that would preempt state siting requirements. The reality is, however, that the federal government will ultimately do what the states in the West cannot or will not do for themselves in facilitating regional transmission infrastructure improvement. The identification and implementation of best practices on a regional basis is imperative if the western states are to maintain significant control over the transmission siting process.

The siting requirements of each of the contiguous western states applicable to major electric transmission facilities are described below, followed by a compendium of the best practices drawn from those requirements.

Arizona

Siting. The Arizona Corporation Commission ("ACC") regulates "public service corporations."¹⁸ A "public service corporation" is a corporation other than a municipal entity engaged in, among other things, furnishing electricity for light, fuel, or power.¹⁹ The ACC does not

have regulatory jurisdiction over political subdivisions of the State of Arizona for rates, rules, and regulations;²⁰ however, if such an entity proposes to construct a transmission line of 115 kV or greater, it is subject to the ACC's requirements for obtaining a Certificate of Environmental Compatibility ("Certificate").²¹

Arizona law requires each entity planning construction of any transmission line within the state to file a ten-year plan with the ACC on or before January 31 of each year.²² The ten-year plan includes a description of the size and route of the proposed facilities, the purpose of each proposed transmission line, the estimated date of commencing operation, an analysis of the effect of the proposed facilities on the current Arizona electric transmission system, and the basis for projects intended to serve customer load growth in the service territory of the proponent.²³ The ACC is required to undertake a Biennial Transmission Assessment in which the ACC reviews the ten-year plans and issues a written decision regarding the adequacy of the existing and planned transmission facilities to meet the present and future energy needs of Arizona in a reliable manner.²⁴

Every utility planning to construct a transmission line with a capacity of 115 kV or greater²⁵ must file an application for a Certificate with the ACC.²⁶ The application is referred by the ACC to the Arizona Transmission Line Siting Committee ("TLSC") for review and decision.²⁷ The TLSC consists of members from the Attorney General's Office; state agencies dealing with environmental, water resources, and energy issues; the ACC; the public; incorporated cities and towns; counties; and agriculture.²⁸

The application for a Certificate is to include both a description of the proposed project and any environmental studies the applicant has performed or intends to perform in connection with the proposal.²⁹

The TLSC is required to act on a Certificate application within 180 days after the application has been filed with or referred to the TLSC.³¹ In issuing its decision, the TLSC is required to consider various environmental, biological, noise, recreational, historic, archeological, and scenic issues.³² The TLSC is also required to evaluate the technical practicability and costs of the proposed facilities and any additional factors that require consideration under applicable federal and state laws.³³

Once the TLSC makes its decision, the application is forwarded to the ACC, after which the ACC has between 30 and 60 days to is-

sue its decision via written order.³⁴ If the TLSC or the ACC fails to act on an application within the applicable time periods prescribed by statute, the applicant may, in its discretion and in the interest of providing adequate, reliable, and economical electric service to its customers, immediately proceed with the construction of the planned facilities at the proposed site or, if application has been made for one or more alternative sites, at the site which, in the opinion of the applicant, best satisfies the factors the TLSC is required to consider in its siting decisions.³⁵ In reviewing a Certificate, the ACC is required to balance, in the broad public interest, the need for an adequate, economical, and reliable supply of electric power with the desire to minimize the effect thereof on the environment of Arizona.³⁶ If the applicant has not included the proposal in a ten-year plan, the ACC may refuse to consider the application.³⁷

Interstate Transmission Planning. There are no Arizona statutory requirements to consider electric transmission lines in an NIETC or to otherwise engage in interstate or regional transmission planning.

Certificate of Public Convenience and Necessity. A public service corporation may not begin construction of a transmission project without first having obtained from the ACC a certificate of public convenience and necessity.³⁸ The applicant for such a certificate is required to demonstrate to the ACC that it has received the required permits, franchises, or consents from the applicable county, city, or other public authority.³⁹

Local Governments. A Certificate granted by the TLSC is conditioned on compliance by the applicant with all applicable ordinances, master plans, and regulations of the state, the county, or the incorporated city or town in which the facility will be situated.⁴⁰ However, the TLSC may grant a Certificate notwithstanding any such ordinance, master plan, or regulation if the TLSC finds that compliance with such a requirement is unreasonably restrictive or is not feasible in view of available technology.⁴¹

A local government is required to cooperate with a utility when the utility consults with the local government.⁴² If a utility develops and delivers a facilities plan to a municipality or a county, the municipality or county must include the location and nature of the planned facilities in the municipality's general plan or the county's

comprehensive plan.⁴³ The utility is required to update each facilities plan provided to a municipality or a county at least every two years.⁴⁴

California

Siting. The California Public Utilities Commission (“California PUC”) is the primary transmission siting agency in California. It has exclusive jurisdiction in California to site investor-owned utility (“IOU”) network transmission lines.⁴⁵ The California PUC is statutorily required to determine the need for the line and to analyze the environmental impacts of the line.

The California Independent System Operator Corporation (“CAISO”), which is not a California state agency, plays a role in the planning and approval of the transmission upgrades of its participating transmission owners (“PTOs”), which include California’s three largest IOUs—Southern California Edison Company, Pacific Gas and Electric Company, and San Diego Gas & Electric Company.

The California Energy Commission (“CEC”) has statutory responsibility for licensing thermal power plants 50 MW and larger, including related facilities such as electric power lines or “tie lines” from the thermal plant to the first point of interconnection with the electrical grid.⁴⁶

California Public Utilities Commission. A “public utility” subject to California PUC jurisdiction is defined to include an “electrical corporation” where the service is performed for, or the commodity is delivered to, the public for compensation.⁴⁷ “Electrical corporation” is defined as a “corporation or person owning, controlling, operating, or managing any electric plant for compensation . . .”⁴⁸ “Electric plant” is defined to include electric transmission facilities.⁴⁹ A corporation is not considered a public utility solely because it owns or operates facilities used for sales into the market operated by the CAISO or other wholesale electricity market.⁵⁰

California law requires a “public utility” to obtain a Certificate of Public Convenience and Necessity (“CPCN”) or a Permit to Construct from the California PUC before constructing any line, plant, system, or extension thereof.⁵¹ A CPCN must be obtained from the California PUC prior to construction by a public utility of transmission line facilities of 200 kV or more.⁵² For projects involving con-

struction of power lines between 50 kV and 200 kV that are not already included as part of a CPCN application, public utilities must obtain a permit to construct from the California PUC.⁵³ Construction of electric distribution lines under 50 kV is exempt from the requirement to obtain California PUC authorization.⁵⁴ Local authorities are preempted from regulating electric power line projects, distribution lines, substations, or electric facilities constructed by public utilities; however, the California PUC is required to consult with local agencies regarding land use matters when locating such projects.⁵⁵

For large transmission projects requiring a CPCN, the California PUC will engage in a two-part analysis.⁵⁶ The first step is an analysis of reliability issues and the need for the project, including load forecasts, local generation capacity, other transmission capacity, and the potential for distributed generation and demand reductions.⁵⁷ Also, the California PUC will consider whether a particular project is needed for interconnecting new sources of renewable generation.⁵⁸ The California PUC will analyze economic issues associated with the proposed transmission line, including project construction costs, reduced congestion management costs, and the effect of additional generation on the project's cost-effectiveness.⁵⁹ This step is referred to as the "CPCN portion" of the proceeding.

The second step of the analysis requires the California PUC to consider the environmental impacts of the proposed transmission project, pursuant to the California Environmental Quality Act ("CEQA").⁶⁰ In addition to the analysis required by CEQA, other statutes require the California PUC to consider community values, recreational and park areas, historical and aesthetic values, and influence on environment,⁶¹ as well as "cost-effective alternatives to transmission facilities that meet the need for an efficient, reliable, and affordable supply of electricity, including, but not limited to, demand-side alternatives such as targeted energy efficiency, ultraclean distributed generation, . . . and other demand reduction resources."⁶² These issues sometimes overlap with the inquiry in the CPCN portion of the proceeding.

Smaller projects involving power lines between 50 kV and 200 kV require only a Permit to Construct from the California PUC. The process associated with obtaining a Permit to Construct primarily involves the environmental review required by CEQA. The need analysis associated with CPCN applications is omitted.⁶³

California PUC jurisdiction does not extend to siting transmission projects proposed by municipally owned utilities (“MOUs”), private transmission development companies, or power marketers.⁶⁴ However, MOUs typically engage in the same two-step analysis followed by the California PUC relating to assessment of the project’s need and the CEQA environmental review.⁶⁵ Non-public utilities, and entities such as private transmission companies or power marketers, do not have eminent domain authority in California. If such entities make their facilities available to the public, they may submit themselves to California PUC jurisdiction as IOUs and obtain eminent domain authority.⁶⁶ Alternatively, projects involving those entities that also plan to make their facilities available to the public are often proposed jointly with MOUs in order to avoid California PUC jurisdiction.

California Independent System Operator. In addition to its responsibility to operate the transmission grid in California on behalf of its PTOs, the CAISO is responsible for planning to ensure transmission system reliability and promote infrastructure development.⁶⁷ Typically, when an IOU applies to the California PUC for CPCN approval of a transmission project, the CAISO will conduct its own independent study relating to the proposed transmission line. If the line is justified by economic need, the CAISO or the project applicant may submit its study to the California PUC as part of the CPCN proceeding.⁶⁸ The CAISO generally limits its analysis to the need for the proposed line or the reliability impacts of the line or proposed alternatives. The California PUC attributes a rebuttable presumption to the CAISO’s assertion that a particular project is needed for economic reasons, provided certain criteria are met.⁶⁹

Renewable Energy Transmission Initiative. The Renewable Energy Transmission Initiative (“RETI”) was established based on the California PUC’s recognition that collaboration among state agencies and stakeholders is the key to future permit streamlining. RETI is a collaborative study effort among California stakeholders seeking to develop renewable generation and associated transmission. The RETI effort is overseen by a Coordinating Committee composed of staff from the California PUC, the CEC, the CAISO, and representatives from three MOU organizations. The analyses and decisions coming from RETI are driven by the Stakeholder Steering Committee composed of investor-owned utilities, MOUs, renewable energy

developers, federal land use agencies, environmental organizations, consumer organizations, local government organizations, and others.

RETI's consensus study and decision process is intended to develop high quality information critical to informing permitting decisions—thus facilitating consensus support for specific transmission lines and streamlining of future renewable energy transmission permit applications.⁷⁰

Colorado

Siting. The siting and approval of a major transmission project in Colorado by a public utility is within the regulatory purview of the Colorado Public Utilities Commission (“Colorado PUC”). A “public utility” is defined as an “electric corporation, . . . person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest . . .”⁷¹ Municipally owned utilities are exempt from Colorado PUC jurisdiction for utility operations within municipal boundaries.⁷² In addition, any cooperative electric association that has voted to exempt itself from regulation is not regulated as a “public utility.”⁷³

Colorado law prohibits the construction of a new electric facility, plan, or system without first “having obtained from the commission a certificate that the present or future public convenience and necessity requires or will require such construction.”⁷⁴ Colorado courts have held that the key factor in the definition of “public utility” is whether the facility is supplying utility services “to the public,” and that such a certificate is not required if the entity provides utility services only to a limited group of customers.⁷⁵ In addition, a certificate is not required for construction, operation, or extension of a facility “in the ordinary course of business.”⁷⁶ Thus, a major transmission project that is constructed in Colorado and contains interconnections to other transmission or distribution systems which serve load in Colorado would likely need a certificate from the Colorado PUC.

Along with supplying the required technical information and design details, an applicant for a certificate of public convenience and necessity for construction or extension of transmission facilities is required to describe how it will achieve “prudent avoidance” with respect to planning, siting, construction, and operation.⁷⁷

“Prudent avoidance” is narrowly defined to mean “striking a reasonable balance between the potential health effects of exposure to magnetic fields and the cost and impacts of mitigation of such exposure.”⁷⁸ An overarching factor to be considered is the public interest or need, although the scope of public interest or need is left to the discretion of the Colorado PUC.⁷⁹

Local Governments. The statute requiring a certificate of public convenience and necessity specifies that no public utility may construct facilities within the territorial boundaries of a city or county unless the utility complies with the applicable zoning requirements.⁸⁰ A public utility or power authority⁸¹ is required to notify the affected local government of its plans to site a major electrical facility within the jurisdiction of the local government before filing a request for a certificate of public convenience and necessity or making any annual filing with the Colorado PUC that proposes or recognizes the need for new construction.⁸² Typically, a county or city will approve a transmission line through the issuance of a special or conditional use permit (a “Use Permit”).⁸³ The decision of a local government denying a permit for a transmission facility or imposing unreasonable restrictions in the permit may be appealed to the Colorado PUC if (1) the applicant has applied to the Colorado PUC for a certificate of public convenience and necessity, (2) such a certificate is not required, or (3) the Colorado PUC has issued an order that conflicts with the local government’s action.⁸⁴ In considering an appeal from a local decision, the Colorado PUC is required to balance the local governmental interest with the statewide interest in the construction of the facilities. In particular, the Colorado PUC is required to consider the demonstrated need for the facility, the extent that it is inconsistent with local land use plans and ordinances, whether it would “exacerbate” a natural hazard, applicable engineering standards, the merits of feasible alternatives proposed by the applicant or the local government, the basis for the local government’s decision, the impact on local residents, and the safety of the public.⁸⁵

1041 Regulations. Colorado cities and counties are authorized to regulate by permit activities within certain areas of state interest.⁸⁶ These permits are commonly referred to as “1041 permits” because the statute was enacted in 1974 as H.B. 1041.⁸⁷ The 1041 process is in addition to the Use Permit process and often requires a substantial

environmental analysis and consideration of project alternatives. Not all counties in Colorado have adopted 1041 regulations, but in those that have, the approval process for a project can be considerably slowed and complicated by the 1041 process. The 1041 process is applicable to “major facilities of a public utility,”⁸⁸ defined to include transmission lines and substations.⁸⁹ However, no decision by an agency under the 1041 permit program may be inconsistent with the Colorado PUC’s decision regarding public convenience and necessity.⁹⁰

Idaho

Siting. The Idaho Public Utilities Commission (“IPUC”) regulates siting of major transmission facilities by public utilities in Idaho through the Certificate of Public Convenience and Necessity (“CPCN”) process.⁹¹ A “public utility” is defined to include an electrical corporation delivering service directly to the public.⁹² An “electrical corporation” is an entity operating an “electric plant” for compensation within the state, except where the electricity is generated or distributed for the entity’s own use and not for resale.⁹³ An “electric plant” is defined broadly to include, without limitation, all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity.⁹⁴ To be considered a public utility, the entity must hold itself out as ready, able, and willing to serve the public.⁹⁵ Additionally, an entity only becomes a regulated public utility when it becomes devoted to a public use.⁹⁶ The IPUC has interpreted the statutory definition of “public utility” to exclude facilities used to provide interstate transmission service which do not provide retail service.⁹⁷

After filing an application for a CPCN, the IPUC holds a hearing concerning the financial ability and good faith of the applicant and the necessity for the additional service.⁹⁸ The criterion used by the IPUC to grant or deny a CPCN is the “present or future public convenience and necessity.”⁹⁹ In granting a CPCN, the IPUC considers both state and regional needs. For example, the IPUC recently granted a certificate for a Rocky Mountain Power Company 345 kV transmission line based, among other things, on findings that the transmission project will facilitate transfer of energy from planned and existing generating resources in Idaho and Wyoming and delivery to load centers in Utah, improve the reliability of the cur-

rently congested transmission system, and improve access to regional markets. The IPUC also found that the transmission project will provide a platform for adding future transmission facilities to increase transfer capacity between east and west control areas.¹⁰⁰

If a CPCN is required, it must be issued before the public utility may obtain any franchise, permit, right, or privilege from a municipality or county.¹⁰¹

Interagency Collaboration. The Idaho Office of Energy Resources (“OER”) was established in 2007 and has responsibility for energy planning, policy, and coordination within the state.¹⁰² The OER has proven effective in facilitating the coordination of state and local siting departments, agencies, and governmental bodies to evaluate proposed project plans and potential routes, to identify obstacles, and to help identify solutions to the challenges facing a proposed project.

Local Governments. Each local government in Idaho has the authority to adopt its own zoning ordinance and comprehensive plan; therefore, the siting of electric transmission lines may be regulated differently by different local governments.¹⁰³ The process for amending zoning ordinances and comprehensive plans may vary from one county or municipality to the next; however, the general requirements are governed by state law.¹⁰⁴

In addition to local zoning ordinances and comprehensive plans, local governments are authorized by state statute to provide for conditional or special use permits in their zoning ordinances.¹⁰⁵ If a proposed use is conditionally permitted by the zoning ordinance and is not otherwise in conflict with the comprehensive plan, the local governing authority may issue a conditional use permit.¹⁰⁶ Construction of certain structures in a local government jurisdiction which has elected to enforce building codes¹⁰⁷ also requires a permit from the local jurisdiction.¹⁰⁸

An order of the IPUC, including the granting of a CPCN, may preempt any action or order of a state or local government agency in conflict with the IPUC order, so long as the IPUC has given the agency the opportunity to consult with it before entering the order.¹⁰⁹ In addition, as noted below, local government regulation of transmission facilities in an NIETC is preempted under certain circumstances.

In 2009, the Idaho Legislature enacted a statute allowing the IPUC to grant priority designation for a proposed transmission project with a capacity of 230 kV or more.¹¹⁰ The new statute requires a reviewing state or local government agency to give the application “priority or immediate attention” as it relates to reviews, permits, reports, studies, or comments.¹¹¹ A decision by the IPUC whether to grant priority designation is to be based on whether the proposed transmission facilities will benefit Idaho customers and the Idaho economy, improve transmission capacity and reliability in Idaho and the region, and promote the public interest.¹¹²

National Interest Electric Transmission Corridors. No construction of a new transmission facility in excess of 115 kV capacity, an upgrade of an existing line to at least 115 kV capacity, or associated substations, switchyards, and other facilities may be undertaken in a designated NIETC without a route certificate from the IPUC.¹¹³ The IPUC also has authority to preempt local government land use decisions pertaining to the construction of transmission facilities located within an NIETC if a local government has denied or has not authorized construction of the transmission facilities or if a local land use condition imposed by a local government is unreasonable or uneconomical.¹¹⁴ To seek review of local government decisions by the IPUC, the application for the route certificate must include a statement as to whether the proponent of the project is requesting local government preemption¹¹⁵ and a list of local government land use applications that are pending, denied, or the conditions to which the proponent objects.¹¹⁶ In addition, the lines must be used in interstate commerce, and the proposal must meet certain criteria including consideration of the regional or national benefits expected from the facilities, the reduction in transmission congestion in interstate commerce, consistency with national energy policy, enhancement of energy independence, consistency with the public interest, minimization of environmental impacts, the financial capability of the proponent, and maximization of existing transmission facilities to the extent reasonable, economical, and consistent with reliability planning.¹¹⁷

Although the IPUC’s jurisdiction is usually limited to public utilities, its jurisdiction is expanded under this statute to apply to the construction or modification of any transmission facility within a designated NIETC, whether or not by a public utility.¹¹⁸

A final order granting a route certificate issued by the IPUC binds the state and each of its agencies, divisions, bureaus, commissions, boards, and local governments as to the approval of the authorized transmission route and the construction and operation of the authorized transmission facility.¹¹⁹ The route certificate also authorizes the transmitting utility to exercise the right of eminent domain.¹²⁰

Montana

Siting. Montana’s transmission siting process is governed by the Montana Major Facility Siting Act of 2003 (“MFSA”),¹²¹ which consolidates the siting process and most permitting functions under the Montana Department of Environmental Quality (“DEQ”). In the statement of policy of the MFSA, the Montana Legislature makes it clear that the principal purpose of the MFSA is to protect “the environmental life support system” and prevent the “unreasonable depletion and degradation” of natural resources.¹²² Pursuant to the MFSA, a “facility” may not be constructed in the state without a Certificate of Compliance (“CC”) from the DEQ.¹²³ The DEQ has jurisdiction over the construction and transmission siting process regardless of whether an otherwise regulated “public utility” is the applicant for the CC.¹²⁴

The MFSA defines a “facility” to include an electric transmission line and associated facilities of a design capacity of more than 69 kV with exceptions for certain lines that are of short lengths, have obtained rights-of-way from most of the landowners along the route, or increase capacity only up to a certain point within existing easements or rights-of-way.¹²⁵ The term “public utility” is defined to include public and private corporations, companies, individuals, and associations, and their lessees, trustees, or receivers that own, operate, or control any plant or equipment in Montana for the production, delivery, or furnishing of light or power for businesses, manufacturing, or household use to other persons, firms, associations, or corporations.¹²⁶

The Montana Public Service Commission (“MPSC”) is not involved in siting and permitting transmission lines, even for a public utility. Rather, the MPSC oversees operations of public utilities to ensure that they provide adequate service to customers at reasonable rates.¹²⁷

An application for a CC must contain, among other things, a statement explaining the need for the facility based on technical and economic considerations.¹²⁸ The economic considerations include analyses of costs, sources and flows of energy on the proposed line, and the feasibility of the line.¹²⁹ In addition, if the transmission grid of which the proposed line will be a part is managed by a regional transmission organization, the application is required to address congestion and costs of congestion and include evaluations of the proposed facility prepared by a regional planning organization.¹³⁰ Currently there are no formal FERC-approved or operational regional transmission groups in Montana.

The application is also required to include a description of reasonable alternate locations for the facility¹³¹ and an environmental study plan (at the application's option) showing compliance with these listed requirements.¹³² Within nine months following acceptance of the application, the DEQ must issue a report containing any DEQ studies, evaluations, recommendations, and other pertinent documents resulting from DEQ's study and evaluation of the application.¹³³ An environmental impact statement or analysis prepared pursuant to the Montana Environmental Policy Act¹³⁴ may be included in the DEQ findings if compelling evidence indicates that adverse environmental impacts are likely to result from the construction and operation of the proposed facility.¹³⁵ The MFSA allows an expedited review process in limited circumstances.¹³⁶

The Montana Departments of Transportation; Fish, Wildlife and Parks; Natural Resources and Conservation; Revenue; and Public Service Regulations, along with the Consumer Counsel, are each required to report information to the DEQ relating to impacts of the proposed project. These reports may include opinions as to the advisability of granting, denying, or modifying the CC.¹³⁷

The CC issued by the DEQ must include an environmental evaluation statement that includes the environmental impacts of the proposed facility and any adverse environmental impacts that cannot be avoided by issuance of the CC and a plan for monitoring environmental effects of the facility.¹³⁸ The DEQ must also file a recommendation with the FERC for a "facility" that is subject to FERC.¹³⁹ Accordingly, the FERC project applicant must file "notice of and a copy of the federal application" with the DEQ.¹⁴⁰

Within 30 days after the issuance of DEQ's report, the DEQ is required to approve a proposed facility if the DEQ determines, among other things, that there is a basis of need for the facility, fo-

cused on technical and economic aspects of the line, although not explicitly on regional or national interest considerations.¹⁴¹ The DEQ must also determine that the facility minimizes adverse environmental impacts; that the facility is consistent with regional plans for expansion of the “appropriate grid of the utility systems serving the state and interconnected utility systems;” that the facility will serve the interests of “utility system economy and reliability;” and that the facility will serve the public interest, convenience, and necessity.¹⁴² The determination of the public interest, convenience, and necessity entails not only the basis of need for the facility and the nature of the probable environmental impacts, but also the benefits to the applicant and state resulting from the facility, the effects on economic activity resulting from the proposed facility, the effects of the proposed facility on the public health, welfare, and safety, and any other factors DEQ considers relevant.¹⁴³ The finding of public interest, convenience, and necessity in the CC presumptively qualifies the facility to exercise eminent domain powers under Montana law.¹⁴⁴

As a practical matter, there is no effective legal means to compel the DEQ to complete an environmental impact statement or issue a CC on the time-table that the statute appears to require. A CC and associated environmental evaluation for a major transmission line typically will require at least 18 to 36 months to complete from date of application, even if there is minimal opposition.

Local Governments. Local governments are empowered to establish zoning districts¹⁴⁵ and to require permits for construction of buildings or structures.¹⁴⁶ Cities and towns may adopt and enforce zoning ordinances under the Municipal Zoning Enabling Act.¹⁴⁷ The Montana County Planning and Zoning Commission Act allows a county to enact zoning regulations.¹⁴⁸ Most of the 54 Montana counties do not have formally enacted zoning and permitting regulations and requirements specifically applicable to siting and constructing structures such as transmission lines.

The MFSA explicitly provides that no Montana state, regional, or local agency or government may require any approval, consent, permit, certificate, or other condition for the construction, operation, or maintenance of a facility authorized by a certificate issued pursuant to the MFSA.¹⁴⁹ The MFSA thus supersedes all other Montana state and local laws or regulations concerning siting jurisdiction and requirements.¹⁵⁰ The MFSA also applies to all federal facili-

ties and to all facilities over which an agency of the federal government has jurisdiction to the fullest extent allowed by federal law.¹⁵¹

Nevada

Siting. The Public Utilities Commission of Nevada (“PUCN”) has authority over siting of transmission lines of 200 kV or more.¹⁵² No person may commence construction of a “utility facility” in Nevada without first obtaining a permit for such construction from the PUCN.¹⁵³ This requirement is not limited to public utilities, but rather applies to any person, other than a local government.¹⁵⁴ A “utility facility” includes electric transmission lines and transmission substations that are designed to operate at 200 kV or more, not required by local ordinance to be placed underground, and constructed outside any incorporated city.¹⁵⁵

Nevada law defines a “public utility” to include “[a]ny plant or equipment . . . for the production, delivery or furnishing for or to other persons, including private and municipal corporations, . . . light, power in any form or by any agency . . .”¹⁵⁶ “Public utility” does not include “[p]ersons who are engaged in the production and sale of energy, including electricity, to public utilities, cities, counties or other entities which are reselling the energy to the public.”¹⁵⁷ “Electric utility” is defined as a “public utility . . . in the business of providing electric service to customers,”¹⁵⁸ but does not include a cooperative association or nonprofit entity that provides service only to its members.¹⁵⁹ Municipalities and certain trusts are exempt from Nevada’s requirements to apply for a certificate of public convenience and necessity.¹⁶⁰

Notwithstanding the broad nature of the PUCN’s authority, the PUCN and other local permitting entities are required to cooperate with each other and the appropriate federal agencies on applications for permits, licenses, and other approvals to construct a utility facility and to coordinate their activities, including conducting hearings or environmental reviews.¹⁶¹

An application for a permit to construct a utility facility is required to include a summary of environmental impact studies of the proposal; except that, if the application is for a utility facility for which a federal agency is required to conduct an environmental analysis, the application must be filed no later than the date on which the project proponent files the application for approval with

the appropriate federal agency. The proponent must also file an amended application with the PUCN no later than thirty days after the issuance by the federal authority of the final environmental assessment or environmental impact statement relating to construction of the utility facility.¹⁶²

A copy of each application and amended application for construction of a utility facility filed with the PUCN must also be filed with the Nevada Division of Environmental Protection.¹⁶³ The application and amended application must also be provided to each local government in which the utility facility is proposed to be sited for both its primary proposed location and any alternate proposed locations.¹⁶⁴

The general description of the location of the proposed utility facility in the application must include any alternative locations of the proposed utility facility and the reasons why the primary proposed location of the proposed utility facility is best suited.¹⁶⁵ In addition, the amended application must include, among other things, not only details of the environmental analyses, but also an explanation of the need for the proposed utility facility to ensure reliable utility service to customers in Nevada and an explanation of how the proposed utility facility will serve the public interest.¹⁶⁶

The explanation as to why a proposed transmission project is needed to ensure reliable utility service must include a description of the extent to which it will achieve interstate benefits.¹⁶⁷ The explanation of how the proposed utility will serve the public interest must include a description of the economic benefits that the proposed utility facility will bring to the applicant and Nevada.¹⁶⁸ If a “public utility” applies to the PUCN for a permit for the construction of a utility facility, the PUCN has exclusive jurisdiction with regard to the determination of whether a need exists for the facility, and no other permitting entity may consider whether a need exists for the utility facility in its review of any application for a permit, license, or other approval for the construction of the utility facility.¹⁶⁹

After a person files the application, the PUCN must either grant or deny the application within 150 days after the application is filed, or 120 days after an amended application is filed, unless otherwise required under federal law.¹⁷⁰ All other permitting entities are required to grant or deny an application for the facility within the same time frame if the application was filed on or before the date of the filing of the application with the PUCN or with the ap-

appropriate federal agency.¹⁷¹ The PUCN's order approving the permit will include a list of permits that must be obtained prior to the PUCN issuing the final construction permit. Once the other permits have been obtained, the construction permit is issued without further PUCN review.¹⁷²

Although the review process is extensive, the actual practice in Nevada is fairly streamlined. During the review of an application for a permit to construct a new transmission line, the PUCN often acts as a clearinghouse. Among other things, the PUCN will ensure that all affected state agencies review the application and have an opportunity to provide input. As a result, by submitting the application with the PUCN, the project will be subject to the input of all affected state agencies in Nevada at one central location. The PUCN also frequently issues compliance orders prior to issuing the construction permit. Such compliance orders will identify other local, state, or federal requirements that must be met prior to issuance of the actual construction permit. In this way, the PUCN makes an initial determination of the need and sets out a clear road map for a public utility to obtain the construction permit.

Local Governments. Authority over zoning, subdivisions, and related entitlements in Nevada is delegated by statute to counties and municipalities.¹⁷³ Land use matters are primarily governed by two county- or municipal-level documents—the Master Plan and the Development Code. The specific requirements for zoning and entitlements are generally found in the Development Code.

For each county, the zoning map largely governs where a transmission line can be sited and which development regulations (e.g., height limitations, setbacks, or screening/landscaping) will apply. For example, subject to obtaining a special use permit, Clark County allows for commercial transmission line uses in all zoning districts.¹⁷⁴ In most of Nye County, “open use” zoning is employed,¹⁷⁵ whereas Elko, Lincoln, and White Pine counties each allow transmission lines in most rural zoning districts subject to obtaining a special use permit.¹⁷⁶

In most Nevada counties, a special use permit is required prior to initiating construction of a transmission line.¹⁷⁷ Special use permits are discretionary approvals of the local jurisdiction and are not granted as a matter of right.¹⁷⁸ All special use permit applications must be considered at a public hearing, with the county planning commission as the decision body for the application and the board

of commissioners as the appellate body.¹⁷⁹ The specific requirements for a special use permit vary slightly among jurisdictions. Generally, an applicant must be able to show that the proposed use is in harmony with the purposes, objectives, and standards of the relevant zoning district; that the proposed use will not result in a material adverse impact on adjacent properties or upon the public health, safety, and general welfare; and that the necessary infrastructure is in place to support the proposed use.¹⁸⁰

New Mexico

Siting. In New Mexico, no electric transmission line with a capacity of 230 kV or more may be constructed by any person, including a municipality, within New Mexico unless the project has been approved by the New Mexico Public Regulation Commission (“NMPRC”).¹⁸¹ No other state agency has siting authority for high-voltage transmission facilities in New Mexico.

If the proponent of the project is a “public utility,” the proponent is also required to obtain a Certificate of Public Convenience and Necessity (“CPCN”) from the NMPRC before commencing construction.¹⁸² “Public utility” is defined to include a person “not engaged solely in interstate business” who owns, operates, leases, or controls any facility for the transmission of electricity.¹⁸³ The NMPRC may approve the application for the CPCN without a formal hearing if no protest is filed within sixty days after the date of notice by the NMPRC that the application has been filed.¹⁸⁴ In any case, the NMPRC must issue an order granting or denying the application within nine months after the date the application is filed with the NMPRC.¹⁸⁵ If the NMPRC fails to issue its order within nine months, the CPCN is deemed to be granted, subject to one six-month extension by the NMPRC.¹⁸⁶

In addition to the CPCN for public utilities, any person proposing to develop a transmission facility with a capacity of 230 kV or more must also file an Application for a Location Permit with the NMPRC.¹⁸⁷ A public utility may simultaneously file its applications for a CPCN and for a Location Permit.¹⁸⁸ The Application for a Location Permit includes any environmental studies required by NEPA or equivalent studies.¹⁸⁹ The NMPRC’s decision on a Location Permit application is determined by whether the proposed location will “unduly impair important environmental values,” and, if it does, whether those impacts can be mitigated.¹⁹⁰

If the right-of-way for the proposed transmission line will be greater than 100 feet, the proponent must obtain a Determination of Right-of-Way Width from the NMPRC before constructing the facilities.¹⁹¹

Local Governments. As a general proposition, each local government in New Mexico has a planning and zoning process that governs proposed construction of an electric transmission line.¹⁹² The degree of sophistication and detail on the land use requirements vary widely among the cities and counties in the state. Bernalillo County, for example, requires a special use permit for utility facilities, although it does not have detailed requirements relating to transmission lines.¹⁹³

No Location Permit application may be approved by the NMPRC that violates an existing state, county, or municipal land use statutory or administrative regulation unless the NMPRC finds that the regulation is “unreasonably restrictive and . . . not in the interest of the public convenience and necessity.”¹⁹⁴

Renewable Energy Transmission Authority. There is no requirement that the NMPRC or local government bodies consider state, regional, or interstate benefits in addressing electric transmission projects, nor is there any provision specifically addressing proposed projects with a designated NIETC. However, in July 2007, the New Mexico Legislature promulgated the Renewable Energy Act (“REA”),¹⁹⁵ the purpose of which is to encourage the “generation of electricity through the use of renewable energy” and to “promote energy self-sufficiency, preserve the state’s natural resources and pursue an improved environment in New Mexico.”¹⁹⁶ In furtherance of those purposes, the Legislature declared that “it may serve the public interest for public utilities to participate in national or regional renewable energy trading.”¹⁹⁷

To encourage renewable energy projects, the Legislature created the New Mexico Renewable Energy Transmission Authority (“RETA”), which is charged with implementing the REA.¹⁹⁸ RETA is authorized to enter into contracts and partnerships with public and private entities and to identify and establish electric transmission corridors within the state. It is also authorized to participate in regional transmission forums to “coordinate, investigate, plan, prioritize and negotiate with entities within and outside the state for

the establishment of interstate transmission corridors.”¹⁹⁹ To this point, no corridor has been identified.

Oregon

Siting. In order to site a major electric transmission line in Oregon, a developer must obtain a siting certificate from the Oregon Energy Facility Siting Counsel (“EFSC”). The EFSC consists of seven members who are appointed by the Governor and confirmed by the Oregon Senate.²⁰⁰ The EFSC is required to further the policy of the state to site energy facilities consistent with the protection of public health and the environment and to cooperate with the federal government to establish a comprehensive system for siting energy facilities.²⁰¹

The EFSC must issue a siting certificate in order for qualifying energy facilities to be built and operated.²⁰² “Energy facilities” are defined to include high voltage transmission lines that are more than ten miles in length with a capacity of 230 kV or more, constructed in more than one city or county of Oregon.²⁰³ The definition does not include lines proposed for construction entirely within 500 feet of an existing corridor occupied by high voltage transmission lines with a capacity of 230 kV or more, or lines of 57 kV or more that are rebuilt and upgraded to 230 kV along the same right of way.²⁰⁴

In reviewing an application for a major transmission project, the EFSC determines compliance with not only its own standards, but also the standards of most other state and local permitting agencies.²⁰⁵ Thus, if another state or local agency would normally issue a permit, license, or certificate that addresses some aspect of the proposed facility, the decision to issue that permit is made by the EFSC as a part of the site certificate.²⁰⁶ Moreover, once the site certificate is issued, any affected state agency or local political subdivision must promptly issue the permits, licenses, and certificates addressed in the site certificate. The only issue in reviewing a state or local agency’s issuance of a required permit is whether the permit is consistent with the terms of the site certificate.²⁰⁷

Each state or local government agency that issues a permit, license, or certificate will continue to exercise enforcement authority over such permit, license, or certificate, but the EFSC retains the authority to inspect or request other agencies to inspect the facility to ensure that the certificate holder is operating the facility in compli-

ance with the terms and conditions of the site certificate.²⁰⁸ Further, if there is a conflict between the EFSC's rules and another state agency's rules regarding the construction and operation of facilities pursuant to a site certificate, the EFSC's jurisdiction supersedes the other agency's jurisdiction regarding matters included in and governed by the site certificate.²⁰⁹ However, the EFSC does not have jurisdiction over matters delegated by the federal government to other state agencies.²¹⁰

An applicant for a siting certificate is required to submit a Notice of Intent ("NOI") to the EFSC and the Oregon Department of Energy ("ODOE") that contains detailed information about the proposed facility sufficient for the preparation of a Project Order.²¹¹ Among other things, the NOI must indicate whether the applicant intends to obtain local government determination of the proposal's consistency with statewide land use planning goals or whether it wishes the EFSC to make that determination.²¹² In the latter case, the EFSC will appoint a Special Advisory Group ("SAG"), which consists of the governing body of any local government within the jurisdiction of which the facility is proposed to be located.²¹³ The ODOE will contact the SAG upon receiving the preliminary application and request the local government's applicable substantive criteria and statewide planning goals.²¹⁴ Based on such criteria, the ODOE will make appropriate recommendations to the EFSC regarding the proposed facility's compliance with state and local land use requirements.²¹⁵

If any substantive local criteria conflict with State statutes and rules, the EFSC may resolve the conflict "in the public interest" but may not override any state statute.²¹⁶ For projects that involve multiple jurisdictions, the EFSC must decide whether to follow SAG recommendations, statewide planning goals, or a combination thereof.²¹⁷ In addition, the EFSC must decide whether the facility complies with any rules and goals of the Oregon Department of Land Conservation and Development ("DLCD") and any land use statutes directly applicable to the facility.²¹⁸ If the proposed facility does not comply with one or more of the applicable substantive criteria, then the EFSC must decide whether the facility complies with the statewide planning goals. If the proposed facility does not comply with a statewide planning goal, then the EFSC may find that the facility qualifies for an exception to that goal.²¹⁹

The NOI is required to identify significant potential environmental impacts from the construction and operation of the pro-

posed facility²²⁰ and a statement of the means by which the applicant intends to comply with state carbon emissions standards.²²¹ Copies of the NOI are required to be submitted to other reviewing state agencies, governments of cities and counties within the site area, and federal land management agencies with jurisdiction over any part of the site.²²² Once the ODOE reviews the NOI and the comments and recommendations received from the other agencies, the ODOE will prepare and submit a Project Order to the applicant. The purpose of the Project Order is to compile the applicable statutes, rules, ordinances, permit requirements, and any other special information needed for the site certificate application.²²³

Upon issuance of the Project Order by ODOE, the applicant submits a preliminary application. The application is considered “preliminary” until the ODOE determines that the application is complete.²²⁴ Among other things, the applicant is required to provide sufficient evidence to enable the EFSC to determine a need for the electric transmission lines.²²⁵

The ODOE prepares a memorandum to accompany each copy of the preliminary application sent to the other agencies.²²⁶ The reviewing agencies submit written comments and recommendations, as well as the status of any requests for permits already submitted by the applicant.²²⁷ The ODOE will then issue a Proposed Order and a notice of a contested case on the Proposed Order.²²⁸ The applicant is automatically a party in the contested case proceedings.²²⁹ However, the only other individuals who may request party status in the proceedings are those who publicly commented on the site certificate application and draft Proposed Order.²³⁰ If no person requests party status, the proposed order will be forwarded to the EFSC and the contested case will be considered concluded.²³¹ If there are one or more challengers, the hearing officer will submit a proposed contested case order with the officer’s findings of fact, conclusions of law, and recommended site certificate conditions on the issues of the contested case,²³² after which the EFSC will issue a final order granting or denying the application for the site certificate.²³³

The ODOE will typically issue a Project Order within 140 days after receiving the applicant’s NOI.²³⁴ Unless the proposed project is under expedited review, the applicant may not submit its Preliminary Application until the ODOE issues the Project Order. Once the applicant receives the Project Order, the applicant will have two years after the date of submission of the NOI to submit an applica-

tion for a site certificate or else the NOI will expire.²³⁵ Once the complete application is filed, the EFSC has 12 months to issue a final decision regarding an application for a site certificate for the operation and construction of an electric transmission line.²³⁶ However, the EFSC's failure to meet this deadline does not constitute an automatic denial or approval of the application.²³⁷

When deciding whether to approve or deny an application for a siting certificate, the EFSC must apply both its own standards and those of other agencies.²³⁸ The EFSC standards for siting a new transmission facility²³⁹ include applicable rules, standards, and ordinances of other agencies,²⁴⁰ statewide land use planning goals,²⁴¹ and the avoidance or mitigation of impacts to protected areas and protected fish and wildlife.²⁴² The EFSC must also find a "need" for the new electric transmission facilities.²⁴³ "Need" is demonstrated if the facility is consistent with Least Cost Plan provisions,²⁴⁴ the facility is consistent with the System Reliability Rule,²⁴⁵ or the facility is proposed to be within a NIETC.²⁴⁶

The Oregon Public Utility Commission ("OPUC") is one of the many reviewing agencies that play an active role in the site certificate application process.²⁴⁷ The applicant must submit copies of its NOI and preliminary application to the OPUC.²⁴⁸ Likewise, the ODOE will request recommendations, comments, and a list of the OPUC's rules, regulations, and permitting requirements at multiple points during the application process.²⁴⁹ Ultimately, however, the EFSC decides whether the proposed transmission lines comply with the OPUC's regulations, and the OPUC is bound by the EFSC's decision.²⁵⁰

When a person or entity proposes to construct an overhead transmission line necessitating condemnation of land or an interest therein, the person must obtain a certificate of public convenience and necessity from the OPUC by setting forth a detailed description and purpose of the transmission line.²⁵¹ However, if the proposed transmission facility is subject to the jurisdiction of the EFSC, the OPUC is required to assure that the proposal has been certified by the EFSC.²⁵² For a proposal subject to EFSC jurisdiction, the only new information that the applicant must provide in order to satisfy the OPUC's requirements for a certificate of public convenience and necessity is an explanation of the necessity and convenience for exercising eminent domain over the property.²⁵³

Local Governments. When the applicant files a preliminary application with the EFSC, the applicant must choose whether to seek land use approval from the local jurisdiction or to have the EFSC make the land use determination.²⁵⁴ If the applicant chooses to seek land use approval at the local level, then the applicant must follow the local procedures and comply with all local land use ordinances.²⁵⁵ The EFSC will issue a site certificate for the project only if the local jurisdiction has approved the proposed land use. If the applicant chooses instead to have the EFSC make the land use determination, the EFSC must make findings of compliance with the local land use ordinances.²⁵⁶ Local officials are asked to identify the “applicable substantive criteria” of local land use ordinances and comprehensive plan that the EFSC should apply to the proposed facility.²⁵⁷

Local review and permitting of a transmission line project will vary depending on the city and county. The DLCDC sets the overall rules for land use planning decisions, provides technical assistance and grants, and reviews local plan amendments for compliance with the cities and counties.²⁵⁸ Each city and county in Oregon is required to have a comprehensive land use plan and implementing regulations.²⁵⁹

If a proposed transmission line would cross more than one local government jurisdiction or more than three zones in any one jurisdiction, the EFSC may choose not to apply the applicable substantive criteria recommended by the SAG and instead evaluate the proposed facility against the statewide planning goals or against a combination of the applicable substantive criteria and statewide planning goals.²⁶⁰ The EFSC must consult with the SAG and consider the number of jurisdictions and zones in question, the degree to which the applicable substantive criteria reflect local government consideration of energy facilities in the planning process, and the level of consistency of the applicable substantive criteria between the various zones and jurisdictions.²⁶¹

Utah

Siting. Although the Utah Public Service Commission (“UPSC”) has broad jurisdiction to regulate every public utility in the state, it does not have direct siting authority for major transmission facilities. In fact, there is no Utah state agency that is charged with making siting determinations for major energy facilities. Rather, siting approval comes in the form of the various local land use and federal, state,

and local permits applicable to the project, including the granting of a Certificate of Public Convenience and Necessity (“Certificate”) by the UPSC to a public utility proposing to construct a major transmission line.

“Public utility” is defined to include an “electrical corporation” performing or delivering service to the public generally for domestic, commercial, or industrial use.²⁶² “Electrical corporation” is defined to include every corporation owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service within the state, except where electricity is distributed by the producer solely for the producer’s own use.²⁶³ “Electric plant” includes all real estate, fixtures, or personal property owned or controlled in connection with the production, generation, transmission, or delivery of electricity.²⁶⁴

Service to the “public” is the defining feature of a public utility.²⁶⁵ If an electric company holds itself out to serve “all who wish to avail themselves of its services,” it is a public utility subject to the jurisdiction of the UPSC.²⁶⁶ Municipal utilities are not subject to the jurisdiction of the UPSC,²⁶⁷ although the Utah Supreme Court has held that an interlocal agency consisting of Utah municipalities is subject to UPSC jurisdiction insofar as it was required to obtain a certificate of public convenience and necessity for a major transmission project outside the boundaries of its member municipalities.²⁶⁸

An electric corporation “may not establish, or begin construction, operation, [or extension,] of a line, route, plant, or system . . . without first having obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.”²⁶⁹ The applicant is required to file a statement with the UPSC that the proposed line, plant, or system will not conflict with or adversely affect the operation of any existing certificated public utility that serves the same territory.²⁷⁰ Furthermore, an applicant for a certificate is required to file with the UPSC evidence showing that the utility has received or is in the process of receiving the necessary consent or franchise from the proper municipal or county authority.²⁷¹ The UPSC may, after the hearing, issue the certificate, refuse to issue the certificate, or issue the certificate for the construction of only a portion of the project.²⁷² The UPSC has considerable latitude when reviewing a certification application.²⁷³

Electric utilities are required to file a report with the UPSC at least thirty days before beginning construction of a transmission

line ten miles or more in length with a design voltage of 138 kV or greater, if the cost of the project will be greater than \$10 million.²⁷⁴ The pre-construction report must include, among other things, a description of the purposes and reasons for the proposed facilities; a description of how the utility has or will obtain any required consent, franchise, or permit from the appropriate county, city, or other public authority, and any other necessary authorizations; and information to show that any proposed line will not conflict with, adversely affect, or extend into the area of operations of any existing certificated public utility that supplies the same product or service to the public.²⁷⁵

In 2008, the Utah State Legislature enacted S.B. 202, which amended the definition of “public utility” by expanding the exemption from regulation for independent energy producers and adding a definition of “independent power production facility.”²⁷⁶ Before the amendment, the exemption applied to “small power production facilities,” which were defined as facilities with a capacity no greater than 80 MW, qualifying small power facilities under federal law, and generators of electricity solely from biomass, renewable resources, geothermal resources, or some combination thereof.²⁷⁷ As amended, the statute now provides that “[a]n independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if . . . the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser . . .”²⁷⁸

The UPSC has cast some doubt on whether transmission facilities constructed by an independent energy producer in order to interconnect with the grid are exempt from the Certificate requirement. In a recent case involving the Milford Wind Corridor project in Beaver County, the UPSC held that the wind farm itself was exempt from the requirement to obtain a Certificate as an independent energy producer under S.B. 202, but that the 90-mile transmission line necessary to connect the wind farm with the grid so as to move the electricity to wholesale purchasers in California was not part of the independent energy producer facility and, therefore, not exempt from the requirement to obtain a Certificate.²⁷⁹ The UPSC reasoned that the exemption for “independent power production facility” is limited to a facility that “produces electric energy.” In addition, the UPSC held that the exemption does not apply to facili-

ties for the “delivery” of the electricity otherwise sold “solely to an electrical corporation or other wholesale purchaser.”²⁸⁰

Local Governments. An applicant proposing a project to a Utah local governmental entity is entitled to approval of a land use request if the application conforms to the requirements of the pertinent local zoning ordinances, unless the local planning commission makes a finding on the record that a compelling, countervailing public interest would be jeopardized if the application were approved.²⁸¹ Local land use ordinances may include “conditional uses” as a category of permitted operations in a given zone, such as transmission lines.²⁸² The conditional use permit process is very similar in most Utah counties, with the major variations being which entity holds final authority to grant a conditional use permit and whether utility projects are classified as permitted or conditional uses under the particular county’s zoning ordinance.²⁸³

A local government or public utility may seek the assistance of the Utility Facility Review Board (“Review Board”) to resolve issues related to the siting and construction of facilities by public utilities, including transmission lines.²⁸⁴ If a local government is considering imposing conditions on the construction of a facility, the utility is required to provide to the local government information regarding the standard costs and the estimated excess costs of the facility if constructed in accordance with the proposed conditions.²⁸⁵ If the excess costs are not recoverable by the public utility through its rates, the local authority is required to pay those costs unless the Review Board decides otherwise.²⁸⁶

The Review Board consists of the members of the UPSC and one individual each appointed by the Governor from lists of nominees from the Utah League of Cities and Towns and the Utah Association of Counties.²⁸⁷ The Review Board hears disputes regarding the excess costs of a project resulting from local government requirements; local requirements that will not permit the utility to provide service to its customers in a safe, reliable, adequate, or efficient manner; prohibition on construction by the local government; failure of the local government to make a final decision on the public utility’s application for a permit, authorization, approval, or exception with respect to the facility within 120 days after the application; and inconsistent decisions from more than one local government on a project.²⁸⁸

To date, the Review Board has issued only one written decision, involving a dispute between PacifiCorp and West Jordan City.²⁸⁹ In 2005, PacifiCorp appealed to the Review Board when the City denied a conditional use permit for the construction of a permanent substation in the “target location” selected by the utility. After hearing evidence from both parties, the Review Board held that requiring PacifiCorp to construct the substation at one of the alternative sites suggested by the city would degrade electric service and reliability and ordered the city to issue the conditional use permit.²⁹⁰

In 2009, the Utah State Legislature enacted the Siting of High Voltage Power Line Act,²⁹¹ which governs the obtaining of a land use permit by a public utility from a local governmental authority for a high voltage power line with a minimum nominal voltage of 230 kVA.²⁹² A public utility proposing a high voltage transmission line is required to notify the local land use authority of its intent to file a land use application at least 90 days before submitting the application.²⁹³ The proponent is also required to send a notice of intent to file an application for a conditional use permit to the local government and landowners within the proposed corridor at least 60 days before filing the application and to set up a website to provide information about the proposed facility and publish a notice in the local newspaper of the filing of the notice of intent.²⁹⁴ The public utility is also required to conduct public workshops in the area of the proposed transmission line.²⁹⁵ The land use authority is required to grant or deny the application within 60 days after the application is filed.²⁹⁶ The Review Board may review the land use authority’s land use permit decision.²⁹⁷

Utah Generated Renewable Energy Infrastructure Authority. The 2009 Utah State Legislature created the Utah Generated Renewable Energy Electricity Network Authority (“Authority”).²⁹⁸ The Authority is required to review the location and availability of renewable energy resources serving electric loads in the state, determine whether there is adequate transmission capacity to bring those resources to market, prioritize transmission projects, and fund plans to provide for connecting renewable energy sources to transmission facilities.²⁹⁹ The Authority may issue bonds to fund qualifying transmission projects,³⁰⁰ which are those which will contribute to state and local economies, maximize connections to renewable energy, and otherwise meet criteria relating to generation of revenue,

technical and environmental requirements, and compliance with regulations of the FERC, UPSC, and North American Electric Reliability Council relating to transmission line development.³⁰¹

Washington

Siting. The State of Washington Energy Facility Site Evaluation Council (“EFSEC”) was created by the Energy Facilities Site Location Act (“EFSLA”).³⁰² The EFSEC consists of representatives from various state agencies³⁰³ and, on a project-by-project basis, representatives of affected local governments.³⁰⁴ The EFSEC coordinates all of the evaluations and permits for siting certain energy facilities in Washington.³⁰⁵ The EFSLA supersedes all siting decisions by other state or local government entities.³⁰⁶

The EFSLA applies to all facilities in a designated NIETC³⁰⁷ and to other transmission facilities in excess of 115 kVA capacity regardless of whether they are in an NIETC.³⁰⁸ However, the EFSEC has historically taken the position that it has jurisdiction over all electric transmission facilities without regard to length or voltage. The EFSEC relies on the definition of “Electric Transmission Facilities,” which is “electric power lines and related equipment,” and on the definition of “Energy Facilities,” which is “an energy plant or transmission facilities . . .”³⁰⁹ Consistent with this interpretation, no stand-alone transmission lines have been sited in Washington without EFSEC approval for at least 20 years.

The EFSEC is charged with developing environmental guidelines for the certification of energy facilities; recommending to the governor whether to approve a siting application; integrating project review with applicable federal agencies; communicating concerns to other states, regional organizations, and the federal government with regard to an energy facility that may affect the state; and serving as an interagency coordinating body for energy issues.³¹⁰ The process for obtaining site approval for electric transmission facilities in Washington comprises several steps, including undergoing a preliminary site study,³¹¹ completing a detailed application proposal,³¹² public hearings,³¹³ a recommendation to the governor,³¹⁴ and finally a Site Certification Agreement (SCA) executed by the governor.³¹⁵

The project may require a simple Environmental Checklist or, as is most likely, a more detailed Environmental Impact Statement.³¹⁶ The EFSEC’s policy is to conduct cooperative NEPA/State Envi-

ronmental Policy Act (“SEPA”) reviews when possible.³¹⁷ For major energy facilities, the EFSEC becomes the lead SEPA agency.³¹⁸ The EFSEC is also the permitting agency for air, water, or hazardous waste permits that may be needed by the facility.³¹⁹ The State Attorney General’s Office appoints a Counsel for the Environment after an application has been filed to represent the public and its interest in protecting the quality of the environment.³²⁰

The EFSEC is responsible for ensuring that all environmental and socioeconomic impacts are considered before a site is approved.³²¹ The EFSEC is also required to balance the increasing demands for energy with the broad interests of the public.³²² The applicant is not required to demonstrate need because the Washington State Legislature has already declared the “pressing need for increased energy facilities” in the state.³²³ In addition, the EFSEC is explicitly prohibited from considering the fuel source of the electricity carried by the proposed transmission facilities.³²⁴

Within 12 months after the receipt of an application, the EFSEC must submit its recommendation to the governor for approval.³²⁵ The governor has 60 days after the date of receipt of the recommendation to approve, deny, or request reconsideration of the proposed project.³²⁶

The EFSEC is required to consult with other state agencies, utilities, local governments, public interest groups, tribes, and other interested parties to gather input on the appropriate limits on federal transmission siting authority within the state and to convey that input to the U.S. Secretary of Energy and to the FERC.³²⁷ The EFSEC is also the designated state authority for purposes of transmission facility siting under NEPA, and in that role the EFSEC has authority to approve the siting of those facilities and consider the interstate benefits expected from the proposed facilities.³²⁸

Local Governments. Washington counties and municipalities are empowered to regulate the siting of electric transmission lines through their respective comprehensive planning and development regulation processes.³²⁹ In particular, local governments are required to develop a comprehensive plan to encourage the most appropriate uses of land throughout the municipality or county and to facilitate those uses.³³⁰ The Washington Growth Management Act provides that the scope of comprehensive plans, development regulations, and amendments thereto adopted after July 27, 1997, should include plans, schemes, or designs for the general location, pro-

posed location, and capacity of all existing and proposed electric transmission lines.³³¹ Thus, each county and municipality will have separate and distinct comprehensive development plans and development regulations applicable to the siting and construction of electric transmission lines.

As noted above, the EFSLA expressly preempts local energy siting regulations.³³² This preemption provision was recently upheld by the Washington Supreme Court.³³³ In order to preempt a local requirement, however, the EFSEC must determine whether the proposed site is in compliance and consistent with city, county, or regional land use plans or zoning ordinances.³³⁴ Further, if the EFSEC approves the request for preemption, it must include conditions in the draft certification agreement that consider state or local governmental or community interests affected by the construction or operation of the energy facility and the purposes of the ordinances, rules, or regulations that are preempted.³³⁵ Any project approval by EFSEC must include conditions to protect local governmental or community interests affected by the construction or operation of the energy facility.³³⁶

National Interest Electric Transmission Corridors. The Washington State Legislature created an NIETC Task Force consisting of representatives of the Legislature, the EFSEC, local governments, state resource agencies, and other stakeholders for the purpose of negotiating an interstate compact to establish a regional process for siting NIETCs.³³⁷ The Task Force was supposed to have issued final recommendations to the Legislature by September 1, 2008.³³⁸ However, as of June 2009, the Task Force had not yet submitted its recommendations.

Wyoming

Siting. No public utility may begin construction of a line, plant, or system, or of any extension of a line, plant, or system, without first obtaining from the Wyoming Public Service Commission (“WPSC”) a Certificate of Public Convenience and Necessity (“CPCN”).³³⁹ A “public utility” is defined to include every person that owns, operates, leases, or controls any plant, property, or facility for the transmission to or use by the public of electricity.³⁴⁰ Wyoming courts have interpreted the term “public” to mean the citizenry or consumers of Wyoming.³⁴¹ Therefore, if a transmission line is not

serving customers in Wyoming, it is not subject to WPSC jurisdiction.

Before construction of a transmission line subject to WPSC jurisdiction, the public utility must first obtain from the WPSC a CPCN for the construction of the project.³⁴² A “major utility facility” is required to submit information regarding the environmental impacts of the facility and the need for the facility by the citizens of Wyoming.³⁴³ A “major utility facility” is defined to include electric transmission lines of more than three miles in length designed to operate at 69 kV or above and electric substations or switching stations designed to operate at 69 kV or above.³⁴⁴ A CPCN for the construction of a high voltage electric transmission line of 230 kV or greater will prohibit construction until all rights-of-way for the line have been acquired.³⁴⁵

The Wyoming Industrial Development and Siting Act permits the construction of a large industrial facility only after a review of the socioeconomic and environmental impacts of the proposed facility.³⁴⁶ No person may construct an industrial facility in Wyoming without a permit for the facility from the Wyoming Industrial Siting Council (“ISC”).³⁴⁷ An “industrial facility” is defined for purposes of ISC jurisdiction as any facility with an estimated cost of \$173,200,000 or more.³⁴⁸ The Wyoming Department of Environmental Quality Industrial Siting Division (“ISD”) functions as the staff of the ISC.

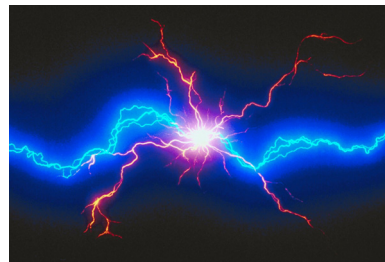
Electric transmission lines with a design capacity not exceeding 500 kV do not need to obtain a permit from the ISC.³⁴⁹ However, while an ISC permit is not required for exempt electric transmission lines, information about the project must be submitted to the ISD.³⁵⁰ Proposed industrial facilities with a construction cost greater than eighty percent and less than one hundred percent of the current threshold construction cost require a certificate of insufficient jurisdiction from the ISC.³⁵¹ The ISC may also grant a waiver of the application requirements in certain circumstances.³⁵²

Local Governments. In Wyoming, land use and zoning are regulated by counties and cities.³⁵³ Although it is possible that a privately owned transmission line could be classified as a “use by right” in accordance with the applicable county zoning code, a typical county code will classify such use as a conditional use or a use by special review.³⁵⁴

When the WPSC or ISC has jurisdiction over a transmission project, it has authority to preempt local decisions regarding transmission siting and construction.³⁵⁵ In particular, the Wyoming Supreme Court has held that a county does not have the power to regulate public utilities.³⁵⁶ Assuming, however, that the county is complying with applicable law and acting within the confines of its authority, the state has little to no oversight or preemption authority over the county's decisions to issue conditional use permits concerning projects that are exempt from WPSC jurisdiction or are otherwise not owned or operated by a public utility.³⁵⁷

Recommendations

In our review of the foregoing state regulatory requirements for siting a major transmission facility in the West, we identified a number of “best practices” that could serve as integral elements of a regional siting regime. These “best practices” include:



- State siting agency preemption of conflicting local decisions, at the same time using a process to assure that local community concerns are considered and that a local decision is only overridden if the broader public interest is compelling.
- A centralized siting agency with jurisdiction over transmission projects proposed by any entity, whether or not the proponent is a regulated public utility.
- A definition of “need” that recognizes the critical public interest in the reliable and efficient transmission of electricity from a diverse portfolio of generation sources in one part of the region to growing load centers in another, even if neither the generator nor the loads to be served are located within the state.
- Mechanisms to facilitate participation in regional and national transmission planning regimes to assure coordination and the most efficient use of resources in the construction of new transmission facilities.
- Regular, periodic planning to assess strategic needs for transmission infrastructure and to assure that proposals are consistent with those needs.
- Timelines that are long enough to assure thorough review of a proposal but short enough to assure that a decision is issued within a reasonable period of time.

- Accelerated reviews for projects in designated corridors, including NIETCs designated under the Energy Policy Act of 2005 and other corridors designated pursuant to state, regional, and federal plans.
- A level regulatory playing field that does not favor investor-owned utilities or any other entities at the expense of other transmission developers.

There is a serious need for a coordinated and rational approach to transmission project siting that accommodates the need to assure protection of environmental and other critical interests, incorporates ample opportunity for input from affected stakeholders, allows for reasonable recovery of costs, and places a priority on the compelling interests in modernizing the transmission grid. A multistate approach, through an interstate compact or the adoption by each state of a model siting regime, will facilitate the development and transmission of renewable energy to meet the demands of ever-growing western urban areas and to secure robust interconnections with the national transmission grid.

Endnotes

- ¹ ENERGY INFORMATION ADMINISTRATION, U.S. DEPT. OF ENERGY, Electric Power Annual Report With Data for 2007, Table 3.2 (released Jan. 21, 2009), *available at* <http://www.eia.doe.gov/cneaf/electricity/epa/epat3p2.html>.
- ² ENERGY INFORMATION ADMINISTRATION, U.S. DEPT. OF ENERGY, Annual Energy Outlook 2008, at 67, *available at* http://www.eia.doe.gov/oiaf/aeo/pdf/trend_3.pdf.
- ³ CAL. PUB. UTIL. CODE § 8340, *et seq.*
- ⁴ *In re* Application of Otter Tail Power Company and Others for Certification of Transmission Facilities in Western Minnesota, Order Granting Certificate of Need With Conditions, Docket No. E-017, (Minn. Pub. Util. Comm'n Mar. 17, 2009).
- ⁵ 16 U.S.C. § 824p (2006).
- ⁶ 72 Fed. Reg. 56,992 (Oct. 5, 2007).
- ⁷ *See* Piedmont Env'tl. Council v. U.S. Dept. of Energy, Civ. No. 00093 (M.D. Pa., filed Jan. 14, 2008); Ctr. for Biological Diversity v. U.S. Dep't of Energy, Civ. no. 00168 (C.D. Cal., filed Jan. 10, 2008).
- ⁸ *See, e.g.*, Piedmont Env'tl. Council v. Fed. Energy Regulatory Comm'n, 538 F.3d 304 (4th Cir. 2009).
- ⁹ *See, e.g.*, §151 of H.R. 2454 ("American Clean Energy and Security Act of 2009), 111th Cong., 1st sess., which would give to FERC final siting authority for transmission facilities in the Western Interconnection.
- ¹⁰ *See* Scott Streater, *Obama Administration Faces Power Grid vs. Public Lands Conundrum*, N.Y. TIMES, Mar. 12, 2009, *available at* <http://www.nytimes.com/gwire/2009/03/12/12greenwire-obama-admin-faces-21stcentury-grid-vs-public-l-10103.html>.
- ¹¹ Protocol among the Members of the Western Governors' Association, The U.S. Department of the Interior, The U.S. Department of Agriculture, The U.S. Department of Energy, and the Council on Environmental Quality Governing the Siting and Permitting of Interstate Electric Transmission Lines in the Western United States, (June 23, 2002), *available at* <http://www.westgov.org/wga/initiatives/energy/protocol.pdf>.
- ¹² *See* <http://www.westgov.org/wga/initiatives/wrez/>.
- ¹³ 16 U.S.C. § 824p(i)(1) (2006).
- ¹⁴ 42 U.S.C. § 7492(f) (1994).
- ¹⁵ 40 CFR § 51.309 (1999).
- ¹⁶ Arizona, California, Montana, New Mexico, Oregon, Utah, Washington and four Canadian provinces are WCI partners, and a number of other U.S., Canadian, and Mexican states and provinces are observers. *See* <http://www.westernclimateinitiative.org/>.
- ¹⁷ *See* note 9, *supra*, and Press Release, Reid Testifies On The Importance of His Energy Transmission Bill, (Mar. 12, 2009) *available at* http://reid.senate.gov/newsroom/pr_031209_reidtestimonyenergy.cfm; Draft Copy, Siting of Interstate Electric Transmission Facilities, *available at* <http://energy.senate.gov/public/files/Bingamandrafttextsiting03090920.pdf>.
- ¹⁸ *See* ARIZ. REV. STAT. §§ 40-201, *et seq.*
- ¹⁹ *See* ARIZ. CONST. art. 15, § 2.

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- ²⁰ See ARIZ. REV. STAT. § 40-360.12 (providing that nothing confers upon the ACC the power or jurisdiction to regulate or establish rates, regulations, or conditions of service of any person not a public service corporation).
- ²¹ ARIZ. REV. STAT. §§ 40-360.03, 07(A).
- ²² ARIZ. REV. STAT. § 40-360.02(A).
- ²³ ARIZ. REV. STAT. § 40-360.02(C).
- ²⁴ ARIZ. REV. STAT. § 40-360.02(G).
- ²⁵ For purposes of a CEC filing, “transmission line” is defined as facilities for the transmission of electricity at nominal voltages of 115 kV or more. ARIZ. REV. STAT. § 40-360(10).
- ²⁶ ARIZ. REV. STAT. § 40-360.03; ARIZ. ADMIN. CODE § R14-3-203(A).
- ²⁷ ARIZ. REV. STAT. § 40-360.03.
- ²⁸ ARIZ. REV. STAT. § 40-360.01(B).
- ²⁹ ARIZ. ADMIN. CODE § R14-3-219.
- ³¹ ARIZ. REV. STAT. § 40-360.04(D); ARIZ. ADMIN. CODE § R14-3-204(A).
- ³² ARIZ. REV. STAT. §§ 40-360.06(A), (B).
- ³³ *Id.*
- ³⁴ ARIZ. REV. STAT. § 40-360.07.
- ³⁵ ARIZ. REV. STAT. § 40-360.08(B).
- ³⁶ ARIZ. REV. STAT. § 40-360.07(B). *See also* Grand Canyon Trust v. Ariz. Corp. Comm’n, 107 P.3d 356, 361 (Ariz. Ct. App. 2005); *Re Southern California Edison Company*, 2007 WL 2126365, at *1 (Ariz. Corp. Comm’n June 6, 2007).
- ³⁷ ARIZ. REV. STAT. § 40-360.02(E).
- ³⁸ ARIZ. REV. STAT. § 40-281(A).
- ³⁹ ARIZ. REV. STAT. § 40-282(B).
- ⁴⁰ ARIZ. REV. STAT. § 40-360.6(D).
- ⁴¹ *Id.*
- ⁴² ARIZ. REV. STAT. § 40-360.52.
- ⁴³ ARIZ. REV. STAT. § 40-360.53(A).
- ⁴⁴ ARIZ. REV. STAT. § 40-360.53(B).
- ⁴⁵ Publicly owned utilities generally site their own lines.
- ⁴⁶ *See* CPUC v. Cal. Energy Res. Conservation & Dev. Comm’n, 150 Cal.App.3d 437 (1984); CAL. PUB. RES. CODE §§ 25000-968.
- ⁴⁷ CAL. PUB. UTIL. CODE § 216.
- ⁴⁸ CAL. PUB. UTIL. CODE § 218.
- ⁴⁹ CAL. PUB. UTIL. CODE § 217.
- ⁵⁰ CAL. PUB. UTIL. CODE § 216(h).
- ⁵¹ CAL. PUB. UTIL. CODE § 1001.
- ⁵² *See* General Order 131-D, sections III, IX.
- ⁵³ *Id.*
- ⁵⁴ *Id.* at section III.
- ⁵⁵ PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Rules Relating to the Planning and Construction of Electric Generation, Transmission/Power/Distribution Line Facilities and Substations Located in California, General Order No. 131-D, Section XIV (adopted June 8, 1994, effective July 8, 1994 by Decision 94-06-014; modified Aug. 11, 1995, effective Sept. 10, 1995 by Decision 95-08-038) [hereinafter General Order 131-D].

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- ⁵⁶ See *Id.* at section IX.
- ⁵⁷ See, e.g., *In re Application of Pacific Gas and Electric Company (U 39 E) for a Certificate of Public Convenience and Necessity Authorizing the Construction of the Jefferson-Martin 230 kV Transmission Project*, Decision 04-08-046, at 21-48 (Cal. Pub. Utils. Comm'n Aug. 19, 2004), available at http://docs.cpuc.ca.gov/published/final_decision/39122.htm.
- ⁵⁸ CAL. PUB. UTIL. CODE § 399.25.
- ⁵⁹ See, e.g., *In re Application of San Diego Gas & Electric Company (U 902 E) for a Certificate of Public Convenience and Necessity for the Miguel-Mission 230 kV #2 Project*, Decision 04-07-026, at 19-23 (Cal. Pub. Utils. Comm'n July 16, 2004), available at http://docs.cpuc.ca.gov/Published/Final_decision/38192.htm.
- ⁶⁰ CAL. PUB. RES. CODE §§ 21000, *et seq.*
- ⁶¹ CAL. PUB. UTIL. CODE § 1002.
- ⁶² CAL. PUB. UTIL. CODE § 1002.3.
- ⁶³ See General Order 131-D, sections IX, X, XI.
- ⁶⁴ CAL. CONST., art. XII, §§ 3, 5; see *County of Inyo v. Pub. Util. Comm'n*, 26 Cal.3d 154 (1980).
- ⁶⁵ See, e.g., LOS ANGELES DEPARTMENT OF WATER & POWER, "LADWP Launches Environmental Study of Transmission Project to Access Renewable Energy in Tehachapi/Mohave Area," News Release April 7, 2008, available at <http://www.ladwpnews.com/go/doc/1475/197687/>.
- ⁶⁶ CAL. PUB. UTIL. CODE § 625.
- ⁶⁷ Cal. Assem. B. 1890, Section 1(c), 1996 Leg. (Cal. 1996).
- ⁶⁸ CAL. CODE REGS. tit. 20, § 1714(b).
- ⁶⁹ See *Opinion on Methodology for Economic Assessment of Transmission Projects*, Decision 06-11-018, Proceeding I05-06-041 (Cal. Pub. Utils. Comm'n Nov. 9, 2006), available at http://docs.cpuc.ca.gov/published/final_decision/61783.htm.
- ⁷⁰ For more information, see <http://www.energy.ca.gov/reti/index.html>.
- ⁷¹ COLO. REV. STAT. § 40-1-103(1)(a)(I).
- ⁷² COL. CONST. art. V, § 35, art. XXV; COLO. REV. STAT. § 40-1-103(1)(b)(II). See also *City of Greeley v. Poudre Valley Rural Elec. Ass'n*, 744 P.2d 739, 745 (Colo. 1987); *Town of Holyoke v. Smith*, 226 P. 158, 162 (Colo. 1924).
- ⁷³ COLO. REV. STAT. §§ 40-1-103(2)(b), 40-9.5-103 and 40-9.5-104.
- ⁷⁴ COLO. REV. STAT. § 40-5-101(1); 4 COLO. CODE REGS. § 723-3-3102(a).
- ⁷⁵ See *Pub. Utils. Comm'n v. Colo. Interstate Gas Co.*, 351 P.2d 241, 250 (Colo. 1960).
- ⁷⁶ 4 COLO. CODE REGS. § 723-3-3102(a).
- ⁷⁷ See 4 COLO. CODE REGS. § 723-3-3102(d).
- ⁷⁸ See *id.*
- ⁷⁹ *Morey v. Pub. Util. Comm'n*, 629 P.2d 1061, 1065 (Colo. 1981).
- ⁸⁰ COLO. REV. STAT. § 40-5-101(3).
- ⁸¹ A "power authority" is a separate governmental entity created by a contract between "cities and towns . . . which are authorized to own and operate electric systems" and which is "used by such contracting municipalities to effect the development of electric energy resources or production and transmission of electric energy in whole or in part for the benefit of the inhabitants of such contracting municipalities." COLO. REV. STAT. § 29-1-204(1).
- ⁸² COLO. REV. STAT. § 29-20-108(4)(a).

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- ⁸³ See generally COLO. REV. STAT. § 29-20-108(2).
- ⁸⁴ COLO. REV. STAT. § 40-5-108(5).
- ⁸⁵ COLO. REV. STAT. § 29-20-108(5)(d). See *In re* Application of Tri-State Generation and Transmission Association, Inc., Docket No. 07A-265E, Dec. No. C09-0183 (Colo. Pub. Utils. Comm'n of Col. Jan. 28, 2009), available at http://www.dora.state.co.us/puc/docketsdecisions/decisions/2009/C09-0183_07A-265E.doc.
- ⁸⁶ COLO. REV. STAT. § 24-65.1-501.
- ⁸⁷ Colo. H. B. 1041, 1974 Leg. (Colo. 1974).
- ⁸⁸ COLO. REV. STAT. § 24-65.1-203.
- ⁸⁹ COLO. REV. STAT. § 24-65.1-104(8).
- ⁹⁰ COLO. REV. STAT. § 24-65.1-105(1).
- ⁹¹ IDAHO CODE ANN. § 61-526.
- ⁹² IDAHO CODE ANN. § 61-129.
- ⁹³ IDAHO CODE ANN. § 61-119.
- ⁹⁴ IDAHO CODE ANN. § 61-118.
- ⁹⁵ *Humbird Lumber v. Idaho Pub. Utils. Comm'n*, 39 Idaho 505, 506, 228 P. 271, 272 (1924).
- ⁹⁶ *Stoehr v. Natatorium Co.*, 34 Idaho 217, 200 P. 132 (1921).
- ⁹⁷ *In re* Petition of Bonneville Power Administration for a Declaratory Order Disclaiming Jurisdiction, 2007 WL 1668340 at *3 (Idaho Pub. Utils. Comm'n June 4, 2007).
- ⁹⁸ IDAHO CODE ANN. § 61-528. As a general principle, an uncontested CPCN may only take 30-60 days to process. A contested CPCN that is set for hearing could take many months to resolve. (The most recent contested hearing took roughly six months.)
- ⁹⁹ See IDAHO CODE ANN. §§ 61-526 through 61-528.
- ¹⁰⁰ *In re* Application of Rocky Mountain Power for a Certificate of Pub. Convenience & Necessity Authorizing Constr. of the Populus to Terminal 345 kV Transmission Line Project, PAC-E-08-03, 2008 WL 4606421 at *5 (Idaho Pub. Utils. Comm'n Oct. 10, 2008) available at www.puc.idaho.gov/internet/cases/elec/PAC/PACE0803/ordnotc/20081010FINAL_ORDER_NO_30657.PDF.
- ¹⁰¹ IDAHO CODE ANN. § 61-527.
- ¹⁰² Idaho Exec. Order No. 2007-11 (Sept. 4, 2007).
- ¹⁰³ IDAHO CODE ANN. §§ 67-6508, 11.
- ¹⁰⁴ IDAHO CODE ANN. § 67-6511.
- ¹⁰⁵ IDAHO CODE ANN. § 67-6512.
- ¹⁰⁶ IDAHO CODE ANN. § 67-6512(a).
- ¹⁰⁷ Local governments have the option to adopt building codes. IDAHO CODE ANN. § 39-4116.
- ¹⁰⁸ IDAHO CODE ANN. § 39-4111(2).
- ¹⁰⁹ IDAHO CODE ANN. § 67-6528.
- ¹¹⁰ Codified at IDAHO CODE ANN. § 61-516, effective July 1, 2009.
- ¹¹¹ IDAHO CODE ANN. § 61-516(3).
- ¹¹² IDAHO CODE ANN. § 61-516(4).
- ¹¹³ IDAHO CODE ANN. §§ 61-1701, *et seq.*
- ¹¹⁴ IDAHO CODE ANN. § 61-1703(3).
- ¹¹⁵ IDAHO CODE ANN. § 61-1705(1)(j).

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- ¹¹⁶ IDAHO CODE ANN. § 61-1705(2)(f).
- ¹¹⁷ IDAHO CODE ANN. §§ 61-1705(1)(e), 61-1703(2).
- ¹¹⁸ IDAHO CODE ANN. § 61-1702(7) (“Transmission utility’ is an entity that owns, operates or controls facilities used for the transmission of electric energy in interstate commerce.”).
- ¹¹⁹ IDAHO CODE ANN. § 61-1708.
- ¹²⁰ IDAHO CODE ANN. § 61-1708(2).
- ¹²¹ MONT. CODE ANN. §§ 75-20-101, *et seq.*
- ¹²² MONT. CODE ANN. § 75-20-102.
- ¹²³ MONT. CODE ANN. § 75-20-201.
- ¹²⁴ MONT. CODE ANN. § 75-20-201; *see* Mont. Power Co. v. Pub. Ser. Comm’n, 692 P.2d 432, 438 (Mont. 1984) (a public utility must first obtain a certificate to construct under the siting act and then it may request rate base treatment from the Montana Public Service Commission).
- ¹²⁵ MONT. CODE ANN. § 75-20-104(8). The 2009 Montana Legislature amended the definition of “facility” in § 75-20-104(8)(iv) to exclude “an upgrade to an existing transmission line to increase that line’s capacity to less than or equal to 230 kilovolts, including construction outside the existing right-of-way” as long as “a newly acquired easement or right-of-way . . . may not exceed a total of 10 miles in length or be more than 10% of the existing transmission right-of-way, whichever is greater, and the purpose of the easement must be to avoid sensitive areas or inhabited areas.” SB 360, 61st Legislature, Sess. Law Ch. 469, § 1.
- ¹²⁶ MONT. CODE ANN. § 69-3-101.
- ¹²⁷ MONT. CODE ANN. § 69-1-102. A municipality also has the power and authority to regulate, establish, and change rates charged and classifications imposed for utility services to persons served by a municipal utility system. MONT. CODE ANN. § 69-7-101.
- ¹²⁸ MONT. CODE ANN. § 75-20-211; MONT. ADMIN. R. 17.20.920.
- ¹²⁹ MONT. ADMIN. R. 17.20.924(1).
- ¹³⁰ MONT. ADMIN. R. 17.20.924(2).
- ¹³¹ MONT. ADMIN. R. 17.20.1304, 1426-1512.
- ¹³² MONT. CODE ANN. § 75-20-211.
- ¹³³ MONT. CODE ANN. § 75-20-216(4).
- ¹³⁴ MONT. CODE ANN. §§ 75-1-201, *et seq.*
- ¹³⁵ MONT. CODE ANN. § 75-20-216(4).
- ¹³⁶ MONT. CODE ANN. §§ 75-20-231, 232.
- ¹³⁷ MONT. CODE ANN. § 75-20-216(6).
- ¹³⁸ MONT. CODE ANN. § 75-20-303(3).
- ¹³⁹ MONT. CODE ANN. § 75-20-204.
- ¹⁴⁰ *Id.*
- ¹⁴¹ MONT. ADMIN. R. 17.20.1606.
- ¹⁴² MONT. CODE ANN. § 75-20-301(2).
- ¹⁴³ MONT. CODE ANN. § 75-20-301(2); MONT. ADMIN. R. 17.20.1604.
- ¹⁴⁴ Transmission facilities are among the public purposes that support eminent domain power, and the findings for a CC under the MFSA mirror those required to support eminent domain. *See* MONT. CODE ANN. §§ 75-20-301(1)(f), 70-30-102(37), 70-30-111.
- ¹⁴⁵ MONT. CODE ANN. §§ 76-2-101, 302.
- ¹⁴⁶ MONT. CODE ANN. §§ 76-2-108, 301.

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- 147 MONT. CODE ANN. § 76-2-301.
- 148 MONT. CODE ANN. § 76-2-201.
- 149 MONT. CODE ANN. § 75-20-401.
- 150 MONT. CODE ANN. § 75-20-103.
- 151 MONT. CODE ANN. § 75-20-201.
- 152 The requirements for obtaining a permit to construct a utility facility are set forth in NEV. REV. STAT. § 704.820-900, inclusive, and NEV. ADMIN. CODE § 703.415-427, inclusive, commonly known as the Utility Environmental Protection Act (“UEPA”).
- 153 NEV. REV. STAT. § 704.865.
- 154 NEV. REV. STAT. § 704.865(1).
- 155 NEV. REV. STAT. § 704.860(2).
- 156 NEV. REV. STAT. § 704.020(2)(a).
- 157 NEV. REV. STAT. § 704.021(4).
- 158 NEV. REV. STAT. § 704.7571(1)(a).
- 159 NEV. REV. STAT. § 704.7571(2).
- 160 NEV. REV. STAT. § 704.340.
- 161 NEV. REV. STAT. § 704.877(2).
- 162 NEV. REV. STAT. §§ 704.870(1), (2).
- 163 NEV. REV. STAT. § 704.870(3).
- 164 NEV. REV. STAT. § 704.870(4)(a).
- 165 NEV. ADMIN. CODE § 703.421(1).
- 166 NEV. ADMIN. CODE § 703.423.
- 167 NEV. ADMIN. CODE §§ 703.423(8)(b)(3), (12)(d).
- 168 NEV. ADMIN. CODE §§ 703.423(12)(a)-(c).
- 169 NEV. REV. STAT. § 704.873.
- 170 NEV. REV. STAT. § 704.8905(1).
- 171 *Id.*
- 172 *See, e.g.*, Revised Compliance Order, Application of Nevada Geothermal Specialists [now Enel Salt Wells, LLC] for authority under the provisions of the Utility Environmental Protection Act for a permit to construct the Salt Wells Geothermal Power Plant to be located in Churchill County, Nevada, Docket No. 04-4011 (Nev. Pub. Utils. Comm’n Jan. 22, 2003).
- 173 Nev. Rev. Stat. 278.020(1); Nev. Rev. Stat. 278.315; Nev. Rev. Stat. 278.344.
- 174 See Clark County Code § 30.08.
- 175 Nye County Code § 17.04.480.
- 176 *See, e.g.*, White Pine County Code § 17.24.020.
- 177 *See, e.g.*, Clark County Code Table 30.44-656a; Elko County Code § 4.9.6.
- 178 *See, e.g.*, Clark County Code Table 30.16-8(k)(1).
- 179 *See, e.g.*, Lincoln County Code § 3-12-9 & 10.
- 180 *See, e.g.*, Clark County Code Table 30.16-8(k)(2).
- 181 N.M. STAT. § 62-9-3(B).
- 182 N.M. STAT. § 62-9-1(A).
- 183 N.M. STAT. § 62-3-3(G).
- 184 N.M. STAT. § 62-9-1(C).
- 185 *Id.*
- 186 *Id.*
- 187 N.M. STAT. § 62-9-3.

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- 188 N.M. STAT. § 62-9-3(K).
- 189 N.M. Code R. § 17.9.592.10.
- 190 N.M. STAT. § 62-9-3(F).
- 191 N.M. STAT. § 62-9-3.2.
- 192 *See, e.g.*, Santa Fe City Code, Zoning Ordinances, § 14-6.2 (“Electric Facilities”).
- 193 *See, e.g.*, Bernalillo County Code, Appendix A (“Zoning”), Ordinance 213, § 18.B.24 (“Public Utility Facility”).
- 194 N.M. STAT. § 62-9-3(G).
- 195 N.M. STAT. §§ 62-16-1, *et seq.*
- 196 *Id.*; N.M. STAT. § 62-16-1(A)(1).
- 197 *Id.*; N.M. STAT. § 62-16-1(A)(7).
- 198 N.M. STAT. §§ 62-16A-1, *et seq.*
- 199 *Id.*; N.M. STAT. § 62-16A-4(B).
- 200 Oregon Department of Energy, Guidelines for Energy Facility Site Certificates: Oregon Energy Facility Siting Council 1 (July 2008), *available at* <http://www.oregon.gov/energy/siting/docs/2008Guidelines.pdf> [hereinafter “Guidelines”].
- 201 OR. REV. STAT. § 469.310.
- 202 OR. REV. STAT. § 469.320.
- 203 OR. REV. STAT. § 469.300(11)(a)(A).
- 204 OR. REV. STAT. § 469.300(11)(a)(A)(i)-(ii).
- 205 Guidelines at 2.
- 206 OR. REV. STAT. § 469.401(3).
- 207 *Id.*
- 208 OR. REV. STAT. §§ 469.401(3), 430.
- 209 OR. REV. STAT. § 469.401(4); OR. ADMIN. R. 345-026-0015(2).
- 210 OR. REV. STAT. § 469.503(3).
- 211 OR. REV. STAT. § 469.330. *See also* OR. ADMIN. R. 345-020-0006 through 0060.
- 212 OR. ADMIN R. 345-020-0011(i).
- 213 OR. REV. STAT. § 469.480.
- 214 OR. ADMIN R. 345-022-0030(3).
- 215 Guidelines at 14.
- 216 OR. ADMIN R. 345-022-0030(5).
- 217 OR. ADMIN R. 345-0030(6).
- 218 OR. ADMIN. R. 345-023-030; OR. REV. STAT. § 197.646(3).
- 219 OR. ADMIN. R. 345-022-0030(4).
- 220 OR. ADMIN R. 345-020-0011(j).
- 221 OR. ADMIN R. 345-020-0011(m).
- 222 OR. ADMIN R. 345-020-0040(1).
- 223 Guidelines at 34.
- 224 *Id.*
- 225 OR. ADMIN R. 345-021-0010(1)(n).
- 226 OR. ADMIN R. 345-015-1080.
- 227 OR. ADMIN R. 345-021-0050(2).
- 228 OR. REV. STAT. § 469.370; OR. ADMIN. R. 345-015-0230(3).
- 229 OR. REV. STAT. § 469.370(5).
- 230 *Id.*

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- 231 OR. REV. STAT. § 469.370(6).
- 232 OR. ADMIN. R. 345-015-0085(3).
- 233 OR. REV. STAT. § 469.370(7).
- 234 OR. ADMIN. R. 345-015-0160(5); Guidelines at 34.
- 235 OR. ADMIN. R. 345-020-0060.
- 236 See OR. REV. STAT. § 469.370(9)(d).
- 237 OR. REV. STAT. § 469.370(11).
- 238 Guidelines at 4.
- 239 *Id.*; OR. ADMIN. R. 345-001-0020(1).
- 240 OR. ADMIN. R. 345-022-0000(1).
- 241 OR. ADMIN. R. 345-022-0030.
- 242 OR. ADMIN. R. 345-022-0040(1)(a)-(p), 0070, 0090; Guidelines 19.
- 243 OR. ADMIN. R. 345-023-0005.
- 244 OR. ADMIN. R. 345-023-0005, 0020.
- 245 OR. ADMIN. R. 345-023-0030.
- 246 OR. ADMIN. R. 345-023-0005(1).
- 247 See OR. ADMIN. R. 345-001-0010(50)(f).
- 248 See, e.g., OR. ADMIN. R. 345-020-0040(1).
- 249 See, e.g., OR. ADMIN. R. 345-015-0120(f).
- 250 OR. REV. STAT. § 469.401(3).
- 251 OR. REV. STAT. § 758.015(1).
- 252 OR. ADMIN. R. 860-025-0030(4).
- 253 Compare OR. ADMIN. R. 860-025-0030(1) with Or. Admin. R. 345-021-0010(b), (c), (e), (f), (k), (n) (comparing the information required by the OPUC for Certificates of Public Convenience and Necessity for overhead transmission lines with the information required by the ODOE and EFSC for preliminary applications for siting certificates).
- 254 See OR. REV. STAT. § 469.504; OR. ADMIN. R. 345-022-0030.
- 255 OR. REV. STAT. § 469.504(4).
- 256 OR. REV. STAT. § 469.504(2).
- 257 OR. REV. STAT. § 469.480.
- 258 OR. REV. STAT. § 197.040.
- 259 OR. REV. STAT. § 197.175(2)(a).
- 260 OR. ADMIN. R. 345-022-0030(6).
- 261 *Id.*
- 262 UTAH CODE ANN. § 54-2-1(16)(A).
- 263 UTAH CODE ANN. § 54-2-1(7).
- 264 UTAH CODE ANN. § 54-2-1(8).
- 265 *Crystal Car Line v. State Tax Comm'n*, 174 P.2d 984, 987 (Utah 1946) (“The principal determinative characteristic of a public utility is that of service to, or readiness to serve, an indefinite public which has a legal right to demand and receive its services or commodities.”).
- 266 *Garkane Power Co. v. Pub. Serv. Comm'n*, 100 P.2d 571, 574 (Utah 1940).
- 267 UTAH CONST. art. VI, § 28.
- 268 *Utah Associated Mun. Power Sys. v. Pub. Serv. Comm'n*, 789 P.2d 298, 303 (Utah 1990).
- 269 UTAH CODE ANN. § 54-4-25(1).
- 270 UTAH CODE ANN. § 54-4-25(4)(b).

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- ²⁷¹ UTAH CODE ANN. § 54-4-25(4)(a).
- ²⁷² UTAH CODE ANN. § 54-4-25(4)(c).
- ²⁷³ See *Utah Gas Serv. Co. v. Mountain Fuel Supply Co.*, 422 P.2d 530, 533 (Utah 1967).
- ²⁷⁴ UTAH ADMIN. CODE R46-401-3.
- ²⁷⁵ *Id.*
- ²⁷⁶ UTAH CODE ANN. § 54-2-1(14).
- ²⁷⁷ UTAH CODE ANN. § 54-2-1(20) (2007).
- ²⁷⁸ UTAH CODE ANN. § 54-2-1(16)(d)(ii).
- ²⁷⁹ *In the Matter of the Application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Convenience and Necessity for the Milford Phase I and Phase II Wind Power Project*, Utah Pub. Serv. Comm'n Docket No. 08-2490-01 (July 2, 2008).
- ²⁸⁰ *Id.* at 3.
- ²⁸¹ UTAH CODE ANN. §§ 10-9a-509(1), 17-27a-508(1)(a); see also *W. Land Equities v. City of Logan*, 617 P.2d 388, 389 (Utah 1980).
- ²⁸² UTAH CODE ANN. §§ 10-9a-507(1), 17-27a-506(1).
- ²⁸³ In some counties, the planning commission has authority to approve or reject a conditional use permit, with the board of adjustment having authority to hear appeals respecting decisions made by the planning commission. See, e.g., *Box Elder County Land Use Mgmt. & Dev. Code* § 2-1-050(D)(8) (October 2007) (Planning Commission), § 2-1-060(D)(2) (Board of Adjustment); cf. *Davis County Code*, § 15.32.210 (Sept. 25, 2007) (County Commission has authority to hear appeals of decisions made by Planning Commission).
- ²⁸⁴ UTAH CODE ANN. §§ 54-14-101, *et seq.*
- ²⁸⁵ UTAH CODE ANN. § 54-14-202.
- ²⁸⁶ UTAH CODE ANN. § 54-14-203.
- ²⁸⁷ UTAH CODE ANN. § 54-14-301(2).
- ²⁸⁸ UTAH CODE ANN. § 54-14-303.
- ²⁸⁹ *Order Designating Geographic Area*, Docket No. 05-999-08 (Utah Pub. Ser. Comm'n Nov. 28, 2005).
- ²⁹⁰ *Id.*
- ²⁹¹ UTAH CODE ANN. § 54-18-101, *et seq.*
- ²⁹² UTAH CODE ANN. § 54-18-101(4).
- ²⁹³ UTAH CODE ANN. § 54-18-301(2).
- ²⁹⁴ UTAH CODE ANN. § 54-18-301(3) and (5).
- ²⁹⁵ UTAH CODE ANN. § 54-18-302.
- ²⁹⁶ UTAH CODE ANN. § 54-18-304(1)(a).
- ²⁹⁷ UTAH CODE ANN. §§ 54-18-304(1)(b) and 54-18-305.
- ²⁹⁸ Codified at UTAH CODE ANN. §§ 63H-2-101, *et seq.*
- ²⁹⁹ UTAH CODE ANN. § 63H-2-301.
- ³⁰⁰ UTAH CODE ANN. § 63H-2-401.
- ³⁰¹ UTAH CODE ANN. § 63H-2-302.
- ³⁰² WASH. REV. CODE § 80.50.030.
- ³⁰³ WASH. REV. CODE § 80.50.030(3).
- ³⁰⁴ WASH. REV. CODE §§ 80.50.030(4)-(6).
- ³⁰⁵ See also Energy Facilities Site Evaluation Council website at www.efsec.wa.gov.
- ³⁰⁶ WASH. REV. CODE § 80.50.110(1).

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- 307 WASH. REV. CODE §§ 50.50.045, 060(3)(i).
- 308 WASH. REV. CODE §§ 80.50.60(3)(a)(ii), (iii).
- 309 WASH. REV. CODE §§ 80.050.020(8), (11).
- 310 *See* WASH. REV. CODE § 80.50.040.
- 311 WASH. REV. CODE § 80.50.330(1).
- 312 WASH. ADMIN. CODE § 463-60-125.
- 313 WASH. REV. CODE § 80.50.90.
- 314 WASH. REV. CODE § 80.50.100.
- 315 WASH. REV. CODE § 80.50.100(1).
- 316 WASH. ADMIN. CODE § 463-47-090.
- 317 WASH. ADMIN. CODE § 463-47-150.
- 318 WASH. ADMIN. CODE § 463-47-150(1).
- 319 WASH. ADMIN. CODE §§ 463-74, 76, 78.
- 320 WASH. REV. CODE § 80.50.080.
- 321 WASH. REV. CODE § 80.50.010.
- 322 *See* WASH. REV. CODE §§ 80.50.010(1)-(5).
- 323 WASH. REV. CODE § 80.50.010; WASH. ADMIN. CODE § 463-60-021.
- 324 WASH. REV. CODE § 80.50.045(4).
- 325 WASH. REV. CODE § 80.50.100(1).
- 326 WASH. REV. CODE § 80.50.100(2).
- 327 WASH. REV. CODE § 80.50.045(1).
- 328 WASH. REV. CODE §§ 80.50.045(2)-(3).
- 329 *See* WASH. REV. CODE § 35.63.010, *et seq.*; § 35A.63.010, *et seq.*; § 36.70A.010, *et seq.*; § 36.70.010, *et seq.*
- 330 WASH. REV. CODE § 35.63.090.
- 331 WASH. REV. CODE §§ 36.70A.035(3), 070(4).
- 332 WASH. REV. CODE § 80.50.110(2); *see also* WASH. ADMIN. CODE § 463-28-020.
- 333 *Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council*, 197 P.3d 1153, 1158 (Wash. 2008).
- 334 *See* WASH. REV. CODE § 80.50.90(2).
- 335 *See* WASH. ADMIN. CODE § 463-28-070.
- 336 *See* WASH. REV. CODE § 80.50.100(1).
- 337 WASH. REV. CODE § 80.50.350.
- 338 WASH. REV. CODE § 80.50.350(6).
- 339 WYO. STAT. ANN. § 37-2-205.
- 340 WYO. STAT. ANN. § 37-1-101(a)(C).
- 341 *Continental Pipeline Co. v. Belle Fourche Pipeline Co.*, 372 F.Supp. 1333, 1334 (D. Wyo. 1974).
- 342 WYO. STAT. ANN. § 37-2-205(a).
- 343 Wyoming Public Service Commission Regulations, Chap. II, Sec. 205.
- 344 *See* Wyoming Public Service Commission Regulations, Chap. II, Sec. 202(c), 203.
- 345 WYO. STAT. ANN. § 37-2-205(f).
- 346 WYO. STAT. ANN. §§ 35-12-101, *et seq.*
- 347 WYO. STAT. ANN. § 35-12-106.
- 348 WYO. STAT. ANN. § 35-12-102(a)(vii). The ISC is authorized to adjust this amount each year using recognized construction cost indices. *See* memorandum from Todd Parfitt,

ISD Administrator to Tom Schroeder, ISD Program Principal (Feb. 26, 2009), *available at* <http://deq.state.wy.us/isd/downloads/Web%20-%20Threshold%20Rates.pdf>.

³⁴⁹ WYO. STAT. ANN. § 35-12-119(c).

³⁵⁰ *See* WYO. STAT. ANN. §§ 35-12-119(d), 35-12-109(a)(iii), (iv), (v), (viii).

³⁵¹ WDEQ Industrial Development Information and Siting Rules and Regulations, Chap.1, Sec. 3.

³⁵² WYO. STAT. ANN. § 35-12-107.

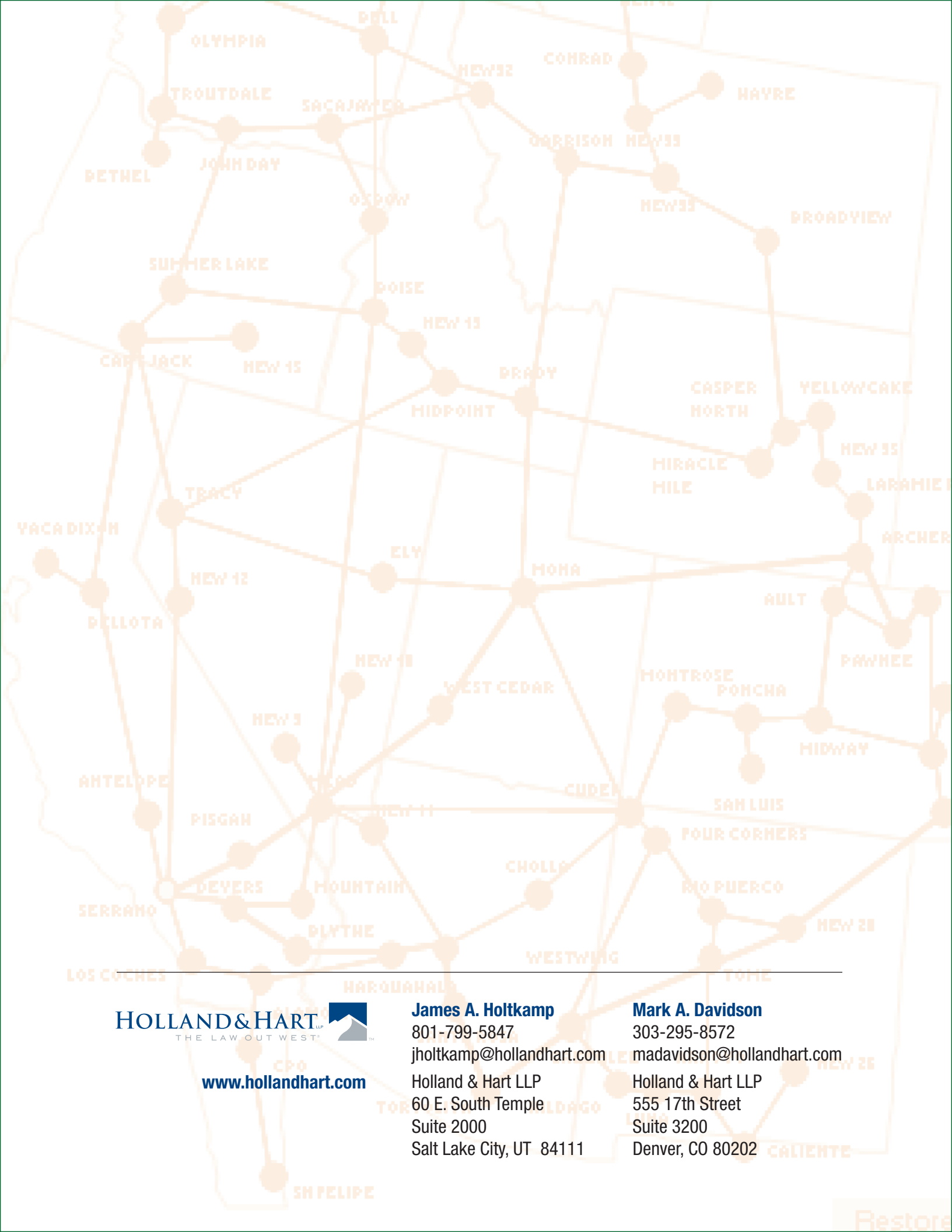
³⁵³ WYO. STAT. ANN. § 18-5-201; §§ 15-1-503, 601.

³⁵⁴ *See* WYO. STAT. ANN. § 18-5-201.

³⁵⁵ *See* *Vandehei Developers v. Pub. Serv. Comm'n*, 790 P.2d 1282, 1287 (Wyo. 1990) (finding it unlawful for a county to infringe upon explicit statutory authority of the state).

³⁵⁶ *Id.*

³⁵⁷ *Id.*



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