

This document has been prepared as part of the implementation project of Legal Pathways to Deep Decarbonization (Michael B. Gerrard and John C. Dernbach, eds. Environmental Law Institute [2019]) (LPDD). For background information on the project, see <https://lpdd.org>.

MODEL STATE LAW PROVISION TO ACHIEVE REGULATORY REALIGNMENT OF PUBLIC UTILITY POLICIES WITH ENERGY AND ENVIRONMENTAL GOALS¹

I. Introduction

The *Model Laws for Deep Decarbonization in the United States* project at Columbia Law School’s Sabin Center for Climate Change Law develops model laws that can be adopted by all levels of government and the private sector to reduce fossil fuel use and greenhouse gas (“GHG”) emissions.² The objective is to identify a broad range of potential approaches to deep decarbonization³ to allow decisionmakers to better understand the wide range of available choices and choose the legal pathways that are appropriate and feasible.⁴ Chapter 23 of *Legal Pathways to Deep Decarbonization in the United States* provides recommendations related to electricity charges, mandates, and subsidies, focusing on specific policy changes aimed at balancing economic, consumer welfare, and environmental goals that can help facilitate the transition to deep decarbonization.

One of the obstacles to achieving decarbonization in the electric power sector is that many of the laws and statutes that govern public utility (or public service) commissions (“PUCs”) are antiquated. PUCs were originally created and tasked with overseeing the operations of utilities to ensure that they provide safe and reliable services at a just and reasonable rate that allows utilities to maintain a viable business. While most PUCs make efforts to modernize their actions, organization, and decision-making through policy changes,

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² *Model Laws for Deep Decarbonization in the United States*, Sabin Center for Climate Change Law, Columbia Law School, <http://lpdd.org> (site last visited August 18, 2021).

³ “‘Deep decarbonization’” refers to the reduction of GHG emissions over time to a level consistent with limiting global warming to 2° C or less, based on the scientific consensus that higher levels of warming pose an unacceptable risk of dangerous climate change.” Williams, J.H., et al. (2014). *Pathways to Deep Decarbonization in the United States*. The U.S. report of the Deep Decarbonization Pathways Project of the Sustainable Development Solutions Network and the Institute for Sustainable Development and International Relations. Revision with technical supplement, Nov. 16, 2015.

⁴ Gerrard, Michael B. & Dernbach, John C., *Legal Pathways to Deep Decarbonization in the United States*, Environmental Law Institute (2019).

the absence of statutory requirements to consider climate effects in making electric power decisions can hamstring the transition to decarbonization. In some instances, these outdated statutory provisions may serve as regulatory barriers to decarbonization because they do not require, and as a result may potentially constrain, consideration of other state energy and environmental goals.⁵ Recommendations provided in *Legal Pathways to Deep Decarbonization* to overcome this obstacle include aligning public utility policies with broader energy goals related to decarbonization.⁶ This can be achieved by requiring public utility regulators to consider decarbonization and creating a state energy office with oversight authority over basic energy policy decisions.⁷ Requiring PUCs to consider decarbonization can be achieved through the addition of an explicit mandate to consider climate effects or through a more generalized mandate to consider the public interest and other relevant environmental costs, benefits, and risk mitigation factors.⁸ Since many states already have an energy office,⁹ another option would be to require commissioners to align policy priorities with other state energy and environmental goals and consider other environmental externalities when making electric power decisions, including rate-making.¹⁰ Additionally, the duties and functions of the existing state energy office should be reviewed and amended as needed to ensure that office also has the statutory authority to coordinate with the state PUC.

A review of existing laws and statutes that currently define the authority of PUCs shows that such legislation varies from state to state, but there are generally three different approaches used to direct PUCs to consider certain criteria in designing electricity policy: (1) statutes that

⁵ *Legal Pathways to Deep Decarbonization*, *supra* note 4, at 611; see also Filipink, Eric, *Serving the “Public Interest” – Traditional vs Expansive Utility Regulation*, Harrison Institute for Public Law, Georgetown University (2009) (noting that courts typically interpret the scope of public interest regulation by analyzing the elements of legislatively delegated authority, including statutory goals, the roles of the commission and its decision-making criteria).

⁶ *Id.* at 612.

⁷ *Id.*

⁸ Compare D.C. Code § 34-808.02 (requiring consideration of the public safety, the economy of the District, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District’s public climate commitments), with Utah Code Ann. § 54-4a-6 (requiring the Division of Public Utilities to act in the public interest and consistent with the promotion of the safe, healthy, economic, efficient, and reliable operation of all public utilities and their services). For a comprehensive list of state PUC legal authority, see Grab, Denise, *et al.*, *Opportunities for Valuing Climate Impacts in U.S. State Electricity Policy*, Institute for Policy Integrity, New York University School of Law, Table 1, 3-4 (April 2019).

⁹ See National Association of State Energy Officials, <https://www.naseo.org/members-states> (providing information about each state energy office).

¹⁰ *Id.*

require specific consideration of environmental externalities; (2) statutes that require consideration of the public health, public welfare, or the public interest; and (3) statutes that provide general regulatory discretion to the utility commission.¹¹ While many PUCs operating under general regulatory discretion language (category 3) can and do consider climate effects and other environmental factors, greater alignment between energy and environmental policy will be achieved if states update PUC statutes to specifically require consideration of environmental externalities or the public interest, health, and welfare as well as coordination between the PUC and other energy and environmental officials as it relates to a state's energy policy. This clarification in PUC authority will streamline existing regulatory processes and promote innovation and flexibility in implementation of decarbonization strategies.

II. Overview of Model State Law Provision

The Model State Law Provision to Achieve Regulatory Realignment of Public Utility Policies with Energy and Environmental Goals provides a framework for promoting decarbonization by balancing a PUC's economic and consumer protection goals of ensuring just and reasonable rates with existing public interest policies implemented through state energy and environmental officials. The Model Provision is not intended to be a comprehensive, stand-alone state law. Instead, it is series of provisions designed to be added to existing state legislation creating public service commissions and providing for their duties and responsibilities. These model provisions can be included in a more comprehensive state bill addressing climate change mitigation or adaptation or as a stand-alone bill designed to modernize public utility policies and rate-making goals and objectives. The three main objectives of this model provisions are to: (1) amend existing PUC rate-making authority to include consideration of the public interest and other environmental externalities related to climate effects; (2) ensure PUCs have sufficient staff, resources, and technical expertise to advance state energy policies through its regulatory decision-making or the ability to utilize other agency resources and expertise; and (3) create a state energy office or, if such an office already exists, amend its existing statutory framework to ensure that office has the authority to coordinate state energy goals, including carbon reduction objectives, with its PUC, coordinate state energy goals with other states and the federal government, and participate in regional discussions, including interstate compact initiatives.

¹¹ Grab, *supra* note 8, at 24.

Model Provision

[To be incorporated into State legislation concerning climate change mitigation and adaptation]

[[AN ACT] relating to [energy][energy and the environment][[climate change mitigation, adaptation][, and [climate] resiliency]; creating a comprehensive regulatory program to reduce greenhouse gas emissions in order to improve the health and welfare of the people of the [state] and advance [state's] economic and energy profile; providing for the fixing of rates and services for public utilities that are just and reasonable and in the public interest; creating an energy analysis and planning division of the public utility commission and providing for its duties and responsibilities; establishing a public utility liaison charged with coordinating the energy policy of the state with other energy and environmental officials; creating an office of energy and providing for its duties and responsibilities.¹²

Part 1. Short title

This Subtitle shall be known and may be cited as the “Climate Mitigation and Adaptation Plan.”

Part 2. Findings and declaration of policy

The legislature finds and declares that to ensure the viability of the state's natural resources, to provide a continuing renewable and resilient energy source for the citizens and business of [state], to promote economic development through job retention and creation in [state], and to ensure the unique economic, climatic, and geographic conditions of this state are considered in the formulation and implementation of clean energy transition, it is the public policy of this state, as a matter of public interest, health, safety, and welfare to provide for a coordinated statewide program related to the transition to a clean, renewable, and resilient power grid.

¹² This introductory language provides a menu of actions for policymakers. The language should be drafted to reflect the model provisions chosen by the legislator(s) based on the specific needs and objectives of the state and revised to conform to the existing PUC enabling legislation of that state.

[Operative Sections:]¹³

Part 3. Public Utility Commission.¹⁴

Section [*]. Creation

Section [*]. Organization and members

Section [*]. Power to regulate rates and services / rate fixing

- A. The commission shall exercise all necessary power and authority over any public utility subject to its jurisdiction for the purpose of fixing and regulating the just and reasonable rates charged or to be charged and service furnished by such public utilities.
- B. In fixing the just and reasonable rates charged or to be charged and service furnished by all public utilities under its jurisdiction, the commission is authorized and directed to consider and act in the public interest. All rules and regulations made by the commission or by a public utility affecting or pertaining to rates, charges, or service to the public shall be just and reasonable. For purposes of this section, the scope of “just and reasonable” may include, but shall not be limited to, the efficiency, sufficiency, and adequacy of the facilities provided and the services rendered; the cost of providing such service and the value of such service to the public; the ability of the utility to improve such service and facilities; the economic impact of charges on each category of customer; the means of encouraging energy conservation and efficiency; the generation and use of renewable energy resources; energy security and resiliency; and other relevant environmental costs, benefits, and risk mitigation factors [,including the preservation of environmental quality and the

¹³ The operative language provided herein is specific only to the modernization of PUC statutes that provide for the alignment of PUCs with other state energy and environmental objectives, programs, and officials and the creation and/or amendment of enabling legislation related to a state energy office. As needed, operative language should be conformed to the priorities set out in the broader legislative or regulatory framework in which the Model Provision is to be incorporated.

¹⁴ General organizational sections of standard state public utility commission legislation are provided for context, with model language provisions included only for those sections related to the objective of aligning public utility policy with broader state energy and environmental goals.

consideration of climate effects] [including reductions in greenhouse gas emissions and the state’s climate commitments] [including the potential costs of carbon].¹⁵

Section [*]. Jurisdiction, Powers, and Duties Generally

Section [*]. Energy Analysis & Planning Division

- A. In order to assist the commission in making an examination of the affairs of any person providing a public service or public utilities business in [state] concerning matters affecting services and rates charged [state] consumers by such public service or public utility business, or for representing the commission in matters affecting services and rates charged by public utilities to consumers within its jurisdiction or the judicial review thereof, there is hereby established an energy analysis and planning division of the public utility commission. The energy analysis and planning division shall act at the direction of the commission.
- B. The energy analysis and planning division is hereby charged with monitoring electric and gas utility energy efficiency, conservation, demand reduction, and related programs; tracking energy and demand reduction targets, goals, review programs; participating in studies concerning energy policy; analyzing alternative regulatory approaches for energy policy; and providing support to commissioners for activities pertaining to energy, environmental regulations, energy efficiency, and renewables.
- C. The energy analysis and planning division is directed to provide for, and assume primary responsibility for, establishing and maintaining continuous liaison with all other appropriate state and federal agencies whose policy decisions and rulemaking authority affect those utilities over which the commission has primary regulatory jurisdiction, including but not limited to the department of natural resources, department of environmental quality, and the state energy office. Active participation in other agencies’ public hearings is encouraged to transmit the commission’s policy positions and information requirements in order to provide for more efficient regulation.

¹⁵ Bracketed language provided for policymakers to choose the language that best fits the needs and objectives of the state, including those that may want to more explicitly target the consideration of decarbonization.

- D. The energy analysis and planning division is authorized to coordinate with other states and the federal government in promoting and coordinating interstate and intrastate public utility service and reliability of public utility energy supply and participate in regional discussions, including interstate compact initiatives, related to public utility service.
- E. The energy analysis and planning division shall consist of, but shall not be limited to, persons with training in economics, energy and environmental sciences, engineering, finance, and public policy, all of whom shall be full-time employees of the commission, and such other support staff and clerical assistants as may be necessary to make such examinations and to carry out such responsibilities. If the staff of the energy analysis and planning division is unable or insufficient to assist the commission in evaluating, reviewing, and representing the commission in matters affecting services and rates charged by public utilities to [state] consumers or the judicial review thereof, the commission is empowered to retain other attorneys, consultants, engineers, or support staff and clerical assistants to assist the energy analysis and planning division and to utilize the services of the other executive departments in the executive branch of state government upon mutually agreeable terms and conditions.

Part 4. State Energy Office.¹⁶

Section [*]. State Energy Office

There is hereby created an office of energy in the [department]. The office of energy shall perform and exercise the following power, duties, functions, and responsibilities:

- A. Plan and execute an energy research and development program, including the formulation of energy plans and policy, the administration and implementation of energy conservation programs, and the development of technical data, analyses,

¹⁶ This Part is intended to create an office or division of energy in states that do not have such an office or amend the enabling legislation for the existing office of energy to provide for the duties and functions of such office, including coordination with the PUC, through the energy analysis and planning division, and the development of other energy research and development programs as needed. The duties and functions outlined herein are intended to serve as a menu of options, subject to the needs of a particular state and the jurisdiction of the applicable department/office.

assessments, and forecasts relative to energy, supply, demand, utilization, technology, economics, and taxation;

- B. Administer and implement laws relating to research and development of renewable energy sources, energy conservation for new and existing residential, commercial and other buildings, energy impacted area assistance and other laws related to energy conservation and efficiency;
- C. Coordinate the state's energy plans and policy with the Public Utility Commission, through the energy analysis and planning division;
- D. Inform, educate, and provide materials to other agencies of the state or political subdivisions thereof and to the public on all energy related matters, with particular emphasis on energy consumption trends and their social, environmental, and economic impacts; conservation and energy efficiency; and alternative energy technologies;
- E. Serve as the primary manager of energy efficiency and renewable energy programs funded by the United States Department of Energy and monitor and assess the relationship and impact of federal and regional energy policies on the state's energy policies and programs; and
- F. Coordinate the state's energy plans and policy with other states and with the federal government, promote and coordinate interstate and intrastate energy policies, and participate in regional discussions, including interstate compact initiatives, related to the state's energy policies and programs.