

PETITIONING FOR REGULATION FROM STATE UTILITY COMMISSIONS

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I. INTRODUCTION

State utility commissions have the authority to impose legal obligations upon electric utilities via administrative order or regulation.² Advocates could petition state commissions to adopt an order or regulation requiring all electric utilities under their jurisdiction to engage in climate resilience planning. Precisely this kind of order was adopted by the California Public Utility Commission (“CPUC”) in August 2020. The order requires each investor-owned energy utility in California to submit a climate vulnerability assessment to the CPUC every four years as part of its rate case filing.³ The assessments must identify risks to the utilities’ assets, operations, and services from changing temperatures, sea level rise, variations in precipitation, wildfire, and “cascading impacts / compounding incidents” over the next fifty years and options for dealing with those risks.⁴ Although the CPUC decision was the result of proceedings it instituted on its own motion in May 2018,⁵ advocates could petition commissions in other states for similar orders and regulations.

Unlike a rate case proceeding, which only binds the specific utility involved in the case, an order or regulation adopted by a state utility commission will apply to all utilities specified in that order or regulation. Thus, petitioning a state commission to adopt an order or regulation requiring climate resilience planning by all utilities may be a more effective advocacy strategy than intervening in individual utilities’ rate case proceedings. However, it is not guaranteed that a state commission will grant a petition.⁶

¹ This document is part of the electric resilience toolkit, <https://www.icrrl.org/electric-resilience-toolkit/>, and complements sections one through three of the report, [Romany M. Webb et al., Climate Risk in the Electricity Sector: Legal Obligations to Advance Climate Resilience Planning by Electric Utilities, 51 ENVTL. L. REV. 577 \(2021\)](#). The authors would like to thank Olivia Satterfield and Jack Sherrick, Spring 2022 interns at the Environmental Defense Fund, for their assistance in preparing this document. Disclaimer: This document is the responsibility of the Sabin Center for Climate Change Law and Environmental Defense Fund, and does not reflect the views of Columbia Law School, Columbia University, or any ICRRL partner organization. This document is an academic study provided for informational purposes only and does not constitute legal advice. Transmission of the information is not intended to create, and the receipt does not constitute, an attorney-client relationship between sender and receiver. No party should act or rely on any information contained in this paper without first seeking the advice of an attorney.

² Romany M. Webb et al., *Climate Risk in the Electricity Sector: Legal Obligations to Advance Climate Resilience Planning by Electric Utilities*, 51 ENVTL. L. REV. 577, 620 (2021), <https://perma.cc/WV5Y-U2HL>.

³ Cal. Pub. Utils. Comm’n, Rulemaking 18-04-019: Decision on Energy Utility Climate Change Vulnerability Assessments and Climate Adaptation in Disadvantaged Communities (Phase 1, Topics 4 and 5) (Aug. 27, 2020), <https://perma.cc/2GKK-VCNP>

⁴ *Id.* at 4.

⁵ See Cal. Pub. Utils. Comm’n, Rulemaking 18-04-019: Order Instituting Rulemaking to Consider Strategies and Guidance for Climate Change Adaptation 16 (May 7, 2018), <https://perma.cc/BL9Q-Y9AX>.

⁶ See 16 TEX. ADMIN. CODE § 22.281 (Within 60 days after submission of a petition, the commission either shall deny the petition in writing, stating its reasons for the denial, or shall initiate rulemaking proceedings.); N.J. ADMIN. CODE § 14:1-5.16 (“[T]he Board shall take one of the following actions on the petition: 1. Deny the petition, in which case the notice of action shall explain the reasons for the denial; 2. Grant the petition and initiate rulemaking within 90 days of granting the petition; or 3. Refer the matter for further deliberations. . . .”); 4 COLO. CODE REGS. § 723-1-1306 (“Upon the filing of a petition for rulemaking, the Commission, at its discretion, may accept the petition . . .”); 220 MASS. CODE REGS. 2.03 (“Upon receipt of a petition, the

II. PROCESS OF PETITIONING

Individuals, organizations, and community groups may petition a state utility commission to issue a declaratory order or to adopt or amend regulations.⁷ Filing rules vary between states, however, there are often few restrictions on who can petition the commission.⁸

State utility commissions typically require petitions seeking the adoption or amendment of regulations to include suggested regulatory language, an explanation of why regulatory or other action is sought, the anticipated effects of such action, and the commission's legal authority to take it.⁹ Legal authority is particularly important because, as most are statutory creations,¹⁰ state utility commissions can only implement rules that are permitted under their authorizing statutes and related judicial decisions. Petitioners can point to various legal principles that authorize, and in some cases even require, state utility commissions to direct utilities to engage in climate resilience planning (see Part III below).

III. LEGAL ARGUMENTS

a. DUTY TO SERVE

State utility commissions are responsible for assuring that utilities fulfil their “duty to serve” all customers within their service territory.¹¹ Originally developed through common law and now codified by state statutes, the duty to serve has been described as requiring electric utilities “to provide extraordinary levels of service to customers.”¹² It includes, among other things, an obligation to provide “adequate service.”¹³ Service adequacy

Department may proceed in accordance with 220 CMR 2.04, 2.05, or 2.08 or take any other action the Department deems appropriate”).

⁷ See Webb et al., *supra* note 2, at 621–22.

⁸ See, e.g., OR. ADMIN. R. 860-001-0250 (providing that any “person may petition the Commission to promulgate, amend, or repeal a rule”); 16 TX. ADMIN. CODE § 22.281 (“Any interested person may petition the commission requesting the adoption of a new rule or the amendment of an existing rule”); WASH. ADMIN. CODE § 480-07-240 (“Any interested person may petition the commission to request that the commission adopt, amend, or repeal any rule”); MISS. ADMIN. CODE R. § 39-1-26-101 (“Any interested person can petition the Commission for issuance, amendment or repeal of a rule.”).

⁹ See, e.g., 16 TX. ADMIN. CODE § 22.281 (requiring that the petition “include a brief explanation of the rule, the reason(s) the new or amended rule should be adopted, the statutory authority for such a rule or amendment, and complete proposed text for the rule. The proposed text for the rule shall indicate by striking through the words, if any, to be deleted from the current rule and by underlining the words, if any, to be added to the current rule.”); WASH. ADMIN. CODE § 82-05-020 (petitioners are “encouraged” to address whether the rule “[] is authorized[;] is needed [;] conflicts with or duplicates other federal, state, or local laws [;] [a]lternatives to the rule exist that will serve the same purpose at less cost [;] [t]he rule applies differently to public and private entities [;] serves the purposes for which it was adopted [;] imposes unreasonable costs [;] is clearly and simply stated, and [;] differs, without adequate justification, from a federal law which applies to the same activity or subject matter”); GA R. & REG. § 515-2-1-.11 (requiring that the petition include “[a] paragraphed statement of the reason such rule should be amended, repealed, or promulgated, including a statement of all pertinent existing facts to petitioner's interest in the matter[;] citations of legal authority, if any, which authorize, support, or require the action requested by petition.”); OR. ADMIN. R. 137-001-0070 (requiring petitions to include “[f]acts or arguments in sufficient detail to show the reasons for and effects of adoption, amendment, or repeal of the rule” and “[a]ll propositions of law to be asserted by the petitioner”); CAL. CODE REGS. TIT. 20, § 6.3(b) (requiring that a petition “state the justification for the requested relief, and if adoption or amendment of a regulation is sought, the petition must include specific proposed wording for that regulation,” among other things).

¹⁰ Some state commissions are constitutionally established by their relevant state constitution. See, e.g., CAL. CONST., art. XII.

¹¹ Webb et al, *supra* note 2, at 623.

¹² *Id.* (quoting Jim Rossi, *The Common Law “Duty to Serve” and Protection of Consumers in an Age of Competitive Retail Public Utility Restructuring*, 51 VAND. L. REV. 1233, 1242 (1998), <https://perma.cc/W5CV-853C>; Jim Rossi, *Universal Service in Competitive Retail Electric Power Markets: Whither the Duty to Serve?* 21 ENERGY L. J. 27, 29 (2000), <https://perma.cc/EZA6-2NAE>)

¹³ *Id.* (citing CAL. PUB. UTIL. CODE § 451 (“Every public utility shall maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its

is often defined in terms of reliability, with electric utilities expected to take appropriate steps to prevent outages and restore service promptly when they occur.¹⁴ In *Langley v. Pacific Gas & Electric Co.*, the California Supreme Court explained that electric utilities are not expected to act as “insurer[s] or guarantor[s] of service,” but do have “a general duty to exercise reasonable care in operating [their] system[s] so as to avoid unreasonable risks of harm” to their customers as a result of outages.¹⁵ Thus, while utilities are not expected to prevent all outages, they must take steps to minimize climate impacts on customers, including through appropriate planning.¹⁶ Climate resilience planning by electric utilities is necessary to assure long-term service reliability and thus fulfil the duty to serve.

b. STATE LAWS

State laws may impose requirements on electric utilities with respect to storm or other extreme event preparedness that could provide another legal justification for requiring climate resilience planning. One example is section 66 of the New York Public Service Law, which requires electric utilities to develop “emergency response plans” that outline measures to prepare for, and ensure prompt restoration of service after, storms and similar events.¹⁷ Citing this provision, a coalition of environmental and public interest organizations—Earthjustice, Environmental Advocates of New York, Municipal Art Society of New York, Natural Resources Defense Council, New York League of Conservation Voters, Pace Energy and Climate Law Center of Pace Law School and Riverkeeper—filed a petition with the NYPSC in December 2012 requesting that it “require all utility companies within its jurisdiction to prepare and implement comprehensive natural hazard mitigation plans to address the anticipated effects of climate change.”¹⁸ The petition noted that electric utilities’ emergency response plans focus solely “on anticipation and response to disasters in the short-term” and argued that “[a]dequately planning for storms, as required under the Public Service Law, requires long-term assessment of risks,” based on “future climate predictions.”¹⁹ Many of the issues raised in the petition were dealt with in the Resiliency Collaborative convened by the NYPSC as part of the 2013 rate case proceedings for Consolidated Edison Company of New York, Inc. (“Con Ed”) (see [Climate Resilience Planning Process](#)).²⁰ While Con Ed has engaged in the type of planning sought out by the Petition, other utilities in New York have not.

In March 2021, the City of New York, Environmental Defense Fund, Natural Resources Defense Council, and Sabin Center for Climate Change Law petitioned the NYPSC to require “every major utility in the state—electric, gas, water, and telecommunications—to conduct a climate change vulnerability study” and incorporate climate resiliency into existing processes, among other things.²¹ Petitioners noted that this requirement “builds on previous actions the Commission has taken to consider the impacts of climate change in utility operations,”

patrons, employees, and the public.”); N.J. STAT. ANN. § 48:2-23 (“The board may . . . require any public utility to furnish safe, adequate and proper service.”); 66 PA. CONS. STAT. § 1501 (“Every public utility shall furnish and maintain adequate, efficient, safe, and reasonable service and facilities.”)).

¹⁴ *Id.* (citing Note, *The Duty of a Public Utility to Render Adequate Service: Its Scope and Enforcement*, 62 COLUM. L. REV. 312, 312–13, 313 n.7 (1962) (noting that, while “[t]he standard of adequacy is incapable of precise definition,” state statutes generally require utilities to “provide safe, continuous, comfortable, and efficient service,” and “to take precautions against [service interruptions] and to restore service as quickly as possible” (internal citations omitted))).

¹⁵ *Langley v. Pac. Gas & Elec. Co.*, 262 P.2d 846, 853 (Cal. 1953).

¹⁶ Webb et al, *supra* note 2, at 623.

¹⁷ N.Y. PUB. SERV. LAW § 66.

¹⁸ See Letter from Anne R. Siders, Assoc. Dir., Ctr. for Climate Change L., et al. to the Hon. Jaclyn A Brillling, Sec’y, N.Y. Pub. Serv. Comm’n 5-6 (Dec. 12, 2012), <https://perma.cc/V43Z-9MX8> [hereinafter “NYPSC Petition”].

¹⁹ NYPSC Petition, *supra* note 18, at 1.

²⁰ *Id.*

²¹ City of New York et. al, In the Matter of the Petition for Performance of Statewide Utility Climate Change Vulnerability Studies, Docket No. 21-M, 1 (Mar. 19, 2021), <https://perma.cc/A9X7-BN8G>.

such as the NYPSC statement in the 2013 Con Ed rate case proceeding.²² Petitioners argued that, because most of the utility systems in the state are integrated, all utilities must all engage in climate resilience efforts.²³ Petitioners requested that the Commission direct each utility to create a plan to incorporate its climate change vulnerability study findings into its strategy and investment processes.²⁴ As of June 2022, the NYPSC has not yet ruled on this petition.

Similar planning obligations to New York’s emergency response plan are imposed in other states. For example, Florida law declares that “it is in the state’s interest for each utility to mitigate restoration costs and outage times to utility customers when developing transmission and distribution storm protection plans” and that each utility “shall file, pursuant to commission rule, a transmission and distribution storm protection plan . . . [that] explains the systematic approach the utility will follow to achieve the objectives of reducing restoration costs and outage times associated with extreme weather events and enhancing reliability.”²⁵ Similarly, regulations in Texas require every state utility to “make all reasonable efforts to prevent interruptions of service,” and “make reasonable provisions to manage emergencies resulting from failure of service.”²⁶ In addition, Massachusetts law provides that each “electric distribution, transmission and natural gas distribution company . . . shall . . . submit [an annual] emergency response plan for review and approval,” and that the plan “shall be designed for the reasonably prompt restoration of service in the case of an emergency event.”²⁷ Advocates could rely on these and similar legal requirements in other states to push for climate resilience planning.

²² *Id.* at 10–11.

²³ *Id.*

²⁴ *Id.* at 3.

²⁵ *See, e.g.*, FLA. STAT. § 366.96(e);

²⁶ TEX. ADMIN. CODE § 25.53.

²⁷ MASS. GEN. LAWS. Ch. 164, § 85B.