



The State Energy &  
Environmental Impact Center  
NYU School of Law

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State Attorneys General:  
**Empowering the  
Clean Energy Future**



**September, 2019**



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This report does not necessarily reflect the views of NYU School of Law, if any.

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# Executive Summary

As their states' chief legal officers, attorneys general play a major role in clearing the path for increased clean energy in the electricity sector. This report focuses, in particular, on how state attorneys general are utilizing federal and state energy law principles across different forums to ensure that clean energy innovators have expanded opportunities to participate fully and fairly in electricity markets.

States have always been primary players in directing and regulating how electricity is produced and supplied to their residents, businesses, and industry. States have embraced their leadership role in the energy field and have been at the forefront of dynamic changes in the industry, particularly in ways relevant to the expansion of clean energy.

Many states have adopted laws, policies, and practices that have increased competition and opened up markets for clean energy by limiting utilities' monopoly ownership of energy production facilities, enacting renewable portfolio standards, and encouraging innovative "behind-the-meter" technologies such as rooftop solar, demand response, and energy storage. Massachusetts and other New England states are leading U.S. offshore wind development efforts.<sup>1</sup> States also are moving forward to plan for and encourage efforts to reduce emissions from the transportation sector, including by expanding the use of electric vehicles.<sup>2</sup> These state-led trends are helping to reduce the industry's unsustainably high levels of climate change-causing greenhouse gas emissions, as well as emissions of conventional pollutants that harm public health.<sup>3</sup> And, by helping to create markets for clean energy, states drive technical innovation that, over time, has helped to substantially reduce the cost of clean energy.

***With its primary focus on energy law, this report complements a report that the State Impact Center issued earlier this year. That report, "Climate & Health Showdown in the Courts," focused on key Clean Air Act rulemakings that would negatively impact state clean energy and climate change interests by rolling back restrictions on greenhouse gas emissions from major sources in the coal, oil and gas, and automotive industries.***

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<sup>1</sup> Karl-Erik Stromsta, *Massachusetts Officials Recommend Another 1.6GW of Offshore Wind*, GREENTECH MEDIA (June 2, 2019), <https://www.greentechmedia.com/articles/read/massachusetts-officials-recommend-another-1-6-gw-of-offshore-wind#gs.zae0ag>.

<sup>2</sup> See *The 50 States of Electric Vehicles: States Focus on Transportation Electrification Planning, Charging Station Regulation in Q2 2019*, NC CLEAN ENERGY TECH. CTR. (Aug. 7, 2019), <https://nccleantech.ncsu.edu/2019/08/07/the-50-states-of-electric-vehicles-states-focus-on-transportation-electrification-planning-charging-station-regulation-in-q2-2019/>. The transportation sector is the largest source of the greenhouse gas emissions that contribute to climate change. *Reducing Your Transportation Footprint*, CTR. FOR CLIMATE AND ENERGY SOLS., <https://www.c2es.org/content/reducing-your-transportation-footprint/> (last visited Sept. 16, 2019).

<sup>3</sup> The electricity sector is one of the top two contributors to U.S. greenhouse gas emissions. *Sources of Greenhouse Gas Emissions*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions> (last visited Sept. 16, 2019).

Prompted by the need to further reduce greenhouse gas emissions and accelerate the industry's transition to clean energy, many states have recently accelerated their clean energy commitments by adopting 100% renewable or clean energy goals. Examples include California, Hawaii, Maine, New Mexico, New York, Nevada, D.C. and Puerto Rico.<sup>4</sup> A total of twenty-nine states (along with D.C. and three territories) have some form of renewable energy mandate.<sup>5</sup>

State attorneys general have a critical role to play in ensuring that their states' clean energy laws and policies are implemented on a timely and effective basis, and without inappropriate interference by the federal government or other parties. Implementing and enforcing state energy laws aligns with traditional attorney general functions of protecting states' rights, promoting fair competition, protecting the environment, and looking out for consumer interests.

As reviewed in this report, state attorneys general are active in both federal and state clean energy matters. Examples include:

- ▶ **Defending state energy rights** against unlawful federal government interventions including, for example, Federal Energy Regulatory Commission (FERC) approval of wholesale market rules that undermine state clean energy law and policies, or FERC approvals of energy infrastructure projects that are inconsistent with state clean energy or environmental interests.
- ▶ **Defending state energy laws and policies** against Commerce Clause and other federal challenges made by incumbent energy providers and other third parties.
- ▶ **Appearing as an advocate** in state legislative and regulatory proceedings to ensure that traditional state utility practices do not inhibit the type of competition needed to achieve their states' clean energy goals and requirements.
- ▶ **Protecting state residents** from fraudulent and misleading practices by energy suppliers and ensuring that utility planning considers both short- and long-term interests.

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<sup>4</sup> *100% Commitments in Cities, Counties, & States*, SIERRA CLUB, <https://www.sierraclub.org/ready-for-100/commitments> (last visited Sept. 16, 2019); *Most States Have Renewable Portfolio Standards*, U.S. ENERGY INFO. ADMIN. (Feb. 3, 2012), <https://www.eia.gov/todayinenergy/detail.php?id=4850>. Other states, such as Colorado and Connecticut, are outlining how to achieve aggressive reductions as well. See Catherine Morehouse, *Colorado Gov Polis Unveils Roadmap to 100% Renewables by 2040, Signs 11 Clean Energy Bills*, UTILITYDIVE (Jun. 3, 2019), <https://www.utilitydive.com/news/colorado-gov-polis-unveils-roadmap-to-100-carbon-free-by-2040-signs-11-cl/555975/> (discussing Colorado "Roadmap to 100% Renewable Energy by 2040 and Bold Climate Action"); *Governor Lamont Signs Executive Order Strengthening Connecticut's Efforts to Mitigate Climate Change*, OFFICE OF GOVERNOR NED LAMONT (Sept. 3, 2019), <https://portal.ct.gov/Office-of-the-Governor/News/Press-Releases/2019/09-2019/Governor-Lamont-Signs-Executive-Order-Strengthening-Connecticuts-Efforts-to-Mitigate-Climate-Change> (discussing executive order to evaluate pathways to 100% clean energy by 2040).

<sup>5</sup> *State Renewable Portfolio Standards and Goals*, NAT'L CONFERENCE OF STATE LEGISLATURES (Feb. 2, 2019), <http://www.ncsl.org/research/energy/renewable-portfolio-standards.aspx>.

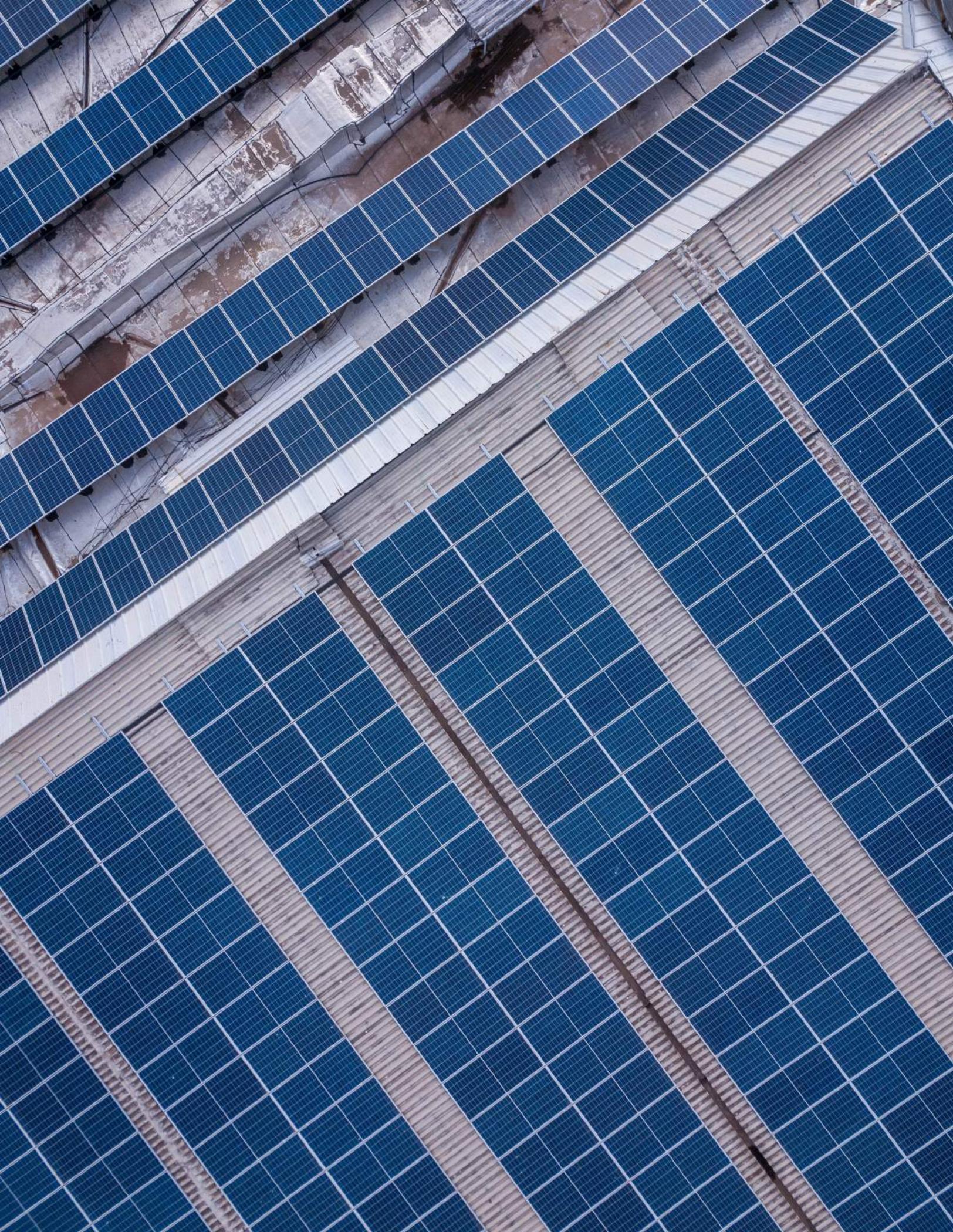
The specific authority that each state provides to its attorney general to engage and lead on energy issues varies. So too does the relationship between a state's attorney general and its utility regulatory commission. While attorneys general often have a broad mandate to represent the public interest, some states specifically task attorneys general with the role of consumer or ratepayer advocate in utility proceedings. Other states have distinct ratepayer advocate offices. The attorney general may also represent a variety of state agencies that are involved in utility matters, such as the state environmental agency.

To cover these topics, the report is divided into three sections:

- ▶ **Section I** provides a high-level overview of roles that state attorneys general play in clean energy-related matters in federal and state forums.
- ▶ **Section II** describes specific examples from around the country of attorney general involvement in high priority federal and state clean energy issues.
- ▶ **Section III** is a state-by-state review of the authority of attorneys general and consumer advocates to address clean energy issues in utility commission proceedings.

The variety and abundance of examples catalogued in this report show the leadership role that many state attorneys general are taking on these important matters.





# Section I. Overview of the Role of Attorney General Activities in Energy Matters

State attorneys general have wide-ranging opportunities to protect and advance state interests in clean energy development and in reducing greenhouse gas emissions.<sup>6</sup> Federal energy law recognizes that states have broad legal rights to shape and enforce their energy policies.<sup>7</sup> State authority has withstood Supremacy Clause, Commerce Clause, and other challenges. Attorneys general play a key role in defending those state prerogatives against such challenges from those who may prefer the status quo over forward-leaning state policies, including the federal government, other states, and incumbent energy providers.

***Attorneys general play a key role in defending state prerogatives against challenges from those who may prefer the status quo over forward-leaning state policies, including the federal government, other states, and incumbent energy providers.***

Attorneys general also have an important role to play in ensuring the implementation of state energy laws and policies, including clean energy and climate change mandates, as well as looking out for consumer interests by promoting competition, fair play, market entry, and fair pricing.

## Protecting States' Energy Rights

### Background

State authority over power generation and distribution is rooted in fundamental legal principles of constitutionally-provided state police power, bounded by the Commerce Clause and Supremacy Clause.<sup>8</sup> The Federal Power Act (FPA) assigns to the Federal Energy Regulatory Commission (FERC) responsibility for regulating the interstate transmission and wholesale sales

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<sup>6</sup> States have a long-standing primary responsibility regarding public health and environmental interests of their residents. While these areas of regulation have traditionally embraced principles of cooperative federalism, the current administration has moved away from this approach and is challenging longstanding state authority under federal environmental laws. Although this report focuses on clean energy and utility issues, concerns about preemption and infringement of states' rights are significant in other environmental areas, such as the Clean Cars Rule. To understand attorney general involvement in this and other Clean Air Act rule rollbacks, see the Center's "Climate & Health Showdown in the Courts" Special Report. STATE ENERGY & ENVTL. IMPACT CTR., N.Y.U. SCH. L., CLIMATE & HEALTH SHOWDOWN IN THE COURTS 3 (2019), <https://www.law.nyu.edu/sites/default/files/climate-and-health-showdown-in-the-courts.pdf>. Though not the focus of this report, state attorneys general have also been active in opposing efforts by the Department of Energy to roll back energy efficiency standards for a range of consumer and commercial products that can save consumers and businesses money on their monthly electricity bills, while reducing climate change causing greenhouse gas emissions. For information on the work of state attorneys general on energy efficiency, see the Center's website: <https://www.law.nyu.edu/centers/state-impact/issues/clean-energy-and-energy-efficiency/energy-efficiency-standards>.

<sup>7</sup> See, e.g., *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1292 (2016) (discussing case law).

<sup>8</sup> See *Pub. Util. Comm'n of R.I. v. Attleboro Steam & Elec. Co.*, 273 U.S. 83, 89-90 (1927).

of electricity. It is a limited grant of jurisdiction that “extend[s] only to those matters which are not subject to regulation by the States.”<sup>9</sup> State-regulated power activities include “facilities used for the generation of electric energy or . . . facilities used in local distribution or only for the transmission of electric energy in intrastate commerce.”<sup>10</sup>

The Federal Power Act’s statutory recognition that states have primacy regarding the “generation of electric energy” is particularly important. Accordingly, courts have confirmed that states have broad authority to shape the type of electric generation that best suits their state interests including, for example, a preference for clean energy.

The dividing line between federal and state jurisdiction, however, is not always clear. As the Supreme Court has observed, “[i]t is a fact of economic life that the wholesale and retail markets in electricity, as in every other known product, are not hermetically sealed from each other.”<sup>11</sup> As a result, some FERC regulations that are directed at wholesale markets may have impacts that spill into state-regulated retail markets. When that is the case, FERC typically can take an approach that acknowledges legitimate wholesale market interests while accommodating states’ rights. The same goes for states.

Unfortunately, as discussed below, FERC does not always accommodate state interests when overseeing wholesale electricity markets, requiring state attorneys general to step in.

### Mutual Accommodation of Federal and State Energy Rights

FERC initiatives can sometimes work in tandem with state clean energy interests as, for example, when FERC adopts wholesale market rules that open up new market opportunities for clean energy technologies that may be connected to state-regulated distribution systems, such as storage, rooftop solar on customers’ homes, and demand-response tools.<sup>12</sup> So long as FERC is respectful of state retail-level interests, the federal government can develop wholesale market rules that expand market opportunities for these clean energy resources by enabling aggregators to bid bulk distributed resources into those markets.

The Supreme Court made this point in *FERC v. Electric Power Supply Association (EPSA)*.<sup>13</sup> In that case, the Court upheld as lawful a FERC regulation that determined the price wholesale market operators should pay to those electricity consumers that committed not to use power at certain times (demand response) because these commitments “directly affect wholesale

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<sup>9</sup> 16 U.S.C. § 824(a)-(b)(1).

<sup>10</sup> 16 U.S.C. § 824(b)(1).

<sup>11</sup> *FERC v. Elec. Power Supply Ass’n (EPSA)*, 136 S.Ct. 760, 776 (2016).

<sup>12</sup> See, e.g., *Brattle Study: FERC Order Sets Course for 50,000 MW U.S. Storage Market*, THE BRATTLE GROUP (Feb. 22, 2018), <https://www.brattle.com/news-and-knowledge/publications/getting-to-50-gw-the-role-of-ferc-order-841-rtos-states-and-utilities-in-unlocking-storages-potential> (concluding that half of total value of energy storage resources will come from the wholesale market).

<sup>13</sup> *EPSA*, 136 S.Ct. at 772, 784.

sales” and did not amount to the regulation of retail sales.<sup>14</sup> The D.C. Circuit is now evaluating a similar order that enables electric storage resources to participate in wholesale markets.<sup>15</sup>

Likewise, a state regulation may create consequences for the wholesale market without treading on FERC’s jurisdiction. The Supreme Court’s most recent energy decision provides helpful guidance here, affirming the important role that states play in shaping their energy mix and standing for the proposition that states are well within their rights to adopt measures to promote clean energy so long as they are not impermissibly tethered to the wholesale market.

More specifically, in *Hughes v. Talen Energy Marketing, LLC*, the Court considered a Maryland program mandating purchases from a new natural gas generator. The problem was that the program tied contractual payments to the generator’s wholesale market sales.<sup>16</sup> This conditioning of receipt of funds on the generator’s capacity clearing the wholesale market was a “fatal defect.”<sup>17</sup>

***The Supreme Court has emphasized that states have significant latitude to encourage new or clean generation.***

Although the *Hughes* Court invalidated the state program’s direct tie-in to the FERC-jurisdictional wholesale power market, it emphasized that states have significant latitude under the Federal Power Act to encourage new or clean generation. The Court noted that “[n]othing in this opinion should be read to foreclose Maryland and other States from encouraging production of new or clean generation” so long as state measures are “untethered to a generator’s wholesale market participation.”<sup>18</sup>

### Defending States’ Rights Against Preemption and Dormant Commerce Clause Claims

State attorneys general have played a critical role in protecting states’ rights against Federal Power Act preemption and dormant Commerce Clause claims.

State adoption of renewable portfolio standards (RPS), for example, has triggered challenges based on allegations that state RPS’s impermissibly constrain interstate commerce, in violation of the Constitution’s commerce clause. In *Allco Finance Limited. v. Klee*, a Georgia renewable energy supplier alleged that Connecticut’s RPS violated the dormant Commerce Clause by requiring the purchase of renewable energy credits (RECs) to satisfy the state’s RPS from electricity generated in the regional energy markets that serve Connecticut.<sup>19</sup> The Second Circuit agreed with the Connecticut Attorney General’s position that because the state’s RPS accepted RECs from all states in its regional energy market (a market defined by others, and not

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<sup>14</sup> *Id.* at 773.

<sup>15</sup> Petition for Review, *Am. Mun. Power Ass’n v. FERC*, Nos. 19-1142, 19-1147 (D.C. Cir. July 15, 2019). Policymakers can use energy storage resources to compliment the deployment of renewable resources. See generally Richard L. Revesz & Burcin Unel, *Managing the Future of the Electricity Grid: Energy Storage and Greenhouse Gas Emissions*, 42 HARV. ENVTL. L. REV. 139 (2018).

<sup>16</sup> *Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1297 (2016).

<sup>17</sup> *Id.* at 1299.

<sup>18</sup> *Id.* (internal quotation marks omitted).

<sup>19</sup> *Allco Fin. Ltd. v. Klee*, 861 F.3d 82, 102 (2d Cir. 2017).

the state of Connecticut), Connecticut’s RPS did not unconstitutionally discriminate against RECs generated in Georgia.<sup>20</sup>

Similar issues have arisen around other state programs that provide state benefits to state-preferred clean energy resources, including challenges to Zero Emissions Credit (ZEC) programs established by the states of New York and Illinois. States explicitly set up their ZEC programs to compensate nuclear generators for keeping their zero-carbon operations online. Without ZECs, there was a concern that natural gas generation would replace nuclear generation, increasing the states’ greenhouse gas emissions.<sup>21</sup> As discussed in Section II of this report, a coalition of attorneys general led by Illinois Attorney General Madigan and including the Attorneys General of California, Connecticut, Massachusetts, New York, Oregon, Vermont and Washington were crucial to this defense, and both the Second and Seventh Circuit Courts of Appeal upheld the ZEC programs as consistent with states’ rights under the Federal Power Act and the Commerce Clause.<sup>22</sup> The Supreme Court denied *certiorari*.

The Second Circuit found no “impermissible tether” under *Hughes* between New York’s program and the wholesale market.<sup>23</sup> While the ZEC program could “exert[] downward pressure on wholesale electricity rates, that incidental effect is insufficient to state a claim for field preemption under the FPA.”<sup>24</sup> Notably, the price for ZECs is tied to the social cost of carbon and did not guarantee a certain wholesale price that would displace the federally-regulated wholesale auction price.<sup>25</sup> Regarding the dormant Commerce Clause, the court found that plaintiffs – natural gas generators who did not allege that they own any nuclear plants – lacked standing.<sup>26</sup>

The court that upheld the Illinois ZEC program similarly noted that “[s]tates may influence, through regulation, which generators participate in FERC’s market, even though the end result may affect the wholesale market.”<sup>27</sup> The court found that the recognition in *EPSA* that FERC’s regulation of wholesale matters may at times have “natural consequences” on retail transactions applies equally in the other direction, and that “a state regulation that substantially affects the quantity and terms of wholesale sales is not necessarily preempted.”<sup>28</sup>

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<sup>20</sup> *Id.* at 107-08.

<sup>21</sup> *Coal. for Competitive Elec. v. Zibelman*, 272 F. Supp. 3d 554, 562 (S.D.N.Y. 2017), *aff’d* 906 F.3d 41, 58 (2d Cir. 2018), and *cert. denied*, 139 S. Ct. 1547 (2019).

<sup>22</sup> *Id.*; *Vill. of Old Mill Creek v. Star*, 2017 WL3008289, at \*14, \*16-17 (N.D. Ill. July 14, 2017), *aff’d sub nom Elec. Power Supply Ass’n v. Star*, 904 F.3d 518, 525 (7th Cir. 2018), *cert. denied* 139 S.Ct. 1547 (2019).

<sup>23</sup> *Coal. for Competitive Elec.*, 906 F.3d at 46.

<sup>24</sup> *Id.* at 54.

<sup>25</sup> *Id.* at 57.

<sup>26</sup> *Id.* at 58.

<sup>27</sup> *Vill. of Old Mill Creek*, 2017 U.S. Dist. LEXIS 109368 at \*32.

<sup>28</sup> *Id.* at \*35.

## Defending States' Rights Against Discriminatory Federal Market Rules

State attorneys general also are active in defending states' rights against market rules that discriminate against state clean energy preferences.

### *Discriminatory Capacity Market Rules*

To improve efficiencies and provide non-discriminatory access to transmission and wholesale markets, FERC has encouraged the formation of Regional Transmission Organizations or Independent System Operators (hereinafter referred to as RTOs) to administer the grid and markets on a regional basis.<sup>29</sup> FERC oversees the operations of RTOs and ensures that they conform with legal requirements, including maintaining just and reasonable rates and avoiding undue discrimination under the Federal Power Act.<sup>30</sup>

RTOs operate centralized wholesale energy markets that balance load and generation on interstate grids on a real-time and day-ahead basis. In addition, they may administer a forward capacity market that is intended to ensure that there will be sufficient resources to meet demand at some time period in the future. For example, PJM Interconnection, the RTO that covers all or parts of thirteen mid-Atlantic and Eastern states, runs a capacity auction three years in advance.

These markets – particularly capacity markets – value resources without regard to their contribution to climate change. But this is in growing tension with state policies to promote clean energy as RTOs develop capacity market rules that penalize state-supported clean energy resources. These rules aim to limit or eliminate their ability to participate in capacity markets. Incumbent fossil fuel energy providers argue that certain clean energy resources' receipt of state support gives them an unfair advantage when bidding into capacity markets, and thus their participation distorts the market.<sup>31</sup> Their solution, which RTOs and FERC appear to be accepting, is to significantly limit state supported energy resources' participation in capacity markets.<sup>32</sup>

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<sup>29</sup> See *Reg'l Transmission Orgs.*, Order No. 2000, FERC Stats. & Regs. ¶ 31,089 (1999), *order on reh'g*, Order No. 2000-A, FERC Stats. & Regs. ¶ 31,092 (2000) (codified at 18 C.F.R. § 35.34), *aff'd sub nom. Pub. Util. Dist. No. 1 of Snohomish Cty. v. FERC*, 272 F.3d 607 (D.C. Cir. 2001).

<sup>30</sup> 16 U.S.C. § 824d. See also LAWRENCE GREENFIELD, OFFICE OF THE GENERAL COUNSEL, FED. ENERGY REGULATORY COMM'N, AN OVERVIEW OF THE FEDERAL ENERGY REGULATORY COMMISSION AND FEDERAL REGULATION OF PUBLIC UTILITIES 26 (2018), <https://www.ferc.gov/about/ferc-does/ferc101.pdf> (discussing standard).

<sup>31</sup> See, e.g., CPV Power Holdings, Complaint at 1-2, *CPV Power Holdings v. PJM Interconnection, LLC*, Docket No. EL18-169-000 (May 31, 2018), eLibrary No. 20180531-5398.

<sup>32</sup> There are also efforts underway in some RTOs/ISOs to price carbon. See *PJM Outlines Plan to Study Market Effects of Carbon Pricing*, PJM INSIDE LINES (May 17, 2019), <http://insidelines.pjm.com/pjm-outlines-plan-to-study-market-effects-of-carbon-pricing/>; *Carbon Pricing Integration in Wholesale Energy Markets: Recent Info & Media Coverage*, NEW YORK INDEPENDENT SYSTEM OPERATOR, <https://www.nyiso.com/carbon> (last visited Sept. 16, 2019). However, any carbon pricing mechanism needs to recognize state authority under the FPA. See Jennifer Chen, *Carbon Pricing in PJM: Are State Policies at Risk?*, GREENTECH MEDIA (Apr. 24, 2019) <https://www.greentechmedia.com/articles/read/carbon-pricing-in-pjm-are-state-policies-at-risk>.

Attorneys general have been active in these fights to respect state policy and law, urging FERC to respect states' rights to shape their preferred energy mix and see state policies that promote clean energy as market corrections, not market distortions.<sup>33</sup> Unfortunately, FERC has been ignoring states' rights and embracing the self-serving market distortion claims of incumbent fossil-fuel generators.<sup>34</sup> If FERC persists in shrinking state-supported clean energy resources' ability to participate in capacity markets, it will be impinging states' exercise of their authority<sup>35</sup> and imposing significant additional costs to consumers, without providing any increased reliability or other system benefits. Indeed, one estimate of the financial impact of part of the PJM proposal shows that it would increase costs for consumers by 90.8% – \$8.4 billion annually – if all units at risk of retirement were to remain in the market.<sup>36</sup> States are actively considering necessary market rule reforms, and there is increasing interest in reconsidering the ongoing viability of capacity markets.

***Attorneys general have urged FERC to respect states' rights to shape their energy mix, including clean energy preferences that correct for carbon costs and other market failures.***

#### *Opposing Fossil Fuel Subsidies*

The federal government also has attempted to provide additional benefits to coal and other incumbent energy sources based on the “fuel security” that those energy resources allegedly provide.<sup>37</sup>

In the fall of 2017, the Department of Energy directed FERC to consider adopting a rule under the Federal Power Act that would have subsidized uneconomic coal and nuclear power plants – and made state-supported clean energy resources less competitive – based on a “fuel security” argument that coal plants' on-site access to fuel allegedly made them more reliable.<sup>38</sup> The Department admitted that it was proposing these subsidies to delay the retirement of uncompetitive coal plants.<sup>39</sup>

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<sup>33</sup> See Section II (discussing specific examples of attorney general advocacy in PJM).

<sup>34</sup> See, e.g., *Calpine Corp. v. PJM*, 163 FERC ¶ 61,236, PP 149-50 (2018).

<sup>35</sup> See Jessica Bell, Opinion, *The Looming Threat to State Renewable Goals in Wholesale Electricity Markets*, UTILITYDIVE (May 8, 2019), <https://www.utilitydive.com/news/the-looming-threat-to-state-renewable-goals-in-wholesale-electricity-market/554277/>.

<sup>36</sup> Memorandum from PJM Market Monitor for PJM to PJM Market Participants, MONITORING ANALYTICS (Sept. 17, 2019), [http://www.monitoringanalytics.com/reports/Market\\_Messages/Messages/IMM\\_Response\\_to\\_Grid\\_Strategies\\_Report\\_201909217.pdf](http://www.monitoringanalytics.com/reports/Market_Messages/Messages/IMM_Response_to_Grid_Strategies_Report_201909217.pdf). See also MICHAEL GOGGIN & ROB GRAMLICH, GRID STRATEGIES LLC, CONSUMER IMPACTS OF FERC INTERFERENCE WITH STATE POLICIES 2 (2019), <https://gridprogress.files.wordpress.com/2019/08/consumer-impacts-of-ferc-interference-with-state-policies-an-analysis-of-the-pjm-region.pdf> (estimating a 60% increase in costs to consumers of part of the PJM proposal).

<sup>37</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003, P 4 (2018).

<sup>38</sup> Grid Resiliency Pricing Rule, 82 Fed. Reg. 46,940 (proposed Oct. 10, 2017) (to be codified at 18 C.F.R. pt. 35).

<sup>39</sup> *Id.*

A coalition of attorneys general filed comments with FERC opposed to the Department of Energy's subsidy proposal. They pointed out the disruption to competitive markets posed by paying the most uneconomic, highest polluting generators more, regardless of ratepayer impacts, was contradicted by facts and unsupported by any evidence that grid reliability was improved by keeping these aging plants around.<sup>40</sup> Further, they noted that clean energy resources and new technologies can serve future needs.

State attorneys general (and others critical of the proposal) prevailed, and FERC declined to adopt the fossil fuel subsidy proposal. The Commission opened a new proceeding, however, to solicit information about grid resilience,<sup>41</sup> which it potentially could use to explore other ways to subsidize fossil-fuel fired generation. Attorneys general are engaged in their respective RTO proceedings to limit the potential for market interventions that favor incumbent fossil fuel generators.<sup>42</sup>

### Objecting to New Fossil Fuel Infrastructure

States that have adopted clean energy laws and goals recognize that the construction of new, long-lived fossil fuel infrastructure can undercut states' abilities to meet their clean energy commitments and are a bad deal for ratepayers.<sup>43</sup> States also may have concerns that fossil fuel-based infrastructure, such as oil and gas pipelines, can leak or rupture, threatening the health of important waterways and endangering local communities.<sup>44</sup>

State attorneys general concerned about new fossil fuel infrastructure investments have relied on a number of important statutory provisions to object to significant new projects. In particular, interstate gas pipeline projects must be approved by the Federal Energy Regulatory Commission based on a "public interest" finding<sup>45</sup> that justifies granting a certificate of "public convenience and necessity" under the Natural Gas Act.<sup>46</sup> FERC's determination gives private pipeline companies eminent domain authority to force the sale and use of private lands for

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<sup>40</sup> Att'y Gen. of Mass., Cal., Conn., Ill., Md., N.C., Or., R.I., Vt. & Wash., Conn. Dept. of Energy and Env'tl. Pro., R.I. Div. of Pub. Util. & N.H. Office of the Consumer Advocate, Initial Comments, *Grid Reliability and Resiliency Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017), eLibrary No. 20171023-5466; see also Office of the N.Y. Att'y Gen., Initial Comments, *Grid Reliability and Resiliency Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017), eLibrary No. 20171023-5407.

<sup>41</sup> *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, 162 FERC ¶ 61,012, P 1 (2018).

<sup>42</sup> Att'y Gen. of Mass., R.I. & Vt., Comments at 1-2, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (May 9, 2018), eLibrary No. 20180509-5190.

<sup>43</sup> See, e.g., David R. Baker, *Gas Plants Will Get Crushed by Wind, Solar by 2035, Study Says*, BLOOMBERG (Sept. 9, 2019), <https://www.bloomberg.com/news/articles/2019-09-09/gas-plants-will-get-crushed-by-wind-solar-by-2035-study-says> ("By 2035, it will be more expensive to run 90% of gas plants being proposed in the U.S. than it will be to build new wind and solar farms equipped with storage systems[.]").

<sup>44</sup> Complaint, *Paylor v. Mountain Valley Pipeline*, Docket No. CL18006874-00 (Va. Cir. Ct. Dec. 7, 2018) (alleging repeated violations of state and federal environmental laws, including discharging pollutants without a permit and failure to maintain and repair erosion control structures).

<sup>45</sup> *Atl. Ref. Co. v. Pub. Serv. Comm'n*, 360 U.S. 378, 391 (1959).

<sup>46</sup> 15 U.S.C. § 717f. FERC also regulates rates charged by these pipelines. 15 U.S.C. § 717c.

construction of a gas pipeline.<sup>47</sup> Pipeline companies have unsuccessfully sought to exercise eminent domain authority over state lands, raising significant federalism issues, including in a recent case decided by the Third Circuit in favor of New Jersey on this issue.<sup>48</sup>

Although FERC purports to consider a variety of factors when making need determinations,<sup>49</sup> the Commission routinely relies solely on so-called “precedent agreements” with companies that commit to purchase part or all of a proposed pipeline’s throughput. Frequently the companies signing these agreements are corporate affiliates of the company that is sponsoring its construction.

State attorneys general and other affected parties have objected to FERC’s inappropriately-narrow need determinations under the Natural Gas Act.<sup>50</sup> Among other deficiencies, FERC typically fails to review regional energy needs and opportunities and fails to evaluate non-fossil fuel alternatives – including clean energy procured pursuant to state policy – when approving new pipelines.<sup>51</sup>

Where electric ratepayers are asked to pay the costs of new infrastructure, attorneys general have used independent economic analysis as an effective tool in demonstrating that a proposed fossil fuel infrastructure project will not be cost effective.<sup>52</sup>

Environmental laws also provide opportunities for states to object to the construction of pipelines that are not adequately evaluated from an environmental perspective, or that may result in violations of state water quality standards.

The National Environmental Policy Act (NEPA), for example, requires preparation of an Environmental Impact Statement (EIS) for major pipeline projects before they can be approved

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<sup>47</sup> *But see City of Oberlin v. FERC*, Nos. 18-1248, 18-1261 (D.C. Cir. Sept. 6, 2019) (remanding to FERC to justify determination that contracts for export can support use of eminent domain).

<sup>48</sup> *In re PennEast Pipeline Co.*, Nos. 19-1191 – 19-1232, 2019 BL 338504, at \*12-13 (3rd Cir. Sept. 10, 2019); *see also* Transcript of Hearing on Motion for Preliminary Injunction, *Columbia Gas Transmission v. 0.12 Acres of Land, More or Less in Washington County, Maryland*, No. 19-1444, (D. Md. Aug. 21, 2019); *Sabine Pipe Line v. J.P. Morgan Chase Bank*, No. 1:16-CV-383, 2016 BL 491729, at \*1 (E.D. Tex. Sept. 22, 2016).

<sup>49</sup> *See* Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 88 FERC ¶ 61,227 (1999), *clarified*, Order Clarifying Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 90 FERC ¶ 61,128 (2000), *further clarified*, Order Further Clarifying Statement of Policy, *Certification of New Interstate Natural Gas Pipeline Facilities*, 92 FERC ¶ 61,094 (2000). FERC initiated a notice of inquiry proceeding to assess its pipeline certificate policy on April 19, 2018. Notice of Inquiry, *Certification of New Interstate Natural Gas Facilities*, 163 FERC ¶ 61,042 (2018). FERC has not made a decision in that docket.

<sup>50</sup> *See, e.g.*, Att’y’s Gen. of Mass., Ill., Md., N.J., R.I., Wash. & D.C., Comments at 2, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000 (July 25, 2018), eLibrary No. 20180725-5204.

<sup>51</sup> *See id.* at 5-8.

<sup>52</sup> PAUL J. HIBBARD & CRAIG AUBUCHON, ANALYSIS GRP. POWER SYSTEM RELIABILITY IN NEW ENGLAND: MEETING ELECTRIC RESOURCE NEEDS IN AN ERA OF GROWING DEPENDENCE ON NATURAL GAS (2015), <https://www.mass.gov/files/documents/2016/11/pe/reros-study-final.pdf> (report on behalf of the Massachusetts Office of the Attorney General).

by FERC.<sup>53</sup> NEPA reviews must include a thorough environmental analysis of foreseeable upstream and downstream greenhouse gas emissions that are likely to be associated with a project, including long-term greenhouse gas emissions associated with the project.

As it stands, however, a majority of current FERC commissioners has consistently declined to consider the climate impacts of new natural gas infrastructure as part of its public interest determination.<sup>54</sup> State attorneys general have challenged this practice as being inconsistent with recent case law,<sup>55</sup> as illustrated in the D.C. Circuit’s conclusion that where a pipeline project’s stated “entire purpose” is to transport natural gas to power plants, it is both foreseeable and indisputable that burning the natural gas will release climate pollution.<sup>56</sup>

Section 401 of the Clean Water Act provides an opportunity for states to object to water quality concerns associated with the construction of gas pipelines.<sup>57</sup> Section 401 requires that applicants for a federal license or permit demonstrate compliance with environmental requirements including state water quality standards.<sup>58</sup> Under the law, states have the authority to withhold certification or to grant it with conditions.<sup>59</sup>

The administration has issued guidance and a proposed new rule<sup>60</sup> which attempts to limit the scope of states’ statutory rights under Section 401. State attorneys general are opposing these attempts to erode states’ rights.<sup>61</sup>

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<sup>53</sup> See generally *Industries: Natural Gas*, FED. ENERGY REGULATORY COMM’N, (last updated June 11, 2019) <https://ferc.gov/industries/gas/enviro.asp>.

<sup>54</sup> See, e.g., *Gulf South Pipeline Co., LP*, 168 FERC ¶ 61,036 (2019) (split majority decision issuing a certificate for a natural gas pipeline project in which Commissioner LaFleur concurred and Commissioner Glick dissented). See generally Rich Glick & Matthew Christiansen, *FERC and Climate Change*, 40 ENERGY L.J. 1 (2019).

<sup>55</sup> Brief for N.Y., Md., Mass., N.J., OR., Wash., & D.C. as Amici Curiae Supporting Petitioners, *Otsego 2000 v. FERC*, No. 18-118 (D.C. Cir. Dec. 3, 2018).

<sup>56</sup> *Sierra Club v. FERC*, 867 F.3d 1357, 1372 (D.C. Cir. 2017); see also *Birckhead v. FERC*, 925 F.3d 510 (2019).

<sup>57</sup> The D.C. Circuit recently interpreted the Clean Water Act’s directive that a state act “within a reasonable period of time (which shall not exceed one year) after receipt of such request” to disallow an applicant from withdrawing and resubmitting the application to allow the permitting agency additional time to work through complex issues. *Hoopa Valley Tribe v. FERC*, 913 F.3d 1099, 1101 (D.C. Cir. 2019), *reh’g en banc denied*, 2019 U.S. App. LEXIS 12763 (D.C. Cir. Apr. 26, 2019), *petition for cert. filed* No. 19-257 (Aug. 26, 2019). Failure to act within the statutory time period means that the applicant can argue that the state has waived its Clean Water Act certification authority. The impacts of the *Hoopa Valley* decision are already being felt. Based on the reasoning in *Hoopa Valley*, FERC found that New York waived its Section 401 certification for a natural gas pipeline that was to be built over 250 streams and 80 acres of wetlands, even though New York’s denial had already been upheld in court on the merits. *Constitution Pipeline Co.*, 168 FERC ¶ 61,129 (2019).

<sup>58</sup> CLAUDIA COPELAND, CONG. RESEARCH SERV., RL97488, CLEAN WATER ACT SECTION 401: BACKGROUND AND ISSUES 1 (updated 2016), <https://fas.org/sgp/crs/misc/97-488.pdf>.

<sup>59</sup> *Id.*

<sup>60</sup> *Updating Regulations on Water Quality Certification*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/cwa-401/updates-regulations-water-quality-certification> (last visited Sept. 16, 2019).

<sup>61</sup> Att’y Gen. of N.Y., Cal., Colo., Conn., Me., Md., Mass., Minn., N.J., N.M., N.C., Or., Pa., R.I., Vt., Wash., Conn. Dep’t of Energy & Envtl. Prot., N.Y. State Dep’t of Envtl. Conservation, N.C. Dep’t of Envtl. Quality & Pa. Dep’t of Envtl. Prot., Response at 1, *EPA’s Request for Pre-Proposal Recommendations Regarding Clean Water Act Section 401 Water Quality Certifications*, Docket Id. EPA-HQ-OW-2018-0855 (May 24, 2019).

## Employing In-State Institutions and Mechanisms to Advance Clean Energy Laws and Policies

State attorneys general have a significant role to play in addressing in-state clean energy issues, particularly as states push for a more rapid transition to clean energy. In many jurisdictions, tensions are rising as utility customers and third-party providers challenge traditional monopoly models and new players enter the energy arena. State attorney general involvement on legal and policy issues in this area is a natural fit because of their traditional role in protecting consumers, ensuring corporate accountability, and protecting the environment.

State public utility commissions (PUCs or commissions) provide the traditional venue in which state energy policy issues are addressed. Commissions review and approve retail rates charged by investor-owned utilities,<sup>62</sup> approve utility plans to meet forecasted energy demand, and decide what investments in the electric distribution grid should be made. State commissions also consider issues such as the scope of appropriate activities that should be undertaken by state-regulated utilities including, for example, whether electric vehicle charging providers should be regulated as utilities by the state commission.<sup>63</sup>

State attorneys general have varying degrees of statutorily-directed involvement in utility matters. In some states, the attorney general serves as the “consumer advocate” who is primarily responsible for ensuring that state-sponsored utility monopolies do not overcharge for their services.<sup>64</sup> In other cases, this role is filled by a statutorily distinct consumer advocate.

The consumer advocate’s traditional role in commission proceedings has mirrored the typical state charge given to commissions, namely, to ensure reliable electricity service to state residents at the lowest possible costs. When PUCs limit their view of costs to the short-term they can be out of step with broader state clean energy laws and policy goals. These state clean energy law and policies recognize the need to evaluate costs through a broader lens that takes into account the long-term cost savings that will flow from the transition to clean energy.

Some states are addressing this mismatch by adopting new laws and policies that broaden the charge to commissions and consumer advocates to look beyond short-term costs. Among other

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<sup>62</sup> All states but Nebraska are served at least in part by investor-owned utilities. Municipally-owned utilities and cooperatively-owned utilities also serve customers but are typically not regulated by state utility commissions.

<sup>63</sup> See Catherine Morehouse, *Should EV Charging Stations Be Regulated As Utilities? Kentucky Joins Majority In Saying No*, UTILITYDIVE (June 17, 2019) <https://www.utilitydive.com/news/should-ev-charging-stations-be-regulated-as-utilities-kentucky-joins-major/556972/> (discussing decision on this issue in various states).

<sup>64</sup> Many states have an office, whether as part of the state attorney general office or separate, that is responsible for representing the interest of utility consumers in the state before the state utility commission. This office is known in various states by various names. For the sake of clarity, this report refers to the office responsible for representing the interests of consumers as the consumer advocate (when not speaking about a particular state).

strategies, many states are finding that commissions have opportunities to recognize otherwise-ignored climate-related costs into utility investment and ratemaking decisions.<sup>65</sup> For example, Colorado recently adopted new legislation that directs its utility commission to consider the cost of carbon emissions when evaluating competing utility proposals.<sup>66</sup> Other states have achieved the same result by interpreting their commissions' obligations to ensure that climate change externalities are taken into account when evaluating whether potential utility investments and utility rates are "just and reasonable."<sup>67</sup>

Some consumer advocates also are embracing a broadened sense of consumer interests and moving beyond a short-term cost frame to consider hidden climate change cost impacts and other public interest considerations embodied in state clean energy laws and policies. Massachusetts Attorney General Maura Healey has made this connection directly with her vision of a 21<sup>st</sup> century ratepayer advocate<sup>68</sup> – an advocate who evaluates the appropriateness of proposed utility rates by considering both near and long-term "costs" to consumers, including costs associated with the climate impacts of continued reliance on fossil fuels.<sup>69</sup>

Regardless of whether the attorney general serves as the state's formal consumer advocate or not, attorneys general often have responsibilities with regard to utility matters, as catalogued in Section III. For example, attorneys general have a powerful platform from which they can influence state policy and priorities and ensure that investments in energy infrastructure are thoughtfully undertaken.

These include transportation electrification efforts – around which there are many crucial policy decisions to be made – as well as investments in new electric generation infrastructure.<sup>70</sup> The transportation sector, as the largest sectoral emitter of greenhouse gases, offers a tremendous opportunity to reduce climate-damaging emissions, especially if states develop policy programs

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<sup>65</sup> For a comprehensive guide to current and possible climate damage valuation mechanisms in state utility proceedings, see DENISE A. GRAB, ILIANA PAUL & KATE FRITZ, INST. FOR POLICY INTEGRITY, OPPORTUNITIES FOR VALUING CLIMATE IMPACTS IN U.S. STATE ELECTRICITY POLICY (2019), <https://policyintegrity.org/publications/detail/opportunities-for-valuing-climate-impacts-in-u.s.-state-electricity-policy> [hereinafter "Valuing Climate Impacts"].

<sup>66</sup> See Jessica Bell, *Colorado's New Legislative Boost to Clean Energy*, LINKEDIN (July 16, 2019), <https://www.linkedin.com/pulse/colorados-new-legislative-boost-clean-energy-jessica-bell/>.

<sup>67</sup> Valuing Climate Impacts at 24. See also Bethany A. Davis Noll & Burcin Unel, *Markets, Externalities, and the Federal Power Act: The Federal Energy Regulatory Commission's Authority to Price Carbon Dioxide Emissions*, 27 N.Y.U. ENVTL. L.J. 1, 42 (2019).

<sup>68</sup> See Kevin Conroy, *Massachusetts Attorney General Maura Healey Describes the Role of the Ratepayer Advocate*, STATE AG INSIGHTS (June 15, 2015), <https://www.stateaginsights.com/2015/06/15/massachusetts-attorney-general-maura-healey-describes-the-role-of-the-ratepayer-advocate/>.

<sup>69</sup> See, e.g., *AG Healey Calls for State Plan on Electric Vehicles and New Clean Energy Goals*, OFFICE OF ATT'Y GEN. MAURA HEALEY (Feb. 15, 2018), <https://www.mass.gov/news/ag-healey-calls-for-state-plan-on-electric-vehicles-and-new-clean-energy-goals>.

<sup>70</sup> For example, Northeast and Mid-Atlantic states have formed the Transportation & Climate Initiative. *About Us*, TRANSP. & CLIMATE INITIATIVE: OF THE NE AND MID-ATL. STATES, <https://www.transportationandclimate.org/content/about-us> (last visited on Sept. 16, 2019).

to electrify the transportation industry that will then reap the benefits of a cleaner grid.<sup>71</sup> Attorneys general have used settlements they have reached with polluters – utilities and automakers (including, in particular, Volkswagen) – to support state programs to electrify the transportation sector, such as by initiating pilot programs to put electrical delivery trucks on the road<sup>72</sup> or helping plan the build out of electric vehicle charging infrastructure<sup>73</sup> for public use.

### Promoting Competition and Protecting Consumers

Different states have different levels of competition in electricity sales. Some states have wholesale market competition, often through the participation of their utilities and generators in RTOs, as discussed above. Some states also have deregulated their retail markets, allowing consumers to choose different electricity providers rather than the vertically-integrated utility that historically served as a monopoly supplier to captive customers.<sup>74</sup>

Attorneys general have always played an important role in promoting open, fair, and competitive markets, and in protecting consumers against fraud. Given the dynamic changes now occurring in the energy sector, and the many new players who are interacting with consumers – whether they be third-party electricity suppliers, solar panel installers, or oil and gas developers – attorney general oversight and enforcement is more important than ever.

Attorneys general can also ensure that these new players and new technologies are allowed to compete by identifying and removing barriers to entry. For example, attorneys general have advocated that vertically-integrated utilities reduce their costs and provide market-opening opportunities by expanding their use of competitive solicitations for different services. Attorneys general are well-positioned to promote the responsible deployment of new technologies across a variety of market designs.

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<sup>71</sup> *Reducing Your Transportation Footprint*, CTR. FOR CLIMATE AND ENERGY SOLS.,

<https://www.c2es.org/content/reducing-your-transportation-footprint/> (last visited Sept. 16, 2019).

<sup>72</sup> *Attorney General James Unveils First-Of-Its-Kind All-Electric Truck Program In New York City*, N.Y. STATE OFFICE OF THE ATT'Y GEN. (Apr. 17, 2019), <https://ag.ny.gov/press-release/attorney-general-james-unveils-first-its-kind-all-electric-truck-program-new-york-city>.

<sup>73</sup> Press Release, Office of Attorney General Maura Healey, AG Healey Calls for State Plan on Electric Vehicles and New Clean Energy Goals (Feb. 15, 2018), <https://www.law.nyu.edu/sites/default/files/ag-healey-state-ev-plan-press-release.pdf>.

<sup>74</sup> SANSEM SERGICI, THE BRATTLE GROUP, STATUS OF RESTRUCTURING: WHOLESALE AND RETAIL MARKETS 11 (2018), [http://www.ncsl.org/Portals/1/Documents/energy/energy\\_markets\\_S Sergici present 32498.pdf](http://www.ncsl.org/Portals/1/Documents/energy/energy_markets_S Sergici_present_32498.pdf).

## Achieving an Equitable Clean Energy Transition

While climate change is clearly an environmental issue, it is also an issue of equity, as research shows that communities of color and low-income communities are disproportionately impacted by climate change.<sup>75</sup> Additionally, low-income, rental, and certain other households spend a higher portion of their income on energy costs.<sup>76</sup>

Markets alone may not promote the deployment of climate and clean energy programs across all communities; rather, government involvement is necessary to ensure the equitable development of programs.<sup>77</sup> For example, the city of Minneapolis has a program to encourage solar installations in economically disadvantaged areas without displacing existing residents and land uses.<sup>78</sup> These programs benefit from involving community members to understand specific concerns, barriers, and goals.

Attorneys general have a key role to play in incorporating equity considerations into climate and clean energy policies. Some attorneys general have created special sections to focus on environmental justice more broadly, addressing the disproportionate burden of pollution and public health hazards borne by particular communities.<sup>79</sup> Attorneys general can also help to ensure that disadvantaged communities are a part of state and local governments' transition to the clean energy economy of the future.<sup>80</sup> Some of the issues discussed above, such as deceptive practices by electricity suppliers, can impact low-income ratepayers particularly hard.<sup>81</sup>

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<sup>75</sup> AFRIN SOPARIWALA, COMMUNICATIONS HUB, CLIMATE JUSTICE NARRATIVE 5 (2016), <https://climateaccess.org/sites/default/files/Climate%20Justice%20Narrative%20Hub%20%281%29.pdf>.

<sup>76</sup> Jeanne Herb and Marjorie Kaplan, *Field Notes: Equity & State Climate Policy* 8, RGGI PROJECT SERIES (Sept. 2019), <https://drive.google.com/file/d/1mB-12SYJHQV4VjFe40ItZFfvQPdLB-cz/view> [hereinafter, "Equity & State Climate Policy"].

<sup>77</sup> *Id.* at 1-2.

<sup>78</sup> Frank Jossi, *Solar is Thriving in Low-income Minneapolis Neighborhoods*, AP NEWS (Jan. 26, 2019), <https://www.apnews.com/639edff630f04b7e88208c767eea5581>.

<sup>79</sup> *Attorney General Becerra Establishes Bureau of Environmental Justice*, STATE OF CAL. DEPT. OF JUSTICE (Feb. 22, 2018), <https://oag.ca.gov/news/press-releases/attorney-general-becerra-establishes-bureau-environmental-justice>; *Attorney General, DEP File Lawsuits Across New Jersey Targeting Polluters in Lower-Income and Minority Communities*, NEW JERSEY OFFICE OF THE ATT'Y GEN (Dec. 6, 2018), <https://www.nj.gov/oag/newsreleases18/pr20181206a.html>.

<sup>80</sup> *See, e.g.*, Equity & State Climate Policy at 2.

<sup>81</sup> *See, e.g.*, Office of the Attorney General, *AG Healey Calls for Shut Down of Individual Residential Competitive Supply Industry to Protect Electric Customers*, MASS.GOV (Mar. 29, 2018), <https://www.mass.gov/news/ag-healey-calls-for-shut-down-of-individual-residential-competitive-supply-industry-to-protect> (finding that the average low-income customer paid \$231 more if enrolled with a competitive supplier than with their utility company).

Encouraging clean energy growth also has the potential to create well-paying, local jobs.<sup>82</sup> In Massachusetts, for instance, there are more clean energy jobs than there are total coal mining jobs in the U.S.<sup>83</sup> Attorneys general can promote and defend state clean energy policies as aligned with state economic interests.

## **Clean Energy Jobs: Growing and Well-Paying**

*Clean energy jobs **grew 3.6% in 2018** and outnumbered fossil fuel jobs **nearly 3 to 1**. Consumer demand and state policies are driving these increases, including in electric vehicle and storage manufacturing.*

*Nationwide the **fastest growing occupations** in 2018 were:*

- 1. Solar photovoltaic installers (\$42,680 annual median pay)*
- 2. Wind turbine service technicians (\$54,370 annual median pay)*

*Mean hourly wages for clean energy workers are “**higher and more equitable**,” exceeding national averages **by 8-19%**.*

*Sources:*

*Clean Jobs America, E2 (Mar. 2019), <https://www.e2.org/wp-content/uploads/2019/04/E2-2019-Clean-Jobs-America.pdf>.*

*Fastest Growing Occupations, BUREAU OF LABOR STATISTICS (Sept. 4, 2019), <https://www.bls.gov/ooh/fastest-growing.htm>.*

*MARK MURO ET AL., BROOKINGS, ADVANCING INCLUSION THROUGH CLEAN ENERGY JOBS (Apr. 2019).*

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<sup>82</sup> See, e.g., Amanda Ostuni, *Minnesota’s Solar Workforce Has More than Doubled Since 2015*, TWIN CITIES BUSINESS (Feb. 13, 2019), <http://tcbmag.com/news/articles/2019/february/minnesota-s-solar-workforce-has-more-than-doubled-since-2015> (discussing state policies and solar job growth).

<sup>83</sup> *Compare Clean Jobs in America 2019*, E2 (Mar. 13, 2019) <https://www.e2.org/reports/clean-jobs-america-2019/> (a 2019 report indicated that there were 116,491 clean energy jobs in Massachusetts), with *All Employees: Mining and Logging: Coal Mining*, U.S. Bureau of Labor Statistics, <https://fred.stlouisfed.org/series/CEU1021210001> (last updated Sept. 6, 2019) (a U.S. Bureau of Labor Statistics August 2019 report showed that there were 53,500 coal mining jobs nationwide).





## Section II. Case Examples of Attorney General Clean Energy Advocacy

This section provides recent examples of attorney general involvement in clean energy matters at the state and federal levels. These examples illustrate the scope of attorney general advocacy, but does not attempt to provide a comprehensive overview of the extensive involvement attorneys general have on clean energy.<sup>84</sup>

### Defending States' Clean Energy Rights Against Preemption and Commerce Clause Claims

The **California Attorney General** successfully defended California's Low Carbon Fuel Standard (LCFS), an initiative to reduce the greenhouse gas intensity of transportation fuels sold in California. Attorney General Kamala Harris defended the state's first iteration of the LCFS, noting that the standard did not violate the Commerce Clause because it only regulates the carbon intensity of fuels sold in California and did not discriminate against out of state fuels.<sup>85</sup> More recently, Attorney General Xavier Becerra successfully defended an updated LCFS against similar attacks.<sup>86</sup>

The **Oregon Attorney General** successfully defended Oregon's LCFS against a Commerce Clause and preemption challenge from oil and gas and trucking industries.<sup>87</sup> Attorney General Ellen Rosenblum argued that the standard distinguishes between fuels on the basis of carbon intensity and therefore does not violate the Commerce Clause, and also that the standard is not preempted by federal law.<sup>88</sup>

The **Attorney General of Illinois** successfully defended the state's Zero Emissions Credit (ZEC) program that compensates qualifying nuclear generators for the zero-carbon emissions attribute of their generation.<sup>89</sup> The Seventh Circuit Court of Appeals agreed with Attorney General Lisa Madigan that the state's program was not preempted by the Federal Power Act and did not run afoul of the dormant Commerce Clause. The Supreme Court denied *certiorari*.

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<sup>84</sup> The Center's website has a comprehensive database of actions on climate and clean energy matters, including a compilation of primary source documents, for additional reference. See *Attorney General Actions*, STATE ENERGY & ENVTL. IMPACT CTR. N.Y.U. SCH. L., <https://www.law.nyu.edu/centers/state-impact/ag-actions> (last visited Sept. 14, 2019).

<sup>85</sup> See Reply Brief for Appellants, *Rocky Mountain Farmers Union v. Goldstene*, No.12-15131 (9th Cir. Sept. 6, 2013).

<sup>86</sup> See *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070, 1107-08 (9th Cir. 2013).

<sup>87</sup> *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F.Supp.3d 1270 (D. Or. 2015), *aff'd*, 903 F.3d 903 (9th Cir. 2018), *cert. denied*, 204 L.E.2d 215 (2019).

<sup>88</sup> See Motion to Dismiss for State Defendants, *Am. Fuel & Petrochemical Mfrs. v. O'Keeffe*, 134 F.Supp.3d 1270 (D. Or. 2015) (No. 3:15-cv-00467-AA).

<sup>89</sup> See Brief for State Defendants-Appellees, *Electric Power Supply Ass'n v. Star*, 904 F.3d 518 (7th Cir. 2018) (Nos. 17 CV 1163 & 17 CV 1164).

The **Attorneys General of California, Connecticut, Massachusetts, New York, Oregon, Vermont and Washington** submitted an *amicus* brief in support of Illinois.<sup>90</sup> This coalition, joined by Attorney General Madigan, also submitted an *amicus* brief in support of the New York Public Service Commission’s defense of New York’s ZECs program.<sup>91</sup>

The **Washington Attorney General** is defending the state’s permit denial for a company’s coal export terminal near the Columbia River as the terminal would cause adverse environmental impacts. Attorney General Bob Ferguson noted that the permit denial is not preempted under the Constitution’s foreign affairs doctrine as the state acted pursuant to federally delegated authority in denying the permit.<sup>92</sup> Similarly, because the Clean Water Act authorizes Washington to deny federal permits if the state concludes that a proposal will harm state water quality standards, the permit denial does not unconstitutionally discriminate against the company’s efforts to ship coal from Wyoming and Montana to Asia.<sup>93</sup>

The **Attorneys General of California, Maryland, Massachusetts, New Jersey, New York and Oregon** submitted an *amicus* brief in support of Washington’s authority to deny the permit for the coal export terminal. The coalition noted that the Commerce Clause does not constrain states from taking action to protect the health, safety, and environmental interests of its residents.<sup>94</sup>

## Objecting to a Coal Bail-Out

The **Attorney General of Massachusetts** led a multistate coalition of attorneys general in successfully objecting to the Department of Energy’s 2017 Notice of Proposed Rulemaking to require wholesale electricity markets to subsidize coal plants. The **Attorneys General of Massachusetts, California, Connecticut, Illinois, Maryland, North Carolina, Oregon, Rhode Island, Vermont, and Washington** told FERC that finalizing the proposal would violate the Federal Power Act in the name of the undefined concept of “resilience.”<sup>95</sup> The attorneys general emphasized that the proposed bail-out was not supported by any credible analysis and that it would impermissibly undermine state renewable energy and climate goals as well as general state authority over electricity generation. The attorneys general warned that the

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<sup>90</sup> Brief for Cal., Conn., Mass., N.Y., Or., Vt., & Wash. as Amici Curiae Supporting Defendants-Appellees, *Electric Power Supply Ass’n v. Star*, 904 F.3d 518 (7th Cir. 2018) (Nos. 17 CV 1163 & 17 CV 1164).

<sup>91</sup> See Brief of Cal., Conn., Mass., N.Y., Or., Vt., & Wash. as Amici Curie Supporting Defendants.-Appellees, *Coal. For Competitive Elec. v. Zibleman*, 906 F.3d 41 (2d Cir. 2018) (No. 17-2654-cv).

<sup>92</sup> See State Defendants Motion for Summary Judgement on CNSF’s Foreign Affairs Doctrine Claim, *Lighthouse Resources Inc. v. Inslee* (W.D. Wash. Jan. 24, 2019) (No. 3:18-cv-05005-RJB).

<sup>93</sup> See State Defendants Motion for Summary Judgement on Commerce Clause Issues, *Lighthouse Resources Inc. v. Inslee* (W.D. Wash. Feb. 13, 2019) (No. 3:18-cv-05005-RJB).

<sup>94</sup> See Brief of Cal., Md., N.J., N.Y., Or., & Mass. as Amici Curie Brief Supporting Defendants Motion for Summary Judgment on Commerce Clause Issues, *Lighthouse Resources Inc. v. Inslee* (W.D. Wash. Feb. 14, 2019) (No. 3:18-cv-05005-RJB).

<sup>95</sup> See Att’y Gens. Of Mass., Cal., Conn., Ill., Md., N.C., Or., R.I., Vt., & Wash. & Conn. Dep’t of Energy & Env’tl. Prot., R.I. Div. of Pub. Util. & Carriers, & N.H. Office of Consumer Advocate, Initial Comments at 19-20, *Grid Reliability & Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017), eLibrary No. 20171023-5466.

proposal would result in “an extraordinary transfer of wealth from customers to generation owners with only undefined and unquantified customer benefits, if any, but certain adverse environmental and public health effects.”<sup>96</sup> Other attorneys general made similar points.<sup>97</sup>

## Ensuring that FERC and Regional Transmission Organizations Do Not Adopt Market Rules that Discriminate Against Clean Energy

Following FERC’s abandonment of the coal bail-out proposal, FERC invited comment on whether Regional Transmission Organizations should take other steps to subsidize incumbent power generators for grid resilience purposes.<sup>98</sup> **Attorneys General Matt Denn of Delaware and Brian Frosh of Maryland** filed comments noting that that PJM RTO does not have a reliability or resilience problem that would justify providing additional subsidies to incumbent power generators.<sup>99</sup> **Attorneys General Maura Healey of Massachusetts, Peter Kilmartin of Rhode Island and Thomas Donovan, Jr. of Vermont** objected to forcing ratepayers to subsidize uneconomic, inefficient resources, taking issue with ISO-New England’s (ISO-NE) concerns about fuel security.<sup>100</sup> **Attorney General Bill Schuette of Michigan** submitted comments on behalf of the Michigan Public Service Commission, noting that states are best positioned to address resilience at the local level.<sup>101</sup>

FERC has not yet taken action on the resilience docket. The **Attorneys General of Massachusetts, California, Illinois, Maryland, Michigan, Minnesota, New York, Oregon, Vermont, and D.C.** have urged Commissioner McNamee to recuse himself from the proceeding given his record of promoting subsidies to uneconomic high-emitting generation.<sup>102</sup>

### Objecting to Discriminatory FERC and PJM Capacity Market Actions

The **Attorneys General of Delaware, Illinois, Kentucky, Maryland, New Jersey, and D.C.** have objected to PJM Interconnection’s (PJM) proposals that could curb the ability of state-supported clean energy resources to participate in the PJM forward capacity market. FERC

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<sup>96</sup> *Id.* at 44.

<sup>97</sup> See, e.g., Joint Consumer Advocates of the PJM Region, Comments, *Grid Reliability & Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017), eLibrary No. 20171023-5383 (including the Delaware Attorney General on behalf of the Division of Public Advocate and the Kentucky Attorney General); New York Attorney General, Initial Comments, *Grid Reliability & Resilience Pricing*, Docket No. RM18-1-000 (Oct. 23, 2017), eLibrary No. 20171023-5407.

<sup>98</sup> See *Grid Reliability and Resilience Pricing*, 162 FERC ¶ 61,012, P 1 (2018).

<sup>99</sup> See Consumer and Public Interest Advocates, Comments, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (May 9, 2018), eLibrary No. 20180509-5202.

<sup>100</sup> See Att’y Gen. of Mass., R.I., & Vt., Comments at 21-22, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (May 9, 2018), eLibrary No. 20180509-5190.

<sup>101</sup> See Michigan Public Services Commission, Reply Comments at 2, *Grid Resilience in Regional Transmission Organizations and Independent System Operators*, Docket No. AD18-7-000 (May 9, 2018), eLibrary No. 20180509-5225.

<sup>102</sup> See Att’y Gen. of Mass., Cal., Ill., Md., Mich., Minn., N.Y., Or., Vt., & D.C., Comments, *Grid Resilience in RTOs/ISOs*, Docket No. AD18-7-000 (Jan. 28, 2019), eLibrary No. 20190128-5152.

previously ordered PJM to change its market capacity rules because they did not address “the price suppressive impact of resources receiving out-of-market support.”<sup>103</sup>

**Attorneys General Brian Frosh of Maryland, Lisa Madigan of Illinois, Karl Racine of D.C., Matt Denn of Delaware, and Gurbir Grewal of New Jersey** wrote an op-ed noting the high stakes of this proceeding.<sup>104</sup> They pledged to fight back against the administration’s continued attempts to penalize states pursuing clean energy goals.

The complainants in these proceedings and FERC itself specifically targeted so-called “out-of-market” payments provided by certain states to support the entry or continued operation of preferred generation resources. **Attorneys General Madigan,<sup>105</sup> Grewal (on behalf of the New Jersey Board of Public Utilities),<sup>106</sup> and Andy Beshear of Kentucky<sup>107</sup>** sought rehearing of this order that put PJM’s capacity market on a collision course with state clean energy programs.

Several attorneys general also participated in the subsequent proceeding to consider alternative market rules, offering detailed comments. **Attorney General Madigan** questioned the contention that out-of-market revenues suppress capacity prices, noting that capacity prices had increased despite Illinois’s expenditure of more than \$100 million through its Zero Emissions Credit program to keep a single nuclear plant online.<sup>108</sup> **Attorney General Racine** commented on the importance of the District’s Renewable Portfolio Standard and commitment to moving to a carbon-free energy future.<sup>109</sup> **Attorney General Grewal** explained, as counsel for the New Jersey Board of Public Utilities, how FERC would be arbitrarily and unlawfully discriminating against state policies if it pursues certain draconian alternatives, and that state environmental attribute programs correct for long-standing deficiencies in FERC’s markets.<sup>110</sup>

Given the importance of the direction of PJM to states’ abilities to pursue clean energy goals, **Attorneys General Racine, Frosh, and Kathleen Jennings of Delaware** sent a letter regarding

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<sup>103</sup> *Calpine Corp. v. PJM Interconnection, LLC*, 163 FERC ¶ 61,236, P 5 (2018).

<sup>104</sup> Brian Frosh, *We’ll Fight the Trump Administration’s Assault on Clean Energy*, THE HILL (Nov. 13, 2018, 12:30 PM), <https://thehill.com/opinion/energy-environment/415702-well-fight-the-trump-administrations-assault-on-clean-energy>.

<sup>105</sup> See People of Illinois, Request for Rehearing, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL16-49-000 et al. (July 30, 2018), eLibrary No. 20180730-5274.

<sup>106</sup> See New Jersey Board of Public Utilities, Request for Rehearing, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL16-49-000 et al. (July 30, 2018), eLibrary No. 20180730-5219.

<sup>107</sup> See D.C. Office of the People’s Counsel, Maryland Office of the People’s Counsel, & Kentucky Office of the Attorney General, Request for Rehearing, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL16-49-000 et al. (July 30, 2018), eLibrary No. 20180730-5273.

<sup>108</sup> See People of Illinois, Responsive Brief at 13-14, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL18-178-000 et al., *PJM Interconnection, LLC* (Nov. 6, 2018), eLibrary No. 20181106-5223.

<sup>109</sup> See Att’y Gen. for D.C., Reply Comments, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL18-178-000 et al. (Nov. 6, 2018), eLibrary No. 20181106-5206.

<sup>110</sup> See New Jersey Board of Public Utilities, Reply Argument, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL18-178-000 et al. (Nov. 6, 2018), eLibrary No. 20181106-5117; see also New Jersey Board of Public Utilities, Initial Argument, *Calpine Corp. v. PJM Interconnection, LLC*, Docket Nos. EL18-178-000 et al. (Oct. 2, 2018), eLibrary No. 20181002-5291.

PJM’s search for its next president and chief executive officer.<sup>111</sup> They urged that the new PJM leader must “purposely engage with states, localities, and stakeholders” to achieve the clean energy transitions that so many states have identified as a priority.<sup>112</sup>

### Objecting to Discriminatory ISO-NE Fuel Security Proposals

The **Massachusetts Attorney General** is actively engaged in ISO-NE “fuel security” proceedings<sup>113</sup> to ensure that ISO-NE does not adopt policies that undermine state clean energy programs or unjustly burden ratepayers.

Attorney General Maura Healey challenged the modeling that ISO-NE performed to determine whether the region had a fuel security need. She urged FERC to direct ISO-NE to rerun its modeling to incorporate stakeholder-proposed scenarios that recognized the existing interconnected renewable energy fleet and included well-supported assumptions such as that the New England states would meet their RPS goals.<sup>114</sup> When ISO-NE used similar modeling to determine that retaining certain natural gas fired units was needed to ensure fuel security, Attorney General Healey again questioned the underlying analysis used to justify a costly out-of-market contract. Noting that these contracts would require customers to pay \$400 million to one generator over two years, Attorney General Healey argued that the request would put an unwarranted burden on ratepayers.<sup>115</sup> After FERC allowed the contracts to move forward, Attorney General Healey continued to scrutinize the terms of such contracts to ensure ratepayer protections.<sup>116</sup>

Attorney General Healey has also participated in the subsequent proceeding established by FERC to consider “specific regional fuel security concerns” in ISO-NE.<sup>117</sup> She challenged ISO-NE’s proposed interim energy security program to ensure that any asserted benefits actually warrant the costs.<sup>118</sup> She also put forth independent proposals that would better protect customers and promote renewable generation than the ISO-NE proposals.

Attorney General Healey continues to scrutinize ISO-NE’s latest fuel security proposals, advocating for right-sized, fair and least cost approaches.<sup>119</sup>

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<sup>111</sup> See Att’y Gens. of D.C., Del., & Md., *Letter to PJM Search Committee Regarding PJM President & Chief Executive Officer Search* (July 5, 2019), [https://www.law.nyu.edu/sites/default/files/state-ag-letter-pjm-pres\\_0.pdf](https://www.law.nyu.edu/sites/default/files/state-ag-letter-pjm-pres_0.pdf).

<sup>112</sup> *Id.* at 2.

<sup>113</sup> See *ISO New England Inc.*, 164 FERC ¶ 61,003, P 38 (2018).

<sup>114</sup> Comments and Partial Protest of the Massachusetts Attorney General at 5, Docket Nos. ER18-2364-000, EL18-182-000 (Sept. 21, 2018), eLibrary No. 20180921-5139.

<sup>115</sup> See *id.* at 1.

<sup>116</sup> See, e.g., Comment and Partial Protest of the Massachusetts Attorney General, Docket No. ER18-1639 (Mar. 22, 2019), eLibrary No. 20190322-5071.

<sup>117</sup> *ISO New England Inc.*, 164 FERC ¶ 61,003, P 4 (2018).

<sup>118</sup> Comments and Partial Protest of the Massachusetts Attorney General in Docket No. ER19-1428-000 (Apr. 12, 2019), eLibrary 2019-0412-5217.

<sup>119</sup> See, e.g., Comment and Partial Protest of the Massachusetts Attorney General, Docket No. ER18-1639 (Mar. 22, 2019), eLibrary No. 20190322-5071.

The development of new offshore wind resources is an important element of the New England region's transition to clean energy. By failing to take action on a waiver request,<sup>120</sup> FERC effectively blocked a key wind developer (Vineyard Wind) from participating in the ISO-NE capacity market.<sup>121</sup> Attorney General Healey submitted a letter to FERC highlighting how the Commission's inaction would cost customers tens of millions of dollars and stand in the way of Massachusetts's ability to pursue its clean energy policies.<sup>122</sup>

## Insisting that Pipeline Projects Account for Climate Impacts

Attorneys general have taken action to insist that natural gas pipeline projects fully account for, and evaluate, the potential climate impacts associated with indirect upstream and downstream emissions of greenhouse gases, as required by the National Environmental Policy Act and the Natural Gas Act. Emissions of methane throughout the chain of natural gas production, transportation and final use are of particular concern because methane has 86 times the climate-forcing effect of carbon over a 20-year timeframe, and the oil and gas industry is the largest source of U.S. methane emissions.<sup>123</sup>

***Attorneys general have taken action to insist that natural gas pipeline projects fully account for, and evaluate, the potential climate impacts associated with indirect upstream and downstream emissions of greenhouse gases, as required by the National Environmental Policy Act and the Natural Gas Act.***

The **Attorneys General of Massachusetts, Illinois, Maryland, New Jersey, Rhode Island, Washington, and D.C.** submitted comments to FERC in response to a Notice of Inquiry inviting comments on FERC's policy statement on the certification of new natural gas transportation facilities.<sup>124</sup> This coalition, led by Attorney General Maura Healey, urged FERC to: more thoroughly consider the need for proposed projects; fully evaluate potential environmental harm, including climate impacts, in its public interest determinations; identify and analyze alternatives to a project on a regional basis, including clean energy and other non-pipeline options; describe and take into account state environmental and land use policies that may be impacted by proposed projects; and not allow

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<sup>120</sup> See Vineyard Wind LLC, Petition for Waiver of Tariff Provisions and Expedited Commission Action, *Vineyard Wind LLC*, Docket No. ER19-570-000 (Dec. 14, 2018), eLibrary No. 20181214-5267; see also Statement of Commissioner Cheryl A. LaFleur & Commissioner Richard Glick, *Vineyard Wind LLC*, Docket No. ER19-570 (Feb. 4, 2019), eLibrary No. 20190205-3003.

<sup>121</sup> See Jessica Bell, *FERC Inaction Translates to Inequity in ISO-New England*, LINKEDIN (Apr. 1, 2019), <https://www.linkedin.com/pulse/ferc-inaction-translates-inequity-iso-new-england-jessica-bell/>.

<sup>122</sup> See Letter from Attorney General Maura Healey to Chairman Chatterjee & Commissioners McNamee, LaFleur, and Glick, *Vineyard Wind LLC*, Docket No. 19-570-000 (Feb. 12, 2019), eLibrary No. 20190213-5052.

<sup>123</sup> See Att'ys Gen. of Cal., Conn., Ill., Iowa, Me., Md., Mass., N.J., N.Y., Or., R.I., Vt., & Wash., Comments at 3, 5, *Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration*, EPA-HQ-OAR-2017-0483 (Dec. 17, 2018); see also *Overview of Greenhouse Gases: Methane*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/ghgemissions/overview-greenhouse-gases> (last visited Sept. 14, 2019).

<sup>124</sup> See Att'ys Gen. of Mass., Ill., Md., N.J., R.I., Wash. & D.C., Comments, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000 (July 25, 2018), eLibrary No. 20180725-5204.

construction to proceed when rehearing requests are pending.<sup>125</sup> The coalition emphasized, in particular, that FERC must honor legal obligations to consider the climate impacts of proposed pipeline projects under the Natural Gas Act and the National Environmental Policy Act. The comments recommended that FERC utilize social cost of carbon and state policies as tools when evaluating the significance of a projects' potential greenhouse gas emissions.

The **Attorney General of New York** also commented on this Notice, incorporating the multistate coalition's comments and emphasizing several points.<sup>126</sup> More specifically, Attorney General Barbara Underwood focused on the need for FERC to wait until a project applicant has all state permits and other approvals needed before issuing a certificate and was critical of FERC's use of tolling orders to extend FERC's time to act on rehearing requests, delaying judicial review.

The **Attorneys General of New York, Maryland, New Jersey, Oregon, Washington, Massachusetts, and D.C.** filed an *amicus* brief in *Otsego 2000 v. FERC* in the D.C. Circuit supporting landowners and environmental petitioners seeking review of a FERC certificate order for a natural gas pipeline project.<sup>127</sup> In the underlying proceeding, FERC articulated a new pipeline environmental review policy on rehearing that curtailed full evaluation of potential climate impacts.<sup>128</sup> Led by Attorney General Underwood, the coalition told the court that it was wrong for FERC to adopt a new policy in this manner, rather than in the pending Notice of Inquiry docket. The coalition further criticized FERC's refusal to evaluate the project's reasonably foreseeable upstream and downstream GHG emissions impacts in contravention of D.C. Circuit case law.

## Resisting the Exercise of Eminent Domain Over State Land

Under the Natural Gas Act, once FERC grants a pipeline company a certificate of public convenience and necessity to build a project, the company can exercise the power of eminent domain to obtain land, rights-of-way, or other property.<sup>129</sup> Natural gas companies have claimed that once FERC has issued a certificate of public convenience for a project, the companies can exercise the power of eminent domain over state lands.

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<sup>125</sup> See *id.* at 4. This practice – allowing construction on the project to commence while delaying ruling on rehearing requests, which effectively prevents judicial review – has been recently subject to criticism by D.C. Circuit Judge Millett. See *Allegheny Defense Project v. FERC*, 932 F.3d 940, 943-48 (D.C. Cir. 2019) (Millett, J., concurring).

<sup>126</sup> Att'y Gen. of N.Y., Comments, *Certification of New Interstate Natural Gas Facilities*, Docket No. PL18-1-000 (July 25, 2018), eLibrary No. 20180725-5220.

<sup>127</sup> See Brief for N.Y., Md., Mass., N.J., Or., Wash., & D.C. as Amici Curiae Supporting Petitioners, *Otsego 2000 v. FERC*, No. 18-118 (D.C. Cir. Dec. 3, 2018). The court dismissed the petition on standing grounds. See Judgment, *Otsego 2000 v. FERC*, No. 18-1188 (D.C. Cir. May 9, 2019).

<sup>128</sup> *Dominion Transmission, Inc.*, 163 FERC ¶ 61,128 (2018).

<sup>129</sup> 15 U.S.C. § 717(h).

The **Maryland Attorney General** successfully fought a pipeline company's attempt to condemn land owned by the State of Maryland for use as a rails-to-trail bike path.<sup>130</sup> Attorney General Brian Frosh prevailed in his argument that state immunity from suit under the Eleventh Amendment blocked the private company's exercise of eminent domain over state lands.

The **New Jersey Attorney General** successfully resisted a pipeline company's taking of state land for pipeline construction.<sup>131</sup> The Third Circuit agreed with Attorney General Gurbir Grewal that allowing a private entity to condemn state land, including lands that the state has preserved for recreational, conservation, and agricultural uses, violates New Jersey's sovereign immunity under the Eleventh Amendment.

## Supporting Local Prohibitions on Fossil Fuel Activities

In addition to defending the exercise of state authority that advances state clean energy interests, attorneys general have supported complementary in-state local government efforts.

The **California Attorney General** filed an *amicus* brief in support of the City of Oakland's ordinance prohibiting the storage and handling of coal for export at Oakland Bulk and Oversized Terminal (OBOT) at the port of Oakland.<sup>132</sup> OBOT had filed a lawsuit alleging that the prohibition violates the Commerce Clause. Attorney General Xavier Becerra noted that the City had constitutionally exercised its police power in passing the ordinance in response to concerns about the health and safety impacts of transporting coal at the port on nearby residents in a community of color.

The **Attorneys General of Massachusetts and Maine** along with the **Attorneys General of California, Connecticut, Delaware, Maryland, Minnesota, New York, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and D.C.** filed an *amicus* brief in support of a City of South Portland, Maine law that prohibits the export and loading of crude oil along its waterfront.<sup>133</sup> Portland Pipe Line Corporation, which was seeking to develop a project to export crude oil, challenged the 2015 ordinance as violating the Commerce Clause. The coalition of attorneys general defended the local ordinance as a lawful exercise of the City's police power to protect public health and the environment by regulating the siting of oil pipelines and vessel-loading activities.

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<sup>130</sup> See Mot. to Dismiss, *Columbia Gas Transmission, LLC v. 0.12 Acres of Land in Wash. Cty., Md.*, No. 1:19-cv-01444-GLR (D. Md. June 17, 2019); see also Transcript of Hearing on Motion for Preliminary Injunction, *Columbia Gas Transmission v. 0.12 Acres of Land, More or Less in Washington County, Maryland*, No. 19-1444, (D. Md. Aug. 21, 2019).

<sup>131</sup> See Merits Brief for Appellants, *In re Penneast Pipeline Co.*, No. 19-1191, 2019 WL 1883547 (3d Cir. Apr. 18, 2019); see also *In re Penneast Pipeline Co.*, Nos. 19-1191 et al., 2019 WL 4265190, at \*5-11 (3rd Cir. Sept. 11, 2019).

<sup>132</sup> Brief of Cal. as Amicus Curiae Supporting Appellant, *City of Oakland v. Oakland Bulk & Oversized Terminal, LLC*, No. 18-16105 (9th Cir. Dec. 17, 2018).

<sup>133</sup> Brief of Mass., Cal., Conn., Del., Me., Md., Minn., N.Y., Or., Penn., R.I., Vt., Wash., & D.C. as Amici Curiae Supporting Appellees, *Portland Pipe Line Corp. v. City of South Portland*, No. 18-2118 (1st Cir. Apr. 12, 2019).

## Insisting that Utility Investments Benefit Consumers and the Environment

In states in which vertically-integrated utilities submit comprehensive planning documents (commonly known as Integrated Resource Plans or IRPs) for state review and approval, attorneys general can play an important role in ensuring that utilities' proposed investments are consistent with state clean energy laws and policies, benefit customers, invite increased competition and market entry (through competitive procurements and other mechanisms) and are undertaken in a sustainable manner.

The **Michigan Attorney General** participated in a recent Michigan Public Service Commission (MPSC) proceeding to consider Consumers Energy's IRP.<sup>134</sup> Attorney General Dana Nessel noted that she supported moving to renewable energy sources that can reduce carbon emissions and that the IRP must balance affordability, reliability and renewability of its energy products.<sup>135</sup> The MPSC ultimately approved a settlement with Attorney General Nessel's support that ensures that Consumers will replace its coal plants in favor of renewable energy sources by 2040, eliminating 90 percent of the company's carbon emissions.<sup>136</sup>

The **North Carolina Attorney General** participated in a recent Duke Power IRP proceeding and called for additional analysis regarding several clean energy issues.<sup>137</sup> In particular, Attorney General Josh Stein highlighted the need for Duke Power to: (1) more thoroughly evaluate how energy storage could be paired with renewable generation; (2) consider climate change-related costs to rate payers when considering potential increases in natural gas generation; and (3) give equal consideration to demand-side management and energy savings opportunities alongside investments in new power plants.

The **Rhode Island Attorney General** recently opposed the development of a new in-state natural gas-fired plant, citing multiple objections to the plant on the basis of the best interests of the state, taxpayers, and natural resources.<sup>138</sup> Attorney General Peter Kilmartin noted that the proposed plant would exacerbate climate change and undermine the state's greenhouse gas reduction goals. He also challenged the need for the power plant, given state clean energy

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<sup>134</sup> See Mich. Dep't of the Attorney Gen., *Michigan AG Nessel Announces Progress in Protecting Michigan Utility Consumers, Ensuring Cleaner Energy Sources for State*, MICHIGAN.GOV, [https://www.michigan.gov/ag/0,4534,7-359-92297\\_47203-500698--,00.html](https://www.michigan.gov/ag/0,4534,7-359-92297_47203-500698--,00.html) (last visited Sept. 15, 2019).

<sup>135</sup> See *id.*; Mich. Attorney General, Initial Brief Regarding the Settlement Agreement, *In the Matter of the Application of Consumers Energy Company for Approval of an Integrated Resource Plan under MCL 460.6t and for Other Relief*, Case No. U-20165 (Mich. Pub. Serv. Comm'n May 8, 2019).

<sup>136</sup> See Mich. Pub. Serv. Comm'n, Order Approving Settlement Agreement, *In the Matter of the Application of Consumers Energy Company for Approval of an Integrated Resource Plan under MCL 460.6t and for Other Relief*, Case No. U-20165 (Mich. Pub. Serv. Comm'n June 7, 2019).

<sup>137</sup> See N.C. Attorney General, Initial Comments, *In Matter of 2018 Integrated Resources Plan and Related 2018 Compliance Plans*, Docket No. E-100, Sub 157 (N.C. Util. Comm'n Mar. 7, 2019).

<sup>138</sup> See *Press Releases: AG Kilmartin Opposes Invenenergy Power Plant Due to Recent Developments*, RI.GOV (Jan. 12, 2018), <https://web.archive.org/web/20180118033810/https://www.ri.gov/press/view/32281>.

policies and the on-going expansion of wind and solar generation in the state. Additionally, he questioned where the power plant would get the water needed to cool its facility.<sup>139</sup>

The **Virginia Attorney General** participated in a recent Dominion Virginia Power's IRP proceeding.<sup>140</sup> The testimony submitted on behalf of Attorney General Mark Herring was critical of Dominion's future capacity and energy projections which were based on unreasonably pessimistic modeling and unrealistic assumptions, including an assumption that Dominion would not take advantage of favorable power purchases from organized wholesale markets.

## Protecting Consumers and Communities from Deceptive Energy Practices

In competitive state energy markets, third party electricity suppliers can compete with the local utility company to supply and sell electricity to consumers.<sup>141</sup> Sometimes, the competitive suppliers engage in fraudulent or misleading practices, preying on uninformed consumers. Further, as energy and natural resource companies seek to use more land for energy infrastructure and development – from oil and gas development to the siting of solar panels – important consumer protection issues arise.

The **Colorado Attorney General**, as counsel to the Colorado Oil and Gas Conservation Commission, has expressed his commitment to support the commission's broad authority to regulate oil and gas development to protect public health, safety, and the environment.<sup>142</sup> Attorney General Phil Weiser's commitment also includes protecting local communities' interests as they enter into surface use agreements for oil and gas development.

The **Connecticut Attorney General** worked with Connecticut's Consumer Counsel in seeking sanctions against the state's largest electricity supplier for its deceptive tactics.<sup>143</sup> Attorney General William Tong participated in the state commission proceeding that resulted in a \$1.5 million fine after finding the company failed to have Spanish-language materials available,

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<sup>139</sup> See Brief of Attorney Gen. Peter F. Kilmartin as Amicus Curiae Supporting of Plaintiffs' Objection to Defendants' Motions for Summary Judgement, *Rhode Island v. Clean River Energy, LLC*, Nos. PC 2017-1037 & PC 2017-1039 (R.I. Super. Ct. Aug. 3, 2018).

<sup>140</sup> See Office of the Attorney General of Virginia, Direct Testimony and Exhibits of Scott Norwood, *In re Va. Elec. & Power Co.'s Integrated Res. Plan*, Case No. PUE-2016-00049 (Aug. 17, 2016).

<sup>141</sup> See *Regulated Versus Deregulated . . . What You Should Know*, DUKE ENERGY (June 9, 2017), <https://nuclear.duke-energy.com/2017/06/09/regulated-versus-deregulated-what-you-should-know>.

<sup>142</sup> See *Attorney General Phil Weiser Pledges to Work with State Agencies, Local Communities to Ensure Oil/Gas Development Is Consistent with Public Health, Safety, and Environment*, COLO. ATTORNEY GEN. (Jan. 14, 2019), <https://coag.gov/press-releases/01-14-19/>.

<sup>143</sup> See Office of the Attorney General & Office of the Consumer Counsel, *Attorney General Tong, Consumer Counsel Katz Applaud Final Decision that Imposes \$1.5M Fine, Penalties on Direct Energy Electric Supplier*, CT.gov (May 1, 2019), <https://portal.ct.gov/AG/Press-Releases/2019-Press-Releases/AG-TONG-COUNSEL-KATZ-APPLAUD-FINAL-DECISION-THAT-IMPOSES-15M-FINE-ON-DIRECT-ENERGY-ELECTRIC-SUPPLIER>.

misstated its standard service price and misrepresented cancellation fees, among other violations.

The **Illinois Attorney General** introduced legislation to provide Illinois consumers with meaningful information to help them understand what signing up with an alternative energy supplier will mean for their bills.<sup>144</sup> Attorney General Kwame Raoul's legislation was supported by consumer, housing, and environmental groups and has been enacted by the legislature.<sup>145</sup> His predecessor, Attorney General Lisa Madigan, secured \$2.65 million in refunds for customers defrauded by an alternative retail electric supplier that engaged in aggressive and deceptive tactics to enroll customers.<sup>146</sup>

The **Massachusetts Attorney General** has issued two ground-breaking reports detailing the consumer losses attributable to the practices of unscrupulous residential competitive suppliers.<sup>147</sup> The reports show that customers living in low-income and minority communities were much more likely to be targeted by competitive suppliers. Attorney General Maura Healey has vigorously prosecuted competitive suppliers for violations of the state consumer protection law. Attorney General Healey recently sued Starion Energy, alleging consumer protection violations, and when Starion declared bankruptcy in Delaware federal court, she successfully argued that the bankruptcy court should abstain from further proceedings until the Massachusetts state court reached a liability determination. She also negotiated a \$5 million settlement with Viridian Energy involving allegations that Viridian engaged in deceptive and unfair sales tactics.<sup>148</sup>

The **Minnesota Attorney General** supports Minnesota's nation-leading community solar program by ensuring that state residents have access to detailed information about community

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<sup>144</sup> See *Attorney General Raoul Applauds Passage of Legislation to Strengthen Regulation of Alternative Retail Energy Suppliers*, ILL. ATTORNEY GEN. (May 30, 2019), [http://www.illinoisattorneygeneral.gov/pressroom/2019\\_05/20190530.html](http://www.illinoisattorneygeneral.gov/pressroom/2019_05/20190530.html).

<sup>145</sup> See *Bill Status of SB0651*, ILL. GEN. ASSEMBLY, <http://www.ilga.gov/legislation/BillStatus.asp?DocTypeID=SB&DocNum=651&GAID=15&SessionID=108&LegID=116588> (last updated Aug. 27, 2019).

<sup>146</sup> See *Attorney General Madigan Secures \$2.65 Million in Refunds for Illinois Residents Defrauded by Sperian Energy*, ILL. ATTORNEY GEN. (Oct. 15, 2018), [https://web.archive.org/web/20190220102457/http://www.illinoisattorneygeneral.gov/pressroom/2018\\_10/20181015.html](https://web.archive.org/web/20190220102457/http://www.illinoisattorneygeneral.gov/pressroom/2018_10/20181015.html).

<sup>147</sup> Office of the Attorney General, *2019 AGO Competitive Electric Supply Report*, MASS.GOV (July 31, 2019), <https://www.mass.gov/doc/2019-ago-competitive-electric-supply-report>; Office of the Attorney General, *AG Healey Calls for Shut Down of Individual Residential Competitive Supply Industry to Protect Electric Customers*, MASS.GOV (Mar. 29, 2018), <https://www.mass.gov/news/ag-healey-calls-for-shut-down-of-individual-residential-competitive-supply-industry-to-protect>.

<sup>148</sup> See Office of the Attorney General, *Viridian Energy Customers Receive Payments in Second Phase of Restitution Program*, MASS.GOV (Mar. 15, 2019), <https://www.mass.gov/news/viridian-energy-customers-receive-payments-in-second-phase-of-restitution-program>.

solar opportunities.<sup>149</sup> This includes easy-to-access information on Attorney General Keith Ellison’s website about key contract terms, such as cost and length of service, that consumers should consider when purchasing energy from solar facilities.<sup>150</sup>

The **New Mexico Attorney General** sued a solar company for defrauding homeowners.<sup>151</sup> Attorney General Hector Balderas alleged that Vivint Solar, Inc. and related companies engaged in unfair and unconscionable business practices in connection with residential solar power purchase agreements and sales of solar equipment, including the use of high-pressure and misleading sales practices.

The **Pennsylvania Attorney General** sued fracking companies that colluded to deprive landowners from competition for leases under the state’s Unfair Trade Practices and Consumer Protection Law and antitrust common law.<sup>152</sup> Attorney General Josh Shapiro alleged that the companies used deceptive, misleading, and unfair tactics and committed antitrust violations when securing leases for subsurface mineral rights from private landowners.

The **Vermont Attorney General** issued guidance for marketers of renewable energy projects to comply with rules on deceptive marketing.<sup>153</sup> The guidance from Attorney General William Sorrell’s office explains concepts such as renewable energy certificates and gives examples of adequate disclosures to consumers.

## Keeping Energy Projects in Line with State Interests

Attorneys general can play an important role in ensuring that in-state energy initiatives help advance their states’ clean energy objectives without imposing excess costs on consumers.

The **Maryland Attorney General** participated in the Maryland Public Service Commission’s proceeding to consider alternative forms of ratemaking. An Assistant Attorney General from Attorney General Brian Frosh’s office testified that any approved alternative form of

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<sup>149</sup> See Walker Orenstein, *Minnesota’s Solar Program Has Been Wildly Popular. Why Some Want to Limit It*, MINNPOST (May 8, 2019), <https://www.minnpost.com/environment/2019/05/minnesotas-community-solar-program-has-been-wildly-popular-why-some-want-to-limit-it/>.

<sup>150</sup> See *Community Solar Gardens*, OFFICE OF MINN. ATTORNEY GEN., <https://www.ag.state.mn.us/Consumer/Publications/CommunitySolarGardens.asp> (last visited Sept. 15, 2019).

<sup>151</sup> See *AG Balderas Sues Massive Solar Company for Defrauding New Mexicans & Jeopardizing Their Home Ownership*, N.M. ATTORNEY GEN. (Mar. 8, 2018), [https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG\\_Balderas\\_Sues\\_Massive\\_Solar\\_Company\\_for\\_Defrauding\\_New\\_Mexicans\\_Jeopardizing\\_Their\\_Home\\_Ownership.pdf](https://www.nmag.gov/uploads/PressRelease/48737699ae174b30ac51a7eb286e661f/AG_Balderas_Sues_Massive_Solar_Company_for_Defrauding_New_Mexicans_Jeopardizing_Their_Home_Ownership.pdf).

<sup>152</sup> See *Legal Action: Attorney General Shapiro Announces Initial Win in Case Against Fracking Companies in Northeast PA*, PENN. OFFICE OF THE ATTORNEY GEN. (Dec. 20, 2017), <https://web.archive.org/web/20190812193138/https://www.attorneygeneral.gov/taking-action/legal-action/attorney-general-shapiro-announces-initial-win-in-case-against-fracking-companies-in-northeast-pa/>; see also *Opinion by Judge Ceisler & Order, Andarko Petroleum Corp. v. Commonwealth*, Nos. 58 C.D. 2018 & 60 C.D. 2018 (Pa. Commw. Ct. Mar. 15, 2019).

<sup>153</sup> See *Guidance for Renewable Energy Marketing Claims*, OFFICE OF VT. ATTORNEY GEN., <https://ago.vermont.gov/wp-content/uploads/2018/01/Guidance-on-Renewable-Marketing.pdf> (last visited Sept. 15, 2019).

ratemaking “should be designed to promote the state’s clean-energy and energy efficiency goals” and “must be accompanied by robust consumer protection mechanisms.”<sup>154</sup>

The **Massachusetts Attorney General** participated in a proceeding to review a joint statewide energy efficiency plan and individual company plans.<sup>155</sup> Massachusetts is a leader in energy efficiency and Attorney General Maura Healey evaluated the plan to ensure that it advances the state’s goals, and in particular, ensured that program benefits were more equitably distributed to lower income customers.

The **Minnesota Attorney General** opposed a utility’s renewable natural gas pilot program on the grounds that it was not be a reasonable way to achieve the state’s conservation and renewable energy goals and would not result in just and reasonable rates.<sup>156</sup> Attorney General Keith Ellison noted that the proposal had no crediting or verification mechanism to ensure that the gas procured was actually renewable natural gas. Additionally, the state legislature had not imposed a renewable mandate on natural gas utilities.

### Insisting that Utilities Be Accountable for Environmental Harms

The **Massachusetts Attorney General** is participating in a proceeding of the Nuclear Regulatory Commission regarding the sale of the Pilgrim Nuclear Power Station to ensure that the company proposing to decommission the plant has adequate financial resources to do the job safely and effectively.<sup>157</sup> Attorney General Maura Healey has emphasized that the state, as the entity that would face the financial, environmental, and public health and safety consequences of a shortfall, has a significant interest in ensuring that the licensee has sufficient funds to decommission and restore the site.

The **North Carolina Attorney General** has objected to Duke Energy’s attempts to impose costs associated with closure and remediation of its coal ash basins on customers, and to collect profits on its cleanup activities.<sup>158</sup> Attorney General Josh Stein has emphasized that the financial consequences of Duke’s decades-long practice of mixing coal ash with water and

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<sup>154</sup> Pub. Serv. Comm’n of Md., Order No. 89226 at 39, *Matter of Alternative Rate Plans or Methodologies to Establish New Base Rates for an Electric Company or a Gas Company*, Case No. 9618 (Md. Pub. Serv. Comm’n Aug. 19, 2019) (quoting testimony).

<sup>155</sup> See Massachusetts Attorney General, Initial Brief, *2019-2021 Joint Statewide Plan*, Nos. D.P.U. 18-110 et al. (Mass. Dep’t of Pub. Util. Dec. 31, 2019).

<sup>156</sup> Minn. Attorney Gen., Comments, *Matter of a Petition by CenterPoint Energy to Introduce a Renewable Natural Gas Pilot Program*, Docket No. G-008/M-18-547 (Minn. Pub. Util. Comm’n Jan. 8, 2019).

<sup>157</sup> See Mass. Pet. for Leave to Intervene & Hr’g Req., *In the Matter of Entergy Nuclear Operations, Inc.*, Docket Nos. 50-293 & 72-1044 (N.R.C. Feb. 20, 2019) (ADAMS No. ML19051A114).

<sup>158</sup> See Attorney General Josh Stein, *Attorney General Josh Stein Appeals Duke Energy Coal Ash Rate Case to Supreme Court of North Carolina*, N.C. DEP’T OF JUSTICE (Apr. 26, 2019), <https://ncdoj.gov/attorney-general-josh-stein-appeals-duke-energy-co/>. Coal ash is generated as a by-product of burning coal to fire coal-powered plants; can pollute water with mercury, cadmium and arsenic; and is often disposed of by utility companies by storing it in surface impoundments. See *Coal Ash Basics*, U.S. ENVTL. PROT. AGENCY, <https://www.epa.gov/coalash/coal-ash-basics> (last visited Sept. 15, 2019).

storing it in unlined ponds – even after Duke learned that this would pollute groundwater – should not now fall on consumers, with Duke profiting on the cleanup.

## Advocating for and Defending Clean Energy Laws

The **Massachusetts Attorney General** successfully defended the Massachusetts Department of Environmental Protection’s authority, under the Commonwealth’s Global Warming Solutions Act, to regulate power sector greenhouse gas emissions.<sup>159</sup> Specifically, the state’s highest court upheld regulations that set a declining cap on power sector greenhouse gas emissions, and established a clean energy standard.<sup>160</sup>

The **New Mexico Attorney General** petitioned the New Mexico Public Regulation Commission to implement a clean energy standard for utilities in the state.<sup>161</sup> Attorney General Hector Balderas, joined by an environmental group and a consumer group, sought a technology-neutral rule to reduce carbon dioxide emissions from electricity generation. The Public Regulation Commission held workshops to consider the petition.

## Promoting Transportation Electrification

The transportation sector is currently the largest source of greenhouse gas (GHG) emissions in the U.S.<sup>162</sup> Many state attorneys general are working to reduce these emissions, including by using funds obtained from their settlements to support transportation electrification projects.

The **Massachusetts Attorney General** provided recommendations regarding how the Massachusetts Department of Environmental Protection should use funds from the settlement that she secured with Volkswagen in the defeat devices emissions scandal.<sup>163</sup> Attorney General Maura Healey’s testimony emphasized the importance of using the funds to increase electric vehicle usage and facilitate a more rapid transition toward the state’s aggressive clean energy goals.

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<sup>159</sup> See Brief of Appellees, *New England Power Generators Ass’n v. Dep’t of Env’tl. Prot.*, SJ-12477 (Mass. Apr. 13, 2018).

<sup>160</sup> *New England Power Generators Ass’n v. Dep’t of Env’tl. Prot.*, 480 Mass. 398 (2018).

<sup>161</sup> New Mexico Attorney General et al., Petition for Rulemaking, *Matter of the Petition to Implement a Clean Energy Standard Rule for New Mexico Electric Public Utilities*, Case No. 17-00211-UT (N.M. Pub. Reg. Comm’n Aug. 29, 2017).

<sup>162</sup> See *Reducing Your Transportation Footprint*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, <https://www.c2es.org/content/reducing-your-transportation-footprint/> (last visited Sept. 15, 2019).

<sup>163</sup> See Office of the Attorney General, *AG Healey Calls for State Plan on Electric Vehicles and New Clean Energy Goals*, MASS.GOV (Feb. 15, 2018), <https://www.law.nyu.edu/sites/default/files/ag-healey-state-ev-plan-press-release.pdf>.

The **New York Attorney General** has applied funds from a settlement reached with American Electric Power to launch an all-electric delivery truck program in New York City.<sup>164</sup> This is a first-of-its-kind program designed to reduce the number of traditional diesel delivery trucks – one of the greatest contributors to air pollution in New York City. Attorney General Letitia James is working with non-profit organizations that are operating the electric vehicles and assisting in the installation of charging infrastructure.

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<sup>164</sup> See *Attorney General James Unveils First-Of-Its-Kind All-Electric Truck Program in New York City*, N.Y. STATE OFFICE OF THE ATTORNEY GEN. (Apr. 17, 2019), <https://ag.ny.gov/press-release/attorney-general-james-unveils-first-its-kind-all-electric-truck-program-new-york-city>.





## Section III. Review of State Authorities

ALABAMA
<p><b>Attorney General</b></p> <ul style="list-style-type: none"> <li>▶ Elected. ALA. CONST. art. V, § 114.</li> <li>▶ Required to assign an assistant attorney general to intervene before the Public Service Commission on “behalf of the using and consumer public, including utility users generally and agencies of the state”; authorized to appear before state and federal courts and agencies in public utility-related matters. ALA. CODE § 37-1-16(a) (2019).</li> </ul>
<p><b>Public Service Commission</b></p> <ul style="list-style-type: none"> <li>▶ Three elected commissioners. ALA. CODE § 37-1-3(a).</li> </ul>
<p><b>Regional Transmission Organization / Independent System Operator</b></p> <ul style="list-style-type: none"> <li>▶ N/A</li> </ul>

ALASKA
<p><b>Attorney General</b></p> <ul style="list-style-type: none"> <li>▶ Appointed subject to “confirmation by a majority of the members of the legislature in a joint session” and serves “at the pleasure of the governor.” ALASKA STAT. §§ 39.05.020, 39.05.030, 44.23.010 (2019).</li> <li>▶ Shall “participate as a party in a matter that comes before the Regulatory Commission . . . when the attorney general determines that participation is in the public interest.” ALASKA STAT. § 44.23.020(e).</li> </ul>
<p><b>Regulatory Commission</b></p> <ul style="list-style-type: none"> <li>▶ Five commissioners “appointed by the governor and confirmed by the legislature in joint session.” ALASKA STAT. § 42.04.020(a).</li> </ul>
<p><b>Regional Transmission Organization / Independent System Operator</b></p> <ul style="list-style-type: none"> <li>▶ N/A</li> </ul>

# ARIZONA

## Attorney General

- ▶ Elected. ARIZ. CONST. art. V, § 1.
- ▶ Chairs the power plant and transmission line siting committee. ARIZ. REV. STAT. § 40-360.01(c) (2019).

## Residential Utility Consumer Office

- ▶ Director is appointed by the governor with the consent of the senate and serves at the pleasure of the governor. ARIZ. REV. STAT. § 40-462(B).
- ▶ “[E]stablished to represent the interests of residential utility consumers in regulatory proceedings involving public service corporations before the corporation commission.” ARIZ. REV. STAT. § 40-462(A).

## Corporation Commission

- ▶ Five elected members. ARIZ. CONST. art. XV, § 1, cl. B.

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

# ARKANSAS

## Attorney General

- ▶ Elected. ARK. CONST. art. VI, § 3.
- ▶ Consumer Utilities Rate Advocacy Division is within the Office of the Attorney General; Director of the Division is appointed by the Attorney General. ARK. CODE ANN. §§ 23-4-303, 304 (2019).
- ▶ Division represents “the state, its subdivisions, and all classes of Arkansas utility rate payers” before the Public Service Commission and state and federal courts and agencies. ARK. CODE ANN. § 23-4-305.

## Public Service Commission

- ▶ Three commissioners appointed by the governor. ARK. CODE ANN. § 23-2-101(a), (d).

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

# CALIFORNIA

## Attorney General

- ▶ Elected. CAL. CONST. art. V, § 11.
- ▶ Charged with the unique authority to protect the environment of the state and may “intervene in any judicial or administrative proceeding in which facts are alleged concerning pollution or adverse environmental effects which could affect the public generally.” CAL. GOV’T CODE §§ 12606, 12612(a) (2019).

## Public Advocate’s Office

- ▶ Director is appointed by the governor subject to senate confirmation and serves at the pleasure of the governor. CAL. PUB. UTIL. CODE § 309.5(b).
- ▶ Within the Public Utilities Commission, “represent[s] and advocate[s] . . . the interests of public utility customers and subscribers” with the goal “to obtain the lowest possible rate for service consistent with reliable and safe service levels.” CAL. PUB. UTIL. CODE § 309.5(a).

## Public Utilities Commission

- ▶ Five members appointed by the governor and approved by the senate. CAL. CONST. art. XII, § 1.

## Regional Transmission Organization / Independent System Operator

- ▶ California ISO

# COLORADO

## Attorney General

- ▶ Elected. COLO. CONST. art. IV, §§ 1, 3.
- ▶ Advises and represents the Office of Consumer Counsel. COLO. REV. STAT. § 40-6.5-102(4) (2019).
- ▶ Advises and represents trial staff of the Public Utilities Commission. COLO. REV. STAT. § 24-31-101.

## Consumer Counsel

- ▶ Appointed by the executive director of the Department of Regulatory Agencies. COLO. REV. STAT. § 40-6.5-102(1).
- ▶ Guided by utility consumers’ board, which has the duty “to represent the public interest of Colorado utility users and, specifically, the interests of residential, agricultural, and small business users.” COLO. REV. STAT. § 40-6.5-102(3).

## Public Utilities Commission

- ▶ Three members appointed by the governor with senate consent. COLO. REV. STAT. § 40-2-101(1).

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

## CONNECTICUT

### Attorney General

- ▶ Elected. CONN. CONST. art. IV, § 1.
- ▶ “[D]uty ... to protect the interest of his [or her] client, the people of the State.” *Conn. Comm’n on Special Revenue v. Conn. Freedom of Info. Comm’n*, 387 A.2d 533 (Conn. 1978).

### Consumer Counsel

- ▶ Appointed by the governor with the “advice and consent of either house of the General Assembly”; subject to statutory removal provision. CONN. GEN. STAT. § 16-2a(d) (2019).
- ▶ Party to each contested case before the Public Utilities Regulatory Authority and authorized to participate in any regulatory or judicial proceedings in which the interests of Connecticut consumers may be involved. CONN. GEN. STAT. § 16-2a(a).

### Public Utilities Regulatory Authority

- ▶ Three commissioners appointed by the governor with the “advice and consent of both houses of the General Assembly”; not more than three members from any one political party. CONN. GEN. STAT. § 16-2(a).

### Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

## DELAWARE

### Attorney General

- ▶ Elected. DEL. CONST. art. III, § 21.
- ▶ State DOJ renders legal services to state commissions. DEL. CODE ANN. tit. 29, § 2501 (2019).

### Public Advocate

- ▶ Appointed by the governor with the advice and consent of the senate and serves at the pleasure of the governor. DEL. CODE ANN. tit. 29, § 8716(a), (c).
- ▶ Appears “on behalf of the interest of consumers in any matter or proceeding over which the [Public Service] Commission has jurisdiction and in which the Public Advocate deems the interest of consumers requires such participation.” DEL. CODE ANN. tit. 29, § 8716(e)(1).

### Public Service Commission

- ▶ Five commissioners appointed by the governor and confirmed by the senate; not more than three commissioners shall be of the same political party. DEL. CODE ANN. tit. 26, § 103(a)-(b).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

# FLORIDA

## Attorney General

- ▶ Elected. FLA. CONST. art. IV, §§ 4-5.
- ▶ “[D]uty, in the absence of express legislative restrictions to the contrary, to exercise all such power and authority as public interests may require from time to time.” *State ex rel. Landis v. S.H. Kress & Co.*, 155 So. 823, 827 (Fla. 1934).

## Public Counsel

- ▶ Appointed by legislative committee. FLA. STAT. § 350.061(1) (2019).
- ▶ Represents the “general public of Florida” before the Public Service Commission and urges the Commission to act in the public interest. FLA. STAT. §§ 350.061(1), 350.0611(1).
- ▶ Appears before other state and federal courts and agencies on utility matters in the name of the state or its citizens. FLA. STAT. § 350.0611(5).

## Public Service Commission

- ▶ Five commissioners appointed by the governor from a list provided by the Public Service Commission Nomination Council. FLA. STAT. §§ 350.01(1), 350.031(1)(a), (6).

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

# GEORGIA

## Attorney General

- ▶ Elected. GA. CONST. art. V, § III.
- ▶ The powers of the Governor’s Office of Consumer Affairs were transferred to the attorney general. 2015 Ga. Laws 1088.
- ▶ Represents the Public Service Commission. GA. COMP. R. & REGS. 515-1-1-.01 (2019).

## Consumers’ Utility Counsel

- ▶ Formerly within the Governor’s Office of Consumer Affairs; repealed in 2015. GA. CODE ANN. § 46-10-3 (2014), 2015 Ga. Laws 1088.

## Public Service Commission

- ▶ Five elected members. GA. CODE ANN. § 46-2-1 (2019).

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

## HAWAII

### Attorney General

- ▶ Appointed “by and with the advice and consent of the senate.” HAW. CONST. art. V, § 6; HAW. REV. STAT. § 26-7 (2019).
- ▶ Gives “advice and counsel” upon request to public officers. HAW. REV. STAT. § 28-4.
- ▶ Division of Consumer Advocacy can request and secure legal services from the attorney general. HAW. REV. STAT. § 269-53.

### Division of Consumer Advocacy

- ▶ Within the Department of Commerce and Consumer Affairs; executive director is appointed by the Director of Commerce and Consumer Affairs. HAW. REV. STAT. § 269-52.
- ▶ “[R]epresent[s], protect[s], and advance[s] the interests of all consumers, including small businesses, of utility services”; “party in interest” in Public Utilities Commission proceedings. HAW. REV. STAT. § 269-51.

### Public Utilities Commission

- ▶ Three commissioners appointed by the governor with the advice and consent of the senate. HAW. REV. STAT. §§ 269-2, 26-34.

### Regional Transmission Organization / Independent System Operator

- ▶ N/A

## IDAHO

### Attorney General

- ▶ Elected. IDAHO CONST. art. IV, §§ 1-2.
- ▶ Represents and appears for the people of the state and for the commission in public utility matters; advises the commission with regard to its duties and generally serves as the attorney to the commission. IDAHO CODE § 61-204 (2019); *see also* IDAHO CODE Idaho Code § 61-701.

### Public Utilities Commission

- ▶ Three members appointed by the governor with approval of the senate; no more than two from the same political party. IDAHO CODE § 61-201.

### Regional Transmission Organization / Independent System Operator

- ▶ N/A

# ILLINOIS

## Attorney General

- ▶ Elected. ILL. CONST. art. V, § 1.
- ▶ Consumer Utilities Unit has the “power and duty” on behalf of the people of the State to intervene in legal proceedings including as a party as a matter of right in all Commerce Commission proceedings. 15 ILL. COMP. STAT. 205/6.5(c)-(d) (2019).

## Citizens Utility Board

- ▶ Nonprofit membership organization with elected directors. 220 ILL. COMP. STAT. 10/4, 10/6.
- ▶ “[P]romote[s] the health, welfare and prosperity of all the citizens of this State by ensuring effective and democratic representation of utility consumers.” 220 ILL. COMP. STAT. 10/2.

## Illinois Commerce Commission

- ▶ Five commissioners appointed by the governor “by and with the advice and consent of the Senate”; “not more than three of whom shall be members of the same political party at the time of appointment.” 220 ILL. COMP. STAT. 5/2-101.

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; PJM Interconnection

# INDIANA

## Attorney General

- ▶ Elected. IND. CODE § 4-6-1-2 (2019).
- ▶ Legal counsel for the commission; “prosecute[s] all cases in which the commission may be interested”; advises the commission. IND. CODE § 8-1-2-2 (2019).

## Utility Consumer Counsel

- ▶ Appointed by the governor; serves at the pleasure of the governor. IND. CODE § 8-1-1.1-3.
- ▶ “[M]ay appear on behalf of ratepayers, consumers, and the public” in commission and other agency proceedings, as well as utility-related court cases. IND. CODE § 8-1-1.1-4.1.

## Utility Regulatory Commission

- ▶ Five members; not more than three from the same political party; appointed by the governor from the nominating committee’s list. IND. CODE § 8-1-1-2.

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; PJM Interconnection

# IOWA

## Attorney General

- ▶ Elected. IOWA CONST. art. V, § 12.
- ▶ Prosecutes and defends in “court or tribunal, all actions and proceedings, civil or criminal, in which the state may be a party or interested, when, in the attorney general’s judgment, the interest of the state requires such action . . .” IOWA CODE § 13.2(1)(b) (2019).

## Consumer Advocate

- ▶ Appointed by the attorney general subject to senate confirmation; removable for “malfeasance or nonfeasance” or if “incapable or unfit to discharge the duties of the advocate’s office.” IOWA CODE § 475A.1(1), (5).
- ▶ Represents all consumers and the public in proceedings before the Utilities Board. IOWA CODE § 475A.2(2).

## Utilities Board

- ▶ Three members appointed by the governor and subject to confirmation by the senate; not more than two from the same political party. IOWA CODE § 474.1(1).

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

# KANSAS

## Attorney General

- ▶ Elected. KAN. CONST. art. I, § 1.
- ▶ Consults with State Corporation Commission on filing *amicus* briefs in court; counsels and advises the commission and assists in hearings, suits, and proceedings as requested. KAN. STAT. ANN. § 66-106(b)(3), (c) (2019).

## Citizens’ Utility Ratepayer Board

- ▶ Five members appointed by the governor; the State Corporation Commission provides technical and clerical staff. KAN. STAT. ANN. § 66-1222.
- ▶ Represents residential and commercial ratepayers. KAN. STAT. ANN. § 66-1223.
- ▶ Can “recommend legislation to the legislature which in the board’s judgment would positively affect the interests of utility consumers.” KAN. STAT. ANN. § 66-1222.

## State Corporation Commission

- ▶ Three members appointed by the governor subject to senate confirmation; no more than two from the same political party. KAN. STAT. ANN. § 74-601(a).

## Regional Transmission Organization / Independent System Operator

- ▶ Southwest Power Pool

## KENTUCKY

### Attorney General

- ▶ Elected. KY. CONST. § 91.
- ▶ Office of Rate Intervention represents consumers' interests before the Public Service Commission and other rate-making or regulatory bodies. KY. REV. STAT. ANN. § 367.150(8) (2019).

### Public Service Commission

- ▶ Three members appointed by the governor and confirmed by the senate. KY. REV. STAT. ANN. § 278.050(1).

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; PJM Interconnection

## LOUISIANA

### Attorney General

- ▶ Elected. LA. CONST. art. IV, § 8.
- ▶ Authority is "[a]s necessary for the assertion or protection of any right or interest of the state." LA. CONST. art. IV, § 8.

### Public Service Commission

- ▶ Five elected members. LA. CONST. art. IV, § 21.

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

## MAINE

### Attorney General

- ▶ Appointed by the state legislature. ME. CONST. art. IX, § 11.
- ▶ Authorized to advocate a position before the Public Utilities Commission when it represents the position most advantageous to consumers, taking into account developments in rate design reform. ME. STAT. 35 § 3155(3) (2019).

### Public Advocate

- ▶ Appointed by the governor; subject to review and to confirmation by the legislature; subject to removal for violating Public Advocate title. ME. STAT. tit. 35, § 1701(1-A)(A), (E).
- ▶ Represents the “using and consumer public in matters within the jurisdiction” of the Public Utilities Commission, but the Attorney General can intervene before the commission or appeal from commission orders or decisions. ME. STAT. tit. 35, §§ 1702, 1705.

### Public Utilities Commission

- ▶ Three commissioners appointed by the governor and subject to review and confirmation by the legislature. ME. STAT. tit. 35-A, § 105(1).

### Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

## MARYLAND

### Attorney General

- ▶ Elected. MD. CONST. art. V, § 1.

### People’s Counsel

- ▶ Appointed by the attorney general; subject to senate confirmation; and removable for “good cause” by the attorney general. MD. CODE ANN., PUB. UTIL. § 2-202(a), (g) (2019).
- ▶ Appears before Public Service Commission and courts, if the interest of residential and noncommercial users is affected. MD. CODE ANN., PUB. UTIL. § 2-204(a)(1)-(2).

### Public Service Commission

- ▶ Five commissioners appointed by the governor with the advice and consent of the senate. MD. CODE ANN., PUB. UTIL. § 2-102(a).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## MASSACHUSETTS

### Attorney General

- ▶ Elected. MASS. CONST. art. LXIV, § 1.
- ▶ Office of Ratepayer Advocacy may intervene or appear on behalf of any group of consumers on “any matter involving rates, charges, prices and tariffs of an electric company . . . gas company” subject to department of public utilities jurisdiction; may intervene, appear or participate in federal energy proceedings. MASS GEN. LAWS ch. 12, § 11E(a) (2019).

### Department of Public Utilities

- ▶ Three commissioners appointed by the secretary of energy and environmental affairs; not more than two commissioners shall be members of the same political party. MASS GEN. LAWS ch. 25, § 2.

### Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

## MICHIGAN

### Attorney General

- ▶ Elected. MICH. CONST. art. V, § 21.
- ▶ Represents the public interest and the interests of the state. MICH. COMP. LAWS § 14.28 (2019).<sup>165</sup>
- ▶ Coordinates with the Utility Consumer Protection Board within the department of licensing and regulatory affairs, which provides grants to qualified applicants to represent residential energy customers, to avoid duplication of effort. MICH. COMP. LAWS §§ 460.6/(3)-(5), (9), 460.6m(17)(c) (2019).

### Public Service Commission

- ▶ Three members, not more than two from the same political party, appointed by the governor with the advice and consent of the senate. MICH. COMP. LAWS § 460.1.

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; PJM Interconnection

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<sup>165</sup> See also Attorney General, Notice of Intervention, *In the Matter on the Commission’s Own Motion, to Consider Changes in the Rates of All Michigan Rate-regulated Electric, Steam, and Natural Gas Utilities to Reflect the Effects of the Federal Tax Cuts and Jobs Act of 2017*, MPSC No. U-20313 (Mich. Pub. Serv. Comm’n Oct. 15, 2018) (identifying interests of ratepayers and economy of the state).

# MINNESOTA

## Attorney General

- ▶ Elected. MINN. CONST. art. V, § 1.
- ▶ Participates in utility matters “involving utility rates and adequacy of utility services to residential or small business utility consumers.” MINN. STAT. § 8.33 (2019).

## Public Utilities Commission

- ▶ Five members appointed by the governor with advice and consent of the senate; no more than three from the same political party. MINN. STAT. § 216A.03.

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

# MISSISSIPPI

## Attorney General

- ▶ Elected. MISS. CODE ANN. § 7-5-1 (2019).
- ▶ State legal officer and advisor; “sole power to bring or defend a lawsuit on behalf of a state agency, the subject matter of which is of statewide interest.” MISS. CODE ANN. § 7-5-1.

## Public Utilities Staff

- ▶ “[I]ndependent” from the Public Service Commission; executive director appointed by the governor from Commission recommended candidates with the advice and consent of the senate; serves “at the will and pleasure” of the governor. MISS. CODE ANN. § 77-2-1, -7(1) (2019).
- ▶ Represents the “broad interests” of the state by “balancing the respective concerns of the residential, commercial or industrial ratepayers, and the state and its agencies and departments and the public utilities.” MISS. CODE ANN. § 77-2-1.

## Public Service Commission

- ▶ Three commissioners elected from districts. MISS. CODE ANN. § 77-1-1.

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

# MISSOURI

## Attorney General

- ▶ Elected. MO. CONST. art. IV, § 17; MO. REV. STAT. § 27.010 (2019).
- ▶ Enforces certain provisions of public utilities statute. MO. REV. STAT. § 386.756, 386.890.

## Public Counsel

- ▶ Appointed by the director of the Department of Economic Development; serves at the pleasure of the director. MO. REV. STAT. § 386.700.
- ▶ “[M]ay represent and protect the interests of the public in any proceeding before or appeal from the public service commission.” MO. REV. STAT. § 386.710(2). *See also* MO. REV. STAT. § 386.710(3) (noting discretion).

## Public Service Commission

- ▶ Five commissioners appointed by the governor with the advice and consent of the Senate. MO. REV. STAT. § 386.050.

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

# MONTANA

## Attorney General

- ▶ Elected. MONT. CONST. art. VI, § 2(1).
- ▶ Has the “duties and powers provided by law,” including “to give an opinion in writing” to any commission “when required upon question of law relating to their respective offices.” MONT. CONST. art. VI, § 4(4); MONT. CODE ANN. § 2-15-501(7) (2019).

## Consumer Counsel

- ▶ Constitutionally created position; appointed by legislative consumer committee consisting of two members of the senate and two members of the house of representatives. MONT. CONST. art. XIII, § 2; MONT. CODE ANN. § 5-15-101.
- ▶ “May institute, intervene in, or otherwise participate in appropriate proceedings in the state and federal courts and administrative agencies in the name of and on behalf of the utility . . . consuming public of the state of Montana or substantial elements thereof.” MONT. CODE ANN. § 69-2-202(2).

## Public Service Commission

- ▶ Five commissioners elected from districts. MONT. CODE ANN. § 69-1-103.

## Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

## NEBRASKA

### Attorney General

- ▶ Elected. NE. CONST. art. IV, § 1.
- ▶ Advises the Public Service Commission as requested. NEB. REV. STAT. Ann. § 75-108 (2019).
- ▶ Prosecutes actions at the request of the Commission. NEB. REV. STAT. Ann. § 75-141.

### Public Advocate

- ▶ Under State Natural Gas Regulation Act.<sup>166</sup> NEB. REV. STAT. ANN. § 66-1830(1).
- ▶ Appointed by the executive director of the Public Service Commission. NEB. REV. STAT. Ann. § 66-1830(2).
- ▶ Represents the interests of ratepayers, other than high-volume ratepayers, considering “all relevant factors, including, but not limited to, the provision of safe, efficient, and reliable utility services at just and reasonable rates.” NEB. REV. STAT. Ann. § 66-1830(1).

### Public Service Commission

- ▶ Five members, elected by district. NEB. REV. STAT. Ann. § 75-101(1), -101.01(1).

### Regional Transmission Organization / Independent System Operator

- ▶ Southwest Power Pool

## NEVADA

### Attorney General

- ▶ Elected. NEV. CONST. art. V, § 19(1).
- ▶ May commence a suit or defensive action in federal or state court. NEV. REV. STAT. ANN. § 228.170(1) (2019).
- ▶ Bureau of Consumer Protection led by Consumer Advocate, who is appointed by the Attorney General and may be removed for “inefficiency, neglect of duty or malfeasance in office.” NEV. REV. STAT. §§ 228.310, 228.320.
- ▶ “Consumer Advocate has sole discretion to represent or refrain from representing the public interest and any class of customers in any proceeding”; public interest is “the interests or rights of the State of Nevada and of the residents of this State, or a broad class of those residents.” NEV. REV. STAT. ANN. §§ 228.308, 228.390(1)(a).

### Utilities Commission

- ▶ Three commissioners appointed by the governor; not more than two of the commissioners may be from the same political party. NEV. REV. STAT. ANN. § 703.030(1), (3)(a).

### Regional Transmission Organization / Independent System Operator

- ▶ California ISO

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<sup>166</sup> Nebraska only has consumer-owned electric utilities. See *Public Power*, NE. POWER ASS’N, <https://www.nepower.org/public-power/benefits.html> (last visited Sept. 18, 2019).

## NEW HAMPSHIRE

### Attorney General

- ▶ Nominated and appointed by the governor with consent of the council. N.H. CONST. pt. 2, art. XLVI.
- ▶ Public Utilities Commission can ask attorney general to “appear to protect the interests of the people of the state,” triggering a duty to do so. N.H. REV. STAT. § 7:10 (2019).

### Consumer Advocate

- ▶ Appointed by the governor and council. N.H. REV. STAT. § 363:28(I)(a).
- ▶ Represents interests of residential utility consumers. N.H. REV. STAT. § 363:28(II).
- ▶ Directed to “advocate against proposed regional or federal rules or polices that are inconsistent with the policies, rules, or laws of New Hampshire” and “consider how other states’ policies will impact New Hampshire rates and work to prevent or minimize any rate impact.” N.H. REV. STAT. § 363:28(IV).

### Public Utilities Commission

- ▶ Three commissioners appointed by the governor with advice and consent of the council and following a council hearing. N.H. REV. STAT. § 363:1, 3.

### Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

## NEW JERSEY

### Attorney General

- ▶ Appointed by governor with advice and consent of the senate. N.J. STAT. ANN. § 52:17A-2 (2019).
- ▶ The sole legal adviser, attorney or counsel for all state boards, including Board of Public Utilities. N.J. STAT. ANN. § 52:17A-4(e).

### Division of Rate Counsel

- ▶ Director appointed by the governor; division within the Department of Treasury. N.J. STAT. ANN. § 52:27EE-47, -48.
- ▶ May represent and protect the public interest as defined by statute in proceedings before and appeals from the New Jersey Board of Public Utilities. N.J. STAT. ANN. § 52:27EE-48(a).

### Board of Public Utilities

- ▶ Five Board members appointed by the governor with the advice and consent of the senate; not more than three Board members shall be members of the same political party. N.J. STAT. ANN. § 48:2-1(b), (c) (2019).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## NEW MEXICO

### Attorney General

- ▶ Elected. N.M. STAT. ANN. § 8-1-1 (2019).
- ▶ May represent residential and small business consumers by intervening or appearing as a party of interest in Public Regulation Commission proceedings. N.M. STAT. ANN. § 8-5-17(A).

### Consumer Relations Division

- ▶ A part of Public Regulation Commission, assists consumers in resolving “complaints against a person under the authority of the commission”; cannot provide “legal representation of a private complaint in an adjudicatory proceeding.” N.M. STAT. ANN. § 8-8-8A(1).

### Public Regulation Commission

- ▶ Currently, five commissioners elected from districts, but state voters will consider a constitutional amendment in the 2020 election that would, starting in 2023, turn the Commission into a three-member body nominated by the governor and “by and with the consent of the senate.” N.M. CONST. Art. XI, § 1; 2019 N.M. Laws Sen. Jt. Res. 1 (Ch. CA1).

### Regional Transmission Organization / Independent System Operator

- ▶ Southwest Power Pool

## NEW YORK

### Attorney General

- ▶ Elected. N.Y. CONST. art. V, § 1.
- ▶ Required to “prosecute and defend all actions and proceedings in which the state is interested . . .” N.Y. EXEC. LAW § 63(1) (2019).

### Utility Intervention Unit

- ▶ Within the Department of State, authorized to “initiate, intervene in, or participate in any proceeding before the” Public Service Commission to the extent authorized by law and if “necessary or appropriate.” N.Y. EXEC. LAW § 94-a(4)(b)(i).
- ▶ Represents the interests of consumers before state and federal energy regulatory agencies. N.Y. EXEC. LAW § 94-a(4)(b)(ii).

### Public Service Commission

- ▶ Five commissioners appointed by the governor, by and with the advice and consent of the senate; no more than three commissioners may be members of the same political party. N.Y. PUB. SERV. LAW § 4(1).

### Regional Transmission Organization / Independent System Operator

- ▶ New York ISO

## NORTH CAROLINA

### Attorney General

- ▶ Elected. N.C. CONST. art. III, § 7(1).
- ▶ May intervene, when he or she “deems it to be advisable in the public interest, in proceedings before the [Utilities] Commission on behalf of the using and consuming public, including utility users generally and agencies of the state”; may also appear before state and federal courts and agencies in matters affecting public utility services. N.C. GEN. STAT. § 62-20 (2019).

### Public Staff

- ▶ Within the Utilities Commission and supervised by the executive director of the Utilities Commission, who is appointed by the governor and subject to legislature confirmation and subject to removal by the governor in limited circumstances. N.C. GEN. STAT. § 62-15(a)-(b).
- ▶ Represents the “using and consuming public,” but is not “subject to the supervision, direction, or control of the [Utilities] Commission” or its members. N.C. GEN. STAT. § 62-15(b).

### Utilities Commission

- ▶ Seven commissioners appointed by the governor subject to confirmation by the General Assembly by joint resolution. N.C. GEN. STAT. § 62-10(a).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## NORTH DAKOTA

### Attorney General

- ▶ Elected. N.D. CONST. art. V, § 2.
- ▶ “Ex officio attorney” for the Public Service Commission and required to provide “such counsel, advice, and assistance necessary for the proper discharge of [the Commission’s] powers and duties”; “appear for, and represent the state at all hearings of the [C]ommission or appeals”; “institute, prosecute, or defend any action or proceeding which the [C]ommission may deem proper and expedient.” N.D. CENT. CODE § 49-01-09 (2019).

### Public Service Commission

- ▶ Three commissioners elected. N.D. CONST. art. V, § 2.

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

## OHIO

### Attorney General

- ▶ Elected. OHIO CONST. art. III, § 1.
- ▶ Legal advisor to the Public Utilities Commission. OHIO REV. CODE ANN. § 4901.17 (2019).

### Consumers' Counsel

- ▶ Appointed by the Consumers' Counsel Governor Board, which is a bi-partisan group that is appointed by the attorney general with consent of the senate. OHIO REV. CODE ANN. §§ 4911.02, 4911.17.
- ▶ Participates on behalf of residential customers. OHIO REV. CODE ANN. § 4911.02(c).

### Public Utilities Commission

- ▶ Five commissioners appointed by the governor with the advice and consent of the senate. OHIO REV. CODE ANN. § 4901.02(A).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## OKLAHOMA

### Attorney General

- ▶ Elected. OKLA. CONST. art. VI, § 4(A).
- ▶ Duty "to represent and protect the collective interests of all utility consumers of the state in rate-related proceedings before the Corporation Commission or in any other state or federal judicial or administrative proceeding." OKLA. STAT. tit. 74, § 18b(A)(21) (2019).

### Corporation Commission

- ▶ Three commissioners elected statewide. OKLA. CONST. art. IX, § 15(A).

### Regional Transmission Organization / Independent System Operator

- ▶ Southwest Power Pool

## OREGON

### Attorney General

- ▶ Elected. OR. REV. STAT. § 180.020 (2019).
- ▶ Assigns “an assistant who shall be the counsel responsible for ensuring the performance of the legal services requested by the” Public Utility Commission. OR. REV. STAT. § 180.060(8).

### Citizens’ Utility Board

- ▶ Nonprofit membership organization with elected board of governors. OR. REV. STAT. §§ 774.030, 774.040, 774.070.
- ▶ Represents and protects the interests of utility consumers. OR. REV. STAT. § 774.030.

### Public Utility Commission

- ▶ Three commissioners appointed by the governor, subject to confirmation by the Senate; no more than two commissioners shall be of the same political party. OR. REV. STAT. § 756.014(1).

### Regional Transmission Organization / Independent System Operator

- ▶ N/A

## PENNSYLVANIA

### Attorney General

- ▶ Elected. PA. CONST. art. IV, § 4.1.
- ▶ May intervene in Public Utility Commission proceedings if in the public interest. 52 PA. CODE § 5.72(a)-(b) (2019).

### Consumer Advocate

- ▶ Appointed by the attorney general subject to the approval of “a majority of the members elected to the Senate.” 71 PA. CONS. STAT. § 732-201(b).
- ▶ Responsible for representing the “interest of consumers as a party” before the Public Utility Commission, state and federal courts and federal agencies. 71 PA. CONS. STAT. § 309-4(a).

### Public Utility Commission

- ▶ Five commissioners appointed by the governor, “by and with the advice and consent of two-thirds of all the members of the Senate.” 66 PA. CONS. STAT. § 301(a).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## RHODE ISLAND

### Attorney General

- ▶ Elected. R.I. CONST. art. IV, § 1.
- ▶ When requested, represents the Division of Public Utilities and Carriers<sup>167</sup> in proceeding or action by the Public Utilities Commission; but the Division can obtain outside counsel for representation in order for the attorney general to intervene “on behalf of the state as customer of a public utility, or on behalf of the citizens of the state, as customers of a public utility.” 39 R.I. GEN. LAWS § 39-1-19(b) (2019).

### Public Utilities Commission

- ▶ Three commissioners appointed by the governor with the advice and consent of the senate. 39 R.I. GEN. LAWS § 39-1-4(a).

### Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

## SOUTH CAROLINA

### Attorney General

- ▶ Elected. S.C. CONST. art. V, § 24, art. VI, § 1.
- ▶ Law detailing duties of the attorney general with respect to the Public Service Commission was repealed in 2005. S.C. CODE ANN. § 58-3-120 (2004), repealed by 2004 S.C. Acts No. 175, § 10, 41; effective January 1, 2005.

### Office of Regulatory Staff

- ▶ Executive Director is nominated by a review committee and appointed by the governor. S.C. CODE ANN. § 58-3-530(b) (2019).
- ▶ Represents the public interest, defined to “mean the concerns of the using and consuming public with respect to public utility services, regardless of the class of customer, and preservation of continued investment in and maintenance of utility facilities so as to provide reliable and high quality utility services.” S.C. CODE ANN. § 58-4-10(B).

### Public Service Commission

- ▶ Seven members elected by the General Assembly. S.C. CODE ANN. § 58-3-20.

### Regional Transmission Organization / Independent System Operator

- ▶ N/A

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<sup>167</sup> The Division “shall exercise the jurisdiction, supervision, powers, and duties not specifically assigned to the commission, including the execution of all laws relating to public utilities and carriers and all regulations and orders of the commission governing the conduct and charges of public utilities and who shall perform such other duties and have such powers as are hereinafter set forth.” 39 R.I. GEN. LAWS §§ 39-1-2; 39-1-3(b).

## SOUTH DAKOTA

### Attorney General

- ▶ Elected. S.D. CONST. art. IV, § 7.
- ▶ Required to give the Public Utilities Commission “counsel and advice” when requested and has as a duty to “institute and prosecute” any and all suits deemed expedient and proper by the Public Utilities Commission. S.D. CODIFIED LAWS § 49-1-14 (2019).

### Public Utilities Commission

- ▶ Three elected commissioners. S.D. CODIFIED LAWS § 49-1-2.

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO; Southwest Power Pool

## TENNESSEE

### Attorney General

- ▶ Appointed by the state supreme court. TENN. CONST. art. VI, § 5.
- ▶ Consumer Advocate Division represents the interests of customers of regulated public utilities. TENN. CODE ANN. § 65-4-118(b) (2019).

### Public Utility Commission

- ▶ Five commissioners, one appointed by the governor, one by the speaker of the senate, one from the house of representatives, and two by joint agreement among the governor and speakers. TENN. CODE ANN. § 65-1-101(a).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

# TEXAS

## Attorney General

- ▶ Elected. TEX. CONST. art. IV, §§ 1-2.
- ▶ Represents the Public Utility Commission in state court, federal court, and federal public utility regulatory commission. TEX. UTILITIES CODE ANN. § 12.004 (2019).

## Public Utility Counsel

- ▶ Appointed by the governor with consent of the senate. TEX. UTILITIES CODE ANN. § 13.021(b).
- ▶ Represents the interests of residential and small commercial customers. TEX. UTILITIES CODE ANN. §§ 13.001, 13.003; *see also* TEX. UTILITIES CODE ANN. § 13.003.

## Public Utility Commission

- ▶ Three commissioners appointed by the governor with the advice and consent of the senate. TEX. UTILITIES CODE ANN. § 12.051(a).

## Regional Transmission Organization / Independent System Operator

- ▶ Electric Reliability Council of Texas; Midcontinent ISO; Southwest Power Pool

# UTAH

## Attorney General

- ▶ Elected. UTAH CONST. art. VII, § 1.
- ▶ If requested, aid in Public Service Commission investigations, hearings or trials and enforce relevant constitutional and statutory provisions; counsel Division of Public Utilities<sup>168</sup> in proceedings before the Commission. UTAH CODE ANN. §§ 54-4a-4, 54-7-21 (2019).

## Office of Consumer Services

- ▶ Within Department of Commerce; director appointed by governor and “concurrence of the Committee of Consumer Services and the consent of the Senate” and may be removed by the governor for cause. UTAH CODE ANN. § 54-10a-201(1)-(2).
- ▶ Represents the interests of residential and small commercial consumers; attorney general to assign at least one attorney to represent the office. UTAH CODE ANN. §§ 54-10a-201(3), 54-10a-203.

## Public Service Commission

- ▶ Three commissioners appointed by the governor with the consent of the senate; not more than two commissioners from the same political party. UTAH CODE ANN. § 54-1-1.5.

## Regional Transmission Organization / Independent System Operator

- ▶ N/A

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<sup>168</sup> The Division may “commence original proceedings, file complaints, appear as a party, present factual information and evidence, examine witnesses, advocate policy recommendations, commence appeals, otherwise participate” in proceedings before the Public Service Commission, state and federal courts and federal agencies. UTAH CODE ANN. §§ 54-4a-1(1)(a)-(b).

# VERMONT

## Attorney General

- ▶ Elected. VT. STAT. ANN. tit. 3 § 151 (2019).
- ▶ Can represent the public or the state in Public Utility Commission hearings if the Commission determines that the public interest would be served. VT. STAT. ANN. tit. 30 § 2(b).

## Public Advocacy

- ▶ Within the Department of Public Service; Director of Public Advocacy is appointed by the Commissioner of Public Service. VT. STAT. ANN. tit. 30 § 1(a)-(b).
- ▶ Represents the “interests of the people of the State” in hearings before the Public Service Commission. VT. STAT. ANN. tit. 30 § 2(b).

## Public Utility Commission

- ▶ Three commissioners; Chair nominated in the same manner as a Superior judge; other commissioners are appointed by the governor, after review by the Judicial Nominating Board, and subject to the consent of the senate. VT. STAT. ANN. tit. 30 § 3(a)-(b).

## Regional Transmission Organization / Independent System Operator

- ▶ ISO New England

# VIRGINIA

## Attorney General

- ▶ Elected. VA. CONST. art. V, § 15.
- ▶ Consumer Counsel within the Department of Law “represent[s] the interests of the people as consumers”; appears before governmental commissions and agencies, including the State Corporation Commission. VA. CODE ANN. § 2.2-517(A)-(B) (2019).

## Corporation Commission

- ▶ Three commissioners elected by the joint vote of the two houses of the General Assembly. VA. CODE ANN. § 12.1-6.

## Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

## WASHINGTON

### Attorney General

- ▶ Elected. WA. CONST. art. III, §§ 1, 4.
- ▶ Duty to “represent and appear for the people of the state and [Utilities and Transportation Commission in all actions and proceedings involving any question” under the public utilities title. WASH. REV. CODE § 80.01.100 (2019).
- ▶ Public Counsel Unit satisfies attorney general’s statutory responsibility to appear before the Utilities and Transportation Commission, but the unit is not statutorily-established itself. See *Power v. Wash. Water Power Co.*, 662 P.2d 374, 378 (Wash. 1983), *rev’d in part*, 684 P.2d 716 (Wash. 1984).

### Utilities and Transportation Commission

- ▶ Three commissioners appointed by the governor with the consent of the senate; not more than two commissioners shall belong to the same political party. WASH. REV. CODE § 80.01.010.

### Regional Transmission Organization / Independent System Operator

- ▶ N/A

## WEST VIRGINIA

### Attorney General

- ▶ Elected. W. VA. CODE § 3-1-16(a) (2019).
- ▶ Required to render and perform all legal services to the Public Service Commission. W. VA. CODE § 5-3-1.

### Consumer Advocate Division

- ▶ Director appointed by the Public Service Commission.<sup>169</sup>
- ▶ Within the Public Service Commission; Public Advocate to “act as an advocate for the position of and in the interest of all customers.” W. VA. CODE § 24-1-1(f)(2).

### Public Service Commission

- ▶ Three commissioners appointed by the governor with the advice and consent of the senate; no more than two of the commissioners shall be members of the same political party. W. VA. CODE § 24-1-3(b)-(c).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection

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<sup>169</sup> See *Home: Who We Are*, CONSUMER ADVOCATE DIV. (last visited Sept. 19, 2019), <http://www.cad.state.wv.us/default.htm>.

## WISCONSIN

### Attorney General

- ▶ Elected. WISC. CONST. art. VI, § 1.
- ▶ Provides legal services to Public Service Commission. WIS. STAT. § 165.25 (4)(a) (2019).

### Citizens Utility Board

- ▶ Two elected directors from each district. WIS. STAT. § 199.06.
- ▶ Represents the interests of residential utility consumers. WIS. STAT. § 199.05 (1)(a).

### Public Service Commission

- ▶ Three commissioners appointed by the governor and confirmed by the senate. WIS. STAT. § 15.79.

### Regional Transmission Organization / Independent System Operator

- ▶ Midcontinent ISO

## WYOMING

### Attorney General

- ▶ Appointed by the governor with the advice and consent of the senate in accordance with § 28-12-101 through 28-12-103 and may be removed by the governor as established in § 9-1-202. WYO. STAT. ANN. § 9-1-601(a) (2019).
- ▶ “Legal adviser” to and “duty to represent” Public Service Commission in “all proceedings in any court, before any other agency or before any departments of the federal government.” WYO. STAT. ANN. § 37-2-111.
- ▶ May complain to Public Service Commission of “anything, actual or proposed, done or omitted to be done in violation” of the Public Service Commission chapter of the Wyoming code. WYO. STAT. ANN. § 37-2-118.

### Office of Consumer Advocate

- ▶ Administrative head of the Office appointed by the governor with senate confirmation; subject to removal by governor. WYO. STAT. ANN. §§ 9-1-202(a), 37-2-403.
- ▶ Housed within Public Service Commission; required to represent the “interests of Wyoming citizens and all classes of utility customers in matters involving public utilities,” including considering “all relevant factors”; authorized to appear as a party in Public Service Commission proceedings and as *amicus curiae* in any court proceeding. WYO. STAT. ANN. §§ 37-2-401, 37-2-402(a).

### Public Service Commission

- ▶ Three commissioners appointed by the governor “by and with the advice and consent of the senate”; not more than 75% of the commission shall be members of the same political party. Wyo. STAT. ANN. § 37-2-101(a).

### Regional Transmission Organization / Independent System Operator

- ▶ Southwest Power Pool

## WASHINGTON, D.C.

### Attorney General

- ▶ Elected. D.C. CODE § 1-204.35(a) (2019).
- ▶ Responsible for “upholding the public interest.” D.C. CODE § 1-301.81(a)(1).

### People’s Counsel

- ▶ Within the Public Service Commission, and the head of the Office is appointed by the Mayor “by and with the advice and consent of the Council.” D.C. CODE § 34-804(b).
- ▶ Party as of right in “any proceeding of any nature” by the Public Service Commission. D.C. CODE § 34-804(a).

### Public Service Commission

- ▶ Three commissioners appointed by Mayor the governor and “by and with the advice and consent of the Council.” D.C. CODE § 34-801(a).

### Regional Transmission Organization / Independent System Operator

- ▶ PJM Interconnection







