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The MGS Public Utility Status Case Is About More Than Just a Power Line

The Bell Center-Columbia-Sugar Creek-IL/WI State Line ("BECI Line") is a 190-mile, 765 kV transmission project designed to run from Bell Center in southwestern Wisconsin through Columbia County to Sugar Creek and the Illinois border. The project represents a $1.2 billion regional transmission investment intended to improve grid reliability, increase power-transfer capability, and accommodate future load growth. If constructed, it would be the largest transmission line ever built in Wisconsin.

The project has drawn substantial public attention. For months, representatives of the developers have met with local officials, stakeholders, and property owners throughout the region. Many have expressed concern about the project's significant environmental and land-use impacts, as well as the proposed siting of the line. These issues will be examined by the Public Service Commission of Wisconsin ("PSC") and the Department of Natural Resources when the developers submit an application for the required certificate of public convenience and necessity.

In the meantime, the PSC is taking up a more fundamental issue that may prove to be even more consequential than where the line is located or how it is built. In PSC Docket 2708-NC-100 (the "MGS Proceeding"), the Commission will consider whether the project developer, Midcontinent Grid Solutions Wisconsin, LLC ("MGS Wisconsin"), should be granted public utility status and whether the company qualifies for certain exemptions under the Wisconsin Utility Holding Company Act ("WUHCA").

Wisconsin enacted WUHCA in 1985 at a time of flat electric growth when electric utilities were increasingly reorganizing into holding companies and expanding beyond their traditional regulated utility businesses. WUHCA allowed those structures but imposed an asset cap and other restrictions intended to protect regulated utilities and their customers from the financial risks of their increasingly diversified, unregulated affiliates.

By the late 1990s, the advent of wholesale electric markets administered by regional transmission organizations such as the Midcontinent Independent System Operator ("MISO") prompted the Legislature to enact the "Reliability 2000" provisions of 1999 Wisconsin Act 9. To ensure reliability, coordinated transmission planning, and nondiscriminatory access to the grid, the law required the State's integrated public utilities to transfer

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their transmission assets to an independent transmission company that became the American Transmission Company ("ATC"), while amending WUHCA and related statutes to accommodate the newly restructured industry.

In many respects, the MGS Proceeding represents Wisconsin's first major test of whether and how this regulatory framework should adapt to an electric industry now confronting forecasts of unprecedented demand growth driven largely by data centers, an accelerating need for new generation and transmission infrastructure, and the growing role of well-capitalized private developers in financing major transmission projects.

MGS Wisconsin was formed after its merchant transmission developer affiliates were selected by MISO in a competitive bidding process to construct the BECI Line, which is part of MISO's Long Range Transmission Planning Tranche 2.1 portfolio. The company's affiliates include Transource Energy, LLC, a transmission-development joint venture of American Electric Power Company, Inc. and Evergy, Inc. and BHE U.S. Transmission, LLC, the transmission-development business of Berkshire Hathaway Energy.

In the MGS Proceeding, MGS Wisconsin is applying to the PSC for a certificate of authority to operate as an electric public utility and to qualify as a "transmission company," as defined in Wis. Stat. § 196.485(1)(ge).

MGS Wisconsin is not the first transmission company to seek Wisconsin public utility status. The PSC previously authorized ITC Midwest to operate as a transmission-only public utility, tailoring the application of certain Wisconsin utility statutes to its transmission-only business model.

The MGS Proceeding, however, raises a materially different question: how far that tailored regulatory treatment can extend when the utility is embedded in an upstream ownership structure that MGS Wisconsin contends should largely fall outside WUHCA. MGS Wisconsin thus seeks both the legal status necessary to operate as a Wisconsin transmission utility and a determination that significant aspects of Wisconsin's statutory framework governing utility ownership and control do not apply to its upstream corporate structure.

The potential regulatory implications of MGS Wisconsin's application are a focal point of ATC's request to intervene. ATC argues that MGS Wisconsin is advancing a novel interpretation of Wisconsin law under which it could obtain "transmission company" status while simultaneously avoiding regulatory requirements that apply to ATC under Wis. Stat. §§ 196.485(3m) and 196.487, while claiming exemption from WUHCA, an outcome ATC contends could fundamentally change Wisconsin's regulatory framework for transmission companies and limit the Commission's future authority.

Municipal electric utilities have a particular interest in these issues. Unlike vertically integrated investor-owned utilities, municipal utilities generally depend upon transmission systems owned and operated by others to deliver power to their communities. How Wisconsin regulates a new transmission-only utility, including its corporate structure and its relationship with affiliated companies, may therefore have consequences not only for MGS Wisconsin but for the regulatory framework governing the transmission providers on which municipal utilities and their customers depend.

Because the Commission's decision may affect both the structure of Wisconsin's transmission industry and the scope of future regulatory oversight, the docket has attracted an unusually broad cross-section of stakeholders. Alongside ATC and organizations representing municipally owned utilities, including WPPI Energy, Municipal Electric Utilities of Wisconsin, the Upper Midwest Municipal Energy Group, Great Lakes Utilities, and groups representing large industrial energy users, local governments, clean-energy advocates, property owners, school districts, and conservation interests have sought to intervene. The docket has also generated dozens of public comments, many focused on the potential land-use, environmental, and community impacts of the BECI Line.

The MGS Proceeding presents an important opportunity to revisit fundamental questions about utility ownership, transmission development, and regulatory oversight that have not been seriously examined for a generation. The answers may help shape Wisconsin's approach to transmission development for the next one.

— Richard A. Heinemann

The PSC's Decision in Docket 5-BS-296: Regional Cooperation, Utility Regulation, and the Limits of Traditional Cost-Of-Service Ratemaking

In 5-BS-296, the Public Service Commission of Wisconsin ("PSC") was asked to determine whether the Village of Potosi Water Utility and the Village of Tennyson Water Utility could enter into a long-term arrangement to share water supply infrastructure, including two wells and Tennyson's elevated water tower. The application represented an effort by two neighboring Grant County communities to make more efficient use of existing infrastructure and improve service reliability through regional cooperation.

The PSC decision is noteworthy because it addresses broader regulatory questions regarding how Wisconsin's traditional public utility statutes apply to innovative intergovernmental arrangements that do not fit neatly within conventional utility ownership and ratemaking models. Rather than constructing duplicate facilities, the villages proposed sharing existing infrastructure through a shared-use and lease agreement. The proposed arrangement would allow both communities to benefit from existing storage capacity, improve system pressure and fire protection capabilities, and potentially avoid significant future capital expenditures.

Potosi and Tennyson had been discussing forms of cooperation for several years. A joint resolution adopted in 2019 expressed the communities' intent to continue sharing resources and exploring future water-system collaboration. Prior PSC decisions involving improvements to the respective water systems had also encouraged the communities to pursue regionalized approaches to water supply.

In January 2026, the utilities formally filed their application seeking PSC approval under Wis. Stat. § 196.49. The Commission initially found the application incomplete and requested additional information before proceeding with substantive review. Following supplemental filings, the Commission opened an investigation and considered the legal, engineering, and ratemaking implications of the proposal.

The most significant issue in Docket 5-BS-296 was not whether the arrangement made practical sense. Commenters viewed shared use of existing infrastructure as a sensible method of reducing costs and increasing reliability. Instead, the difficulty arose from how to measure, allocate, and bill for water service between two regulated municipal utilities.

PSC staff's memorandum focused on whether the proposed arrangement provided a sufficiently accurate method for measuring each utility's use of the shared facilities. Concerns were raised regarding the absence of a dedicated interconnection meter and whether costs could be allocated fairly among customers of the respective utilities. According to comments filed by the municipalities and the League of Wisconsin Municipalities, installation of additional metering equipment would substantially increase project costs, potentially undermining the economic benefits that motivated the proposal in the first place.

The case therefore presented a classic tension in utility regulation: the desire to promote efficient regional cooperation versus the need for accurate accounting and rate design that protects utility customers from subsidizing others.

The Commission's handling of Docket 5-BS-296 is important because it highlights the challenges facing small municipal utilities throughout Wisconsin. Many communities have aging infrastructure, limited customer bases, and increasing capital costs. Shared-service arrangements are often the most economical means of maintaining reliable utility service. The docket illustrates how existing regulatory requirements, developed largely for traditionally structured utility systems, can complicate innovative cooperative arrangements.

As Wisconsin communities increasingly seek shared-service models, Docket 5-BS-296 is likely to be cited as an important example of how the PSC approaches nontraditional utility partnerships and the regulatory issues that accompany them. The case demonstrates that, while the PSC is supportive of cooperative arrangements to provide efficient and cost-effective utility service, such arrangements must also satisfy the Commission's obligations regarding customer protection, rate fairness, and accountability.

Boardman Clark, along with Town and Country Engineering and Onward Accounting and Consulting, provided assistance to Potosi and Tennyson.

— Lawrie Kobza

Governor's Race Could Reshape Wisconsin's Utility and Natural-Resources Leadership

For the first time since 2010, Wisconsin voters will choose a governor without an incumbent on the ballot. The result of that election could significantly influence the leadership of the Public Service Commission of Wisconsin ("PSC") and the Natural Resources Board ("NRB").

Treatment of Unconfirmed Appointive State Officials

Two of the three current PSC commissioners and all seven sitting NRB members are serving without Senate confirmation for their current terms. When the Senate confirms an appointee to serve, that appointee generally may only be removed by the governor "for cause." Wis. Stat. § 17.07. Conversely, an appointee serving without confirmation is subject to a governor withdrawing their nomination or removing the official from office at the governor's pleasure. However, chapter 17 is not always clear about the extent of a governor's authority and past attempts to exercise executive control over appointments to executive agencies has led to significant litigation, including in *League of Women Voters of Wisconsin v. Evers*, 2019 WI 75, 387 Wis. 2d 511, 929 N.W.2d 209, and *State ex rel. Kaul v. Prehn*, 2022 WI 50, 402 Wis. 2d 539, 976 N.W.2d 821.

Public Service Commission

The PSC's three commissioners interpret and apply Wisconsin statutes and administrative rules governing utility rates and the provision of safe, reliable, reasonable, and adequate utility service in Wisconsin. Commissioners are nominated by the governor and appointed with the Senate's advice and consent to staggered six-year terms. This schedule allows a new administration to influence the Commission gradually, with the governor ordinarily having the opportunity to appoint a new majority during the third year of a four-year term.

Two of the PSC's current three commissioner appointments remain pending before the Senate. Marcus Hawkins's appointment remains pending for the remainder of a term ending March 1, 2027. Kristy Nieto's appointment also remains pending for a term ending March 1, 2031. This opens the possibility for the next governor to replace at least one, if not both, of these commissioners upon taking office.

The next governor will also select the PSC chair. The chair administers the PSC's administrative duties including oversight of PSC staff-related activities. Chair Summer Strand was confirmed for a commissioner term ending March 1, 2029, but her current two-year term as chair ends March 1, 2027. The governor designates the chair from among the commissioners for a two-year term ending March 1 of each odd-numbered year. The chair designation does not require separate Senate confirmation.

Natural Resources Board

The seven-member NRB reviews and approves proposed rules, land acquisitions, property-management master plans, and budget proposals for the Department of Natural Resources. NRB members are nominated by the governor and appointed with the Senate's advice and consent to staggered six-year terms. Currently, two seats have terms ending May 1, 2027, three end May 1, 2029, and two end May 1, 2031. Like the PSC, the terms of the NRB members are designed to be gradually influenced by a new governor.

The potential effect on the NRB is broader because none of its seven sitting members has received full Senate confirmation for the member's current term. As a result, the next governor may have an opportunity, perhaps unprecedented in recent decades, to nominate replacements for all of the sitting NRB members early in the new administration. Any replacements would remain subject to Senate confirmation.

What Municipalities Should Watch

The next governor will have an opportunity to make a substantial statement about the oversight of public utilities and the state's natural resources through decisions involving the pending PSC and NRB appointments. Those appointments could significantly affect the direction of utility regulation and DNR policymaking early in the 2027–2028 legislative session.

— Jared W. Smith

A Refresher On Attorney-Client Privilege

Municipalities seek legal advice for various reasons. The attorney-client privilege protects from disclosure communications between an attorney and the attorney's municipal client if the communications are intended to be confidential and are "made for the purpose of facilitating the rendition of professional legal services to the client." Wis. Stat. § 905.03(2). The attorney-client privilege is narrowly construed, but, where it applies, it is absolute and applies even after the legal representation has ended or the specific legal matter has been resolved.

Communications that are protected by the attorney-client privilege can be disclosed if the client decides to waive the privilege. Only the client can waive the privilege. Unless an exception to the privilege applies, an attorney cannot choose to disclose confidential communications with a client without the client's approval. In the case of a municipal client, the municipality owns the privilege. As a result, attorney-client privilege can be waived by a municipality only by an individual or entity with authority to make that decision for the municipality. Thus, waiver of attorney-client privilege may require a vote of the municipality's governing body. An individual municipal employee or official who seeks and receives legal advice on behalf of a municipality does not own the privilege and cannot waive the privilege without authorization from the municipality.

Attorney-client privilege is waived if the client voluntarily discloses or consents to disclosure of the communication. In addition, a client's intentional disclosure of one communication may forfeit the attorney-client privilege with respect to another communication if the communications concern the same subject matter and "[t]he disclosed and undisclosed communications ought in fairness to be considered together." Wis. Stat. § 905.03(5)(b). Whether fairness requires the communications to be considered together is determined on a case-by-case basis and is most likely to be found in a litigation setting. If a municipality inadvertently discloses privileged attorney-client communications, it should immediately contact the person to whom the disclosure was made, acknowledge the mistake, explain that the municipality is not waiving attorney-client privilege, and ask for the privileged communication to be returned or destroyed. The municipality should alert its attorney in the event of an inadvertent disclosure and may ask the attorney to take these steps on its behalf.

There are five statutory exceptions to the attorney-client privilege that are listed in Wis. Stat. § 905.03(4). The exceptions include where the legal services were sought to help "commit what the client knew or reasonably should have known to be a crime or fraud" or if the communication is "relevant to an issue of breach of duty by the lawyer to the lawyer's client or by the client to the client's lawyer." Wis. Stat. § 905.03(4). If two or more clients jointly hired a lawyer, attorney client privilege does not apply to prevent the communications being offered in an action between any of the clients, but the communications remain privileged with respect to third parties.

Because attorney-client privileged communications are specifically exempted from disclosure by state law in Wis. Stat. § 905.03, attorney-client privilege is grounds to deny a public records request. If only a portion of a requested record is protected by attorney-client privilege, the privileged portion should be redacted and the remainder of the record provided. If any municipality has questions about attorney-client privilege, please reach out to a member of the Boardman Clark's Municipal Law Practice Group.

— Heather L. Curnutt

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1 S PINCKNEY ST SUITE 410 PO BOX 927
MADISON WI 53701-0927

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Nicholas D. Bratsos	608-283-1737	nbratsos@boardmanclark.com
Heather L. Curnutt	608-286-7237	hcurnutt@boardmanclark.com-
Anita T. Gallucci	608-283-1770	agallucci@boardmanclark.com
Brian P. Goodman	608-283-1722	bgoodman@boardmanclark.com
Eric B. Hagen	608-286-7255	ehagen@boardmanclark.com
Richard A. Heinemann	608-283-1706	rheinemann@boardmanclark.com
Paul A. Johnson	608-286-7210	pjohnson@boardmanclark.com
Lawrie J. Kobza	608-283-1788	lkobza@boardmanclark.com
Storm B. Larson	608-286-7207	slarson@boardmanclark.com
Julia K. Potter	608-283-1720	jpotter@boardmanclark.com
Jared W. Smith	608-286-7171	jsmith@boardmanclark.com

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