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STATE STATUTORY DEFINITIONS OF ELECTRIC UTILITIES¹

Introduction

Today, the electricity market is undergoing profound changes in how power is generated, transmitted, and sold, the result of efforts both to introduce competition into the electricity wholesale and retail markets, and to decarbonize its physical infrastructure overall. Customers (including residential, commercial and industrial facilities, and municipalities), equipment providers, and private third-party retailers, developers, and investors, are bringing together novel technologies, financing structures, and legal relationships (regulatory and contractual) to build new facilities at the grid edge – located on local utility distribution systems, often behind a customer’s meter. These facilities allow parties to supply more decarbonized electricity in particular locations close to load and allow electricity consumers to be more active participants in the market through behind-the-meter generation and demand reduction — in other words, as both producer and consumer, or “prosumer.”

While many factors affect the success of these efforts, one of the most important can be how each state defines the term “public utility,” which is often a determinant of which resources at the grid’s edge can, and cannot, sell power to end users. This Report addresses how the term “public utility” (or its equivalent) is currently defined in each of the 50 states and the District of Columbia and will hopefully provide a “first cut” for those seeking to develop grid edge projects. It comprises the first step in a broader effort to draft model legislation and regulations that particular states could adopt to best adjust their existing regulatory structure to further their decarbonization efforts, all while helping them achieve energy rights — including energy justice — for all their citizens and the communities in which they reside.

Background

Examples of new facilities and resources that are being developed at the grid edge include:

- (1) **Distributed Generation²** (DG) are relatively small generation facilities including solar, wind, biomass, fuel cells, and cogeneration;

¹ Initial draft prepared by Karen Anderson, J.D. ’21, Yale Law School. Additional editing and contribution by Baird Brown, Principal, eco(n)law LLC; Charles Howland, Partner, Curtis, Mallet-Prevost, Colt & Mosle LLP; and Karl Pielmeier, J.D. ’21, NYU School of Law.

² *Distributed Energy Resources*, AM. COUNCIL FOR AN ENERGY-EFFICIENT ECONOMY, <https://www.aceee.org/topic/distributed-energy-resources> (last visited Mar. 6, 2021).

- (2) **Demand Resources**³ (DR) are facilities operated by electricity customers that can reduce consumption (often in aggregation with others) during periods of high electricity demand in return for compensation by the local utility or through an accessible wholesale market;
- (3) **Battery storage**⁴ can provide power (or absorb power to assist in grid balancing) with immediate response for comparatively short time periods, including from both dedicated facilities and (increasingly) aggregated, parked, plugged-in electric vehicles and other customer battery systems;
- (4) **Microgrids**⁵ combine one or more customers, one or more DG resources, and often storage into a single controllable entity that can decouple from the grid and remain operational in the event of grid disruptions;
- (5) **“Behind the Meter”**⁶ generators are DG that directly serve customers without using utility wires and may be eligible for net metering tariffs; and
- (6) **Smart metering technologies**⁷ are metering devices that allow consumers to manage and record electric energy consumption and electronic device performance in real time and can communicate directly with utilities to facilitate deployment of the other resources described above.

With respect to climate change, these new resources can collectively provide:

- (1) **Mitigation**, by reducing the grid’s carbon footprint through lessened peak demand (which typically requires the dispatch of the most expensive, and typically most carbon-intensive generation units, such as oil and diesel “peakers”) and increased deployment of renewables and other low carbon technologies, and
- (2) **Adaptation**, by increasing resiliency against grid disruption from the impacts of climate change such as storms, wildfires, floods, and excessive heat, as well as cyber-attacks and other grid-wide events.

These issues are explored in detail by C. Baird Brown in Chapter 6, *Financing at the Grid Edge*, of *Legal Pathways to Deep Decarbonization in the United States*.⁸ *Legal Pathways* offers a

³ U.S. DEP’T OF ENERGY, BENEFITS OF DEMAND RESPONSE IN ELECTRICITY MARKETS AND RECOMMENDATIONS FOR ACHIEVING THEM (Feb. 2006) <https://www.raonline.org/wp-content/uploads/2016/05/doe-benefitsofdrandrecommendations-2006-02.pdf>.

⁴ *Energy Storage Ass’n*, ENERGY STORAGE ASS’N, <https://energystorage.org/> (last visited Mar. 6, 2021).

⁵ Elisa Wood, “What is a Microgrid?,” *Microgrid Knowledge*, (June 24, 2020) <https://microgridknowledge.com/microgrid-defined/>.

⁶ *Net Metering*, NAT’L RENEWABLE ENERGY LAB., [https://www.nrel.gov/state-local-tribal/basics-net-metering.html#:~:text=Net%20energy%20metering%20\(NEM\)%2C,exported%20to%20the%20utility%20grid.&text=NEM%20customers%20directly%20use%20the,site%20by%20their%20DG%20systems](https://www.nrel.gov/state-local-tribal/basics-net-metering.html#:~:text=Net%20energy%20metering%20(NEM)%2C,exported%20to%20the%20utility%20grid.&text=NEM%20customers%20directly%20use%20the,site%20by%20their%20DG%20systems) (last visited Mar. 6, 2021).

⁷ Özge İşlegen et al., “Why Power Companies Love Smart Meters,” *Kellogg Insight*, KELLOGG SCHOOL OF MANAGEMENT AT NORTHWESTERN UNIV., (Sept. 8, 2015) <https://insight.kellogg.northwestern.edu/article/why-power-companies-love-smart-meters>.

⁸ C. Baird Brown, *Financing at the Grid Edge*, in *LEGAL PATHWAYS TO DEEP DECARBONIZATION IN THE UNITED STATES* (Michael B. Gerrard & John C. Dernbach, eds., 2019) [*hereinafter* “LEGAL PATHWAYS”].

playbook of legal tools available to achieve deep reductions in U.S. fossil fuel use and greenhouse gas emissions. *Financing at the Grid's Edge* discusses “legal impediments and solutions for customer, community, and third-party financing of behind-the-meter and community-scale clean generation, storage, and energy efficiency.”⁹

One major impediment to these new developments at the grid edge is the fact that generation, delivery, or sale of electricity by entities that are not franchised public utilities is often nominally prohibited by a state’s utilities laws. Conversely, under most state laws, undertaking an activity that renders one a “public utility,” even if not otherwise prohibited, may trigger rate regulation and other regulatory requirements that impose excessive costs or obligations that the proponent of the grid edge facility cannot support. The regulatory trigger is typically whether a “sale” of power is taking place or the facility developer owns or operates generation or distribution equipment.¹⁰

Thus, the consequence of falling within a state’s definition of an electric utility may “either to be subject to full regulation as a public utility or to simply be prohibited from acting as a utility if one does not have an assigned service territory” — and “either result effectively prevents ownership or operation of a generating resource by anyone other than a franchised utility.”¹¹

However, many state statutes *do* provide certain exceptions to the strictures created by the definition of “public utility,” a few examples of which include:

- (1) **Self-generation** – Generating one’s own power is typically excluded from a state’s definition of “public utility,” but is often limited to customer owned equipment on the customer’s property.
- (2) **Geographic exceptions** – Various states permit electric energy generators to sell electricity to customers without being regulated as a public utility, so long as the customers are geographically close (variously defined) to the generation source.
- (3) **Landlord exceptions** – Many states allow landlords to sell and distribute electric energy to tenants without being deemed “public utilities.”

⁹ *Id.* at 156.

¹⁰ All states regulate the sale of electricity to some extent, premised on the fact that at least the distribution system comprises a “natural monopoly” whose high capital costs discourage new market entrants. Thus, under what is informally termed the “regulatory compact,” an electric utility is given an exclusive franchise as the “public utility” to service customers within a given geographic territory, and its rates are set by the state’s public utility commission or its equivalent. In the early 20th century all states fully regulated all terms of the generation, transmission, distribution and retail sale of electricity, with the federal government’s role being limited to regulation of interstate wholesale sales necessary to balance supply needs among various vertically integrated electricity utilities. Beginning in the 1970s, a series of federal laws and regulations were issued that gradually opened up the generation, wholesale sales, and transmission functions of electricity sales to competition, accompanied in some states by initiatives to allow for retail competition. For a more detailed discussion of this history and the legal issues that the current federal and state regulatory landscape set for grid edge resources, see JEFFERY S. DENNIS ET AL., ENERGY ANALYSIS & ENVTL. IMPACTS DIV., LAWRENCE BERKELEY NAT’L LAB., FEDERAL/STATE JURISDICTIONAL SPLIT: IMPLICATIONS FOR EMERGING ELECTRICITY TECHNOLOGIES (Dec. 2016), <https://www.energy.gov/sites/prod/files/2017/01/f34/Federal%20State%20Jurisdictional%20Split--Implications%20for%20Emerging%20Electricity%20Technologies.pdf>.

¹¹ LEGAL PATHWAYS, *supra* n. 8, at 156.

- (4) **Judicial exceptions** – Some states have developed judicial carve-outs that allow certain entities to not be regulated as public utilities notwithstanding their engagement in activities that would otherwise trigger “public utility” status.

Each state’s mix of positive state law (statute and regulations) and utility commission and judicial interpretation, is unique, and thus, as Brown has noted, “a review of all exceptions [to the definition of “public utility”] in a particular jurisdiction will often yield fortuitous paths forward.”¹²

This compilation provides such a review. For each of the fifty states and the District of Columbia, it provides the relevant statutory definitions of electric utilities (variously termed “public utilities,” “electric companies,” “electric corporations,” “public service corporations,” etc.). Then, it reviews the statutory exceptions to that definition that are available in each state, as well as relevant judicial or regulatory interpretations.

Report Organization

For each state, a preliminary “Regulatory Environment At-a-Glance” table provides context on the state’s electricity market, as reflected in the availability or applicability status of four key metrics: Retail Electric Competition, RTO/ISO Membership, Renewable Portfolio Standard, and Net Metering Regulations. Collectively, these metrics represent often-useful avenues to sell power from a grid edge resource without being deemed a “public utility,” as detailed in the remainder of each state’s discussion. These four regulatory attributes and how they operate to facilitate a state’s expansion of grid edge resources are described below.

Retail Electric Competition

Sixteen states and the District of Columbia have partially deregulated the sale of electricity, allowing customers some degree of choice regarding their generation supplier. In the remaining states, electricity in any particular location is a bundled product that is sold only by the local utility. Competitive suppliers in such states can facilitate customer generation by selling additional amounts the customer needs and purchasing excess generation on privately negotiated terms.¹³ A multi-customer microgrid operator can register as a retail supplier.

RTO/ISO Membership

Utilities in all or parts of 40 states and the District of Columbia, comprising approximately two thirds of the country’s electricity load, are members of one of seven regional transmission organization (RTOs) or independent system operators (ISOs) which operate non-discriminatory wholesale markets for electricity. While RTO and ISO markets vary, grid edge facilities located

¹² *Id.*

¹³ The designation in this Report of whether a state has “**Retail Electric Competition**” is based on: Electric Choice, *Map of Deregulated Energy States & Markets*, <https://www.electricchoice.com/map-deregulated-energy-markets/> (last updated 2020); Lisa M. Quilici et al., *Retail Competition in Electricity: What Have We Learned in 20 Years?*, CONCENTRIC ENERGY ADVISORS, INC. (2019), <https://ceadvisors.com/wp-content/uploads/2019/07/AEPG-FINAL-report.pdf>.

in the service areas of utilities which are members of an RTO/ISO often have avenues to sell energy and other related services in relevant wholesale markets.¹⁴

Renewable Portfolio Standard

Thirty states and the District of Columbia have adopted renewable portfolio standards (RPSs) which require electricity utilities to source a given (typically increasing over time) percentage of the electricity they sell from various renewable resources, often with further encouragement for particular technologies (such as solar photovoltaic (PV) or offshore wind). Grid edge facilities that incorporate an RPS-favored technology can sell renewable energy credits to utilities in the state, in most cases separately from the actual energy produced.¹⁵

Net Metering Regulations.

Forty states and the District of Columbia have some form of net metering rules or voluntary programs in which an electricity customer with a behind the meter generation facility can sell excess electricity back to the utility, often at its retail rate, by receiving a credit on its monthly utility bill, subject to certain size and other limits.¹⁶

While utilities comply with RTO/ISO rules and legislatively mandated programs, such rules and mandates do not necessarily reflect a flexible attitude on the part of utilities or public utility commissions toward grid edge resources. They do provide strategic pathways within their limits and may provide some flexibility to utilities that choose to take advantage of it.

Themes, Common Issues, and Qualifications

While each state's definition of "public utility" or its analog is unique, there are several common themes and issues that arise from a review of the different state's use of the term (in addition to the four attributes discussed above) that may inform the reader's review of a particular state's statute. Additionally, while much effort has been made to ensure that this 50-state review is both accurate and comprehensive, the regulatory landscape is changing in many states, and all references should be confirmed and further research done as necessary. Finally, there are several issues related to the definition of "public utility" that may incidentally appear in a particular state's

¹⁴ Per FERC Order No. 2000 (Regional Transmission Organizations, 89 FERC ¶ 61,285 (Dec. 20, 1999) (to be codified at 18 C.F.R. pt. 35)) and other orders, ISOs and RTOS collectively operate a region's electricity grid, administer a region's wholesale electricity markets, and provides reliability planning for a region's bulk electricity system. (While Texas's ERCOT is not subject to FERC jurisdiction, functionally it operates as an ISO/RTO.) The designation of a state's "**RTO/ISO Membership**" in this Report is based on: *Electric Power Markets*, FERC, <https://www.ferc.gov/industries-data/market-assessments/electric-power-markets> (last visited Dec. 13, 2020).

¹⁵ The designation in this Report of whether a state has a "**Renewable Portfolio Standard**" is based on: National Conference of State Legislatures, *State Renewable Portfolio Standards and Goals*, <https://www.ncsl.org/research/energy/renewable-portfolio-standards> (last updated Jan. 4, 2021). Additional information is available at *Renewables Portfolio Standard*, DATABASE OF STATE INCENTIVES FOR RENEWABLES AND EFFICIENCY, N.C. CLEAN ENERGY TECHNOLOGY CENTER AT N.C. STATE UNIVERSITY [hereinafter "DSIRE"], <https://programs.dsireusa.org/system/program/detail/840> (last updated Sept. 24, 2018).

¹⁶ The designation of whether a state has "**Net Metering Regulations**" is based on: *Programs: Net Metering*, DSIRE, <https://programs.dsireusa.org/system/program?type=37&> (last visited Dec. 13, 2020); National Conference of State Legislatures, *State Net Metering Policies*, <https://www.ncsl.org/research/energy/net-metering-policy-overview-and-state-legislative-updates.aspx> (last visited Dec. 13, 2020).

individual discussion in the Report, but that are generally beyond its scope. Following are some specific examples of these themes, common issues, and qualifications.

Limitations of Judicial Exceptions

In some states judicial carve-outs and exceptions to the term “public utility” that may permit a grid edge resource have been developed, often based on whether a seller of electricity holds itself out as serving the “public.” A project relying on such an exception may face a challenge by the incumbent utility, especially where the exception has been narrowly applied in the past, or has little apparent support in the language or legislative-regulatory history of the relevant law or regulation. Such legal risk and uncertainty may prevent grid edge projects relying on such an exception from receiving financing, and thus could be less useful than statutory exceptions in facilitating such projects.

Municipal Utilities; Electric and Other Cooperatives

Individual states often treat municipal utilities and cooperatives somewhat differently from investor-owned utilities (IOUs). Such “munis” and “co-ops” are typically authorized by state law to operate under various conditions similar, but not necessarily identical, to those applicable to IOUs. Rules that apply to grid edge resources in IOU service territories may not apply in the service territories of munis or co-ops. While this Report references these distinctions in some states, they are not explored comprehensively or in detail.

On the other hand, some state statutes would permit the formation of a multi-customer microgrid as a new co-op. While use of rural and other local cooperatives to develop grid edge resources can be promising, co-ops are often subject to specific limits on formation that are not thoroughly discussed in this Report, and this Report should only be the beginning of any related inquiry.

Siting Requirements

Many states have separate siting requirements for electric generating facilities, apart from the definition of “public utility.” While this issue is incidentally discussed with respect to some states in this Report, it is generally beyond its scope.

Specified Technologies

Many states’ exceptions to the scope of a “public utility” are based on use of particular technologies, and the definition of seemingly the same technology can actually differ from one state to another.

Community Solar; Other Multi-Customer Exceptions

One of the most promising developments in grid edge resources is “community solar” (individual customers purchase individual interests in a separately sited solar farm) and similar multi-customer virtual metering programs. While the development of these programs in some states is addressed in this Report, it is a rapidly developing structure whose availability should be further researched closely in a given state. Also, multi-customer exceptions to the strictures of a

“public utility” are often coupled with required disclosures to the customers. Further research beyond this Report is necessary to comprehensively understand these requirements.¹⁷

¹⁷ LPDD The Legal Pathways to Deep Decarbonization website includes model state community solar legislation. See LPDD Model Law: Model State Legislation to Promote Community Solar Facilities, available at <https://lpdd.org/resources/lpdd-model-law-state-legislation-to-promote-community-solar-facilities/>

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ALABAMA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | None |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | No |

Definitions

Title 37 (“Public Utilities and Public Transportation” of the Code of Alabama defines “**utility**” to “include every person, not engaged solely in interstate business, that now or may hereafter own, operate, lease, or control: any plant, property, or facility for the generation, transmission or distribution, sale or furnishing to or for the public of electricity for light, heat, or power, or other uses, including any conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power, or other uses . . . the term ‘utility’ shall also mean and include two or more utilities rendering joint service.”¹⁸

Alabama Power is currently the only electric utility under the jurisdiction of the Alabama Public Service Commission—several other entities do provide retail electric service, including municipalities and cooperatives (discussed below).¹⁹

Judicial Interpretation

The Supreme Court of Alabama has held that “**not all purveyors of energy commodities are ‘public’ utilities**, even though they sell and distribute their products under statutory regulation,” because “an essential element of a utility is that it is both serving and is constituted to serve all the inhabitants in the area who comply with reasonable conditions.”²⁰

Exception: Producer or Producer’s Tenants Sole Use

Title 37 states that “none of the provisions of this title shall apply to the generation, transmission or distribution of electricity . . . **for the sole use of such producer, or for the use of tenants of such producer**, nor shall they apply to any person not otherwise a utility who manufactures and supplies such products to a utility for its use or distribution without participation by such manufacturer in such use or distribution.”²¹

¹⁸ ALA. CODE § 37-4-1(7) (West 2021).

¹⁹ *In re Comm’n’s Jurisdiction over Elec. Vehicle Charging Stations*, 2018 WL 3208563, at *2 (Ala. P.S.C. June 22, 2018).

²⁰ *Coastal States Gas Transm’n Co. v. Alabama Pub. Serv. Comm’n*, 524 So. 2d 357, 359–60 (Ala. 1988) (quoting *Southern Liquid Gas Co. v. City of Dothan*, 44 So.2d 744, 747 (Ala. 1950)).

²¹ ALA. CODE, *supra* n. 18, § 37-1-33.

Exception: Electric Cooperatives

Alabama law provides that “cooperative, nonprofit membership corporations may be organized” in accordance with specific statutory provisions “for the purpose of supplying electric energy and promoting and extending the use thereof.”²²

The powers of an electric cooperative include “to construct, acquire, maintain, and operate electric transmission and distribution lines” and “to generate, manufacture, purchase, acquire and transmit electric energy and to distribute, sell, supply and dispose of electric energy to its members, to governmental agencies and political subdivisions and to other persons; provided, however, that should a cooperative acquire any electric facilities dedicated or devoted to the public use, it may continue to serve the persons served directly from such facilities at the time of such acquisition without requiring that such persons become members, and, provided further, that such nonmembers shall have the right to become members upon nondiscriminatory terms.”²³ Electric cooperatives “may not condition membership or provision of service on compliance by the member with requirements not directly related to the electric or other service to be provided by the cooperative.”²⁴

The Supreme Court of Alabama has held that such “**an electric cooperative is a ‘public utility.’**”²⁵ Thus electric cooperatives are “obligation to serve all members of the public that it holds itself out to serve, fairly and without discrimination.”²⁶ However, the Electric Cooperatives chapter states that “cooperatives transacting business in this state pursuant to this chapter shall be deemed to be general welfare cooperatives and **exempt in all respects from the jurisdiction and control of the Public Service Commission** of this state.”²⁷

Distributed Generation Facilities

Alabama law defines a “distributed generation facility” as “a facility owned and operated by a customer of the utility or a commission non-jurisdictional electric supplier [such as an electric cooperative or municipal utility] for the production of electrical energy that is located on the customer's premises, that may transmit electrical energy to distribution facilities at any time, that has a peak generating capacity of not more than 100 kW, and that is intended primarily to offset part or all of the customer's requirements for electricity.”²⁸

The Public Service Commission “may approve a utility proposal to establish a renewable energy program whereby the utility purchases energy from a distributed generation facility that generates electrical energy from a renewable energy resource,” but the Commission “shall not require a utility to purchase electrical energy from any distributed generation facility at a price that exceeds the utility's avoided costs.”²⁹ When a utility “purchases electrical energy from any distributed generation facility,” the Commission “shall approve the utility’s rates, fees, and charges for

²² ALA. CODE § 37-6-2.

²³ ALA. CODE § 37-6-3.

²⁴ *Id.*

²⁵ *Baldwin Cty. Elec. Membership Corp. v. Lee*, 804 So.2d 1087, 1090 n. 4 (Ala. 2001) (quoting *Mitchell v. Concerned Citizens of CVEC, Inc.*, 486 So.2d 1283, 1285 (Ala. 1986)).

²⁶ *S. Pine Elec. Co-op. v. Burch*, 878 So.2d 1120, 1127 (Ala. 2003) (quoting *Miller v. Hillview Water Works Project, Inc.*, 273 Ala. 267, 271, 139 So.2d 337, 339 (1962)).

²⁷ ALA. CODE, *supra* n. 18, § 37-6-27.

²⁸ ALA. CODE § 37-4-140(a)(4).

²⁹ ALA. CODE § 37-4-140(b).

services” and “may adopt or approve any safety, power quality, reliability, and interconnection requirements for a distributed generation facility that the commission determines are necessary to protect public safety, power quality, and system reliability.”³⁰

Similarly, a commission non-jurisdictional electric supplier can establish a “renewable energy program . . . whereby the supplier purchases energy from a distributed generation facility that generates electrical energy from a renewable energy resource,” and in doing so “shall establish rates, fees, and charges for services to a distributed generation facility including, but not limited to, metering service, administering metering service, standby power, supplementary power, back-up power, and maintenance power” and “may adopt any safety, power quality, reliability, and interconnection requirements for a distributed generation facility that it determines are necessary to protect public safety, power quality, and system reliability.”³¹

ALASKA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|----------------------------------|
| Retail Electricity Choice? | No (considered but rejected) |
| RTO/ISO Membership? | None (outside FERC jurisdiction) |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (mandatory) ³² |

Definitions

The Alaska Public Utilities Regulatory Act defines “**public utility**” or “**utility**” to include “every corporation whether public, cooperative, or otherwise, company, individual, or association of individuals, their lessees, trustees, or receivers appointed by a court, that owns, operates, manages, or controls any plant, pipeline, or system for furnishing, by generation, transmission, or distribution, **electrical service to the public for compensation**.”³³

“**Public**” or “**general public**” is further defined to mean:

“(A) a group of 10 or more customers that purchase the service or commodity furnished by a public utility;

(B) one or more customers that purchase electrical service for use within an area that is certificated to and presently or formerly served by an electric utility if the total annual compensation that the electrical utility receives for sales of electricity exceeds \$50,000; and

(C) a utility purchasing the product or service or paying for the transmission of electric energy, natural or manufactured gas, or petroleum products that are re-sold to a person or group included in (A) or (B) of this paragraph or that are used to produce the service or commodity sold to the public by the utility.”³⁴

³⁰ ALA. CODE § 37-4-140(c).

³¹ ALA. CODE § 37-4-140(d).

³² *Alaska Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/3734> (last updated Nov. 30, 2018).

³³ ALASKA STAT. ANN. § 42.05.990(6) (West 2021).

³⁴ ALASKA STAT. ANN. § 42.05.990(5).

The Regulatory Commission of Alaska has the power to “regulate every public utility engaged or proposing to engage in a utility business inside the state, except to the extent exempted by AS 42.05.711 [which identifies several categories of exempt entities, including those described below].”³⁵ The Commission may also “exempt a utility, a class of utilities, or a utility service from all or a portion of this chapter [the Alaska Public Utilities Regulatory Act] if the commission finds that the exemption is in the public interest.”³⁶

Exception: Electric Cooperatives

A “cooperative organized under AS 10.25 may elect to be exempt from the provisions of this chapter, other than AS 42.05.221 - 42.05.281 [regarding certificates of public convenience and necessity], under the procedure described in AS 42.05.712 [providing for deregulation ballots].”³⁷ AS 10.25 provides that an “electric cooperative may generate, manufacture, purchase, acquire, accumulate, and transmit electric energy, and distribute, sell, supply, and dispose of electric energy to its members, to governmental agencies and political subdivisions, and to other persons not exceeding 10 percent of the number of its members.”³⁸

Exception: Electric Utilities with Low Revenues

An “electric or telephone utility that does not gross \$50,000 annually is exempt from regulation under this chapter [the Alaska Public Utilities Regulatory Act], unless the subscribers petition the commission for regulation under AS 42.05.712(h).”³⁹ Moreover, “an electric or telephone utility that does not gross \$500,000 annually may elect to be exempt from the provisions of this chapter other than AS 42.05.221-42.05.281 [regarding certificates of public convenience and necessity] under the procedure described in AS 42.05.712 [providing for deregulation ballots].”⁴⁰

Exception: Political Subdivisions

The Regulatory Commission’s “jurisdiction and authority extend to public utilities operating within a municipality, whether home rule or otherwise.”⁴¹ However, in general “**public utilities owned and operated by a political subdivision of the state**, or electric operating entities established as the instrumentality of two or more public utilities owned and operated by political subdivisions of the state, **are exempt from this chapter** [the Alaska Public Utilities Regulatory Act], other than” requirements regarding certificates of public convenience and necessity.⁴² However, utilities operated by political subdivisions may be subject to Regulatory Commission regulation if they “directly compet[e] with another utility or electric operating entity.”⁴³

Exception: Renewable Energy Generation Facilities

Any “**plant or facility that generates electricity entirely from renewable energy resources is exempt from regulation** under this chapter [the Alaska Public Utilities Regulatory Act] if” it “is

³⁵ ALASKA STAT. ANN. § 42.05.141.

³⁶ ALASKA STAT. ANN. § 42.05.711(d).

³⁷ ALASKA STAT. ANN. § 42.05.711(h).

³⁸ ALASKA STAT. ANN. § 10.25.020.

³⁹ ALASKA STAT. ANN. § 42.05.711(e).

⁴⁰ ALASKA STAT. ANN. § 42.05.711(f).

⁴¹ ALASKA STAT. ANN. § 42.05.641.

⁴² ALASKA STAT. ANN. § 42.05.711(b).

⁴³ ALASKA STAT. ANN. § 42.05.711(b)(2).

first placed into commercial operation on or after August 31, 2010, and before July 1, 2021 and does not generate more than 65 megawatts of electricity; the electricity generated by the plant or facility is sold only to one or more electric utilities that are regulated by the commission; and the person that constructs, owns, acquires, or operates the plant or facility has not received from the state a grant that was used to generate the electricity from the renewable energy resources; or a tax credit related to the generation of electricity from the renewable energy resources.”⁴⁴

Exception: Sale of Industrial By-Product Electricity

The provisions of the Alaska Public Utilities Regulatory Act “do not apply to sales, exchanges, or gifts of energy to an electric utility certificated under this chapter **when the energy which is the subject of the sale, exchange, or gift is waste heat, electricity, or other energy which is surplus or the by-product of an industrial process.** In an area in which no electric utility is certificated for service, energy provided by sale, exchange, or gift may be provided to any utility which is certificated for service to that area. A contract for the sale, exchange, or gift of energy exempt under this subsection does not make the supplier a public utility and does not transfer the responsibility to provide utility services from a certificated utility to any other person.”⁴⁵

ARIZONA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | None |
| Renewable Portfolio Standard? | Yes, 15% by 2025 ⁴⁶ |
| Net Metering Regulations? | No (has other distributed generation compensation rules) ⁴⁷ |

Definitions

The Arizona Constitution states that “**all corporations other than municipal engaged in furnishing gas, oil, or electricity for light, fuel, or power;** or in furnishing water for irrigation, fire protection, or other public purposes; or in furnishing, for profit, hot or cold air or steam for heating or cooling purposes; or engaged in collecting, transporting, treating, purifying and disposing of sewage through a system, for profit; or in transmitting messages or furnishing public telegraph or telephone service, and all corporations other than municipal, operating as common carriers, **shall be deemed public service corporations.**”⁴⁸

Arizona public utilities law further defines an “**electric distribution utility**” as “a public service corporation or public power entity that operates, controls or maintains electric distribution facilities,” which are defined as “all property used in connection with the distribution of electricity from an electric generating plant **to retail electric customers** except electric transmission facilities.”⁴⁹ A retail electric customer is any “person who purchases electricity for that person’s

⁴⁴ ALASKA STAT. ANN. § 42.05.711(r).

⁴⁵ ALASKA STAT. ANN. § 42.05.711(j).

⁴⁶ ARIZ. ADMIN. CODE §14-2-1801 *et seq.* (2021).

⁴⁷ *Arizona Net Billing Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/3093> (last updated May 30, 2017); *Arizona SRP – Net Metering*, DSIRE, <https://programs.dsireusa.org/system/program/detail/1082> (last updated Nov. 8, 2016).

⁴⁸ ARIZ. CONST. art. XV, § 2.

⁴⁹ ARIZ. REV. STAT. ANN. § 40-201 (2021).

own use, including use in that person's trade or business, and not for resale, redistribution or retransmission.”⁵⁰

The Arizona Corporation Commission “may supervise and regulate every public service corporation” in the state. Ariz. Rev. Stat. Ann. § 40-202(A). Since 1998, it has been the “public policy of [Arizona] that a **competitive market shall exist in the sale of electric generation service**.”⁵¹ The Corporation Commission thus also regulates “electricity suppliers that are public service corporations” to provide them with competitive access to the service territories of electric distribution utilities.⁵²

An “**electricity supplier**” is defined as “a person, whether acting in a principal, agent or other capacity, that is a **public service corporation that offers to sell electricity to a retail electric customer** in this state.”⁵³ An electricity supplier must “obtain a certificate from the commission before offering electricity for sale to retail electric customers in [Arizona].”⁵⁴

Judicial and Regulatory Interpretation

Arizona courts have held that to qualify as a public service corporation, an entity must not only meet the state constitution’s textual standard of “furnishing gas, oil, or electricity for light, fuel, or power,” but must also have “business and activities . . . such as to make its rates, charges and methods of operation, a matter of public concern, clothed with a public interest to the extent contemplated by law which subjects it to governmental control—its business must be of such a nature that competition might lead to abuse detrimental to the public interest.”⁵⁵ The Arizona Supreme Court has “articulated eight factors to be considered in identifying those corporations ‘clothed with a public interest’ and subject to regulation because they are ‘indispensable to large segments of our population,’” namely:

- “(1) What the corporation actually does.
- (2) A dedication to public use.
- (3) Articles of incorporation, authorization, and purposes.
- (4) Dealing with the service of a commodity in which the public has been generally held to have an interest.
- (5) Monopolizing or intending to monopolize the territory with a public service commodity.
- (6) Acceptance of substantially all requests for service.
- (7) Service under contracts and reserving the right to discriminate is not always controlling.

⁵⁰ ARIZ. REV. STAT. ANN. § 40-201(21).

⁵¹ ARIZ. REV. STAT. ANN.. § 40-202(B).

⁵² *Id.*

⁵³ ARIZ. REV. STAT. ANN. § 40-201(14).

⁵⁴ ARIZ. REV. STAT. ANN. § 40-207(A).

⁵⁵ *Sw. Transmission Co-op, Inc. v. Ariz. Corp. Comm'n*, 142 P.3d 1240, 1244–45 (Ariz. Ct. App. 2007) (quoting *Trico Elec. Co-op, Inc. v. Ariz. Corp Comm'n*, 339 P.2d 1046, 1052 (Ariz. 1959)).

(8) Actual or potential competition with other corporations whose business is clothed with public interest.”⁵⁶

Arizona courts treat these eight factors as “guidelines for analysis,” considering themselves “not required to find all eight factors to conclude that a company is a public service corporation.”⁵⁷

In 2010, the Arizona Corporation Commission applied these factors to determine that when a solar company “designs, installs, owns, maintains and finances solar PV panels for schools, governmental entities, and non-profits pursuant to an SSA [Solar Services Agreement] arrangement . . . **its activities are not clothed with the public interest such that [the solar company] is acting as a public service corporation.**”⁵⁸

However, commentators have described as “doubtful” whether even in this limited circumstance “the commission's position can withstand scrutiny, because the state's constitution effectively requires the regulation of third-party developers.”⁵⁹

A 2010 National Renewable Energy Laboratory Report noted that “Article 15 Section 2 of Arizona’s Constitution defines a public utility as a corporation that ‘furnishes’ electricity or power, requiring that any entity furnishing electricity be regulated in Arizona,” and that “because the definition is part of the constitution, the issue would likely require a legislative solution rather than a regulatory one.”⁶⁰

ARKANSAS

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-------------------------------|
| Retail Electric Competition? | No (considered but rejected) |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (mandatory) ⁶¹ |

Definitions

Under Arkansas law, the term “**public utility**” includes “persons and corporations, or their lessees, trustees, and receivers, owning or operating in this state equipment or facilities for: (i) Producing, generating, transmitting, delivering, or furnishing gas, electricity, steam, or another agent for the production of light, heat, or power to or for the public for compensation.”⁶²

⁵⁶ *Id.* at 1245 (quoting *Sw. Gas Corp. v. Ariz. Corp. Comm’n*, 818 P.2d 714, 720 (Ct. App. 1991); citing *Nat. Gas Serv. Co. v. Serv-Yu Co-op.*, 219 P.2d 324, 325 (1950)).

⁵⁷ *Sw. Transmission Co-op., Inc. v. Arizona Corp. Comm’n*, 213 Ariz. 427, 432, 142 P.3d 1240, 1245 (Ct. App. 2006) (citing *Sw. Gas Corp. v. Arizona Corp. Comm’n*, 169 Ariz. 279, 287, 818 P.2d 714, 722 (Ct. App. 1991)).

⁵⁸ *In re: Application of Solarcity Corp.*, No. E-20690A-09-0346, 2010 WL 2864938, at *51 (O.L.C. July 12, 2010).

⁵⁹ Samuel Farkas, *Third-Party PPAs: Unleashing America’s Solar Potential*, 28 J. LAND USE & ENVTL. L. 91, 104 (2012) (citing KATHARINE KOLLINS ET AL., U.S. DEP’T OF ENERGY, SOLAR PV PROJECT FINANCING: REGULATORY AND LEGISLATIVE CHALLENGES FOR THIRD-PARTY PPA SYSTEM OWNERS 10 (2010), <http://www.nrel.gov/docs/fy10osti/46723.pdf>.) [hereinafter KOLLINS].

⁶⁰ KOLLINS ET AL., *supra* n. 59, at 10.

⁶¹ *Arkansas Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/536> (last updated Nov. 30, 2018).

⁶² ARK. CODE ANN. § 23-1-101(9)(A) (2021).

Moreover, “the term ‘**public utility**’, as used for ratemaking purposes only: (i) Shall include persons and corporations or their lessees, trustees, and receivers producing, generating, transmitting, delivering, or furnishing any of the services set forth in subdivisions (9)(A)(i) [quoted above] and (ii) of this section to any other person or corporation for resale or distribution to or for the public for compensation.”⁶³

Exception: Provision to Tenants and Employees

“The term ‘public utility’, as to any public utility defined in subdivisions (9)(A)(i) [quoted above], (ii), and (vi) of this section, shall not include any person or corporation who or which **furnishes the service or commodity exclusively to himself or herself or itself, or to his or her or its employees or tenants**, when the service or commodity is not resold to or used by others.”⁶⁴

Exception: Wholesale Generators

In defining “public utility,” Arkansas law states that “the term ‘public utility’ shall not include an exempt wholesale generator as defined in subdivision (5) of this section.”⁶⁵ That subdivision defines “**exempt wholesale generator**” as “a person, including an affiliate of a public utility, that:

(A) Is engaged directly or indirectly through one (1) or more affiliates and exclusively in the business of **owning or operating all or part of a facility for generating electric energy and selling electric energy at wholesale**; and

(B) **Does not own or operate a facility for the transmission of electricity other than interconnecting transmission facilities** used to effect a sale of electric energy at wholesale.”⁶⁶

Similarly, Arkansas law allows utilities to enter into “**power purchase agreements**” with generators of electricity, under conditions set out in § 23-18-109.⁶⁷

Electric Cooperatives

The **Electric Cooperative Corporation Act** provides that “cooperative, nonprofit membership corporations may be organized under this subchapter for the purpose of any one (1) or more of the following:

- (1) The furnishing of electricity to persons;
- (2) Assisting in the wiring of the premises of persons in rural areas or the acquisition, supply, or installation of electrical or plumbing equipment therein; and
- (3) The furnishing of electricity, wiring facilities, or electrical or plumbing equipment or services to any other corporation organized under this subchapter or to the members thereof.”⁶⁸

⁶³ ARK. CODE ANN. § 23-1-101(9)(B).

⁶⁴ ARK. CODE ANN. § 23-1-101(9)(C).

⁶⁵ ARK. CODE ANN. § 23-1-101(9)(D).

⁶⁶ ARK. CODE ANN. § 23-1-101(5).

⁶⁷ ARK. CODE ANN. § 23-18-109.

⁶⁸ ARK. CODE ANN. § 23-18-306.

The 23 enumerated powers of such corporations include the power “to **generate, manufacture, purchase, acquire, accumulate, transmit, distribute, sell, furnish, and dispose of electric power and energy**,” “to construct, erect, purchase, lease as lessee, and in any manner acquire, own, hold, maintain, operate, sell, dispose of, lease as lessor, exchange, and mortgage **plants, buildings, works, machinery, supplies, equipment, apparatus, and generation, transmission, and distribution facilities or systems** as it deems necessary, convenient, or useful,” and “to enter into sale or interchange **agreements for surplus power and energy** with any and all other persons, business entities, or public bodies or agencies. The **electric power and energy may be resold at wholesale or retail** and may be sold or disposed of by the other party to the agreement as provided in the contract or agreement.”⁶⁹

In general, “electric cooperative corporations generating, manufacturing, purchasing, acquiring, transmitting, distributing, selling, furnishing, and disposing of electric power and energy in this state . . . **shall be subject to the general jurisdiction of the Arkansas Public Service Commission.**”⁷⁰ However, a “**rural electric distribution cooperative . . . which sells electricity only at retail**”⁷¹ shall “**not be subject to rate case procedures and hearings** and other requirements of §§ 23-4-402 – 23-4-405, 23-4-407 – 23-4-418, and 23-4-620 – 23-4-634 and Arkansas Public Service Commission rules implementary thereof, hereafter referred to as “rate case procedures”, by the commission unless:

- (1) By action of its board of directors, the co-op elects to be subject to rate case procedures by the commission;
- (2) A proposed change in the co-op's rates and charges exceeds ten percent (10%) of total gross revenues;
- (3) Ten percent (10%) of the co-op's member-consumers petition the commission to apply rate case procedures; or
- (4) As otherwise provided in this subchapter.”⁷²

Moreover, in general the PSC can “adopt rules under which electric utilities shall seek commission review and approval of the processes, actions, and plans by which the utilities:

- (1) Engage in comprehensive resource planning;
- (2) Acquire electric energy, capacity, and generation assets; or
- (3) Utilize alternative methods to meet their obligations to serve Arkansas retail electric customers.”⁷³

However, “with regard to electric cooperatives formed under the Electric Cooperative Corporation Act, § 23-18-301 et seq., **to the extent that an electric distribution cooperative purchases electricity from an electric generation and transmission cooperative** pursuant to a wholesale power contract, **the authority granted to the commission by subdivisions (a)(1) and (2) of this**

⁶⁹ ARK. CODE ANN. § 23-18-307.

⁷⁰ ARK. CODE ANN. § 23-18-201.

⁷¹ ARK. CODE ANN. § 23-4-901(3).

⁷² ARK. CODE ANN. § 23-4-902.

⁷³ ARK. CODE ANN. § 23-18-106(a).

section shall not extend to the electric distribution cooperative to the extent of such purchases but shall only extend to the electric generation and transmission cooperative.”⁷⁴

CALIFORNIA

Regulatory Environment At-a-Glance

| | | |
|-------------------------------|--|---------------------------|
| Retail Electric Competition? | No | |
| RTO/ISO Membership? | California Independent System Operator (CAISO) | |
| Renewable Portfolio Standard? | Yes, 60% by 2030 ⁷⁵ | |
| Net Metering Regulations? | Yes | (mandatory) ⁷⁶ |

Definitions

The California Public Utilities Code defines “**public utility**” to “include every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.”⁷⁷

More specifically, whenever one of those entities “performs a service for, or delivers a commodity to, the public or any portion thereof for which any compensation or payment whatsoever is received, that [entity] is a public utility subject to the jurisdiction, control, and regulation of the [California Public Utilities] commission and the provisions of this part.” Additionally, “when any person or corporation performs any service for, or delivers any commodity to, any person, private corporation, municipality, or other political subdivision of the state, that in turn either directly or indirectly, mediately or immediately, performs that service for, or delivers that commodity to, the public or any portion thereof, that person or corporation is a public utility subject to the jurisdiction, control, and regulation of the commission and the provisions of this part.”⁷⁸

The phrase “**public or any portion thereof**” is defined to mean “the public generally, or any limited portion of the public, including a person, private corporation, municipality, or other political subdivision of the State, for which the service is performed or to which the commodity is delivered.”⁷⁹

An “**electrical corporation**” is defined to include “every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.”⁸⁰

An “**electric plant**” includes all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission,

⁷⁴ ARK. CODE ANN. § 23-18-106(b).

⁷⁵ CAL. PUB. UTIL. CODE §399.11 *et seq.* (West 2021); CAL. PUB. RESOURCES CODE §25740 *et seq.* (West 2021).

⁷⁶ *California Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/276> (last updated Mar. 16, 2018).

⁷⁷ CAL. PUB. UTIL. CODE, *supra* n. 75, § 216(a)(1).

⁷⁸ CAL. PUB. UTIL. CODE § 216(c).

⁷⁹ CAL. PUB. UTIL. CODE § 207.

⁸⁰ CAL. PUB. UTIL. CODE § 218(a).

delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.”⁸¹

An “**electric service provider**” is defined as “an entity that offers electrical service to customers within the service territory of an electrical corporation and includes the unregulated affiliates and subsidiaries of an electrical corporation.”⁸² Each electric service provider must register with the California Public Utilities Commission.⁸³ For the purposes of some provisions within the Electrical Restructuring Chapter, electric service providers are included (along with electrical corporations) as “retail suppliers” subject to certain requirements.⁸⁴

Partial Exception: Electrical Cooperatives

An “electrical cooperative” is defined as “any private corporation or association organized for the purposes of transmitting or distributing electricity exclusively to its stockholders or members at cost.”⁸⁵ The California Public Utilities Commission “shall have no authority to establish rates or regulate the borrowing of money, the issuance of evidences of indebtedness, or the sale, lease, assignment, mortgage, or other disposal or encumbrance of the property of any electrical cooperative.”⁸⁶ That said, electrical cooperatives are “otherwise . . . subject to Part 1 (commencing with Section 201),” the Public Utilities Act.⁸⁷

Partial Exception: Electric Microutilities

An “**electric micrutility**” is defined as “any electrical corporation that is regulated by the commission and organized for the purpose of providing sole-source generation, distribution, and sale of electricity exclusively to a customer base of fewer than 2,000 customers.”⁸⁸

The only provision related to electric microutilities is the following:

- (a) It is the intent of the Legislature that the commission consider the legal, administrative, and operational costs that an electric micrutility faces if it is named as a respondent in a hearing generally applicable to electrical corporations. The limited resources of a micrutility are disproportionately strained by the cost of response.
- (b) Further, it is the intent of the Legislature that the commission consider the costs described in subdivision (a) before naming an electric micrutility as a respondent in a hearing generally applicable to electrical corporations.⁸⁹

Exception: Private Energy Producers

A “private energy producer” includes “every person, corporation, city, county, district, and public agency of the state **generating or producing electricity not generated from conventional**

⁸¹ CAL. PUB. UTIL. CODE § 217.

⁸² CAL. PUB. UTIL. CODE § 218.3(a).

⁸³ CAL. PUB. UTIL. CODE § 394.

⁸⁴ See, e.g., CAL. PUB. UTIL. CODE, §§ 398.2, 399.12 (including electric service providers as “retail suppliers”).

⁸⁵ CAL. PUB. UTIL. CODE § 2776.

⁸⁶ CAL. PUB. UTIL. CODE § 2777.

⁸⁷ CAL. PUB. UTIL. CODE § 2778.

⁸⁸ CAL. PUB. UTIL. CODE § 2780.

⁸⁹ CAL. PUB. UTIL. CODE § 2780.1.

sources or natural gas for energy either directly or as a byproduct solely for his or its own use or the use of his or its tenants; or generating or producing electricity, or owning the means thereof, to or for any electrical corporation, heat corporation, state agency, city, county, district, or an association thereof, but not to or for the public for any other purpose. Notwithstanding any other provision of law, **a private energy producer shall not be found to be a public utility** subject to the general jurisdiction of the commission solely because of conducting any activity authorized by this chapter.”⁹⁰

A “**conventional power source**” is defined as “power derived from nuclear energy or the operation of a hydropower facility greater than 30 megawatts or the combustion of fossil fuels, unless cogeneration technology, as defined in Section 25134 of the Public Resources Code, is employed in the production of such power.”⁹¹

Note that this exception seems to overlap with some of the categories discussed below.

Exception: Service to Oneself or Tenants

As stated above, the definition of “electrical corporation” excludes instances “where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.”⁹²

Exception: Cogeneration, Unconventional Power Source, Landfill Gas, and Digester Gas Facilities

The section defining “public utility” provides that “ownership or operation of a facility that employs **cogeneration technology** or produces power from **other than a conventional power source** or the ownership or operation of a facility which employs **landfill gas technology** does not make a corporation or person a public utility within the meaning of this section solely because of the ownership or operation of that facility.”⁹³

The “public utility” definition also states that “the ownership, control, operation, or management of an electric plant used for . . . the use or sale as permitted under subdivisions (b) to (d), inclusive, of Section 218, shall not make a corporation or person a public utility within the meaning of this section solely because of that ownership, participation, or sale.”⁹⁴

Subdivisions (b) to (d) of Section 218 provide several exceptions to the definition of an electrical corporation:

(b) ‘Electrical corporation’ does not include a corporation or person employing **cogeneration technology or producing power from other than a conventional power source** for the generation of electricity solely for any one or more of the following purposes:

⁹⁰ CAL. PUB. UTIL. CODE § 2802.

⁹¹ CAL. PUB. UTIL. CODE § 2805.

⁹² CAL. PUB. UTIL. CODE § 218(a).

⁹³ CAL. PUB. UTIL. CODE § 216(d).

⁹⁴ CAL. PUB. UTIL. CODE § 216(h).

(1) Its own use or the use of its tenants.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated or on real property immediately adjacent thereto, unless there is an intervening public street constituting the boundary between the real property on which the electricity is generated and the immediately adjacent property and one or more of the following applies:

(A) The real property on which the electricity is generated and the immediately adjacent real property is not under common ownership or control, or that common ownership or control was gained solely for purposes of sale of the electricity so generated and not for other business purposes.

(B) The useful thermal output of the facility generating the electricity is not used on the immediately adjacent property for petroleum production or refining.

(C) The electricity furnished to the immediately adjacent property is not utilized by a subsidiary or affiliate of the corporation or person generating the electricity.

(3) Sale or transmission to an electrical corporation or state or local public agency, but not for sale or transmission to others, unless the corporation or person is otherwise an electrical corporation.

(c) 'Electrical corporation' does not include a corporation or person employing **landfill gas technology** for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency.

(d) "Electrical corporation" does not include a corporation or person employing **digester gas technology** for the generation of electricity for any one or more of the following purposes:

(1) Its own use or the use of not more than two of its tenants located on the real property on which the electricity is generated.

(2) The use of or sale to not more than two other corporations or persons solely for use on the real property on which the electricity is generated.

(3) Sale or transmission to an electrical corporation or state or local public agency, if the sale or transmission of the electricity service to a retail customer is provided

through the transmission system of the existing local publicly owned electric utility or electrical corporation of that retail customer.⁹⁵

Exception: Solar, Geothermal, and Cogeneration Resources

The section defining “public utility” provides that “any corporation or person engaged directly or indirectly in developing, producing, transmitting, distributing, delivering, or selling any form of heat derived from **geothermal or solar resources or from cogeneration technology** to any privately owned or publicly owned public utility, or to the public or any portion thereof, is not a public utility within the meaning of this section solely by reason of engaging in any of those activities.”⁹⁶

Exception: Independent Solar Energy Producers

The definition of “‘electrical corporation’ does not include an independent solar energy producer, as defined in Article 3 (commencing with Section 2868) of Chapter 9 of Part 2.”⁹⁷ Section 2868 defines as “**independent solar energy producer**” as “a corporation or person employing one or more solar energy systems for the generation of electricity for any one or more of the following purposes:

- (1) Its own use or the use of its tenants.
- (2) The use of, or sale to, not more than two other entities or persons per generation system solely for use on the real property on which the electricity is generated, or on real property immediately adjacent thereto.”⁹⁸

A “**solar energy system**” is defined as “any configuration of solar energy devices that collects and distributes solar energy for the purpose of generating electricity and that has a single interconnection with the electric utility transmission or distribution network.”⁹⁹

“‘**Real property**’ means a single parcel of land.”¹⁰⁰

Exception: Direct Transactions and Wholesale Transactions

The section defining “public utility” provides that “the ownership, control, operation, or management of an electric plant used for direct transactions or participation directly or indirectly in **direct transactions, as permitted by subdivision (b) of Section 365**” and “sales into a market established and operated by the Independent System Operator or **any other wholesale electricity market** . . . shall not make a corporation or person a public utility within the meaning of this section solely because of that ownership, participation, or sale.”¹⁰¹

Subdivision (b) of Section 365, within the “Electrical Restructuring” Chapter, provides that the PUC shall:

⁹⁵ CAL. PUB. UTIL. CODE § 218.

⁹⁶ CAL. PUB. UTIL. CODE § 216(e).

⁹⁷ CAL. PUB. UTIL. CODE § 218(e).

⁹⁸ CAL. PUB. UTIL. CODE § 2868(b).

⁹⁹ CAL. PUB. UTIL. CODE § 2868(d).

¹⁰⁰ CAL. PUB. UTIL. CODE § 2868(c).

¹⁰¹ CAL. PUB. UTIL. CODE § 216(h).

(1) Authorize direct transactions between electricity suppliers and end use customers, subject to implementation of the nonbypassable charge referred to in Sections 367 to 376, inclusive. Direct transactions shall commence simultaneously with the start of an Independent System Operator and Power Exchange referred to in subdivision (a). The simultaneous commencement shall occur as soon as practicable, but no later than January 1, 1998. The commission shall develop a phase-in schedule at the conclusion of which all customers shall have the right to engage in direct transactions. Any phase-in of customer eligibility for direct transactions ordered by the commission shall be equitable to all customer classes and accomplished as soon as practicable, consistent with operational and other technological considerations, and shall be completed for all customers by January 1, 2002.

(2) Customers shall be eligible for direct access irrespective of any direct access phase-in implemented pursuant to this section if at least one-half of that customer's electrical load is supplied by energy from a renewable resource provider certified pursuant to Section 383, provided however that nothing in this section shall provide for direct access for electric consumers served by municipal utilities unless so authorized by the governing board of that municipal utility.¹⁰²

Exception: Electric Vehicle Charging Facilities

The section defining “public utility” provides that “the ownership, control, operation, or management of a **facility that supplies electricity to the public only for use to charge light duty plug-in electric vehicles** does not make the corporation or person a public utility within the meaning of this section solely because of that ownership, control, operation, or management. For purposes of this subdivision, ‘light duty plug-in electric vehicles’ includes light duty battery electric and plug-in hybrid electric vehicles. This subdivision does not affect the commission's authority under Section 454 or 740.2 any other applicable statute.”¹⁰³

Exception: Small Power Producers and Wholesale Generators

“Notwithstanding any other provision of law, a **qualifying small power producer** owning or operating a small power production facility is not a public utility subject to the general jurisdiction of the commission solely because of the ownership or operation of the facility.”¹⁰⁴ The terms “qualifying small power producer,” “small power production facility,” and “qualifying small power production facility” here “have the same meanings as found in Section 796 of Title 16 of the United States Code and the regulations enacted pursuant thereto.”¹⁰⁵

Similarly, “notwithstanding any other provision of law, an **exempt wholesale generator** is not a public utility subject to the general jurisdiction of the commission solely due to the ownership or operation of the facility.” An “exempt wholesale generator” here “has the same meaning as defined in the Public Utility Holding Company Act of 2005 (42 U.S.C. Sec. 16451(6)).”¹⁰⁶

¹⁰² CAL. PUB. UTIL. CODE § 365(b).

¹⁰³ CAL. PUB. UTIL. CODE § 216(i).

¹⁰⁴ CAL. PUB. UTIL. CODE § 218.5(b).

¹⁰⁵ CAL. PUB. UTIL. CODE § 218.5(a)(2).

¹⁰⁶ CAL. PUB. UTIL. CODE § 218.5(a)(1).

COLORADO

Regulatory Environment At-a-Glance

| | | |
|-------------------------------|--|----------------------------|
| Retail Electric Competition? | No | |
| RTO/ISO Membership? | None | |
| Renewable Portfolio Standard? | Yes, 100% by 2050 for large utilities ¹⁰⁷ | |
| Net Metering Regulations? | Yes | (mandatory) ¹⁰⁸ |

Definitions

The Colorado Public Utilities Law defines “**public utility**” to include “every common carrier, pipeline corporation, gas corporation, electrical corporation, telephone corporation, water corporation, person, or municipality operating for the purpose of supplying the public for domestic, mechanical, or public uses and every corporation, or person declared by law to be affected with a public interest.”¹⁰⁹

Moreover, “every cooperative electric association, or nonprofit electric corporation or association, and **every other supplier of electric energy**, whether supplying electric energy for the use of the public or for the use of its own members, is hereby declared to be affected with a public interest and to be a public utility and to be subject to the jurisdiction, control, and regulation of the commission [the Colorado Public Utilities Commission] and to the provisions of articles 1 to 7 of this title.”¹¹⁰ However, as described below under “Exception: Cooperative Electric Associations,” this paragraph “requiring regulation by the commission shall not be applicable to a cooperative electric association which has voted to exempt itself from regulation pursuant to the provisions of section 40-9.5-103.”¹¹¹

Article 2 of the Public Utilities Law (“Public Utilities Commission—Renewable Energy Standard”) also uses throughout the definition of “**qualifying retail utility**” which includes “each provider of retail electric service in the state of Colorado, other than municipally owned utilities that serve forty thousand customers or fewer.”¹¹²

Exception: On-Site Solar Generation

In 2009, “the Colorado Public Utilities Commission questioned whether small-scale renewable generators should be subject to state regulation as public utilities,” and “shortly thereafter, Colorado passed Senate Bill 51 . . . to clarify that on-site solar generating equipment is not subject to regulation as a state public utility as long as the system was ‘sized to supply no more than [120%] of the average annual consumption of the consumer.’”¹¹³

¹⁰⁷ COLO. REV. STAT. ANN. § 40-2-124 (West 2021).

¹⁰⁸ *Colorado Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/271> (last updated Nov. 30, 2018).

¹⁰⁹ COLO. REV. STAT. ANN., *supra* n. 107, § 40-1-103(1)(a)(I).

¹¹⁰ COLO. REV. STAT. ANN. § 40-1-103(2)(a).

¹¹¹ COLO. REV. STAT. ANN. § 40-1-103(2)(b)(I).

¹¹² COLO. REV. STAT. ANN. § 40-2-124(1).

¹¹³ Trevor D. Stiles, *Regulatory Barriers to Clean Energy*, 41 U. TOL. L. REV. 923, 937–38 (2010) (quoting COLO. REV. STAT., *supra* n. 107, § 40-1-103(2)(c)).

Specifically, the law states that: “the supply of electricity or heat to a consumer of the electricity or heat **from solar generating equipment located on the site of the consumer’s property**, which equipment is owned or operated by an entity other than the consumer, shall not subject the owner or operator of the on-site solar generating equipment to regulation as a public utility by the commission if the solar generating equipment is sized to **supply no more than one hundred twenty percent of the average annual consumption of electricity by the consumer** at that site. For purposes of this paragraph (c), the **consumer’s site shall include all contiguous property owned or leased by the consumer**, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.”¹¹⁴

Exception: Cooperative Electric Associations

Cooperative electric associations are defined to include “**a nonprofit electric corporation or association** but does not include nonprofit generation and transmission electric corporations or associations.”¹¹⁵

As mentioned above, in general, cooperative electric associations are regulated as public utilities.¹¹⁶ However, the “provisions of the ‘Public Utilities Law’, articles 1 to 7 of this title, **shall not apply to cooperative electric associations which have, by an affirmative vote of the members and consumers pursuant to section 40-9.5-104, voted to exempt themselves** from such provisions and to be subject to the provisions of this part 1. The period of exemption shall begin on the date the election results are filed with the public utilities commission.”¹¹⁷

This exemption furthers the legislative finding “that cooperative electric associations which are owned by the member-consumers they serve are regulated by the member-consumers themselves acting through an elected governing body,” and thus “the regulation by the public utilities commission under the ‘Public Utilities Law’, articles 1 to 7 of this title, **may be duplicative of the self-regulation by the association and may be neither necessary nor cost-effective**. It is therefore the purpose of this part 1 to determine the necessity of regulation by the public utilities commission by allowing cooperative electric associations to exempt themselves from regulation by the public utilities commission.”¹¹⁸

All cooperative electric associations must “provide reasonably continuous and adequate electric utility service to all members and consumers within their certificated service areas;” “cooperate with each other and with other electric utilities in avoiding unnecessary construction of facilities and cooperate in the joint use of facilities for generation, transmission, and distribution of electric energy;” and file certain required records and accounts with the Public Utilities Commission (PUC).¹¹⁹

Renewable Energy Standards

Colorado’s Renewable Energy Standard law requires most in-state providers of retail electric service to “generate, or cause to be generated, electricity from eligible energy resources” in certain

¹¹⁴ COLO. REV. STAT. ANN., *supra* n. 107, § 40-1-103(2)(c).

¹¹⁵ COLO. REV. STAT. ANN. § 40-1-102.

¹¹⁶ COLO. REV. STAT. ANN. § 40-1-103(2)(a).

¹¹⁷ COLO. REV. STAT. ANN. § 40-9.5-103.

¹¹⁸ COLO. REV. STAT. ANN. § 40-9.5-101.

¹¹⁹ COLO. REV. STAT. ANN. § 40-9.5-107.

minimum amounts.”¹²⁰ Under this law, “each provider of retail electric service in the state of Colorado, **other than municipally owned utilities that serve forty thousand customers or fewer**, is a qualifying retail utility,” and “each qualifying retail utility, **with the exception of cooperative electric associations that have voted to exempt themselves from commission jurisdiction pursuant to section 40-9.5-104 and municipally owned utilities**, is subject to the rules established under this article 2 by the commission.”¹²¹

Distributed Generation

“A retail electric utility customer is entitled to generate, consume, store, and export electricity produced from eligible energy resources to the electric grid through the use of customer-sited retail distributed generation, subject to reliability standards, interconnection rules, and procedures, as determined by the commission.”¹²²

As defined in section § 40-2-124(1)(a)(VIII), “retail distributed generation” means a renewable energy resource that is located on the site of a customer's facilities and is interconnected on the customer's side of the utility meter. In addition, retail distributed generation shall provide electric energy primarily to serve the customer's load and shall be sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the customer at that site. For purposes of this subparagraph (VIII), the customer's “site” includes all contiguous property owned or leased by the customer without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, or utility rights-of-way.¹²³

CONNECTICUT

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 44% by 2030 ¹²⁴ |
| Net Metering Regulations? | Yes (mandatory) ¹²⁵ |

Definitions

A “**public service company**” includes “electric distribution, gas, telephone, pipeline, sewage, water and community antenna television companies and holders of a certificate of cable franchise authority, owning, leasing, maintaining, operating, managing or controlling plants or parts of plants or equipment, but shall not include towns, cities, boroughs, any municipal corporation or department thereof, whether separately incorporated or not, a private power producer, as defined in section 16-243b, or an exempt wholesale generator, as defined in 15 USC 79z-5a.”¹²⁶

¹²⁰ COLO. REV. STAT. ANN. § 40-2-124(1)(c)(I).

¹²¹ COLO. REV. STAT. ANN. § 40-2-124(1).

¹²² COLO. REV. STAT. ANN. § 40-2-135.

¹²³ COLO. REV. STAT. ANN. § 40-2-124(1)(a)(VIII).

¹²⁴ CONN. GEN. STAT. ANN. §§ 16-1, 16-245a *et seq.* (West 2021).

¹²⁵ *Connecticut Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/27> (last updated Nov. 26, 2018).

¹²⁶ CONN. GEN. STAT. ANN., *supra* n. 124, § 16-1(3).

An **electric distribution company** is defined as “any person providing electric transmission or distribution services within the state,” other than a series of enumerated exceptions, which are discussed in detail below:

“Electric distribution company . . . does not include: (A) A private power producer, as defined in section 16-243b; (B) a municipal electric utility established under chapter 101, other than a participating municipal electric utility; (C) a municipal electric energy cooperative established under chapter 101a; (D) an electric cooperative established under chapter 597; (E) any other electric utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or special act; (F) an electric supplier; (G) an entity approved to submeter pursuant to section 16-19ff; or (H) a municipality, state or federal governmental entity authorized to distribute electricity across a public highway or street pursuant to section 16-243aa.”¹²⁷

“**Electric transmission services**” are defined as “electric transmission or transmission-related services,”¹²⁸ and “**electric distribution services**” are defined as “the owning, leasing, maintaining, operating, managing or controlling of poles, wires, conduits or other fixtures along public highways or streets for the distribution of electricity, or electric distribution-related services.”¹²⁹

In Connecticut’s deregulated electricity market, “**electric suppliers**” are separately defined as “any person, including an electric aggregator or participating municipal electric utility that is licensed by the Public Utilities Regulatory Authority in accordance with section 16-245, that provides electric generation services to end use customers in the state using the transmission or distribution facilities of an electric distribution company, regardless of whether or not such person takes title to such generation services.”¹³⁰ “Electric generation services” are defined as “electric energy, electric capacity or generation-related services.”¹³¹ Electric suppliers are specifically excluded from the definition of “electric distribution company” (and therefore from the definition of public service company).¹³²

Exception: Private Power Producers

Excluded from the definition of “electric distribution company” and “public service company” are “private power producer[s], as defined in section 16-243b.”¹³³

This section defines a “private power production facility” as “a facility which generates electricity in the state (A) solely through the use of **cogeneration technology**, provided the average useful thermal energy output of the facility is at least twenty per cent of the total energy output of the facility, (B) **solely through the use of renewable energy sources**, or (C) **through both only**.”¹³⁴ A “**private power producer**” is then defined as:

(A) a subsidiary of a gas public service company which is not affiliated with an electric public service company, or a subsidiary of a holding company controlling, directly or

¹²⁷ CONN. GEN. STAT. ANN. § 16-1(23).

¹²⁸ CONN. GEN. STAT. ANN. § 16-1(27).

¹²⁹ CONN. GEN. STAT. ANN. § 16-1(22).

¹³⁰ CONN. GEN. STAT. ANN. § 16-1(24).

¹³¹ CONN. GEN. STAT. ANN. § 16-1(26).

¹³² CONN. GEN. STAT. ANN. § 16-1(23)(F).

¹³³ CONN. GEN. STAT. ANN. §§ 16-1(3), 16-1(23).

¹³⁴ CONN. GEN. STAT. ANN. § 16-243b(a)(1).

indirectly, a gas public service company but not an electric public service company, which generates electricity solely through ownership of fifty per cent or less of a private power production facility or, with the approval of the Public Utilities Regulatory Authority, through ownership of one hundred per cent of a private power production facility which (i) **uses a source of energy other than gas as the primary energy source of the facility**, or (ii) **uses gas as the primary energy source of the facility and uses an improved and innovative technology** which furthers the state energy policy as set forth in section 16a-35k;

(B) a subsidiary of any other public service company or a subsidiary of a holding company controlling, directly or indirectly, such a public service company, which **generates electricity solely through ownership of fifty per cent or less of a private power production facility**;

(C) the state, a political subdivision of the state or any other person, firm or corporation other than a public service company or any corporation which was a public service company, prior to July 1, 1981, and which **consents to be regulated as a public service company or a holding company for a public service company**, which generates electricity solely through ownership of one hundred per cent or less of a private power production facility; or

(D) any combination thereof.”¹³⁵

Exception: Electric Cooperatives

The definition of “electric distribution company” also excludes “an electric cooperative established under chapter 597.”¹³⁶ Chapter 597, the Electric Cooperative Act, provides that:

“(a) cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of **supplying electric energy and promoting and extending the use thereof** to persons (1) in rural areas or in any portion thereof occupied by such persons and not receiving central station service, and (2) elsewhere except that the supplying of electric energy to franchise areas being supplied on October 1, 1971, with electric energy, or to areas supplied on said date by municipal utilities, shall be permitted only with the consent of the holder of the franchise or the municipal utility.

(b) Notwithstanding the provisions of subsection (a) of this section, cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of **generating electric energy by means of cogeneration technology, renewable energy resources or both and supplying it** to any member or supplying it to, purchasing it from or exchanging it with a public service company, electric supplier, as defined in section 16-1, municipal aggregator, as defined in said section, municipal utility or municipal electric energy cooperative, in accordance with an agreement with the company, electric supplier, electric aggregator, municipal utility or cooperative.”¹³⁷

Exception: Submeters

¹³⁵ CONN. GEN. STAT. ANN. § 16-243b(a)(3).

¹³⁶ CONN. GEN. STAT. ANN. § 16-1(23)(D).

¹³⁷ CONN. GEN. STAT. ANN. § 33-219.

Electric distribution companies are defined to exclude “**an entity approved to submeter pursuant to section 16-19ff.**”¹³⁸ This section provides that “each electric distribution company shall allow the installation of submeters at (1) a recreational campground, (2) individual slips at marinas for metering the electric use by individual boat owners, (3) commercial, industrial, multifamily residential or multiuse buildings where the electric power or thermal energy is provided by a Class I renewable energy source, as defined in section 16-1, or a combined heat and power system, as defined in section 16-1, or (4) in any other location as approved by the authority where submetering promotes the state's energy goals, as described in the Comprehensive Energy Strategy, while protecting consumers against termination of residential utility service or other related issues.”¹³⁹

The Public Utilities Regulatory Authority (PURA) oversees an application and approval process, and each entity approved to submeter “shall provide electricity to any allowed facility, as described in this subsection, at a rate no greater than the rate charged to that customer class for the service territory in which such allowed facility is located, provided nothing in this section shall permit such entity to charge a submetered account for (A) usage for any common areas of a commercial, industrial or multifamily residential building, or (B) other usage not solely for use by such account.”¹⁴⁰

PURA also adopts regulations to “(1) require a submetered customer to pay only his portion of the energy consumed, which cost shall not exceed the amount paid by the owner of the main meter for such energy; (2) establish standards for the safe and proper installation of submeters; (3) require that the ultimate services delivered to a submetered customer are consistent with any service requirements imposed upon the company; (4) establish standards that protect a submetered customer against termination of service or other related issues; and (5) establish standards for the locations of submeters.”¹⁴¹

DELAWARE

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--------------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 25% by 2025-2026 ¹⁴² |
| Net Metering Regulations? | Yes (mandatory) ¹⁴³ |

Definitions

“**Public utility**” includes every individual, partnership, association, corporation, joint stock company, agency or department of the State or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a ‘cooperative’), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate

¹³⁸ CONN. GEN. STAT. ANN. § 16-1(23)(G).

¹³⁹ CONN. GEN. STAT. ANN. § 16-19ff(a).

¹⁴⁰ *Id.*

¹⁴¹ CONN. GEN. STAT. ANN. § 16-19ff(b).

¹⁴² DEL. CODE ANN. tit. 26, § 351 *et seq.* (West 2021).

¹⁴³ *Delaware Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/43> (last updated Nov. 19, 2018).

for public use within this State, (however, electric cooperatives shall not be permitted directly or through an affiliate to engage in the production, sale or distribution of propane gas or heating oil), any natural gas, electric (excluding electric suppliers as defined in § 1001 of this title), electric transmission by other than a public utility over which the Commission has no supervisory or regulatory jurisdiction pursuant to § 202(a) or (g) of this title, water, wastewater (which shall include sanitary sewer charge), telecommunications (excluding telephone services provided by cellular technology or by domestic public land mobile radio service) service, system, plant or equipment.”¹⁴⁴

In Delaware’s deregulated electricity market, “**electric supplier**” is separately defined as “a person or entity certified by the Commission that sells electricity to retail electric customers utilizing the transmission and/or distribution facilities of a nonaffiliated electric utility, including:

- a. Municipal corporations which choose to provide electricity outside their municipal limits (except to the extent provided prior to February 1, 1999);
- b. Electric cooperatives which, having exempted themselves from the Commission's jurisdiction pursuant to §§ 202(g) and 223 of this title, choose to provide electricity outside their assigned service territories; and
- c. Any broker, marketer or other entity (including public utilities and their affiliates).”¹⁴⁵

Within the Electric Utility Restructuring law, an electric supplier is distinguished from an “**electric distribution company**,” defined as a “public utility owning and/or operating transmission and/or distribution facilities in this State.”¹⁴⁶ This law also provides that “the generation, supply and sale of electricity, including all related facilities and assets, used to serve standard offer service and returning customer service, shall be treated as a public utility service or function.”¹⁴⁷

Judicial Interpretation

The “Delaware Supreme Court has acknowledged a ‘**public interest**’ test for determining whether a service is a ‘**public utility**.’ That test states that, regardless of whether a company sells to less than the general public, when a company engages in the sale of a regulated commodity to independent third parties, the selling entity may be subject to the jurisdiction of the PSC under the Public Utilities Act of 1974 for the purposes of regulation.”¹⁴⁸ The pivotal factor is “whether the company's activities have a significant impact on the public interest the PSC was designed to protect, [creating] a two-part test: 1) First, a determination is made as to whether there is a sale of a regulated commodity to independent third parties; 2) If so, then it must be determined whether such sales affect the public interest in a significant manner.”¹⁴⁹

Exception: Electric Cooperatives

¹⁴⁴ DEL. CODE ANN. tit. 26, *supra* n. 142, § 102.

¹⁴⁵ DEL. CODE ANN. tit. 26, § 1001(14).

¹⁴⁶ DEL. CODE ANN. tit. 26, § 1001(12).

¹⁴⁷ DEL. CODE ANN. tit. 26, § 1003.

¹⁴⁸ *Reserves Dev. Corp. v. State P.U.C.*, No. CIV.A.02A-07-001 HDR, 2003 WL 139777, at *3 (Del. Super. Ct. Jan. 17, 2003), *aff’d*, 830 A.2d 409 (Del. 2003) (citing *Public Water Supply Co. v. DiPasquale*, 735 A.2d 378, 383–84 (Del. 1999)).

¹⁴⁹ *Id.*

The “§ 202(g)” exception referred to in the public utilities definition is for transmission by electric cooperatives:

“(g) Except as provided in § 224 of this title, the Commission shall have no supervision or regulation over any electric cooperative the membership of which has voted to be exempt from regulation by the Commission in accordance with § 223 of this title.”¹⁵⁰

Section 223 governs an “electric cooperative’s election to be exempt from regulation,” requiring an electric cooperative to “conduct an election of all its members” subject to certain procedures.¹⁵¹ “In the event the members of the cooperative have voted, pursuant to subsection (a) of this section, to exempt the cooperative from regulation by the Commission, any such cooperative may vote no more than once every 12 months to return said cooperative under the regulation of the Commission.”¹⁵²

However, Section 224 provides that “notwithstanding any electric cooperative’s election to exempt itself from the regulatory authority of the Commission under § 223 of this title, during any such period of exemption . . . Such cooperative shall remain subject to the Commission’s jurisdiction and regulatory authority as necessary to implement §§ 203A, 203B and 204 of this title [dealing with certificates of public convenience and necessity; service territories for electric utilities; and extension of utilities’ facilities] . . . Such cooperative shall make available to its members the following reports [on rate schedules, service terms and conditions, information on finances, load management and energy conservation programs, consumer education programs, and the cooperative’s performance] . . . Such cooperative shall remain subject to § 117 of this title [dealing with termination of service or sale] and shall continue to abide by § 303(a) of this title [dealing with unjust or unreasonable rates]. No such cooperative shall increase or decrease any of its rates or charges for electric distribution service or electric supply service for ‘default’ customers under paragraph (9)f. of this section unless [it follows certain procedures].”¹⁵³

If an electric cooperative has not “implemented a restructuring plan that provides for retail competition in its Delaware service territory,” then “such electric cooperative may not use the transmission or distribution facilities of a nonaffiliated electric utility to make sales to customers in such nonaffiliated electrical utility’s Delaware service territory; nor shall such electric cooperative own or receive, directly or indirectly, any economic interest in any entity which uses the transmission or distribution facilities of a nonaffiliated electric utility to make sales to customers in such non-affiliated electrical utility’s Delaware service territory.”¹⁵⁴

If an electric cooperative “has implemented a restructuring plan that provides for retail competition in its Delaware service territory,” then “such electric cooperative:

- a. Shall remain subject to the Commission’s jurisdiction and regulatory authority as necessary to implement § 1012 of this title (certification of ‘electric suppliers’).

¹⁵⁰ DEL. CODE ANN. tit. 26, *supra* n. 142, § 202(g).

¹⁵¹ DEL. CODE ANN. tit. 26, § 223(a).

¹⁵² DEL. CODE ANN. tit. 26, § 223(b).

¹⁵³ DEL. CODE ANN. tit. 26, § 224.

¹⁵⁴ DEL. CODE ANN. tit. 26, § 224(8).

b. Shall implement procedures to require all electric suppliers to deliver energy to the cooperative at locations and in amounts which are adequate to meet each electric supplier's obligations to its customers.

c. Shall be governed by § 1011(b) of this title with regard to metering and billing for customers in the cooperative's service territory.

d. Shall implement and maintain such procedures, processes and protocols (including all personnel, facilities and equipment) as reasonable and necessary to provide direct access (as defined in § 1001 of this title) to electric suppliers and their customers . . .

. . . f. Shall have the obligation to provide electric supply service, in accordance with the cooperative's published rate schedules, terms and conditions of service to all customers within its Commission-designated territory who:

1. Have no choice regarding electric suppliers;
2. Do not choose another electric supplier; or
3. Have contracted for electric supply service that is not delivered.”¹⁵⁵

DISTRICT OF COLUMBIA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|----------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 100% by 2032 ¹⁵⁶ |
| Net Metering Regulations? | Yes (mandatory) ¹⁵⁷ |

Definitions

The D.C. Code defines “the term ‘**public utility**’, ‘**utility**’ or ‘**utility company**’” to “mean and embrace every street railroad, street railroad corporation, common carrier, gas plant, gas company, **electric company**, telephone corporation, telephone line, telegraph corporation, telegraph line, and pipeline company. Until the initial implementation date of Chapter 15 of this title, the term shall also include every electric generating facility owned and operated by the electric company. The term ‘public utility’ excludes a person or entity that owns or operates electric vehicle supply equipment but does not sell or distribute electricity, an electric vehicle charging station service company, or an electric vehicle charging station service provider.”¹⁵⁸

An “**electric company**” is defined to include “every corporation, company, association, joint-stock company or association, partnership, or person and doing business in the District of Columbia, their lessees, trustees, or receivers, appointed by any court whatsoever, physically transmitting or distributing electricity in the District of Columbia to retail electric customers. The term excludes any building owner, lessee, or manager who, respectively, owns, leases, or manages, the internal

¹⁵⁵ DEL. CODE ANN. tit. 26, § 224(9).

¹⁵⁶ D.C. CODE ANN. § 34-1431 *et seq.* (West 2021)

¹⁵⁷ *District of Columbia Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/105> (last updated Dec. 12, 2019).

¹⁵⁸ D.C. CODE ANN., *supra* n. 156, § 34-214.

distribution system serving the building and who supplies electricity and other related electricity services solely to occupants of the building for use by the occupants. The term also excludes a person or entity that does not sell or distribute electricity and that owns or operates equipment used exclusively for the charging of electric vehicles.”¹⁵⁹

As noted by the D.C. Court of Appeals, “prior to 2000, the electricity market in the District was monopolistically held by Pepco, which was responsible for generating, transmitting, and delivering electricity . . . In December of 1999, the Council of the District of Columbia passed the ‘Retail Electric Competition and Consumer Protection Act of 1999,’ effectively deregulating the retail supply of electricity in the District.”¹⁶⁰ This law defines “**electric company**” to “have the same meaning as provided in the fifteenth unnumbered paragraph in § 34-207,” but also defines an “**electricity supplier**” to mean “a person, including an aggregator, broker, or marketer, who generates electricity; sells electricity; or purchases, brokers, arranges or, markets electricity for sale to customers.”¹⁶¹

Exception: Supply to Building Occupants

As stated above, the D.C. Code definition of electric company “excludes any building owner, lessee, or manager who, respectively, owns, leases, or manages, the internal distribution system serving the building and who **supplies electricity and other related electricity services solely to occupants of the building for use by the occupants.**”¹⁶²

The definition of a competitive “electricity supplier” similarly “excludes the following:

- (A) Building owners, lessees, or managers who manage the internal distribution system serving such building and who supply electricity solely to occupants of the building for use by the occupants;
- (B)(i) Any person who purchases electricity for its own use or for the use of its subsidiaries or affiliates; or (ii) Any apartment building or office building manager who aggregates electric service requirements for his or her building or buildings, and who does not:
 - (I) Take title to electricity;
 - (II) Market electric services to the individually-metered tenants of his or her building; or
 - (III) Engage in the resale of electric services to others;
- (C) Property owners who supply small amounts of power, at cost, as an accommodation to lessors or licensees of the property; and
- (D) A consolidator.”¹⁶³

A 2019 report of the D.C. Public Service Commission’s working groups on “Modernizing the Energy Delivery System for Increased Sustainability” stated that “MRC [Microgrid Resources

¹⁵⁹ D.C. CODE ANN. § 34-207.

¹⁶⁰ *Washington Gas Energy Servs., Inc. v. Pub. Serv. Comm’n*, 893 A.2d 981, 984 (D.C. 2006).

¹⁶¹ D.C. CODE ANN., *supra* n. 156, §§ 34-1501(16A), (17).

¹⁶² D.C. CODE ANN. § 34-207.

¹⁶³ D.C. CODE ANN. § 34-1501(17).

Coalition] points out the DC Code recognizes the ability of customers / owners / landlords to serve their tenants / occupants. MRC highlights that when a classification discusses serving a ‘customer(s)’ (including in single customer microgrids), it should be understood that it may include such customer(s) serving their tenants. A microgrid may serve combinations and collectives of customers (such customers may be owners, lessees, and managers under the DC Code) and tenants.”¹⁶⁴

Exception: Electric Vehicle Charging Stations

As stated above, “the term ‘public utility’ excludes a person or entity that owns or operates electric vehicle supply equipment but does not sell or distribute electricity, an electric vehicle charging station service company, or an electric vehicle charging station service provider.”¹⁶⁵

Similarly, the term “electric company” also “excludes a person or entity that does not sell or distribute electricity and that owns or operates equipment used exclusively for the charging of electric vehicles.”¹⁶⁶

FLORIDA

Regulatory Environment At-a-Glance

| | | |
|-------------------------------|------------------------------|----------------------------|
| Retail Electric Competition? | No (considered but rejected) | |
| RTO/ISO Membership? | None | |
| Renewable Portfolio Standard? | No | |
| Net Metering Regulations? | Yes | (mandatory) ¹⁶⁷ |

Definitions

A “**public utility**” means “every person, corporation, partnership, association, or other legal entity and their lessees, trustees, or receivers supplying electricity or gas (natural, manufactured, or similar gaseous substance) to or for the public within this state; but the term “public utility” does not include either a cooperative now or hereafter organized and existing under the Rural Electric Cooperative Law of the state; a municipality or any agency thereof . . .”¹⁶⁸

The Florida Public Service Commission (PSC) has “jurisdiction to regulate and supervise each public utility with respect to its rates and service.”¹⁶⁹

Judicial and Regulatory Interpretation

¹⁶⁴ DCPSC MEDSIS STAKEHOLDER WORKING GROUPS, MODERNIZING THE ENERGY DELIVERY SYSTEM FOR INCREASED SUSTAINABILITY: FINAL REPORT v1.0 177 (May 31, 2019), <https://dcpssc.org/PSCDC/media/PDFFiles/HotTopics/GridModernizationFinalReport.pdf>.

¹⁶⁵ D.C. CODE ANN., *supra* n. 156, § 34-214.

¹⁶⁶ D.C. CODE ANN. § 34-207.

¹⁶⁷ *Florida Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/2880> (last updated Nov. 30, 2018).

¹⁶⁸ FLA. STAT. ANN. § 366.02(1) (West 2021).

¹⁶⁹ FLA. STAT. ANN. § 366.04(1).

The Florida Supreme Court has upheld the “PSC’s determination that **the sale of electricity to even a single customer makes the provider a ‘public utility’** subject to PSC jurisdiction.”¹⁷⁰ Those holdings have “severely impacted the availability of third-party purchasing agreements (‘PPAs’) in Florida,” given that the solar developer would qualify as “a ‘utility’ as defined by § 366 because he is an individual providing electricity to the public and he is thus subject to the same regulations as energy giants.”¹⁷¹

In 2011, the Florida legislature considered “exempting third-party developers from regulation as utilities,” but the “bill failed to pass through the Energy and Utilities Sub-Committee”—and thus “Florida continues to effectively exclude third-party PPAs as a potential financing vehicle for site-owners.”¹⁷²

Change did arrive in 2018, when the Public Service Commission considered the petition from Sunrun, Inc. about a “residential solar equipment lease program” with “payment amounts . . . based on a negotiated rate of return” and “independent of electric generation, production rates, or any other operational variable of the leased equipment.”¹⁷³ The Commission looked to a regulation about “customer-owned renewable generation” (discussed below) which provided that “the term ‘customer-owned renewable generation’ does not preclude the customer of record from contracting for the purchase, lease, operation, or maintenance of an on-site renewable generation system with a third-party **under terms and conditions that do not include the retail purchase of electricity from the third party.**”¹⁷⁴ The Commission thus held that the “residential solar equipment lease as described in Sunrun’s Petition does not constitute a sale of electricity; (2) **offering its solar equipment lease to customers in Florida as described in the Petition will not cause Sunrun to be deemed a public utility** under Florida law; and (3) the residential solar equipment lease described in Sunrun’s Petition will not subject Sunrun or Sunrun’s customer-lessees to our regulation.”¹⁷⁵

Customer-Owned Renewable Generation

Florida law provides for net metering, defined as “a metering and billing methodology whereby customer-owned renewable generation is allowed to offset the customer’s electricity consumption on site.”¹⁷⁶ Here “customer-owned renewable generation” means “an electric generating system located on a customer’s premises that is primarily intended to offset part or all of the customer’s electricity requirements with renewable energy.”¹⁷⁷ Each public utility, as well as each municipal electric utility and rural electric cooperative that sells electricity at retail, must “develop a standardized interconnection agreement and net metering program for customer-owned renewable generation.”¹⁷⁸

¹⁷⁰ *Pub. Serv. Comm’n v. Bryson*, 569 So. 2d 1253, 1255 (Fla. 1990) (citing *Fletcher Properties, Inc. v. Pub. Serv. Comm’n*, 356 So.2d 289, 292 (Fla.1978)).

¹⁷¹ Lauren Gillespie, *It’s Always Sunny in Florida: Reexamining the Role of Energy Monopolies After Recent Solar Ballot Initiatives*, 42 WM. & MARY ENVTL. L. & POL’Y REV. 1051, 1060–61 (2018) (citing *PW Ventures, Inc. v. Nichols*, 533 So.2d 281, 283–84 (Fla. 1988)).

¹⁷² Farkas, *supra* n. 59, at 103.

¹⁷³ *In re Petition by Sunrun Inc.*, No. 20170273-EQ, 2018 WL 2316552, at *3 (Fla. P.S.C. May 17, 2018).

¹⁷⁴ *Id.* at *4 (citing FLA. ADMIN. CODE ANN. r. 25-6.065).

¹⁷⁵ *Id.* at *9.

¹⁷⁶ FLA. STAT. ANN., *supra* n. 168, § 366.91(2)(c).

¹⁷⁷ FLA. STAT. ANN. § 366.91(2)(b).

¹⁷⁸ FLA. STAT. ANN. § 366.91(5)-(6).

Before 2018, “households in Florida were unable to lease solar systems due to restrictions on electricity sales from third-party providers.”¹⁷⁹ As described above, a 2018 Public Service Commission ruling removed that obstacle—while “it is still illegal for a third party to sell electricity to customers in the state,” solar leases are permissible “as a lease of equipment, rather than a contract for power.”¹⁸⁰

Rural Electric Cooperatives

Rural electric cooperatives are excluded from the definition of public utility, and the public utilities law further states that “no provision of this chapter shall apply in any manner, other than as specified in [particular sections], to utilities owned and operated by . . . cooperatives organized and existing under the Rural Electric Cooperative Law of the state, or to the sale of electricity . . . at wholesale by any public utility to, and the purchase by, any municipality or cooperative under and pursuant to any contracts now in effect or which may be entered into in the future, when such municipality or cooperative is engaged in the sale and distribution of electricity or manufactured or natural gas, or to the rates provided for in such contracts.”¹⁸¹

However, rural electric cooperatives are specifically included in the definition of “electric utility,” which “means **any municipal electric utility, investor-owned electric utility, or rural electric cooperative** which owns, maintains, or operates an electric generation, transmission, or distribution system within the state.”¹⁸²

The Florida Public Service Commission “**shall have power over electric utilities** for the following purposes:

- (a) To prescribe uniform systems and classifications of accounts.
- (b) To prescribe a rate structure for all electric utilities.
- (c) To require electric power conservation and reliability within a coordinated grid . . .
- (d) To approve territorial agreements between and among rural electric cooperatives, municipal electric utilities, and other electric utilities under its jurisdiction . . .
- (e) To resolve, upon petition of a utility or on its own motion, any territorial dispute involving service areas . . .
- (f) To prescribe and require the filing of periodic reports and other data as may be reasonably available and as necessary to exercise its jurisdiction hereunder.”¹⁸³

The Commission also has “exclusive jurisdiction to prescribe and enforce safety standards for transmission and distribution facilities of all public electric utilities, cooperatives organized under the Rural Electric Cooperative Law, and electric utilities owned and operated by municipalities.”¹⁸⁴

¹⁷⁹ Julia Pyper, *How Solar Scored a ‘Game-Changing’ Victory in Florida*, GREENTECH MEDIA (Apr. 25, 2018), <https://www.greentechmedia.com/articles/read/how-solar-scored-a-game-changing-victory-in-florida>

¹⁸⁰ *Id.*

¹⁸¹ FLA. STAT. ANN., *supra* n. 168, § 366.11(1).

¹⁸² FLA. STAT. ANN. § 366.02(2).

¹⁸³ FLA. STAT. ANN. § 366.04(2).

¹⁸⁴ FLA. STAT. ANN. § 366.04(6).

The Rural Electric Cooperative Law, FLA. STAT. ANN. § 425, provides that “cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas.”¹⁸⁵

GEORGIA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Yes (partial—some commercial and industrial consumers) |
| RTO/ISO Membership? | None |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | No (has other distributed generation compensation rules) ¹⁸⁶ |

Definitions

The “Public Utilities and Public Transportation” title of the Code of Georgia defines “**utility**” to mean “any person who is subject in any way to the lawful jurisdiction of the commission [the Public Service Commission].”¹⁸⁷

“**Electric utility**” is defined as “any retail supplier of electricity whose rates are fixed by the commission.”¹⁸⁸

The subsection governing the jurisdiction of the Public Service Commission states that “except as otherwise provided by law, the commission shall have the general supervision of all common carriers, express companies, railroad or street railroad companies, dock or wharfage companies, terminal or terminal station companies, telephone companies, **gas or electric light and power companies**, and persons or private companies who operate rapid rail passenger service lines within this state.”¹⁸⁹

The chapter on “Electrical Service” defines “**electric supplier**” to mean “any electric light and power company subject to regulation by the commission, any electric membership corporation furnishing retail service in this state, and any municipality which furnishes such service within this state.”¹⁹⁰

The chapter’s section on “legislative findings and declaration of policy” states that “it is necessary and appropriate that the state establish and implement a plan whereby every geographic area within the state shall be either assigned to an electric supplier or declared unassigned as to any electric supplier; that, to accomplish such a plan, it is necessary that all electric suppliers within the state be subject to this part; that the commission be delegated power, authority, and jurisdiction with respect to such plan.”

¹⁸⁵ FLA. STAT. ANN. § 425.02.

¹⁸⁶ *Georgia Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/574> (last updated Nov. 16, 2018).

¹⁸⁷ GA. CODE ANN. § 46-1-1(9).

¹⁸⁸ GA. CODE ANN. § 46-1-1(4).

¹⁸⁹ GA. CODE ANN. § 46-2-20(a).

¹⁹⁰ GA. CODE ANN. § 46-3-3(3).

Electric Membership Corporations

The “Electrical Service” chapter also provides that **“all electric membership corporations and all municipalities which furnish retail electric service be additionally subject to regulation by the commission in the same manner as provided for regulation of electric light and power companies, except as to the fixing of their rates, charges, and service rules and regulations,** it being determined by the General Assembly that such electric membership corporations and municipalities, which by their corporate nature are wholly or substantially controlled by their consumers, should for regulatory purposes be classified differently in certain respects from electric light and power companies.”¹⁹¹

Specifically, “all electric membership corporations which furnish service in the State of Georgia and all municipalities, whether incorporated by this state or not, which furnish service inside the state shall, in addition to the manner and extent otherwise provided for in this part, be subject to the authority and jurisdiction of the commission in the same manner as electric light and power companies are subject under other laws of the State of Georgia and regulations of the commission pursuant thereto, provided that **the rates, charges, and service rules and regulations of electric membership corporations and municipalities shall be filed with the commission and shall be subject to Code Section 46-3-11 but shall not otherwise be fixed by the commission.**”¹⁹²

Distributed Generation Facilities

Electric service providers (any “any electric utility, electric membership corporation, or municipal electric utility that is engaged in the business of distributing electricity to retail electric customers in the state”) must make certain metering services available to **“customer generators,”** meaning any “owner and operator of a distributed generation facility.”¹⁹³

“Distributed generation facility” is defined as a “facility owned and operated by a customer of the electric service provider for the production of electrical energy that: (A) Uses a solar Photovoltaic system, fuel cell, or wind turbine; (B) Has a peak generating capacity of not more than 10kw for a residential application and 100kw for a commercial application; (C) Is located on the customer's premises; (D) Operates in parallel with the electric service provider's distribution facilities; (E) Connected to the electric service provider's distribution system on either side of the electric service provider's meter; and (F) Is intended primarily to offset part or all of the customer generator's requirements for electricity.”¹⁹⁴

The Georgia Public Service Commission, “in the case of an electric utility, or the appropriate governing body, in the case of other electric service providers or electric suppliers, after appropriate notice and opportunity for comment, may adopt by regulation additional safety, power quality, and interconnection requirements for customer generator that the commission or governing body determines are necessary to protect public safety and system reliability.”¹⁹⁵ Moreover, “a distributed generation facility used by a customer generator shall include, at the

¹⁹¹ GA. CODE ANN. § 46-3-2.

¹⁹² GA. CODE ANN. § 46-3-12.

¹⁹³ GA. CODE ANN. §§ 46-3-52, 46-3-54.

¹⁹⁴ GA. CODE ANN. § 46-3-52(5).

¹⁹⁵ GA. CODE ANN. § 46-3-56(d).

customer's own expense, all equipment necessary to meet applicable safety, power quality, and interconnection requirements established by the National Electrical Code, National Electrical Safety Code, the Institute of Electrical and Electronics Engineers, and Underwriters Laboratories.”¹⁹⁶

Exception: Cogeneration Facilities

Some cogeneration facilities, defined as “a facility, other than a distributed generation facility, which produces electric energy, steam, or other forms of useful energy (such as heat) which are used for industrial, commercial, heating, or cooling purposes,” are exempt from regulation by the Georgia Public Service Commission.¹⁹⁷

This cogenerator exception provides that:

“(a) Any person may operate a cogeneration facility without being subject to the jurisdiction or regulation of the commission if such person **uses all of the electric energy, steam, or other form of useful energy produced at such cogeneration facility.** The electric energy shall not be sold to any other person except as provided in subsection (b) of this Code section.

(b) Any person may operate a cogeneration facility and **sell any excess electric energy to an electric supplier without being subject to the jurisdiction or regulation of the commission;** provided, however, that nothing in this article shall except a person from compliance with federal law.”¹⁹⁸

HAWAII

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No (considered but rejected) |
| RTO/ISO Membership? | None (outside FERC jurisdiction) |
| Renewable Portfolio Standard? | Yes, 40% by 2030, 100% by 2045 ¹⁹⁹ |
| Net Metering Regulations? | Yes ²⁰⁰ |

Definitions

Hawaii statutory law defines “**public utility**” to include “every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, **any plant or equipment, or any part thereof, directly or indirectly for public use** for the transportation of passengers or freight; for the conveyance or transmission of telecommunications messages; for the furnishing of facilities for the transmission of intelligence by electricity within the State or between points within the State by land, water, or air; for the **production, conveyance, transmission, delivery, or**

¹⁹⁶ GA. CODE ANN. § 46-3-56(c).

¹⁹⁷ GA. CODE ANN. § 46-3-52(2).

¹⁹⁸ GA. CODE ANN. § 46-3-53.

¹⁹⁹ HAW. REV. STAT. ANN. § 269-91 *et seq.* (West 2021)

²⁰⁰ *Hawaii Distributed Generation Tariffs Overview, DSIRE,*
<https://programs.dsireusa.org/system/program/detail/596> (last updated Nov. 28, 2018).

furnishing of light, power, heat, cold, water, gas, or oil; for the storage or warehousing of goods; or for the disposal of sewage.”²⁰¹

The Renewable Portfolio Standards law defines “**electric utility company**” to mean “a public utility as defined under section 269-1, for the production, conveyance, transmission, delivery, or furnishing of power.”²⁰² The section on “power purchase agreements; cost recovery for electric utilities” similarly states that “for purposes of this section, an ‘**electric utility company**’ means a public utility as defined under section 269-1, for the production, conveyance, transmission, delivery, or furnishing of electric power.”²⁰³

Judicial Exception

The Supreme Court of Hawaii has narrowed the reach of the statute by reading it to exclude facilities not intended to serve the public. The Court stated “The term ‘public utility’ implies a public use. . . . [W]hether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.”²⁰⁴ The Supreme Court held as not clearly erroneous the state Public Utility Commission’s determination that a wind project which sold its output to a water supply company to power its well pumps (which company then sold excess power to the local electric utility), was not “devoted to a public use” and thus was not a public utility.²⁰⁵

Exception: Renewable Energy System Supply to Oneself, Tenants, or Electric Utility

Hawaii law defines a “renewable energy system” as “any identifiable facility, equipment, apparatus, or the like that converts renewable energy, as defined in section 269-91, to useful thermal or electrical energy for heating, cooling, or reducing the use of other types of energy that are dependent on fossil fuel for their generation.”²⁰⁶

Excluded from the definition of “public utility” is:

“(M) Any person who:

- (i) Owns, controls, operates, or manages a renewable energy system that is located on a customer's property; and
- (ii) **Provides, sells, or transmits the power generated from that renewable energy system to an electric utility or to the customer on whose property the renewable energy system is located;** provided that, for purposes of this subparagraph, a customer's

²⁰¹ HAW. REV. STAT. ANN., *supra* n. 199, § 269-1.

²⁰² HAW. REV. STAT. ANN. § 269-91.

²⁰³ HAW. REV. STAT. ANN. § 269-116.22.

²⁰⁴ *In re Wind Power Pac. Inv'rs-III*, 686 P.2d 831, 833-834 (1984) (quoting 73B C.J.S. *Public Utilities* § 3.

²⁰⁵ *In re Wind Power Pac. Inv'rs-III*, 686 P.2d at 834.

²⁰⁶ HAW. REV. STAT. ANN., *supra* n. 199, § 269-1.

property shall include all contiguous property owned or leased by the customer without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights-of-way, and utility rights-of-way; and

(N) Any person who owns, controls, operates, or manages a renewable energy system that is located on such person's property and provides, sells, or transmits the power generated from that renewable energy system **to an electric utility or to lessees or tenants on the person's property where the renewable energy system is located**; provided that:

(i) An interconnection, as defined in section 269-141, is maintained with an electric public utility to preserve the lessees' or tenants' ability to be served by an electric utility;

(ii) Such person does not use an electric public utility's transmission or distribution lines to provide, sell, or transmit electricity to lessees or tenants;

(iii) At the time that the lease agreement is signed, the rate charged to the lessee or tenant for the power generated by the renewable energy system shall be no greater than the effective rate charged per kilowatt hour from the applicable electric utility schedule filed with the public utilities commission;

(iv) The rate schedule or formula shall be established for the duration of the lease, and the lease agreement entered into by the lessee or tenant shall reflect such rate schedule or formula;

(v) The lease agreement shall not abrogate any terms or conditions of applicable tariffs for termination of services for nonpayment of electric utility services or rules regarding health, safety, and welfare;

(vi) The lease agreement shall disclose: (1) the rate schedule or formula for the duration of the lease agreement; (2) that, at the time that the lease agreement is signed, the rate charged to the lessee or tenant for the power generated by the renewable energy system shall be no greater than the effective rate charged per kilowatt hour from the applicable electric utility schedule filed with the public utilities commission; (3) that the lease agreement shall not abrogate any terms or conditions of applicable tariffs for termination of services for nonpayment of electric utility services or rules regarding health, safety, and welfare; and (4) whether the lease is contingent upon the purchase of electricity from the renewable energy system; provided further that any disputes concerning the requirements of this provision shall be resolved pursuant to the provisions of the lease agreement or chapter 521, if applicable; and

(vii) Nothing in this section shall be construed to permit wheeling.”²⁰⁷

Exception: Users, Owners, and Operators of the Hawaii Electric System

The definition of “public utility” excludes “any user, owner, or operator of the Hawaii electric system as defined under section 269-141.”²⁰⁸

²⁰⁷ HAW. REV. STAT. ANN. § 269-1.

²⁰⁸ HAW. REV. STAT. ANN. § 269-1.

This section defines “**Hawaii electric system**” to mean “all electric elements located within the State together with all interconnections located within the State that collectively provide for the generation, transmission, distribution, storage, regulation, or physical control of electricity over a geographic area; provided that this term shall not include any electric element operating without any interconnection to any other electric element located within the State.”²⁰⁹

The definition of “**user, owner, or operator of the Hawaii electric system**” is “any person, business, organization, or other entity who:

- (1) Owns, controls, operates, or manages plants or facilities for the generation, transmission, or furnishing of electricity; and
- (2) Provides, sells, or transmits all of that electricity, except such electricity as is used in its own internal operations or is used for its own consumption, directly to a public utility for either transmission or distribution to the public;

provided that a user, owner, or operator of the Hawaii electric system shall not be considered a public utility for the purposes of this chapter.”²¹⁰

IDAHO

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-------------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | None (part of Northwest Power Pool) |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (voluntary) ²¹¹ |

Definitions

The Idaho Public Utilities Law defines “**public utility**” to include “every common carrier, pipeline corporation, gas corporation, **electrical corporation**, telephone corporation and water corporation, as those terms are defined in this chapter and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act. The term ‘public utility’ as used in this act shall cover cases where the service is performed and the commodity delivered directly to the public or some portion thereof, and where the service is performed or the commodity delivered to any corporation or corporations, or any person or persons, who in turn, either directly or indirectly or mediately or immediately, performs the services or delivers such commodity to or for the public or some portion thereof.”²¹²

The definition of electrical corporation incorporates the relevant definition of “**corporation**,” which “when used in this act includes a corporation, a company, an association and a joint stock

²⁰⁹ HAW. REV. STAT. ANN. § 269-141.

²¹⁰ HAW. REV. STAT. ANN. § 269-141.

²¹¹ *Idaho Power Net Metering Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/279> (last updated Oct. 27, 2016); *Rocky Mountain Power Net Metering Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/980> (last updated Oct. 27, 2016); *Avista Utilities Net Metering Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/2339> (last updated Oct. 27, 2016).

²¹² IDAHO CODE ANN. § 61-129 (West 2021).

association, but does not include a municipal corporation, or mutual nonprofit or cooperative gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the limits of incorporated cities, towns or villages.”²¹³

Also relevant is the definition of “**electric plant**,” which “includes all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity for light, heat or power, and all conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”²¹⁴

“**Electrical corporation**” is then defined to include “every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant for compensation within this state, **except where the electricity is:**

- (1) Generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others;
- (2) Purchased from a public utility as defined in section 61-129, Idaho Code, to charge the batteries of an electric motor vehicle as provided by order or rule of the commission; or
- (3) To be used exclusively in operations incident to the working of metalliferous mines and mining claims, mills, or reduction and smelting plants, and the transmission lines and distribution systems are owned by the consumer or where several consumers severally own their individual distribution systems and jointly own, in their own names or through a trustee, the transmission lines used in connection therewith and transmit such electricity, whether generated by themselves or procured from some other source, over such transmission lines and distribution systems without profit, and to be used for their private uses for the purposes aforesaid in places outside the limits of incorporated cities, towns and villages, and not for resale or public use, sale or distribution.”²¹⁵

Judicial Interpretation

In interpreting the statutory language of “**to the public or some portion thereof**” within the public utility definition, the Supreme Court of Idaho has held that “the furnishing of water to one person or corporation, under a contract, does not constitute a delivery of water to the public or some portion thereof . . . “a corporation becomes a public service corporation, and therefore subject to regulation as a public utility, only when and to the extent that the business of such corporation becomes devoted to a public use . . . such dedication is never presumed without evidence of unequivocal intention . . . the test for determining whether [a] company is a public utility would seem to depend upon whether it has held itself out as ready, able, and willing to serve the public generally, or some portion thereof.”²¹⁶

Exception: Supply to Oneself or Tenants

²¹³ IDAHO CODE ANN. § 61-104.

²¹⁴ IDAHO CODE ANN. § 61-118.

²¹⁵ IDAHO CODE ANN. § 61-119.

²¹⁶ *Humbird Lumber Co. v. P.U.C.*, 228 P. 271, 273 (Idaho 1924) (internal citations omitted).

As stated above, excluded from the definition of “electrical corporation” (and thereby excluded from public utility regulation” are any instances “where the electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others.”²¹⁷

Exception: Electric Cooperatives

As stated above, the relevant definition of “corporation” (which an entity must meet to be categorized as an “electrical corporation” and thereby as a ‘public utility’) specifically “**does not include** a municipal corporation, or **mutual nonprofit or cooperative** gas, electrical, water or telephone corporation or any other public utility organized and operated for service at cost and not for profit, whether inside or outside the limits of incorporated cities, towns or villages.”²¹⁸

The Idaho Public Utilities law further states that “nothing contained in this act shall be construed to grant the commission [the Idaho Public Utilities Commission] jurisdiction over cooperatives or municipalities except as authorized in this act.”²¹⁹

Accordingly, in a case before the Supreme Court of Idaho involving appellants that were “rural electrical, nonprofit, cooperative corporations, organized pursuant to the Rural Electrification Acts of Congress,” the court held that “it is established in this state that appellants are not public utilities and are not subject to the jurisdiction of the public utilities commission.”²²⁰

However, municipal corporations and cooperatives are subject to the Electric Supplier Stabilization Act, which defines “**electric supplier**” as “any public utility, cooperative, or municipality supplying or intending to supply electric service to a consumer.”²²¹ This Act is “designed to promote harmony among and between electric suppliers furnishing electricity within the state of Idaho, prohibit the ‘pirating’ of consumers of another electric supplier, discourage duplication of electric facilities, actively supervise certain conduct of electric suppliers as it relates to this act, and stabilize the territories and consumers served with electricity by such electric suppliers.”²²²

ILLINOIS

Regulatory Environment At-a-Glance

| | |
|------------------------------|---------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | MISO; PJM Interconnection |

²¹⁷ IDAHO CODE ANN., *supra* n. 212, § 61-119.

²¹⁸ IDAHO CODE ANN. § 61-104.

²¹⁹ IDAHO CODE ANN. § 61-334.

²²⁰ *Clearwater Power Co. v. Washington Water Power Co.*, 299 P.2d 484, 484–85 (1956) (citing IDAHO CODE ANN., *supra* n. 212, § 61-104; *Sutton v. Hunziker*, 75 Idaho 395, 272 P.2d 1012 (1954)).

²²¹ IDAHO CODE ANN., *supra* n. 212, § 61-332A(4).

²²² IDAHO CODE ANN. § 61-332.

| | | |
|-------------------------------|--------------------------------------|----------------------------|
| Renewable Portfolio Standard? | Yes, 25% by 2025-2026 ²²³ | |
| Net Metering Regulations? | Yes | (mandatory) ²²⁴ |

Definitions

The Illinois Public Utilities Act defines “**public utility**” to mean and include, “except where otherwise expressly provided in this Section, every corporation, company, limited liability company, association, joint stock company or association, firm, partnership or individual, their lessees, trustees, or receivers appointed by any court whatsoever that owns, controls, operates or manages, within this State, directly or indirectly, for public use, any plant, equipment or property used or to be used for or in connection with, or owns or controls any franchise, license, permit or right to engage in: the production, storage, transmission, sale, delivery or furnishing of heat, cold, power, electricity, water, or light . . .”²²⁵

The public utility definition excludes “alternative retail electric suppliers,” which in Illinois’ deregulated electricity market (through the Electric Service Customer Choice and Rate Relief Law of 1997) include a variety of “resellers, aggregators and power marketers” that can offer “electric power or energy for sale, lease or in exchange for other value received to one or more retail customers” and/or “engag[e] in the delivery or furnishing of electric power or energy to such retail customers.”²²⁶

This deregulation law also defined “**electric utility**” to mean “a public utility, as defined in Section 3-105 of this Act [quoted above], **that has a franchise, license, permit or right to furnish or sell electricity to retail customers within a service area.**”²²⁷

Judicial Interpretation

In 2017, the Supreme Court of Illinois stated that “the mere fact that a company sells heat, cold, water, electricity or any of the various other things ordinarily sold by public utilities does not, in itself, make the enterprise a public utility . . . **a company could, for example, build power generation and transmission systems to service a select group of industrial customers without falling subject to the Public Utilities Act or the regulatory oversight of the Commission.**”²²⁸

This case affirmed a holding of the Appellate Court that an entity “does not satisfy the statutory qualifications of a public utility simply because it sells something ordinarily sold by a public utility,” but rather “also must provide its product or service ‘**for public use**’ . . . [therefore] a private company that provides public utility services according to its own terms and conditions does not meet the statutory definition of a public utility.”²²⁹

Exception: Electric Cooperatives

²²³ 220 ILL. COMP. STAT. ANN. 3855/1-75 (West 2021).

²²⁴ *Illinois Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/2700> (last updated Nov. 30, 2018).

²²⁵ 220 ILL. COMP. STAT. ANN., *supra* n. 223, 5/3-105(a).

²²⁶ 220 ILL. COMP. STAT. ANN. 5/16-102.

²²⁷ 220 ILL. COMP. STAT. ANN.

²²⁸ *Illinois Landowners All., NFP v. Illinois Commerce Comm’n*, 90 N.E.3d 448, 459 (Ill. 2017) (internal citations omitted).

²²⁹ *Illinois Landowners All., NFP v. Illinois Commerce Comm’n*, 60 N.E.3d 150, 158–59 (Ill. App. Ct. 2016), *aff’d*, 90 N.E.3d 448.

“Electric cooperatives as defined in Section 3-119” are excluded from the public utility definition.²³⁰ This section in turn refers to the definition used in Section 3.4 of the Electric Suppliers Act.²³¹ This definition of electric cooperative is “any not-for-profit corporation or other person that owns, controls, operates or manages, directly or indirectly, within this State, any plant, equipment or property for the production, transmission, sale, delivery or furnishing of electricity and (b) that either is or has been financed in whole or in part under the federal “Rural Electrification Act of 1936” and the Acts amendatory thereof and supplementary thereto [7 U.S.C.A. § 901 et seq.] or is directly or indirectly caused to be formed by any one or more such not-for-profit corporations or other persons that is or has been so financed.”²³²

Electric cooperatives are not subject to the provisions of the Electric Service Customer Choice and Rate Relief Law of 1997.²³³

Instead, electric cooperatives can “make one or more elections to cause one or more of the existing or future customers of each respective system to be eligible to take service from an alternative retail electric supplier for a specified period of time,” with the proviso that “each shall continue to provide exclusive distribution facilities for any existing and future customers” that it is “otherwise entitled to serve and which customers are now or in the future receiving service provided by an alternative retail electric supplier.”²³⁴

Exception: Electric Vehicle Charging Services

“An entity that furnishes the **service of charging electric vehicles** does not and shall not be deemed to sell electricity and is not and **shall not be deemed a public utility** notwithstanding the basis on which the service is provided or billed. If, however, the entity is otherwise deemed a public utility under this Act, or is otherwise subject to regulation under this Act, then that entity is not exempt from and remains subject to the otherwise applicable provisions of this Act.”²³⁵

INDIANA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; PJM Interconnection |
| Renewable Portfolio Standard? | Voluntary target, 10% by 2025 ²³⁶ |
| Net Metering Regulations? | No (has other distributed generation compensation rules) ²³⁷ |

Definitions

The Indiana Code chapter on “Utility Regulation” defines “**public utility**” to mean “every corporation, company, partnership, limited liability company, individual, association of

²³⁰ 220 ILL. COMP. STAT. ANN., *supra* n. 223, 5/3-105(b)(3).

²³¹ 220 ILL. COMP. STAT. ANN. 5/3-119.

²³² 220 ILL. COMP. STAT. ANN. 30/3.4.

²³³ 220 ILL. COMP. STAT. ANN. 5/17-100.

²³⁴ 220 ILL. COMP. STAT. ANN. 5/17-200(a).

²³⁵ 220 ILL. COMP. STAT. ANN. 5/3-105(c).

²³⁶ IND. CODE ANN. § 8-1-37 (West 2021).

²³⁷ *Indiana Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/342> (last updated Aug. 18, 2017).

individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the:

- (1) conveyance of telegraph or telephone messages;
- (2) production, transmission, delivery, or furnishing of heat, light, water, or power; or
- (3) collection, treatment, purification, and disposal in a sanitary manner of liquid and solid waste, sewage, night soil, and industrial waste.”²³⁸

The term does not include a municipality that may acquire, own, or operate any of the foregoing facilities.²³⁹

For the purposes of the chapter governing “Electricity Suppliers’ Service Area Assignments,” an “**electricity supplier**” is defined as “a public utility, a local district rural electric membership corporation, or a municipally owned electric utility which furnishes retail electric service to the public.”²⁴⁰

Judicial Interpretation

The Indiana Supreme Court has said cited public utilities treatises for the proposition that “a business or enterprise must in some way be impressed with a public interest before it may become a public utility.”²⁴¹ The Court of Appeals of Indiana has elaborated on this point by holding that despite the absence of the words “to the public” in the public utility definition above, a business must be “**affected with a public interest**” to “become a public utility subject to the PSCI’s [predecessor to the Indiana Utility Regulatory Commission] jurisdiction.”²⁴²

The Court of Appeals of Indiana has also held that a company’s “distribution of its own electricity” across its property, even though that property covered two different electric service areas, would not render it an “electricity supplier.”²⁴³

Alternative Utility Regulation

The chapter on “Alternative Utility Regulation” allows certain energy utilities to request that the Indiana Utility Regulatory Commission decline to exercise its jurisdiction, in whole or in part, over the energy utility and/or its retail energy service.²⁴⁴

The chapter begins with legislative findings, including “that traditional commission regulatory policies and practices, and certain existing statutes are not adequately designed to deal with an increasingly competitive environment for energy services and that alternatives to traditional

²³⁸ IND. CODE ANN., *supra* n. 234, § 8-1-2-1(a).

²³⁹ IND. CODE ANN. § 8-1-2-1(a).

²⁴⁰ IND. CODE ANN. § 8-1-2.3-2(b).

²⁴¹ *Foltz v. City of Indianapolis*, 130 N.E.2d 650, 659 (Ind. 1955) (citing 73 C.J.S., Public Utilities, § 2, p. 991).

²⁴² *U.S. Steel Corp. v. N. Ind. Pub. Serv. Co.*, 482 N.E.2d 501, 506 (Ind. Ct. App. 1985).

²⁴³ *Knox Cty. Rural Elec. Membership Corp. v. PSI Energy, Inc.*, 663 N.E.2d 182, 195 (Ind. Ct. App. 1996).

²⁴⁴ IND. CODE ANN., *supra* n. 234, § 8-1-2.5.

regulatory policies and practices may be less costly,” and “that the public interest requires the commission to be authorized to issue orders and to formulate and adopt rules and policies that will permit the commission in the exercise of its expertise to flexibly regulate and control the provision of energy services to the public in an increasingly competitive environment.”²⁴⁵

The chapter defines “**energy utility**” as “a public utility or a municipally owned utility within the meaning of IC 8-1-2-1, or a local district corporation or a general district corporation within the meaning of IC 8-1-13-23, engaged in the production, transmission, delivery, or furnishing of heat, light, or power.”²⁴⁶

“**Retail energy service**” is defined as “energy service furnished by an energy utility to a customer for ultimate consumption, including energy service by a general district corporation to a local district corporation within the meaning of IC 8-1-13-23. The term does not include wholesale energy service furnished by an energy utility for resale (other than energy service by a general district corporation to a local district corporation) to another energy utility, a cooperatively owned electric utility, or a municipally owned electric utility.”²⁴⁷

Section 5 of the chapter provides that after receiving “the request of an energy utility electing to become subject to this section, the commission may enter an order, after notice and hearing, that the public interest requires the commission to commence an orderly process to **decline to exercise, in whole or in part, its jurisdiction over either the energy utility or the retail energy service of the energy utility, or both.** In determining whether the public interest will be served, the commission shall consider the following:

- (1) Whether technological or operating conditions, competitive forces, or the extent of regulation by other state or federal regulatory bodies render the exercise, in whole or in part, of jurisdiction by the commission unnecessary or wasteful.
- (2) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will be beneficial for the energy utility, the energy utility's customers, or the state.
- (3) Whether the commission's declining to exercise, in whole or in part, its jurisdiction will promote energy utility efficiency.
- (4) Whether the exercise of commission jurisdiction inhibits an energy utility from competing with other providers of functionally similar energy services or equipment.”²⁴⁸

Section 6 provides that “in approving retail energy services or establishing just and reasonable rates and charges, or both for an energy utility electing to become subject to this section, the commission may do the following:

- (1) **Adopt alternative regulatory practices, procedures, and mechanisms**, and establish rates and charges that:
 - (A) are in the public interest as determined by consideration of the factors described in section 5 of this chapter; and

²⁴⁵ IND. CODE ANN. § 8-1-2.5-1.

²⁴⁶ IND. CODE ANN. § 8-1-2.5-2.

²⁴⁷ IND. CODE ANN. § 8-1-2.5-3.

²⁴⁸ IND. CODE ANN. § 8-1-2.5-5.

(B) enhance or maintain the value of the energy utility's retail energy services or property;

including practices, procedures, and mechanisms focusing on the price, quality, reliability, and efficiency of the service provided by the energy utility.

(2) Establish rates and charges based on market or average prices, price caps, index based prices, and prices that:

(A) use performance based rewards or penalties, either related to or unrelated to the energy utility's return or property; and

(B) are designed to promote efficiency in the rendering of retail energy services.

. . . (c) An energy utility electing to become subject to this section shall file with the commission an **alternative regulatory plan** proposing how the commission will approve retail energy services or just and reasonable rates and charges for the energy utility's retail energy service.”²⁴⁹

IOWA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, 105 MW of generating capacity for IOUs ²⁵⁰ |
| Net Metering Regulations? | Yes (mandatory) ²⁵¹ |

Definitions

The Iowa Code’s chapter on “Public Utility Regulation” defines “**public utility**” to include “any person, partnership, business association, or corporation, domestic or foreign, owning or operating any facilities for furnishing gas by piped distribution system or electricity **to the public for compensation**.”²⁵²

For purposes of assigned electric service areas, an “**electric utility**” is defined as “a public utility furnishing electricity as defined in section 476.1 and a city utility as defined in section 390.1.”²⁵³

²⁴⁹ IND. CODE ANN. § 8-1-2.5-6.

²⁵⁰ IOWA CODE ANN. § 476.41 *et seq.* (West 2021).

²⁵¹ *Iowa Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/488> (last updated June 7, 2019).

²⁵² IOWA CODE ANN., *supra* n. 250, § 476.1(3).

²⁵³ IOWA CODE ANN. § 476.22.

Judicial Interpretation

The Iowa Supreme Court has held that the “statutory phrase ‘**to the public**’ . . . means sales to sufficient of the public to clothe the operation with a public interest and does not mean willingness to sell to each and every one of the public without discrimination.”²⁵⁴

In a 2014 case regarding Eagle Point Solar’s “construction of a solar energy system on the property of the city of Dubuque under which the city would purchase . . . all of the electricity generated,” the Iowa Supreme Court reviewed the Iowa Utilities Board [IUB] determination that “Eagle Point would be a public utility and thus was prohibited from selling the electricity to the city,” which was “located within the exclusive service territory of another electric utility.”²⁵⁵ The court upheld a lower court’s decision that the **“provision of electric power through a ‘behind the meter’ solar facility was not the type of activity which required a conclusion that Eagle Point was a public utility.”**²⁵⁶

The court noted that “under the IUB approach, a behind-the-meter solar generating project built by an engineering class at Iowa State University that furnished electricity on a per kWh basis to a nearby farm would be considered a public utility subject to a wide gamut of regulatory requirements. Even if the students obtained a waiver of the territorial exclusivity of the local electric utility, students would be required to stay after class to handle the paperwork associated with filing tariffs with the IUB.”²⁵⁷ Instead, the court approved the use of the Arizona Supreme Court’s eight “*Serv-Yu*” factors from *Natural Gas Service Co. v. Serv-Yu Co-op.*, 219 P.2d 324 (Ariz. 1950) in determining “whether an activity is sufficient to draw an entity within the scope of utilities regulation,” based on “assessing the strength of the *Serv-Yu* factors on a case-by-case basis,” not as “a mathematical exercise but instead” though “practical judgment.”²⁵⁸

The court held that these eight factors (in addition to the consideration of mere power stemming from an entity’s articles of incorporation) included:

- (1) What the corporation actually does;
- (2) A dedication to public use;
- (3) Articles of incorporation, authorization, and purposes;
- (4) Dealing with the service of a commodity in which the public has been generally held to have an interest;
- (5) Monopolizing or intending to monopolize the territory with an public service commodity;
- (6) Acceptance of substantially all requests for service;
- (7) Service under contracts and reserving the right to discriminate is not always controlling;
- (8) Actual or potential competition with other corporations whose business is clothed with public interest.²⁵⁹

²⁵⁴ *Iowa State Commerce Comm’n v. N. Nat. Gas Co.*, 161 N.W.2d 111, 115 (Iowa 1968).

²⁵⁵ *SZ Enterprises, LLC v. Iowa Utils. Bd.*, 850 N.W.2d 441, 444 (Iowa 2014), *as corrected* (Aug. 14, 2014).

²⁵⁶ *Id.*

²⁵⁷ *Id.* at 466.

²⁵⁸ *Id.* at 468.

²⁵⁹ *Natural Gas Serv. Co. v. Serv-Yu Co-op.*, 219 P.2d 324, 325–326 (Ariz. 1950).

The court concluded that “in this case, the balance of factors point away from a finding that the third-party PPA for a behind-the-meter solar generation facility is sufficiently ‘clothed with the public interest’ to trigger regulation.”²⁶⁰

The court also held that **when regulation as a public utility was not triggered, neither was regulation as an electric utility** under Iowa Code § 476.22: “the IUB asserts that the exclusive territory provisions require that the definition of electric utility should be broader than public utility, but we do not agree . . . the IUB . . . has not offered a clear explanation as to why Eagle Point should be considered an electric utility even if it is not a public utility.”²⁶¹

Exception: Excess Electricity Supplied to Five or Fewer Customers

Chapter 476 (“Public Utility Regulation”) of the Iowa Code “does not apply to . . . a person **furnishing electricity to five or fewer customers either by secondary line or from an alternate energy production facility or small hydro facility**, from electricity that is produced primarily for the person's own use.”²⁶²

The Iowa Administrative Code defines “**secondary line**” for purposes of “Iowa Code chapter 476” as “any single or multiphase electric power line operating at nominal voltage less than either 2,000 volts between ungrounded conductors or 1,155 volts between grounded and ungrounded conductors, regardless of the functional service provided by the line.”²⁶³

By statute, an “**alternate energy production facility**” means any or all of the following:

- (1) A solar, wind turbine, waste management, resource recovery, refuse-derived fuel, agricultural crops or residues, or woodburning facility. For purposes of this definition only, “waste management” includes a facility using plasma gasification to produce synthetic gas, either as a stand-alone fuel or for blending with natural gas, the output of which is used to generate electricity or steam. For purposes of this definition only, “plasma gasification” means the thermal dissociation of carbonaceous material into fragments of compounds in an oxygen-starved environment.
- (2) Land, systems, buildings, or improvements that are located at the project site and are necessary or convenient to the construction, completion, or operation of the facility.
- (3) Transmission or distribution facilities necessary to conduct the energy produced by the facility to users located at or near the project site.”²⁶⁴

By statute, “**small hydro facility**” means any or all of the following:

- (1) A hydroelectric facility at a dam.
- (2) Land, systems, buildings, or improvements that are located at the project site and are necessary or convenient to the construction, completion, or operation of the facility.

²⁶⁰ *Id.*

²⁶¹ *Id.* at 470.

²⁶² IOWA CODE ANN., *supra* n. 250, § 476.1(4).

²⁶³ IOWA ADMIN. CODE r. 199-20.1(476) (2021).

²⁶⁴ IOWA CODE ANN., *supra* n. 250, § 476.42(1).

(3) Transmission or distribution facilities necessary to conduct the energy produced by the facility to users located at or near the project site.”²⁶⁵

Exception: Electric Cooperatives and Electric Utilities with Fewer Than Ten Thousand Customers

Certain electric utilities are not subject to the full regulatory authority of the Iowa Utilities Board: “1. **Electric public utilities having fewer than ten thousand customers and electric cooperative corporations and associations** are not subject to the regulation authority of the board, except for regulatory action pertaining to all of the following:

- a. Assessment of fees for the support of the division and the office of consumer advocate, pursuant to section 476.10.
- b. Safety and engineering standards for equipment, operations, and procedures.
- c. Assigned area of service.
- d. Pilot projects of the board.
- e. Assessment of fees for the support of the Iowa energy center created in section 15.120 and the center for global and regional environmental research established by the state board of regents. This paragraph “e” is repealed July 1, 2022.
- f. Filing alternate energy purchase program plans with the board, and offering such programs to customers, pursuant to section 476.47.

2. However, sections 476.20, subsections 1 through 4, 476.21, 476.51, 476.56, 476.62, and 476.66 and chapters 476A and 478, to the extent applicable, apply to such electric utilities.”²⁶⁶

KANSAS

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | Southwest Power Pool |
| Renewable Portfolio Standard? | Voluntary target, 20% by 2020 ²⁶⁷ |
| Net Metering Regulations? | Yes (mandatory) ²⁶⁸ |

Definitions

“‘**Electric public utility**’ means any public utility, as defined in K.S.A. 66-104, and amendments thereto, which generates or sells electricity.”²⁶⁹

²⁶⁵ IOWA CODE ANN. § 476.42(4).

²⁶⁶ IOWA CODE ANN. § 476.1A.

²⁶⁷ KAN. STAT. ANN. § 66-1256 *et seq.* (West 2021).

²⁶⁸ *Kansas Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/3403> (last updated Nov. 30, 2018).

²⁶⁹ KAN. STAT. ANN., *supra* n. 267, § 66-101a.

“The term ‘**public utility**,’ as used in this act, shall be construed to mean every corporation, company, individual, association of persons, their trustees, lessees or receivers, that now or hereafter may own, control, operate or manage, **except for private use**, any equipment, plant or generating machinery, or any part thereof, for the transmission of telephone messages or for the transmission of telegraph messages in or through any part of the state, or the conveyance of oil and gas through pipelines in or through any part of the state, except pipelines less than 15 miles in length and not operated in connection with or for the general commercial supply of gas or oil, **and all companies for the production, transmission, delivery or furnishing of heat, light, water or power.**”²⁷⁰

The Supreme Court of Kansas has construed the “private use exemption” narrowly, emphasizing that “there is nothing in the Kansas statutory definition of a public utility which requires it to hold itself out as serving the public generally.”²⁷¹

Exception: Independent Power Producer Property

Kansas law defines “Independent power producer property” as “all or any portion of property used solely in the generation, marketing and sale of electricity generated by an electric generation facility described in subsection (e) of K.S.A. 66-104, and amendments thereto.”²⁷²

As set out in Kan. Stat. Ann. § 66-104, such property can be exempt from the definition of a public utility:

“At the option of an otherwise jurisdictional entity, **the term ‘public utility’ shall not include any activity or facility of such entity as to the generation, marketing and sale of electricity generated by an electric generation facility or addition to an electric generation facility which:**

- (1) Is **newly constructed** and placed in service on or after January 1, 2001; and
- (2) is **not in the rate base** of: (A) An electric public utility that is subject to rate regulation by the state corporation commission; (B) any cooperative, as defined by K.S.A. 17-4603, and amendments thereto, or any nonstock member-owned cooperative corporation incorporated in this state; or (C) a municipally owned or operated electric utility.”²⁷³

Exception: Electric Cooperatives

The public utilities law exempts certain electric cooperatives from regulation by the State Corporation Commission:

“(a) As used in this section, ‘cooperative’ means any: (1) **Corporation organized under the electric cooperative act, K.S.A. 17-4601 et seq.**, and amendments thereto, or which becomes subject to the electric cooperative act in the manner therein provided; (2) limited liability company or corporation providing electric service at wholesale in the state of Kansas that is owned by four or more electric cooperatives that provide retail service in the state of Kansas; or (3) member-owned corporation formed prior to 2004.

²⁷⁰ KAN. STAT. ANN. § 66-104(a).

²⁷¹ *Cities Serv. Gas Co. v. State Corp. Comm'n*, 567 P.2d 1343, 1352 (Kan. 1977).

²⁷² KAN. STAT. ANN., *supra* n. 267, § 79-256(a).

²⁷³ KAN. STAT. ANN. § 66-104(e).

(b) Except as otherwise provided in subsection (f), **a cooperative may elect to be exempt from the jurisdiction, regulation, supervision and control of the state corporation commission** by complying with the provisions of subsection (c).

(c) To be exempt under subsection (b), a cooperative shall poll its members [according to certain procedures] . . .

. . . (f) **Nothing in this section shall be construed to affect the single certified service territory of a cooperative or the authority of the state corporation commission, as otherwise provided by law, over a cooperative with regard to: (1) Service territory; (2) charges, fees or tariffs for transmission services, except those charges or fees for transmission services that are recovered through an open access transmission tariff of a regional transmission organization which has its rates approved by the federal energy regulatory commission; (3) sales of power for resale, other than sales between a cooperative, as defined in subsection (a), that does not provide retail electric service and an owner of such cooperative; and (4) wire stringing and transmission line siting, pursuant to K.S.A. 66-131, 66-183, 66-1,170 et seq. or 66-1,177 et seq., and amendments thereto. Nothing in this subsection shall be construed to affect the authority of the commission pursuant to K.S.A. 66-144, and amendments thereto.**

(g)(1) Notwithstanding a cooperative's election to be exempt under this section, **the commission shall investigate all rates, joint rates, tolls, charges and exactions, classifications and schedules of rates of such cooperative if there is filed with the commission, not more than one year after a change in such cooperative's rates, joint rates, tolls, charges and exactions, classifications or schedules of rates, a petition** in the case of a retail distribution cooperative signed by not less than 5% of all the cooperative's customers or 3% of the cooperative's customers from any one rate class, or, in the case of a generation and transmission cooperative, not less than 20% of the generation and transmission cooperative's members or 5% of the aggregate retail customers of such members. If, after investigation, the commission finds that such rates, joint rates, tolls, charges or exactions, classifications or schedules of rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, the commission shall have the power to fix and order substituted therefor such rates, joint rates, tolls, charges and exactions, classifications or schedules of rates as are just and reasonable.”²⁷⁴

The public utilities law also exempts certain out-of-state electric cooperatives from regulation by the State Corporation Commission:

“(a) Except as otherwise provided in subsection (b), no electric cooperative public utility, which is a nonprofit membership corporation, shall be subject to the jurisdiction, regulation, supervision and control of the state corporation commission if it meets the following conditions:

(1) The original cost of its electric public utility facilities located in the state constitutes less than 25% of the total original cost of all its electric public utility facilities located everywhere;

(2) the electric cooperative public utility does not have its headquarters office in this state;

²⁷⁴ KAN. STAT. ANN. § 66-104d.

(3) the **electric cooperative public utility is subject to the jurisdiction, regulation, supervision and control of a regulatory authority existing under the laws of any state bordering upon this state;**

(4) the electric cooperative public utility certifies to the state corporation commission that a regulatory authority of a bordering state has asserted jurisdiction, regulation, supervision and control over its electric operations; and

(5) customers of the electric cooperative public utility in this state are charged the same rates and are provided service under the same terms and conditions as are its customers located in similar areas in a bordering state.

(b) The state corporation commission shall retain jurisdiction and control over any such electric cooperative public utility necessary to insure compliance with the condition that customers of the electric cooperative public utility in this state are provided service under the same terms and conditions as are its customers located in similar areas of a bordering state . . . Nothing in this section shall be construed to affect the single certified service territory of an electric cooperative public utility or the authority of the state corporation commission over an electric cooperative public utility with regard to service territory, wire stringing and transmission line siting . . . Nothing herein shall affect the jurisdiction of the state corporation commission over sales of power for resale.”²⁷⁵

Exception: Nonprofit Public Utilities

The public utilities law also exempts certain nonprofit public utilities from regulation by the State Corporation Commission:

“(a) Except as otherwise provided in subsection (b), no nonprofit public utility shall be subject to the jurisdiction, regulation, supervision and control of the state corporation commission if the utility meets the following conditions: (1) **Every customer, shareholder, household or meter owner is an owner of the utility and has an equal vote on matters concerning the utility;** (2) the utility employs **no full-time employees;** and (3) **the utility has no more than 100 customers,** provided that customer additions resulting from sales or transfers of real property or rights in tenancy shall not be counted . . .

(b) The state corporation commission shall retain jurisdiction and control over the service territory of a utility described in subsection (a) . . .”²⁷⁶

KENTUCKY

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | PJM Interconnection (only part of state) |
| Renewable Portfolio Standard? | No |

²⁷⁵ KAN. STAT. ANN. § 66-104b.

²⁷⁶ KAN. STAT. ANN. § 66-104c.

Net Metering Regulations? Yes (mandatory)²⁷⁷

Definitions

Kentucky's Public Utilities title defines "**utility**" to include "any person except a regional wastewater commission established pursuant to KRS 65.8905 and, for purposes of paragraphs (a), (b), (c), (d), and (f) of this subsection, a city, who owns, controls, operates, or manages any facility used or to be used for or in connection with: (a) The **generation, production, transmission, or distribution of electricity to or for the public, for compensation**, for lights, heat, power, or other uses."²⁷⁸

An analysis of third-party power purchase agreement regulation cited Kentucky as a state that would "subject third-party developers to regulation" because of how its "statutes define electric utilities."²⁷⁹

Kentucky law defines "**retail electric supplier**" as "any person, firm, corporation, association, or cooperative corporation, excluding municipal corporations, engaged in the furnishing of retail electric service."²⁸⁰ **Retail electric service** is defined as "electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale."²⁸¹ KRS § 278.017 establishes "the boundaries of the certified territory of each retail electric supplier."²⁸²

Except for "retail electric suppliers" providing "service connections to electric-consuming facilities located within its certified territory" or "ordinary extensions of existing systems in the usual course of business," no entity can "commence providing utility service to or for the public or begin the construction of any plant, equipment, property, or facility for furnishing to the public any of the services enumerated in KRS 278.010 [including electric service] . . . until that person has obtained from the Public Service Commission a certificate that public convenience and necessity require the service or construction."²⁸³

Electric Cooperatives

An **electric cooperative** is defined as "a nonprofit cooperative corporation for the primary purpose of generating, purchasing, selling, transmitting, or distributing electric energy to any individual or entity, and providing any good or service related to generating, purchasing, selling, transmitting, or distributing electric energy to any individual or entity."²⁸⁴ Electric cooperatives "formed under KRS 279.010 to 279.220 **shall be subject to the general supervision of the Public Service Commission**, and shall be subject to all the provisions of KRS 278.010 to 278.450 inclusive, and KRS 278.990."

²⁷⁷ *Kentucky Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/1081> (last updated June 21, 2019).

²⁷⁸ KY. REV. STAT. ANN. § 278.010(3) (West 2021).

²⁷⁹ Farkas, *supra* n. 59, at 104.

²⁸⁰ KY. REV. STAT. ANN., *supra* n. 278, § 278.010(4).

²⁸¹ KY. REV. STAT. ANN. § 278.010(7).

²⁸² KY. REV. STAT. ANN. § 278.017(1).

²⁸³ KY. REV. STAT. ANN. § 278.020(1)(a).

²⁸⁴ KY. REV. STAT. ANN. § 279.020.

LOUISIANA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (mandatory) ²⁸⁵ |

Definitions

Title 45 (“Public Utilities and Carriers”), Chapter 3 (“Electricity”) of the Louisiana Statutes defines “**electric public utility** as used in this Chapter” to mean “any person furnishing electric service within this state, the parish of Orleans excepted, including any electric cooperative transacting business in this state.”²⁸⁶

Exception: Electricity Supplied for Own Use or to Electric Public Utility

The definition above continues by stating “provided, however, that said term shall not be construed to apply to any person owning, leasing and/or operating an electric generation facility provided **such person is not primarily engaged in the generation, transmission, distribution, and/or sale of electricity**, and provided that such person:

- (a) **consumes all of the electric power and energy generated by such facility for its own use at the site of generation or at some other location** if mutually acceptable agreements to transport such electric power and energy can be reached with each electric public utility whose transmission facilities would be electrically utilized therefor, provided, however, notwithstanding any provision contained herein, there shall be no obligation or duty, expressed or implied, to purchase, to sell, to transport, or to engage in any other type of transaction with respect to the electric power and energy that may be generated by such person, imposed upon any public utility by this Section except as shall be provided in the cogeneration rules and regulations adopted by the Louisiana Public Service Commission pursuant to the Public Utility Regulatory Policies Act of 1978; or,
- (b) **only consumes a portion thereof** in such manner and **sells the entire remaining portion of such electric power and energy generated to an electric public utility** as herein defined; or,
- (c) **sells the entire production of electric power and energy** generated by such facility to an electric public utility as herein defined.”²⁸⁷

Exception: Electric Cooperatives

Electric cooperatives are covered by the definition of electric public utility (“including any electric cooperative transacting business in this state”),²⁸⁸ and in general the Louisiana Public Service

²⁸⁵ *Louisiana Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/983> (last updated Jan. 17, 2017).

²⁸⁶ LA. STAT. ANN. § 45:121.

²⁸⁷ LA. STAT. ANN. § 45:121.

²⁸⁸ LA. STAT. ANN. § 45:121.

Commission has “authority over any street railway, gas, electric light, heat, power, waterworks, or other local public utility for the purpose of fixing and regulating the rates charged or to be charged by and service furnished by such public utilities.”²⁸⁹

However, “**a schedule of rates of an electric cooperative shall not require approval of the commission if** the schedule previously was approved by the board of directors of the electric cooperative and by the federal government or any agency thereof, **nor shall the authority of the commission extend to the service rendered by electric cooperatives** except to the extent provided in R.S. 45:123 [regarding service areas of electric public utilities and extension and construction of facilities] and in orders of the commission promulgated to effectuate the purposes of R.S. 45:123.”²⁹⁰ That said, “the commission shall exercise all necessary power and authority over any electric cooperative that, by a vote of its membership, has elected to be regulated by the commission, as provided in R.S. 12:426, for the purpose of fixing and regulating the rates charged or to be charged and services furnished by the cooperative.”²⁹¹

MAINE

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 80% by 2030, 100% by 2050 ²⁹² |
| Net Metering Regulations? | No (has other distributed generation compensation rules) ²⁹³ |

Definitions

“**Public utility**” is defined to include “every gas utility, natural gas pipeline utility, transmission and distribution utility, telephone utility, water utility and ferry, as those terms are defined in this section, and each of those utilities is declared to be a public utility.”²⁹⁴

A “**transmission and distribution plant**” is defined to include “all real estate, fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate **the transmission, distribution or delivery of electricity for light, heat or power for public use** and includes all conduits, ducts and other devices, materials, apparatus and property for containing, holding or carrying conductors used, or to be used, for the transmission or distribution of electricity for light, heat or power for public use.”²⁹⁵

A “**transmission and distribution utility**” is defined as “a person, its lessees, trustees or receivers or trustees appointed by a court, owning, controlling, operating or managing a transmission and distribution plant for compensation within the State, **except where the electricity is distributed**

²⁸⁹ LA. STAT. ANN. § 45:1163(A)(1).

²⁹⁰ LA. STAT. ANN. § 45:1163(A)(3).

²⁹¹ LA. STAT. ANN. § 45:1163(B).

²⁹² ME. REV. STAT. ANN. tit. 35-A, §§ 3210 *et seq.*, 3401 *et seq.* (2021).

²⁹³ *Maine Distributed Generation Buy-All, Sell-All Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/280> (last updated May 30, 2017).

²⁹⁴ ME. REV. STAT. ANN. tit. 35-A, *supra* n. 292, § 102(13).

²⁹⁵ ME. REV. STAT. ANN. tit. 35-A, § 102(20-A).

by the entity that generates the electricity through private property alone solely for the use of:

A. The entity;

B. The entity's tenants; or

C. Commercial or industrial consumers located on:

(1) The property where the entity is located or on **abutting property**; or

(2) A commercial or industrial site that was served by the entity or its predecessor without using the transmission and distribution plant of a public utility prior to December 31, 2018.”²⁹⁶

In Maine’s deregulated electricity market, a “competitive electricity provider” is separately defined as “a marketer, broker, aggregator or any other entity selling electricity to the public at retail.”²⁹⁷

2019 “Act to Allow the Direct Sale of Electricity”

The exceptions within the definition of “transmission and distribution utility” above were expanded, effective September 2019, to include C(1) and C(2). This “Act to Allow the Direct Sale of Electricity” made corresponding amendments to other provisions of the public utilities law, including:²⁹⁸

ME. REV. STAT. ANN. tit. 35-A, § 102: **Adding a definition of “abutting property,”** meaning “with respect to a parcel of land, another parcel of land that shares a common property boundary, except that ‘abutting property’ does not include a parcel of land separated from another parcel by a public road or highway.”

ME. REV. STAT. ANN. tit. 35-A, § 2102 (Approval to Furnish Service): **Adding an “exemption for certain private electric facilities,”** such that “The provisions of this section do not apply to the construction of a transmission line, together with all associated equipment and facilities, that is constructed, owned and operated by a generator of electricity for the purpose of electrically and physically interconnecting that generator to a commercial or industrial consumer of the electricity that is located on: A. The property where the entity that generates the electricity is located or on abutting property; or B. A commercial or industrial site that was served by the entity that generates the electricity or its predecessor without using the transmission and distribution plant of a public utility prior to December 31, 2018.”

ME. REV. STAT. ANN. tit. 35-A, § 3132 (Construction of transmission lines prohibited without prior order of the commission): **Exempting “the construction of a generator interconnection transmission facility” from “the requirements of this section.** For the purposes of this subsection, ‘generator interconnection transmission facility’ means a transmission line, together with all associated equipment and facilities, that is constructed, owned and operated by a generator

²⁹⁶ ME. REV. STAT. ANN. tit. 35-A, § 102(20-B).

²⁹⁷ ME. REV. STAT. ANN. tit. 35-A, § 3201(5).

²⁹⁸ 2019 Me. Laws ch. 205, https://legislature.maine.gov/legis/bills/bills_129th/chapters/PUBLIC205.asp.

of electricity solely for the purpose of electrically and physically interconnecting such generator to:

A. The transmission system of a transmission and distribution utility; or

B. A commercial or industrial consumer of the electricity that is located on:

(1) The property where the entity that generates the electricity is located or on abutting property; or

(2) A commercial or industrial site that was served by the entity that generates the electricity or its predecessor without using the transmission and distribution plant of a public utility prior to December 31, 2018.”

ME. REV. STAT. ANN. tit. 35-A, § 3201 (Definitions): **Amending the definition of “competitive electricity provider”** (“a marketer, broker, aggregator or any other entity selling electricity to the public at retail”) to state that this “does not include . . . an entity that generates electricity solely for the use of:

A. The entity;

B. The entity's tenants; or

C. Commercial or industrial consumers located on:

(1) The property where the entity is located or on abutting property; or

(2) A commercial or industrial site that was served by the entity or its predecessor without using the transmission and distribution plant of a public utility prior to December 31, 2018.”

ME. REV. STAT. ANN. tit. 35-A, § 3217 (Reports): **Adding a mandate for the Public Utilities Commission to report on direct sales:** “Beginning in 2022 and every 3 years thereafter, the commission shall include in its report pursuant to section 120, subsection 7, information regarding the incidence of direct sales of electricity by an entity that generates electricity to commercial or industrial consumers located on the property where the entity that generates the electricity is located or on abutting property or on a commercial or industrial site that was served by the entity that generates the electricity or its predecessor without using the transmission and distribution plant of a public utility prior to December 31, 2018.”

Finally, the Act concludes with a section on “Precedent established by Public Utilities Commission. The provisions of this Act **may not, except to the extent the provisions expressly modify the Maine Revised Statutes, Title 35–A, sections 102, 2102, 3132 and 3201, be interpreted to otherwise modify or nullify the analytical framework and precedent for analyzing when an entity is a transmission and distribution utility or a competitive electricity provider** established by the Public Utilities Commission in opinions and orders issued prior to the effective date of this Act, including, but not limited to, opinions and orders issued under Docket Number 2000–653, Request for Commission Investigation Regarding the Plans of Boralex Stratton Energy, Inc. to Provide Electric Service Directly from Stratton Lumber Company and Docket

MARYLAND

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 50% by 2030 ³⁰⁰ |
| Net Metering Regulations? | Yes (mandatory) ³⁰¹ |

Definitions

The Maryland Public Utilities law defines “**public service company**” as “a common carrier company, electric company, gas company, sewage disposal company, telegraph company, telephone company, water company, or any combination of public service companies.”³⁰² The Maryland Public Service Commission “shall (i) supervise and regulate the public service companies subject to the jurisdiction of the Commission to: 1. ensure their operation in the interest of the public; and 2. promote adequate, economical, and efficient delivery of utility services in the State without unjust discrimination; and (ii) enforce compliance with the requirements of law by public service companies, including requirements with respect to financial condition, capitalization, franchises, plant, manner of operation, rates, and service.”³⁰³

An “**electric company**” is defined as “a person who physically transmits or distributes electricity in the State to a retail electric customer.”³⁰⁴

A “**retail electric customer**” “means a purchaser of electricity for end use in the State.”³⁰⁵

In Maryland’s deregulated electricity market (*see* MD Public Util D. I, T. 7, Subt. 5—“Electric Industry Restructuring” for governing provisions), an “**electricity supplier**” is separately defined as “a person: (i) who sells: 1. electricity; 2. electricity supply services; 3. competitive billing services; or 4. competitive metering services; or (ii) who purchases, brokers, arranges, or markets electricity or electricity supply services for sale to a retail electric customer.”³⁰⁶ This definition “includes an electric company, an aggregator, a broker, and a marketer of electricity.”³⁰⁷

Exception: Electricity Supply to Building Occupants

The definition of an “electric company” does not include:

²⁹⁹ *Id.*

³⁰⁰ MD. CODE ANN., PUB. UTIL. § 7-701 *et seq.* (West 2021).

³⁰¹ *Maryland Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/363> (last updated Nov. 19, 2018).

³⁰² MD. CODE ANN., PUB. UTIL., *supra* n. 300, § 1-101(x)(1).

³⁰³ MD. CODE ANN., PUB. UTIL. § 2-113(a).

³⁰⁴ MD. CODE ANN., PUB. UTIL. § 1-101(h)(1).

³⁰⁵ MD. CODE ANN., PUB. UTIL. § 1-101(cc)(1).

³⁰⁶ MD. CODE ANN., PUB. UTIL. § 1-101(j)(1).

³⁰⁷ MD. CODE ANN., PUB. UTIL. § 1-101(j)(2).

(i) the following persons who **supply electricity and electricity supply services solely to occupants of a building** for use by the occupants:

1. an owner/operator who holds ownership in and manages the internal distribution system serving the building; or
2. a lessee/operator who holds a leasehold interest in and manages the internal distribution system serving the building;

. . . (iii) a person who transmits or distributes electricity within a site owned by the person or the person's affiliate that is **incidental to a primarily landlord-tenant relationship**.³⁰⁸

An “electricity supplier” likewise “does not include: (i) the following persons who supply electricity and electricity supply services solely to occupants of a building for use by the occupants:

1. an owner/operator who holds ownership in and manages the internal distribution system serving the building; or
2. a lessee/operator who holds a leasehold interest in and manages the internal distribution system serving the building.”³⁰⁹

Similarly, the definition of “‘retail electric customer’ does not include: (i) an occupant of a building in which the owner/operator or lessee/operator manages the internal distribution system serving the building and supplies electricity and electricity supply services solely to occupants of the building for use by the occupants.”³¹⁰

Exception: On-Site Generation

The definition of an “‘electric company’ does not include . . . (ii) any person who generates on-site generated electricity.”³¹¹

“**On-site generated electricity** means electricity that:

- (1) is not transmitted or distributed over an electric company's transmission or distribution system; or
- (2) is generated at a facility owned or operated by an electric customer or operated by a designee of the owner who, with the other tenants of the facility, consumes at least 80% of the power generated by the facility each year.”³¹²

Likewise, the definition of an “‘electricity supplier’ does not include . . . (ii) a person who generates on-site generated electricity.”³¹³

Similarly, the definition of “‘retail electric customer’ does not include . . . (ii) a person who generates on-site generated electricity, to the extent the on-site generated electricity is consumed by that person or its tenants.”³¹⁴

³⁰⁸ MD. CODE ANN., PUB. UTIL. § 1-101(h)(2).

³⁰⁹ MD. CODE ANN., PUB. UTIL. § 1-101(j)(3).

³¹⁰ MD. CODE ANN., PUB. UTIL. § 1-101(cc)(3).

³¹¹ MD. CODE ANN., PUB. UTIL. § 1-101(h)(2).

³¹² MD. CODE ANN., PUB. UTIL. § 1-101(s).

³¹³ MD. CODE ANN., PUB. UTIL. § 1-101(j)(3).

³¹⁴ MD. CODE ANN., PUB. UTIL. § 1-101(cc)(3).

MASSACHUSETTS

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 35% by 2030 ³¹⁵ |
| Net Metering Regulations? | Yes (mandatory) ³¹⁶ |

Definitions

Chapter 164 of the Massachusetts General Laws, “Manufacture and Sale of Gas and Electricity,” applies to all “gas and electric companies organized or chartered under any general or special laws applicable thereto, and to the respective officers and stockholders of such corporations.”³¹⁷ Such gas and **electric companies are under the general supervision of the Department of Public Utilities.**³¹⁸

“**Electric company**” is defined as “a corporation organized under the laws of the commonwealth for the purpose of making by means of water power, steam power or otherwise and for selling, transmitting, distributing, transmitting and selling, or distributing and selling, electricity within the commonwealth, or authorized by special act so to do, even though subsequently authorized to make or sell gas; provided, however, that electric company shall not mean an alternative energy producer; provided further, that a distribution company shall not include an entity which owns or operates a plant or equipment used to produce electricity, steam and chilled water, or an affiliate engaged solely in the provision of such electricity, steam and chilled water, where the electricity produced by such entity or its affiliate is primarily for the benefit of hospitals and nonprofit educational institutions, and where such plant or equipment was in operation before January 1, 1986; and provided further, that electric company shall not mean a corporation only transmitting and selling, or only transmitting, electricity unless such corporation is affiliated with an electric company organized under the laws of the commonwealth for the purpose of distributing and selling, or distributing only, electricity within the commonwealth.”³¹⁹

“**Distribution**” is defined as “the delivery of electricity over lines which operate at a voltage level typically equal to or greater than 110 volts and less than 69,000 volts to an end-use customer within the commonwealth. The distribution of electricity shall be subject to the jurisdiction of the department of public utilities.”³²⁰

“**Transmission**” is defined as “the delivery of power over lines that operate at a voltage level typically equal to or greater than 69,000 volts from generating facilities across interconnected high voltage lines to where it enters a distribution system.”³²¹

³¹⁵ MASS. GEN. LAWS ANN. ch. 25A, § 11F (2021).

³¹⁶ *Massachusetts Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/281> (last updated Nov. 21, 2019).

³¹⁷ MASS. GEN. LAWS ANN. *supra* n. 315, ch. 164, § 3.

³¹⁸ MASS. GEN. LAWS ANN., ch. 164, § 76.

³¹⁹ MASS. GEN. LAWS ANN., ch. 164, § 1.

³²⁰ *Id.*

³²¹ *Id.*

In Massachusetts' deregulated electricity market, a “**supplier**” is separately defined as “a supplier of generation service to retail customers, including power marketers, brokers and marketing affiliates of distribution companies, except that no electric company shall be considered a supplier.”³²²

“**Generation**” is defined as “the act or process of transforming other forms of energy into electric energy or the amount of electric energy so produced,” and “**generation service**” is defined as “the provision of generation and related services to a customer.”³²³

A “**generation company**” is defined as “a company engaged in the business of producing, manufacturing or generating electricity or related services or products, including but not limited to, renewable energy generation attributes for retail sale to the public,” and a “**wholesale generation company**” is defined as “a company engaged in the business of producing, manufacturing or generating electricity for sale at wholesale only.”³²⁴

Under the electric company restructuring law requiring “retail access to generation services and choice of suppliers,” a “**generation company** shall not be subject to regulation as a public utility or as an electric company, except as specifically provided in this chapter. A **wholesale generation company** shall be subject to regulation only as specifically provided in this chapter.”³²⁵ For example, the Department of Public Utilities has the authority to “promulgate rules and regulations to provide retail customers with the utmost consumer protections contained in law,” including regulations of generation companies, and “all generation companies shall submit a license application to the department for approval to sell electric power or provide generation services within the commonwealth.”³²⁶

Exception: Alternative Energy Producers

As stated above, an “electric company shall not mean an alternative energy producer.”³²⁷

An “**alternative energy producer**” is defined as “a person, firm, partnership, association, public or private corporation, or an agency, department, board, commission or authority of the commonwealth or of a subdivision of the commonwealth, that **owns or operates a cogeneration facility or small power production facility** as defined in this section, and does not engage in the retail sale of electricity other than sales to customers that are within the confines of an industrial park, which existed before March 1, 1982, and in which there existed as of said date electrical generating capacity of more than 15 megawatts.”³²⁸

A “**small power production facility**” is defined as “a facility which is any electrical generating unit which **produces electric energy solely by the use, as a primary energy source, of biomass, waste, wind, water, wood, geothermal, solar energy or any combination thereof**, or produces gas if it is produced from coal, biomass, solid waste or wood, and has a power production capacity

³²² *Id.*

³²³ *Id.*

³²⁴ *Id.*

³²⁵ MASS. GEN. LAWS ANN., ch. 164, § 1A(e)

³²⁶ MASS. GEN. LAWS ANN., ch. 164, § 1F.

³²⁷ MASS. GEN. LAWS ANN., ch. 164, § 1.

³²⁸ *Id.*

which, together with any other facilities located at the same site, **is not greater than 30 megawatts.**”³²⁹

A “**cogeneration facility**” is defined as “any electrical generating unit having a power production capacity which, together with any other facilities located at the same site, is not greater than 30 megawatts and which produces electric energy and steam or other form of useful energy utilized for industrial, commercial, heating or cooling purposes, and employs a fuel other than oil as its primary energy source, except that oil may be used: (1) in combination with coal, in a mixture not exceeding 70 per cent oil; or (2) during any modifications to any existing electrical generating facility undertaken for the purpose of enabling such facility to employ, except during any periods of maintenance or repair, a fuel other than oil as its primary energy source; provided, however, that cogeneration facility shall also include any electric generating unit having a power production capacity which, together with any other facilities located at the same site, is not greater than 30 megawatts and which produces electric energy and steam or other form of useful energy utilized for industrial, commercial, heating or cooling purposes that is within the confines of an industrial park, which existed before March 1, 1982 and, in which park there existed, as of said date, electrical generating capacity of more than 15 megawatts, and in which there existed, since said date, a cogeneration facility or a small power production facility.”³³⁰

Net Metering & Third-Party Financing

Massachusetts law provides that “a distribution company customer that uses electricity generated by” a defined set of net metering facilities “may elect net metering” according to certain provisions.³³¹

“Net metering” is defined as “the process of measuring the difference between electricity delivered by a distribution company and electricity generated by a Class I, Class II, Class III or neighborhood net metering facility and fed back to the distribution company,” and Class I, Class II, Class III, and neighborhood net metering facilities are each separately defined and have varying generating capacities.³³²

The corresponding regulations to these net metering statutes provide that “nothing in 220 CMR 18.00 is intended in any way to limit eligibility for Net Metering services based upon a third-party ownership or financing agreement related to a Net Metering facility, where Net Metering services would otherwise be available.” The Department of Public Utilities has stated that this clause was added “[t]o ensure that our final regulations do not impede the development of third-party ownership or financing arrangements.”³³³ This regulatory clarification has been described as “an example of the commission providing an exemption [from utility regulation] for third-party financing arrangements of small-scale renewable energy generation facilities on a customer’s premises.”³³⁴

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ MASS. GEN. LAWS ANN., ch. 164, § 139(a).

³³² MASS. GEN. LAWS ANN., ch. 164, § 138.

³³³ Mass. Dep’t of Pub. Utils., Order Adopting Final Regulations, D.P.U. 08-75-A (Jun. 26, 2009), <http://www.env.state.ma.us/dpu/docs/gas/08-75/62609dpuord.pdf>.

³³⁴ Ari Peskoe, *A Challenge for Federalism: Achieving National Goals in the Electricity Industry*, 18 MO. ENVTL. L. & POL’Y REV. 209, 281 n.345 (2011).

MICHIGAN

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Yes (partial, 10% cap) |
| RTO/ISO Membership? | MISO; PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 15% by 2021 (and voluntary goal of 35% by 2025) ³³⁵ |
| Net Metering Regulations? | Yes (mandatory) ³³⁶ |

Definitions

Chapter 460 (“Public Utilities”) of the Michigan Compiled Laws states that “the public service commission . . . is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of **public utilities, including electric light and power companies**, whether private, corporate, or cooperative.”³³⁷ The Commission’s “jurisdiction shall be deemed to extend to and include the control and regulation, including the fixing of rates and charges, of all public utilities within this state, **producing, transmitting, delivering or furnishing steam for heating or power, or gas for heating or lighting purposes for the public use.**”³³⁸

For the purposes of provisions regarding certificates of public convenience and necessity, the term “public utility . . . means persons and corporations, other than municipal corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for **producing, generating, transmitting, delivering or furnishing gas or electricity for the production of light, heat or power to or for the public for compensation.**”³³⁹

An “**alternative electric supplier**,” for the purposes of the partial retail choice available in Michigan, is defined as “a person selling electric generation service to retail customers in this state. Alternative electric supplier does not include a person who physically delivers electricity directly to retail customers in this state. An alternative electric supplier is not a public utility.”³⁴⁰

Exception: Renewable Resource Power Production Facilities

“The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state except . . . the owner of a renewable resource power production facility as provided in section 6d.”³⁴¹

This section defines a “**renewable resource power production facility**” as “a facility having a rated power production capacity of 30 megawatts or less which produces electric energy by the

³³⁵ MICH. COMP. LAWS ANN. § 460.1001 *et seq.* (West 2021).

³³⁶ *Michigan Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/5773> (last updated Nov. 30, 2018).

³³⁷ MICH. COMP. LAWS ANN., *supra* n. 335, § 460.6(1).

³³⁸ MICH. COMP. LAWS ANN. § 460.54.

³³⁹ MICH. COMP. LAWS ANN. § 460.501.

³⁴⁰ MICH. COMP. LAWS ANN. § 460.10g(1)(a).

³⁴¹ MICH. COMP. LAWS ANN. § 460.6(1).

use of biomass, waste, wood, hydroelectric, wind, and other renewable resources, or any combination of renewable resources, as the primary energy source.”³⁴² It provides that:

Notwithstanding any other provision of this act, the owner of a renewable resource power production facility shall not be subject to the regulation or control of the public service commission, if all of the following conditions are met:

- (a) The owner of the renewable resource power production facility, before the construction of the renewable resource power production facility, was not a public utility subject to the jurisdiction of the public service commission.
- (b) The ownership of the renewable resource power production facility is ancillary to the financing of the facility.”³⁴³

Exception: Self-Service Power

“A person using self-service power is not an electric supplier, electric utility, or a person conducting an electric utility business. As used in this subsection, ‘**self-service power**’ means any of the following:

- (a) Electricity generated and consumed at an industrial site or contiguous industrial site or single commercial establishment or single residence without the use of an electric utility's transmission and distribution system.
- (b) Electricity generated primarily by the use of by-product fuels, including waste water solids, which electricity is consumed as part of a contiguous facility, with the use of an electric utility's transmission and distribution system, but only if the point or points of receipt of the power within the facility are not greater than 3 miles distant from the point of generation.
- (c) A site or facility with load existing on June 5, 2000 that is divided by an inland body of water or by a public highway, road, or street but that otherwise meets this definition meets the contiguous requirement of this subdivision regardless of whether self-service power was being generated on June 5, 2000.
- (d) A commercial or industrial facility or single residence that meets the requirements of subdivision (a) or (b) meets this definition whether or not the generation facility is owned by an entity different from the owner of the commercial or industrial site or single residence.”³⁴⁴

While “only investor-owned, cooperative, or municipal electric utilities shall own, construct, or operate electric distribution facilities or electric meter equipment used in the distribution of electricity in this state,” “this subsection does not prohibit a self-service power provider from owning, constructing, or operating electric distribution facilities or electric metering equipment for the sole purpose of providing or utilizing self-service power.”³⁴⁵

³⁴² MICH. COMP. LAWS ANN. § 460.6d(2).

³⁴³ MICH. COMP. LAWS ANN. § 460.6d(1).

³⁴⁴ MICH. COMP. LAWS ANN. § 460.10a(4).

³⁴⁵ MICH. COMP. LAWS ANN. § 460.10q(4).

Partial Exception: Cooperative Electric Utilities

The Electric Cooperative Member-Regulation Act defines a “cooperative” or “**cooperative electric utility**” as “an electric utility organized as a cooperative corporation under sections 98 to 109 of 1931 PA 327, MCL 450.98 to 450.109, serving primarily members of the cooperative electric utility.” The sections cited provides that:

Corporations may engage in any lawful business within this state upon any cooperative plan adopted by the incorporators, or by the shareholders at any annual or special meeting . . . ‘cooperative plan’ shall be deemed to mean a mode of operation whereby the earnings of the corporation are distributed on the basis of, or in proportion to, the value of property bought from or sold to shareholders and/or members or other persons, or labor performed for, or services rendered to, or by the corporation . . . Corporations organized under a cooperative plan and governed by sections 98 to 109, inclusive, of this act are hereinafter in this act called cooperative corporations and they may use the term ‘cooperative’, ‘co-op’, or any variation thereof in their name.³⁴⁶

A cooperative electric utility can become “member-regulated” upon a two-thirds vote of the Board of Directors.³⁴⁷ “**Member-regulation**” means “the board of directors of the cooperative is charged with establishing, maintaining, and applying all rates, charges, accounting standards, billing practices, and terms and conditions of service.”³⁴⁸

However, “the commission shall retain jurisdiction and control over all member-regulated cooperatives for matters involving safety, interconnection, code of conduct including, but not limited to, all relationships between a member-regulated cooperative and an affiliated alternative electric supplier, customer choice including, but not limited to, the ability of customers to elect service from an alternative electric supplier under 1939 PA 3, MCL 460.1 to 460.10cc, and the member-regulated cooperative’s rates, terms, and conditions of service for customers electing service from an alternative electric supplier, service area, distribution performance standards, and quality of service, including interpretation of applicable commission rules and resolution of complaints and disputes, except any penalties pertaining to performance standards and quality of service shall be established by the cooperative’s members when voting on the proposition for member-regulation or at an annual meeting of the cooperative.”³⁴⁹

MINNESOTA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-----------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, 26.5% by 2025 ³⁵⁰ |

³⁴⁶ MICH. COMP. LAWS ANN. § 450.99.

³⁴⁷ MICH. COMP. LAWS ANN. § 460.34(d).

³⁴⁸ MICH. COMP. LAWS ANN. § 460.32(f).

³⁴⁹ MICH. COMP. LAWS ANN. § 460.36(2).

³⁵⁰ MINN. STAT. ANN. § 216B.1691 (West 2021).

Net Metering Regulations? Yes (mandatory)³⁵¹

Definitions

Chapter 216B (“Public Utilities”) of the Minnesota Statutes defines “**public utility**” as any “persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for **furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof** but does not include” a series of enumerated exceptions—the exceptions relevant to electric service are described below.³⁵²

“**Service**” is defined as “natural, manufactured, or mixed gas and electricity; the installation, removal, or repair of equipment or facilities for delivering or measuring such gas and electricity.”³⁵³

For purposes of assigned service areas, “**electric utility**” means persons, their lessees, trustees, and receivers, separately or jointly, now or hereafter operating, maintaining, or controlling in Minnesota equipment or facilities for providing electric service at retail and which fall within the definition of ‘public utility’ in section 216B.02, subdivision 4, and includes facilities owned by a municipality or by a cooperative electric association.”³⁵⁴ “Electric service” is defined as “electric service furnished to a customer at retail for ultimate consumption, but does not include wholesale electric energy furnished by an electric utility to another electric utility for resale.”³⁵⁵

Exception: Service to Tenants or Occupants

The definition of “public utility” states that “no person shall be deemed to be a public utility if it **furnishes its services only to tenants or cooperative or condominium owners** in buildings owned, leased, or operated by such person. No person shall be deemed to be a public utility if it furnishes service **to occupants of a manufactured home or trailer park** owned, leased, or operated by such person.”³⁵⁶

³⁵¹ *Minnesota Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/282> (last updated Mar. 19, 2018).

³⁵² MINN. STAT. ANN., *supra* n. 350, § 216B.02(4). In full, the definition reads:

‘Public utility’ means persons, corporations, or other legal entities, their lessees, trustees, and receivers, now or hereafter operating, maintaining, or controlling in this state equipment or facilities for furnishing at retail natural, manufactured, or mixed gas or electric service to or for the public or engaged in the production and retail sale thereof but does not include (1) a municipality or a cooperative electric association, organized under the provisions of chapter 308A, producing or furnishing natural, manufactured, or mixed gas or electric service; (2) a retail seller of compressed natural gas used as a vehicular fuel which purchases the gas from a public utility; or (3) a retail seller of electricity used to recharge a battery that powers an electric vehicle, as defined in section 169.011, subdivision 26a, and that is not otherwise a public utility under this chapter. Except as otherwise provided, the provisions of this chapter shall not be applicable to any sale of natural, manufactured, or mixed gas or electricity by a public utility to another public utility for resale. In addition, the provisions of this chapter shall not apply to a public utility whose total natural gas business consists of supplying natural, manufactured, or mixed gas to not more than 650 customers within a city pursuant to a franchise granted by the city, provided a resolution of the city council requesting exemption from regulation is filed with the commission. The city council may rescind the resolution requesting exemption at any time, and, upon the filing of the rescinding resolution with the commission, the provisions of this chapter shall apply to the public utility. No person shall be deemed to be a public utility if it furnishes its services only to tenants or cooperative or condominium owners in buildings owned, leased, or operated by such person. No person shall be deemed to be a public utility if it furnishes service to occupants of a manufactured home or trailer park owned, leased, or operated by such person. No person shall be deemed to be a public utility if it produces or furnishes service to less than 25 persons.

³⁵³ MINN. STAT. ANN. § 216B.02(6).

³⁵⁴ MINN. STAT. ANN. § 216B.38(5).

³⁵⁵ MINN. STAT. ANN. § 216B.38(4a).

³⁵⁶ MINN. STAT. ANN. § 216B.02(4).

Exception: Service to Less Than 25 Persons

The definition of “public utility” states that “no person shall be deemed to be a public utility if it **produces or furnishes service to less than 25 persons.**”³⁵⁷

Exception: Sales for Resale

The definition of “public utility” states that “except as otherwise provided, the provisions of this chapter shall not be applicable to any sale of natural, manufactured, or mixed gas or electricity by a public utility **to another public utility for resale.**”³⁵⁸

Exception: Electric Vehicle Recharging

The definition of “public utility . . . does not include . . . a **retail seller of electricity used to recharge a battery that powers an electric vehicle**, as defined in section 169.011, subdivision 26a, and that is not otherwise a public utility under this chapter.”³⁵⁹

That subdivision defines an “**electric vehicle**” as “(a) . . . a motor vehicle that is able to be powered by an electric motor drawing current from rechargeable storage batteries, fuel cells, or other portable sources of electrical current, and meets or exceeds applicable regulations in Code of Federal Regulations, title 49, part 571, and successor requirements.

(b) Electric vehicle includes:

- (1) a neighborhood electric vehicle;
- (2) a medium-speed electric vehicle; and
- (3) a plug-in hybrid electric vehicle.”³⁶⁰

Exception: Cooperative Electric Associations

The definition of public utility “**does not include** a municipality or a **cooperative electric association**, organized under the provisions of chapter 308A, producing or furnishing natural, manufactured, or mixed gas or electric service.”³⁶¹

However, cooperative electric associations do fall within the definition of “electric utility” for purposes of assigned service areas (“‘electric utility’ . . . includes facilities owned by a municipality or by a cooperative electric association”).³⁶² Similarly, for purposes of requirements regarding “Renewable Energy Objectives,” an “‘electric utility’ means a public utility providing electric service, a generation and transmission cooperative electric association, a municipal power agency, or a power district.”³⁶³

³⁵⁷ MINN. STAT. ANN. § 216B.02(4).

³⁵⁸ MINN. STAT. ANN. § 216B.02(4).

³⁵⁹ MINN. STAT. ANN. § 216B.02(4).

³⁶⁰ MINN. STAT. ANN. § 169.011(26a).

³⁶¹ MINN. STAT. ANN. § 216B.02(4).

³⁶² MINN. STAT. ANN. § 216B.38(5).

³⁶³ MINN. STAT. ANN. § 216B.1691(1)(b).

Moreover, “the commission [Minnesota Public Utilities Commission] and each cooperative electric association and municipal utility shall adopt standards for safety, reliability, and service quality for distribution utilities. Standards for cooperative electric associations and municipal utilities should be as consistent as possible with the commission standards.”³⁶⁴

A “cooperative electric association may elect to become subject to rate regulation by the commission pursuant to sections 216B.03 to 216B.23.”³⁶⁵

MISSISSIPPI

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | No (has other distributed generation compensation rules) ³⁶⁶ |

Definitions

Title 77, Chapter 3 (“Regulation of Public Utilities”) of the Mississippi Code defines “**public utility**” to include “persons and corporations, or their lessees, trustees and receivers now or hereafter owning or operating in this state equipment or facilities for the **generation, manufacture, transmission or distribution of electricity to or for the public for compensation.**”³⁶⁷

Exception: Service to Oneself, Employees, or Tenants

The definition of “public utility” does “not include any person not otherwise a public utility, who furnishes the services or commodity described in this paragraph **only to himself, his employees or tenants as an incident of such employee service or tenancy**, if such services are not sold or resold to such tenants or employees on a metered or consumption basis other than the submetering authorized under Section 77-3-97 [which governs submetering of water and wastewater disposal service].”³⁶⁸

Exception: Cooperative Electric Power Associations

The section governing jurisdiction of the Mississippi Public Service Commission states that “the commission shall not have jurisdiction to regulate the rates for the sales and/or distribution . . . of gas or **electricity by cooperative gas or electric power associations to the members thereof as consumers**, except as provided by Section 77-3-17, where service is rendered in a municipality.”³⁶⁹

³⁶⁴ MINN. STAT. ANN. § 216B.029.

³⁶⁵ MINN. STAT. ANN. § 216B.026.

³⁶⁶ *Mississippi Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/5841> (last updated July 12, 2016).

³⁶⁷ MISS. CODE. ANN. § 77-3-3(d) (West 2021).

³⁶⁸ MISS. CODE. ANN. § 77-3-3(d).

³⁶⁹ MISS. CODE. ANN. § 77-3-5.

Section 77-3-17 provides that “any co-operative which shall operate within any area of a municipality shall likewise pay such municipality two percent (2%) of the co-operative's gross revenue from sales to residential and commercial customers within said municipality.”³⁷⁰

MISSOURI

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, 15% by 2021 ³⁷¹ |
| Net Metering Regulations? | Yes (mandatory) ³⁷² |

Definitions

Chapter 386 (“Public Service Commission”) of the Missouri Statutes states that “‘**public utility**’ includes every pipeline corporation, gas corporation, electrical corporation, telecommunications company, water corporation, heating company or refrigerating corporation, and sewer corporation, as these terms are defined in this section, and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the [Public Service] commission and to the provisions of this chapter.”³⁷³

“**Electrical corporation**” is defined to include “every corporation, company, association, joint stock company or association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever, other than a railroad, light rail or street railroad corporation generating electricity solely for railroad, light rail or street railroad purposes or for the use of its tenants and not for sale to others, owning, operating, controlling or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or for its own use or the use of its tenants and not for sale to others. The term ‘electrical corporation’ shall not include:

- (a) Municipally owned electric utilities operating under chapter 91;
- (b) Rural electric cooperatives operating under chapter 394;
- (c) Persons or corporations not otherwise engaged in the production or sale of electricity at wholesale or retail that sell, lease, own, control, operate, or manage one or more electric vehicle charging stations.”³⁷⁴

“**Electric plant**” includes “all real estate, fixtures and personal property operated, controlled, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or

³⁷⁰ MISS. CODE. ANN. § 77-3-17.

³⁷¹ MO. ANN. STAT. § 393.1020 *et seq.* (West 2021).

³⁷² *Missouri Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/2621> (last updated Nov. 30, 2018).

³⁷³ MO. ANN. STAT., *supra* n. 371, § 386.020(43).

³⁷⁴ MO. ANN. STAT. § 386.020(15).

other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”³⁷⁵

Judicial Interpretation

While “the relevant statutory definitions contain no explicit requirement that an entity be operated for a public use in order for it to constitute a ‘public utility,’ **the Missouri Supreme Court long ago held that such a ‘public use’ requirement was intended.**”³⁷⁶

In a 1918 case [*Danciger*] dealing with the definitions of “electric plant” and “electrical corporation,” the Missouri Supreme Court noted that the definitions “express therein no word of public use, or necessity that the sale of the electricity be to the public,” but nevertheless held that “it is apparent that the words ‘for public use’ are to be understood and to be read therein. For the operation of the electric plant must of necessity be for a public use, and therefore be coupled with a public interest; otherwise the Commission can have no authority whatever over it. **The electric plant must, in short, be devoted to a public use before it is subject to public regulation.**”³⁷⁷

In 2009, the Missouri Court of Appeals noted that “the statutory provisions on which *Danciger* relied remain largely unchanged today, and more recent decisions continue to cite and follow *Danciger*’s holding that facilities must be ‘devoted to a public use before [they are] subject to public regulation.’”³⁷⁸

In 2018, the Missouri Court of Appeals considered the determination of the Public Service Commission that “it lacks statutory authority over the proposed EV charging stations because they are not used for furnishing electricity for light, heat, or power,” and therefore do not constitute ‘electric plant’ within the meaning of § 386.020(14).”³⁷⁹ The court held that “nothing in the statutory definition of ‘electric plant’ authorizes the Commission to exclude equipment from the definition . . . **electric vehicle charging stations constitute ‘electric plant’** within the meaning of § 386.020(14).”³⁸⁰

Exception: Electricity Supply to Oneself or Tenants

As stated above, the definition of electrical corporation (and thereby the definition of public utility) excludes entities “owning, operating, controlling or managing any electric plant . . . where electricity is generated or distributed by the producer solely on or through private property for railroad, light rail or street railroad purposes or **for its own use or the use of its tenants and not for sale to others.**”³⁸¹

Missouri courts have thus held that entities “are engaged as a public utility to the extent that they manufacture, distribute and sell electrical energy to members of the public, [but] are not, however,

³⁷⁵ MO. ANN. STAT. § 386.020(14).

³⁷⁶ *Hurricane Deck Holding Co. v. Pub. Serv. Comm’n*, 289 S.W.3d 260, 264 (Mo. Ct. App. 2009) (citing *State ex rel. M.O. Danciger & Co. v. Pub. Serv. Comm’n*, 275 Mo. 483, 205 S.W. 36, 38 (Mo. 1918)).

³⁷⁷ *State ex rel. M.O. Danciger & Co.*, *supra* n. 376, at 38 (internal citations omitted).

³⁷⁸ *Hurricane Deck Holding Co.*, *supra* n. 376, at 264 (citing *Osage Water Co. v. Miller Cty. Water Auth., Inc.*, 950 S.W.2d 569, 574 (Mo. App. S.D. 1997); *Khulusi v. Sw. Bell Yellow Pages, Inc.*, 916 S.W.2d 227, 232 (Mo. App. W.D. 1995)).

³⁷⁹ *In re Kansas City Power & Light Co. v. Pub. Serv. Comm’n*, 557 S.W.3d 460, 465 (Mo. Ct. App. 2018).

³⁸⁰ *Id.* at 472–73.

³⁸¹ MO. ANN. STAT., *supra* n. 371, § 386.020(15).

a public utility insofar as their facilities and activities are confined to the manufacture, distribution and sale of electrical energy to themselves and to their own buildings and tenants.”³⁸²

Exception: Rural Electric Cooperatives

As stated above, “rural electric cooperatives operating under chapter 394” are excluded from the definition of “electrical corporation,” and therefore from the definition of “public utility.”³⁸³

Chapter 394, the “**Rural Electric Cooperative Law**,” provides that “cooperative, nonprofit, membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas.”³⁸⁴ Rural electric cooperatives must comply with regulations “prescribed by the public service commission for the construction, maintenance and operation of electric transmission or distribution lines or system,” and “the jurisdiction, supervision, powers and duties of the public service commission shall extend to every such cooperative so far as concerns the construction, maintenance and operation of the physical equipment of such cooperative to the extent of providing for the safety of the public and the elimination or lessening of induction or electrical interference . . . [but] nothing herein contained shall be construed as otherwise conferring upon such commission jurisdiction over the service, rates, financing, accounting or management of any such cooperative.”³⁸⁵

The **Net Metering and Easy Connection Act** does create obligations for all “**retail electric suppliers**,” defined as “any municipal utility, electrical corporation regulated under this chapter [chapter 386], or rural electric cooperative under chapter 394 that provides retail electric service in this state.”³⁸⁶ All retail electric suppliers must “make net metering available to customer-generators on a first-come, first-served basis until the total rated generating capacity of net metering systems equals five percent of the utility’s single-hour peak load during the previous year . . . offer to the customer-generator a tariff or contract that is identical in electrical energy rates, rate structure, and monthly charges to the contract or tariff that the customer would be assigned if the customer were not an eligible customer-generator . . . [and] disclose annually the availability of the net metering program to each of its customers with the method and manner of disclosure being at the discretion of the supplier.”³⁸⁷

MONTANA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No (previous Deregulation Act mostly phased out) |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, 15% by 2015 ³⁸⁸ |

³⁸²*State ex rel. & to Use of Cirese v. Pub. Serv. Comm’n of Missouri*, 178 S.W.2d 788, 790 (Mo. App. 1944) (citing *State ex rel. Lohman & Farmers Mutual Telephone Co. v. Brown et al.*, 19 S.W.2d 1048, 1049; *State ex rel. M.O. Danciger*, *supra* n. 376)).

³⁸³ MO. ANN. STAT. *supra* n. 371, § 386.020.

³⁸⁴ MO. ANN. STAT. § 394.030.

³⁸⁵ MO. ANN. STAT. § 394.160(1).

³⁸⁶ MO. ANN. STAT. § 386.890(2)(7).

³⁸⁷ MO. ANN. STAT. § 386.890(3).

³⁸⁸ MONT. CODE ANN. § 69-3-2001 *et seq.* (West 2021).

Net Metering Regulations? Yes (mandatory)³⁸⁹

Definitions

Title 69, Chapter 3 (“Regulation of Utilities”) of the Montana Code defines “**public utility**” to include “every corporation, both public and private, company, individual, association of individuals, and their lessees, trustees, or receivers appointed by any court that own, operate, or control any plant or equipment, any part of a plant or equipment, or any water right within the state for the production, delivery, or **furnishing for or to other persons, firms, associations, or corporations, private or municipal:** (a) heat; (b) street-railway service; (c) light; (d) power in any form or by any agency; (e) except as provided in chapter 7, water for business, manufacturing, household use, or sewerage service, whether within the limits of municipalities or towns or elsewhere; (f) regulated telecommunications service.”³⁹⁰

The **Montana Public Service Commission** is “invested with full power of supervision, regulation, and control of such public utilities, subject to the provisions of this chapter and to the exclusion of the jurisdiction, regulation, and control of such utilities by any municipality, town, or village.”³⁹¹

In 1997, the Electric Utility Industry Restructuring and Customer Choice Act “forced the public utility, Montana Power Company, to separate its generation assets from its distribution assets,” with “the intent of affording Montana consumers the ability to choose their electricity supplier in a competitive market.”³⁹² In 2007, Montana reversed course on that deregulation law, instead enacting the Electric Utility Industry Generation Reintegration Act, which mostly eliminated consumer choice, but “expressly preserved supply choices made by electricity consumers who, relying on the Deregulation Act, obtained their electricity from a competitive supplier.”³⁹³ This Act, codified at Title 69, Chapter 8 (“**Electric Utility Industry Generation Reintegration**”), defines “**public utility**” to have “the meaning of a public utility regulated by the commission pursuant to Title 69, chapter 3, on May 2, 1997, including the public utility's successors or assignee.”³⁹⁴

Within Chapter 8, “**cooperative utility**” is defined as “(a) a utility qualifying as an electric cooperative pursuant to Title 35, chapter 18; or (b) an existing municipal electric utility as of May 2, 1997.”³⁹⁵

Within Chapter 8, “**utility**” is defined as “any public utility or cooperative utility.”³⁹⁶

For the purposes of Title 69, Chapter 3, Part 20 (“**Montana Renewable Power Production and Rural Economic Development Act**”), a “**cooperative utility**” is likewise defined as “(a) a utility qualifying as an electric cooperative pursuant to Title 35, chapter 18; or (b) an existing municipal electric utility as of May 2, 1997.”³⁹⁷ A “**public utility**” is defined as “any electric utility regulated

³⁸⁹ *Montana Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/37> (last updated Aug. 8, 2017).

³⁹⁰ MONT. CODE ANN., *supra* n. 388, § 69-3-101(1).

³⁹¹ MONT. CODE ANN. § 69-3-102.

³⁹² *City of Great Falls v. Dep't of Pub. Serv. Reg.*, 254 P.3d 595, 596 (Mont. 2011).

³⁹³ *Id.* at 597.

³⁹⁴ MONT. CODE ANN., *supra* n. 388, § 69-8-103(21).

³⁹⁵ MONT. CODE ANN. § 69-8-103(4).

³⁹⁶ MONT. CODE ANN. § 69-8-103(33).

³⁹⁷ MONT. CODE ANN. § 69-3-2003(7).

by the commission pursuant to Title 69, chapter 3, on January 1, 2005, including the public utility's successors or assignees.”³⁹⁸ A “**competitive electricity supplier**” is defined as “any person, corporation, or governmental entity that is selling electricity to small customers at retail rates in the state of Montana and that is not a public utility or cooperative.”³⁹⁹

For the purposes of Title 69, Chapter 5, Part 1 (“Territorial Integrity for Electric Suppliers”), a “**utility**” means a public utility regulated by the commission pursuant to Title 69, chapter 3, or a utility qualifying as an electric cooperative pursuant to Title 35, chapter 18, or their successors or assignees,” while a “**regulated utility**” means any electric utility regulated by the commission pursuant to Title 69, chapter 3, on May 2, 1997, including the public utility's successors or assignees.”⁴⁰⁰ An “**electricity supplier**” means any person, corporation, or governmental entity that: (a) sells electricity to customers at retail rates in the state; and (b) is not a public utility or a cooperative.”⁴⁰¹

Exception: Customer-Owned Facilities for Customer’s Own Use

Title 69, Chapter 5, Part 1 (“Territorial Integrity for Electric Suppliers”) states that “this part may not limit a customer's right to construct, own, or operate electric service facilities for the customer's own use, and **construction, ownership, or use may not cause the customer to be considered a utility**. A customer may not duplicate existing electric service facilities.”⁴⁰²

Exception: Electric Cooperatives

As described above, in both the Electric Utility Industry Generation Reintegration Act and the Montana Renewable Power Production and Rural Economic Development Act, any “utility qualifying as an electric cooperative pursuant to Title 35, chapter 18” is categorized not as a public utility, but rather as “cooperative utilities.”⁴⁰³

Cooperative utilities are exempt from several requirements that apply to public utilities: for example, “a cooperative utility is exempt from the graduated renewable energy standard established in 69-3-2004.”⁴⁰⁴

Exception: Property Leased to Public Utility

The definition of “public utility” states that “the term does not include . . . a person exempted from regulation as a public utility as provided in 69-3-111.”⁴⁰⁵

Section 69-3-11 provides that “upon application, the commission may, by order, determine that any person not otherwise a public utility is not a public utility subject to the jurisdiction, control, or regulation of the commission under this title solely because the person owns or controls any plant or equipment, any part of or undivided interest in a plant or equipment, or any water right described in 69-3-101: (a) that is leased or sold or held for lease or sale to any public utility or other lessee; (b) the operation and use of which is vested by lease or other contract in a public

³⁹⁸ MONT. CODE ANN. § 69-3-2003(13).

³⁹⁹ MONT. CODE ANN. § 69-3-2003(5)(a).

⁴⁰⁰ MONT. CODE ANN. § 69-5-102(13)-(16).

⁴⁰¹ MONT. CODE ANN. § 69-5-102(8).

⁴⁰² MONT. CODE ANN. § 69-5-107.

⁴⁰³ MONT. CODE ANN. §§ 69-8-103(4), 69-3-2003(7).

⁴⁰⁴ MONT. CODE ANN. § 69-3-2008(1).

⁴⁰⁵ MONT. CODE ANN. § 69-3-101(2).

utility or other lessee; or (c) for a period of not more than 90 days after termination of any lease or contract described in subsection (1)(a) or (1)(b) or after the person gains possession of the property following a breach of a lease or contract.”⁴⁰⁶

Exception: Electric Vehicle Charging Stations

An “**electric vehicle charging station**” is defined as “a commercial charging station including all required equipment for the provision of power and fueling of electric vehicles.”⁴⁰⁷ As specifically provided in Title 69, “entities operating electric vehicle charging stations are not public utilities.”⁴⁰⁸ Here an “entity” means “any party procuring power for the commercial purpose of electric vehicle charging.”⁴⁰⁹

NEBRASKA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-------------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | None (part of Southwest Power Pool) |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (mandatory) ⁴¹⁰ |

Definitions

Nebraska is “the only State in the country that generates and provides electricity to consumers entirely by publicly-owned power systems.”⁴¹¹

Pursuant to Chapter 70 (“Power Districts and Corporations”) of the Revised Statutes of Nebraska, the Nebraska Power Review Board regulates all “**electric suppliers or suppliers of electricity**,” defined as “any legal entity supplying, producing, or distributing electricity within the state for sale at wholesale or retail.”⁴¹²

“**All suppliers of electricity**, including public power districts, public power and irrigation districts, individual municipalities, registered groups of municipalities, electric membership associations, and cooperatives, serving customers at retail in adjoining service areas shall have the authority to enter into written agreements with each other specifying either the service area or customers each shall serve with electric energy. Before such agreements shall be effective . . . they shall be submitted to and approved by the Nebraska Power Review Board . . . It is declared to be the purpose of this section to promote and encourage the making of such agreements.”⁴¹³

⁴⁰⁶ MONT. CODE ANN. § 69-3-111(1).

⁴⁰⁷ MONT. CODE ANN. § 69-8-801(1).

⁴⁰⁸ MONT. CODE ANN. § 69-8-803(3).

⁴⁰⁹ MONT. CODE ANN. § 69-8-801(2).

⁴¹⁰ *Nebraska Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/3386> (last updated June 25, 2019).

⁴¹¹ Allan M. Williams, *The Winds of Change: How Nebraska Law Has Stalled the Development of Wind Energy and What Can Be Done to Spur Growth*, 47 CREIGHTON L. REV. 477, 478 (2014).

⁴¹² NEB. REV. STAT. ANN. § 70-1001.01(2) (West 2021).

⁴¹³ NEB. REV. STAT. ANN. § 70-1002.

Any “supplier of electricity at retail shall furnish service, upon application, to any applicant within the service area of such supplier if it is economically feasible to service and supply the applicant.”⁴¹⁴

Exception: Privately Developed Renewable Energy Generation Facilities

In general, any supplier must receive approval of the Nebraska Power Review Board before constructing or acquiring any electric generation facility.⁴¹⁵ However, effective in July 2016, privately developed renewable energy facilities are exempt from those “extensive application and hearing procedures” under certain conditions.⁴¹⁶

A “**privately developed renewable energy generation facility**” is defined as “a facility that (a) generates electricity using solar, wind, geothermal, biomass, landfill gas, or biogas, including all electrically connected equipment used to produce, collect, and store the facility output up to and including the transformer that steps up the voltage to sixty thousand volts or greater, and including supporting structures, buildings, and roads, unless otherwise agreed to in a joint transmission development agreement, (b) is developed, constructed, and owned, in whole or in part, by one or more private electric suppliers, and (c) is not wholly owned by a public power district, a public power and irrigation district, a municipality, a registered group of municipalities, an electric cooperative, an electric membership association, any other governmental entity, or any combination thereof.”⁴¹⁷

A “**private electric supplier**” is defined as “an electric supplier producing electricity from a privately developed renewable energy generation facility that is not a public power district, a public power and irrigation district, a municipality, a registered group of municipalities, an electric cooperative, an electric membership association, any other governmental entity, or any combination thereof.”⁴¹⁸

Notably, “nothing in this section shall be construed to authorize a private electric supplier to sell or deliver electricity at retail in Nebraska.”⁴¹⁹

The exception is available “if no less than thirty days prior to the commencement of construction the owner of the facility:

- (i) Notifies the board in writing of its intent to commence construction of a privately developed renewable energy generation facility;
- (ii) Certifies to the board that the facility will meet the requirements for a privately developed renewable energy generation facility;
- (iii) Certifies to the board that the private electric supplier will (A) comply with any decommissioning requirements adopted by the local governmental entities having jurisdiction over the privately developed renewable energy generation facility and (B)

⁴¹⁴ NEB. REV. STAT. ANN. § 70-1017.

⁴¹⁵ NEB. REV. STAT. ANN. § 70-1012.

⁴¹⁶ Lisa N. Garrett, *Wind in the Wild West to Wind in the Midwest: How Iowa and Nebraska Could Implement Texas Strategies to Increase Installed Wind Capacity*, 48 TEX. ENVTL. L.J. 101, 114–15 (2018).

⁴¹⁷ NEB. REV. STAT. ANN., *supra* n. 412, § 70-1001.01(4).

⁴¹⁸ NEB. REV. STAT. ANN. § 70-1001.01(3).

⁴¹⁹ NEB. REV. STAT. ANN. § 70-1014.02(7).

except as otherwise provided in subdivision (b) of this subsection, submit a decommissioning plan to the board obligating the private electric supplier to bear all costs of decommissioning the privately developed renewable energy generation facility and requiring that the private electric supplier post a security bond or other instrument, no later than the tenth year following commercial operation, securing the costs of decommissioning the facility and provide a copy of the bond or instrument to the board;

(iv) Certifies to the board that the private electric supplier has entered into or prior to commencing construction will enter into a joint transmission development agreement pursuant to subdivision (c) of this subsection with the electric supplier owning the transmission facilities of sixty thousand volts or greater to which the privately developed renewable energy generation facility will interconnect; and

(v) Certifies to the board that the private electric supplier has consulted with the Game and Parks Commission to identify potential measures to avoid, minimize, and mitigate impacts to species identified under subsection (1) or (2) of section 37-806 during the project planning and design phases, if possible, but in no event later than the commencement of construction.”⁴²⁰

Rural Electric Cooperatives

The Electric Cooperative Corporation Act provides that “**cooperative, nonprofit, membership corporations may be organized for the purpose of engaging in rural electrification** and the furnishing of electric energy to persons in rural areas not served with electrical energy through existing facilities within such rural areas.”⁴²¹ A “**rural area**” is defined as “any area not included within the boundaries of any incorporated city, town, or village.”⁴²²

Incorporators can be “any twenty or more natural persons, residents of the territory to be served by the corporation, of the age of twenty-one years or more, residents of this state.”⁴²³

Such cooperatives have powers including “to generate, manufacture, purchase, acquire, and accumulate electric energy and to transmit, distribute, sell, furnish, and dispose of such electric energy,” to “have the same powers now exercised by law by public light and power districts or private corporations to use any of the streets, highways, or public lands of the state or its political subdivisions in the manner provided by law, and “to have and exercise the power of eminent domain for the purposes expressed in section 70-703 in the manner set forth in sections 76-704 to 76-724 and to have the powers and be subject to the restrictions of electric light and power corporations and districts as regards the use and occupation of public highways and the manner or method of construction and physical operation of plants, systems, and transmission lines.”⁴²⁴

NEVADA

Regulatory Environment At-a-Glance

Retail Electric Competition? Partial (only large customers with PSC permission)

⁴²⁰ NEB. REV. STAT. ANN. § 70-1014.02(2)(a).

⁴²¹ NEB. REV. STAT. ANN. § 70-703.

⁴²² NEB. REV. STAT. ANN. § 70-702.

⁴²³ NEB. REV. STAT. ANN. § 70-705.

⁴²⁴ NEB. REV. STAT. ANN. § 70-704.

| | |
|-------------------------------|-------------------------------------|
| RTO/ISO Membership? | None (part of Southwest Power Pool) |
| Renewable Portfolio Standard? | Yes, 50% by 2030 ⁴²⁵ |
| Net Metering Regulations? | Yes (mandatory) ⁴²⁶ |

Definitions

“**Public utility’ or ‘utility’** is defined to include: “(a) Any plant or equipment, or any part of a plant or equipment, within this State for the production, delivery or furnishing for or to other persons, including private or municipal corporations, heat, gas, coal slurry, light, power in any form or by any agency, water for business, manufacturing, agricultural or household use, or sewerage service, whether or not within the limits of municipalities. (b) Any system for the distribution of liquefied petroleum gas to 10 or more users.”⁴²⁷

Agency Interpretation

Even before reaching the specific exception described below for individual renewable energy systems, the Nevada Public Utilities Commission has found “that the plain language of the statute provides that a facility that generates power is only a public utility if it provides, delivers, or furnishes power to multiple ‘other persons,’ and thus a facility does not qualify as a public utility based on “the sale of power to only one person.”⁴²⁸

Exception: Sales to Public Utilities

The definition of “‘public utility’ or ‘utility’ does not include . . . Persons who are engaged in the production and sale of energy, including electricity, to public utilities, cities, counties or other entities which are reselling the energy to the public.”⁴²⁹

Exception: Individual Renewable Energy Systems

Excluded from the definition of public utility are “Persons who for compensation own or operate individual systems which use renewable energy to generate electricity and sell the electricity generated from those systems to not more than one customer of the public utility per individual system if each individual system is:

- (a) Located on the premises of another person;
- (b) Used to produce not more than 150 percent of that other person's requirements for electricity on an annual basis for the premises on which the individual system is located; and
- (c) Not part of a larger system that aggregates electricity generated from renewable energy for resale or use on premises other than the premises on which the individual system is located.”⁴³⁰

⁴²⁵ NEV. REV. STAT. ANN. § 704.7801 *et seq.* (West 2021).

⁴²⁶ *Nevada Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/372> (last updated Feb. 1, 2018).

⁴²⁷ NEV. REV. STAT. ANN., *supra* n. 425, § 704.020(2).

⁴²⁸ *In re Uc Won, LLC*, No. 19-08019, 2019 WL 5874352, at *4 (Nev. P.U.C. Oct. 23, 2019).

⁴²⁹ NEV. REV. STAT. ANN., *supra* n. 425, § 704.021.

⁴³⁰ NEV. REV. STAT. ANN. § 704.021(10).

Exception: Some Net Metering Systems

Also excluded from the definition of public utility are “Persons who own or operate a net metering system described in paragraph (c) of subsection 1 of NRS 704.771.”⁴³¹

This paragraph defines net metering systems to include “A facility or energy system for the generation of electricity:

- (1) Which uses **wind power** as its primary source of energy to generate electricity;
- (2) Which is located on property owned or leased by an **institution of higher education** in this State;
- (3) Which has a generating capacity of **not more than 1 megawatt**;
- (4) Which **operates in parallel with the utility's transmission and distribution** facilities;
- (5) Which is **intended primarily to offset all or part of the customer-generator's requirements for electricity** on that property or on contiguous property owned or leased by the customer-generator;
- (6) Which is used for **research and workforce training**; and
- (7) The **construction or installation of which is commenced on or before December 31, 2011, and is completed on or before December 31, 2012.**”⁴³²

Exception: Electric Vehicle Charging

The “public utility” definition “does not include . . . Persons who own, control, operate or manage a facility that supplies electricity only for use to charge electric vehicles.”⁴³³

Nevada Renewable Energy Bill of Rights

In 2017, the Nevada Legislature passed AB 405, known as the “Renewable Energy Bill of Rights.”⁴³⁴ The Assembly Bill was described as an Act “creating the contractual requirements for an agreement for the lease or purchase of a **distributed generation system** and a power purchase agreement,” “requiring a utility to provide a credit to certain customer-generators for excess electricity generated by the **net metering systems** of such customer-generators, and “revising various other provisions relating to net metering.”⁴³⁵

The Bill of Rights itself grants “each natural person who is a resident” of Nevada “the right to:

1. **Generate, consume and export renewable energy** and reduce his or her use of electricity that is obtained from the grid.
2. Use technology to **store energy at his or her residence.**

⁴³¹ NEV. REV. STAT. ANN. § 704.021(9).

⁴³² NEV. REV. STAT. ANN. § 704.771(1)(c).

⁴³³ NEV. REV. STAT. ANN. § 704.021(11).

⁴³⁴ NEV. REV. STAT. ANN. § 701.540.

⁴³⁵ See 2017 Nev. Stat. Ch. 598 (A.B. 405), <https://www.leg.state.nv.us/App/NELIS/REL/79th2017/Bill/5487/Text>, (generally amending NEV. REV. STAT. ANN., *supra* n. 425, § 704).

3. If the person generates renewable energy pursuant to subsection 1, or stores energy pursuant to subsection 2, or any combination thereof, **be allowed to connect his or her system** that generates renewable energy or stores energy, or any combination thereof, **with the electricity meter** on the customer's side . . .

4. **Fair credit for any energy exported to the grid.**

5. **Consumer protections** in contracts for renewable energy pursuant to NRS 598.9801 to 598.9822, inclusive.

6. Have his or her generation of renewable energy given **priority in planning and acquisition of energy resources** by an electric utility.

7. Except as otherwise provided in NRS 704.7725 or 704.7732, **remain within the existing broad rate class** to which the resident would belong in the absence of a net metering system or a system that generates renewable energy or stores energy . . . provided that such technologies do not compromise the safety and reliability of the utility grid.”⁴³⁶

However, these “new renewable energy rights established by AB 405” do not necessarily create new exceptions from public utility regulation.⁴³⁷ In December 2018, the Nevada Public Utilities Commission (PUC) denied a petition from a property management company requesting an advisory opinion stating “that both the facility and sale of the output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities pursuant to AB 405.”⁴³⁸ The company was seeking to avoid utility regulation of its “concept, referred to as ‘Tenant Solar,’ whereby an apartment owner directly installs, or contracts with a third party to install, a distributed energy system on the rooftops or common areas of an apartment complex and that energy output is then consumed by the tenants of the apartment complex.”⁴³⁹

The PUC’s denial was based primarily on a concern that it would be “impermissible ad hoc rulemaking” to issue the type of advisory opinion requested, “stating that both the facility and the sale of output from distributed generation systems installed on multi-family dwellings are not jurisdictional public utilities,” because such an opinion “would be a statement of the Commission’s official position on its interpretation of AB 405 and NRS Chapter 704 as it applies to Tenant Solar on all multi-family dwellings in Nevada.”⁴⁴⁰

That said, PUC staff argued “that pursuant to the plain language of NRS 704.020, provision of power as described by [the property management company] in its Petition falls within the definition of a public utility. Staff further recognizes that there are some configurations by which a multi-family dwelling may avail itself of distributed generation renewable energy and not trigger the public utility provisions of NRS 704.020, but this is not the type of service described by [the company] in its Petition. **Staff requests that the Commission deny [the company’s] request and find that the facility and the sale of output from distributed generation systems installed on multi-family dwellings as described in the Petition are jurisdictional public utilities.**”⁴⁴¹

⁴³⁶ NEV. REV. STAT. ANN. § 701.540.

⁴³⁷ *In re Ovation Mm, Inc.*, No. 18-10008, 2018 WL 6706331, at *2 (Nev. P.U.C. Dec. 13, 2018).

⁴³⁸ *Id.* at *1.

⁴³⁹ *Id.*

⁴⁴⁰ *Id.* at *4–5.

⁴⁴¹ *Id.* at *2.

NEW HAMPSHIRE

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-----------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 25.2% by 2025 ⁴⁴² |
| Net Metering Regulations? | Yes (mandatory) ⁴⁴³ |

Definitions

Title XXXIV (“Public Utilities”) of the New Hampshire Revised Statutes Annotated defines “**public utility**” to “include every corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court, except municipal corporations and county corporations operating within their corporate limits, owning, operating or managing any plant or equipment or any part of the same for the conveyance of telephone or telegraph messages or for the manufacture or **furnishing of light, heat, sewage disposal, power or water for the public**, or in the **generation, transmission or sale of electricity ultimately sold to the public**, or owning or operating any pipeline, including pumping stations, storage depots and other facilities, for the transportation, distribution or sale of gas, crude petroleum, refined petroleum products, or combinations of petroleum products, rural electric cooperatives organized pursuant to RSA 301 or RSA 301-A, and any other business, except as hereinafter exempted, over which on September 1, 1951, the public utilities commission exercised jurisdiction.”⁴⁴⁴

In New Hampshire’s deregulated electricity market, “**electricity suppliers**” means suppliers of electricity generation services and includes actual electricity generators and brokers, aggregators, and pools that arrange for the supply of electricity generation to meet retail customer demand, which may be municipal or county entities.”⁴⁴⁵ The New Hampshire Public Utilities Commission “is authorized to require the implementation of retail choice of electric suppliers for all customer classes of utilities providing retail electric service under its jurisdiction.”⁴⁴⁶ This Electric Utility Restructuring law, Chapter 374-F, provides that “**competitive energy suppliers are not public utilities** pursuant to RSA 362:2, though a competitive energy supplier may seek public utility status from the commission if it so chooses. Notwithstanding a competitive energy supplier’s non-utility status, the commission is authorized to establish requirements, excluding price regulation, for competitive electricity suppliers, including registration, registration fees, customer information, disclosure, standards of conduct, and consumer protection and assistance requirements. Unless electing to do so, an electricity supplier that offers or sells at retail to consumers within this state products and services that can lawfully be made available to such consumers by more than one supplier shall not, because of such offers or sales, be deemed to be a public utility as defined by RSA 362:2. These requirements shall be applied in a manner consistent with the restructuring principles of this chapter to promote competition among electricity

⁴⁴² N.H. REV. STAT. ANN. § 362-F (2021).

⁴⁴³ *New Hampshire Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/283> (last updated May 6, 2016).

⁴⁴⁴ N.H. REV. STAT. ANN., *supra* n. 442, § 362:2.

⁴⁴⁵ N.H. REV. STAT. ANN. § 374-F:2.

⁴⁴⁶ N.H. REV. STAT. ANN. § 374-F:4.

suppliers.”⁴⁴⁷ Moreover, “**aggregators of electricity load that do not take ownership of power or other services and do not represent any supplier interest are not public utilities** pursuant to RSA 362:2, but shall notify the commission of their intent to do business. Municipalities that aggregate electric power or energy services for their citizens pursuant to RSA 53-E are not public utilities pursuant to RSA 362:2 and are not subject to the provisions of paragraph III and RSA 374-F:4-b.”⁴⁴⁸

Exception: Certain Wholesale Power Facilities

Title XXXIV, Chapter 362 (“Definition of Terms; Utilities Exempted”) provides that “I. The term **‘public utility’ shall not include any entity determined by the Federal Energy Regulatory Commission to be an exempt wholesale generator**, nor shall it include any corporation, company, association, limited liability company, joint stock association, partnership, or person, their lessees, trustees, or receivers appointed by any court, solely by virtue of owning, operating, or managing any plant or equipment or any part of the same **which has received a certificate of site and facility as an energy facility or as a bulk power supply facility pursuant to RSA 162-H** after July 1, 1998, or are sold after July 1, 1998, for the generation or sale of electricity or for transmission of electricity from such a plant to an interconnection with the transmission grid. II. Any entity exempted by this section may seek public utility status from the commission if it so chooses.”⁴⁴⁹

Exception: Qualifying Small Power Producers and Cogenerators

The Limited Electrical Energy Producers Act provides that “**qualifying small power producers and qualifying cogenerators shall be exempt** from all rules and statutes relative to electric utility rates or relative to the financial or organizational regulation of electric utilities.”⁴⁵⁰

The Act defines “**qualifying small power producer**” as “the owner or operator of a qualifying small power production facility.”⁴⁵¹ A “**small power production facility** means a facility which produces electric energy solely by the use, as a primary energy source, of biomass, waste, renewable resources, bio-oil, bio synthetic gas, biodiesel, or any combination thereof and which has a power production capacity which, together with any other facility located at the same site, as determined by the commission, is not greater than 30 megawatts.”⁴⁵² A “**qualifying small power production facility**” is defined as “a small power production facility which the commission determines meets such requirements, including requirements respecting fuel use, fuel efficiency and reliability, as the commission may prescribe and which is owned by a person not primarily engaged in the generation or sale of electric power, other than electric power solely from cogeneration facilities or small power production facilities.”⁴⁵³

The Act defines a “**qualifying cogenerator**” as “the owner or operator of a qualifying cogeneration facility.”⁴⁵⁴ A “**cogeneration facility** means a facility which produces electric energy and other

⁴⁴⁷ N.H. REV. STAT. ANN. § 374-F:7.

⁴⁴⁸ *Id.*

⁴⁴⁹ N.H. REV. STAT. ANN. § 362:4-c.

⁴⁵⁰ N.H. REV. STAT. ANN. § 362-A:2

⁴⁵¹ N.H. REV. STAT. ANN. § 362-A:1-a.

⁴⁵² *Id.*

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

forms of useful energy, such as steam or heat, which are used for industrial, commercial, heating, or cooling purposes.” A “**qualifying cogeneration facility** means a cogeneration facility which the commission determines meets such requirements, including requirements respecting minimum size, fuel use and fuel efficiency, as the commission may prescribe and which is owned by a person not primarily engaged in the generation or sale of electric power, other than electric power solely from cogeneration facilities or small power production facilities.”⁴⁵⁵

The Act’s **Declaration of Purpose** states that “it is found to be in the public interest to provide for small scale and diversified sources of supplemental electrical power to lessen the state’s dependence upon other sources which may, from time to time, be uncertain. It is also found to be in the public interest to encourage and support diversified electrical production that uses indigenous and renewable fuels and has beneficial impacts on the environment and public health. It is also found that these goals should be pursued in a competitive environment pursuant to the restructuring policy principles set forth in RSA 374-F:3. It is further found that net energy metering for eligible customer-generators may be one way to provide a reasonable opportunity for small customers to choose interconnected self generation, encourage private investment in renewable energy resources, stimulate in-state commercialization of innovative and beneficial new technology, enhance the future diversification of the state’s energy resource mix, and reduce interconnection and administrative costs.”

Exception: Manufacturing Establishments Selling Surplus Electricity

The New Hampshire Public Utilities Commission “may exempt any person or corporation engaged in manufacturing and carrying on in this state a manufacturing establishment the product of which is something besides power, and **producing electricity primarily for the operation of such establishment or incidental thereto**, from any or all provisions of this title [Title XXXIV, Public Utilities], except those directly relating to rates and service, whenever the commission may find such exemption consistent with the public good.”⁴⁵⁶

Exception: Rural Electric Cooperatives

While “**rural electric cooperatives organized pursuant to RSA 301 or RSA 301-A**” are expressly included in the definition of “public utility,” that definition also states that “for the purposes of this title [Title XXXIV, Public Utilities] only, rural electric cooperatives for which a **certificate of deregulation** is on file with the public utilities commission pursuant to RSA 301:57 **shall not be considered public utilities**; provided, however, that the provisions of RSA 362-A:1, 362-A:2, 362-A:3, 362-A:4, 362-A:5, 362-A:6, 362-A:7, 362-A:8, 363-B, 371, 374:2-a, 374:26, 374:48-56, 374-A, 374-C, 374-F, and 378:37 shall, unless otherwise provided herein, be applicable to rural electric cooperatives, without regard to whether a certificate of regulation or deregulation is on file with the public utilities commission. The provisions of RSA 374-A and the provisions of RSA 374-F:3, V(b) and (f) and RSA 374-F:7 shall be applicable to rural electric cooperatives for which a certificate of deregulation is on file with the public utilities commission to the same extent as municipal utilities.”⁴⁵⁷

⁴⁵⁵ *Id.*

⁴⁵⁶ N.H. REV. STAT. ANN. § 362:5.

⁴⁵⁷ N.H. REV. STAT. ANN. § 362:2.

Exception: Electric Vehicle Charging Stations

An “**electric vehicle charging station**” is defined as “an electric component or cluster of component assemblies designed specifically to charge an electric vehicle battery by transferring electric energy to a battery or a storage device in the vehicle.”⁴⁵⁸

“An owner of an electric vehicle charging station shall not be deemed to be a ‘utility,’ ‘public utility,’ or ‘public service company’ solely by virtue of the fact that such an owner is an owner of an electric vehicle charging station. All electricity distribution companies shall make available in tariffs terms and rates for electronic vehicle charging stations and offer such information to the public.”⁴⁵⁹

NEW JERSEY

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 50% by 2030 ⁴⁶⁰ |
| Net Metering Regulations? | Yes (mandatory) ⁴⁶¹ |

Definitions

Title 48, Chapter 2 (“Board of Public Utility Commissioners”) of the New Jersey Statutes grants the Board of Public Utility Commissioners “general supervision and regulation of and jurisdiction and control over all public utilities as defined in this section and their property, property rights, equipment, facilities and franchises so far as may be necessary for the purpose of carrying out the provisions of this Title.”⁴⁶²

The term “**public utility**” is defined to “include every individual, copartnership, association, corporation or joint stock company, their lessees, trustees or receivers appointed by any court whatsoever, their successors, heirs or assigns, that now or hereafter may own, operate, manage or control within this State any railroad, street railway, traction railway, autobus, charter bus operation, special bus operation, canal, express, subway, pipeline, gas, **electricity distribution**, water, oil, sewer, solid waste collection, solid waste disposal, telephone or telegraph system, **plant or equipment for public use, under privileges granted or hereafter to be granted by this State or by any political subdivision thereof**.”⁴⁶³

Moreover, “unless otherwise specifically provided pursuant to P.L.1999, c. 23 (C.48:3-49 et al.), **all services necessary for the transmission and distribution of electricity** and gas, including

⁴⁵⁸ N.H. REV. STAT. ANN. § 236:132(VI).

⁴⁵⁹ N.H. REV. STAT. ANN. § 236:133(IV).

⁴⁶⁰ N.J. STAT. ANN. § 48:3-49 *et seq.* (West 2021).

⁴⁶¹ *New Jersey Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/38> (last updated Nov. 16, 2018).

⁴⁶² N.J. STAT. ANN., *supra* n. 460, § 48:2-13(a).

⁴⁶³ *Id.*

but not limited to safety, reliability, metering, meter reading and billing, **shall remain the jurisdiction of the Board of Public Utilities.** The board shall also maintain the necessary jurisdiction with regard to the production of electricity and gas to assure the reliability of electricity and gas supply to retail customers in the State as prescribed by the board or any other federal or multi-jurisdictional agency responsible for reliability and capacity in the State.”⁴⁶⁴

That 1999 law, the **Electric Discount and Energy Competition Act** (Title 48, Chapter 3, Article 7), authorized “the Board of Public Utilities to permit competition in the electric generation and gas marketplace” and provided “the Board of Public Utilities with ongoing oversight and regulatory authority to monitor and review composition of the electric generation and retail power supply marketplace in New Jersey.”⁴⁶⁵

This Act defines “**electric public utility**” to mean “a public utility, as that term is defined in R.S.48:2-13, that transmits and distributes electricity to end users within this State.”⁴⁶⁶

“**Electric power supplier**” is defined as “a person or entity that is duly licensed pursuant to the provisions of P.L.1999, c. 23 (C.48:3-49 et al.) to offer and to assume the contractual and legal responsibility to provide electric generation service to retail customers, and includes load serving entities, marketers, and brokers that offer or provide electric generation service to retail customers. The term excludes an electric public utility that provides electric generation service only as a basic generation service pursuant to section 9 of P.L.1999, c. 23 (C.48:3-57).”⁴⁶⁷ “**Electric generation service**” is defined as “the provision of retail electric energy and capacity which is generated off-site from the location at which the consumption of such electric energy and capacity is metered for retail billing purposes, including agreements and arrangements related thereto.”⁴⁶⁸

Exception: On-Site Generation Facilities

The Electric Discount and Energy Competition Act provides that “**an on-site generation facility shall not be considered a public utility.**”⁴⁶⁹ An “on-site generation facility” is defined as:

“a generation facility, including, but not limited to, a generation facility that produces Class I or Class II renewable energy, and equipment and services appurtenant to electric sales by such facility to the end use customer located on the property or on property contiguous to the property on which the end user is located. An on-site generation facility shall not be considered a public utility. The property of the end use customer and the property on which the on-site generation facility is located shall be considered contiguous if they are geographically located next to each other, but may be otherwise separated by an easement, public thoroughfare, transportation or utility-owned right-of-way, or if the end use customer is purchasing thermal energy services produced by the on-site generation facility, for use for heating or cooling, or both, regardless of whether the customer is located on property that is separated from the property on which the on-site generation facility is

⁴⁶⁴ N.J. STAT. ANN. § 48:2-13(d).

⁴⁶⁵ N.J. STAT. ANN. § 48:3-50(c).

⁴⁶⁶ N.J. STAT. ANN. § 48:3-51.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.*

⁴⁶⁹ *Id.*

located by more than one easement, public thoroughfare, or transportation or utility-owned right-of-way.”⁴⁷⁰

Exception: Co-Generation Facilities

The Electric Discount and Energy Competition Act provides that “**a combined heat and power facility or co-generation facility shall not be considered a public utility.**”⁴⁷¹ A “combined heat and power facility” or “co-generation facility” is defined as “a generation facility which produces electric energy and steam or other forms of useful energy such as heat, which are used for industrial or commercial heating or cooling purposes.”⁴⁷²

Exception: Small Scale Hydropower and Resource Recovery Facilities

As used in New Jersey Statutes Chapter 48:3-110 *et seq.*, a “facility” means “**a small scale hydropower facility** put into service after the effective date of P.L.2012, c. 24 with a capacity of three megawatts or less or a resource recovery facility,” which is defined to “have the same meaning as provided in section 3 of P.L.1999, c. 23 (C.48:3-51).”⁴⁷³ In that chapter, “**resource recovery facility**” is defined as “a solid waste facility constructed and operated for the incineration of solid waste for energy production and the recovery of metals and other materials for reuse, which the Department of Environmental Protection has determined to be in compliance with current environmental standards, including, but not limited to, all applicable requirements of the federal “Clean Air Act” (42 U.S.C. s.7401 *et seq.*).”⁴⁷⁴

An “electric power supplier or a basic generation service provider shall offer a facility net metering at a non-discriminatory rate,” and “**a facility may deliver or sell power to up to 10 end-use customers, who are located within 10 miles of the facility and net-metered within the service territory of a single electric public utility**, and designate the end-use customers to be credited by the electric power supplier or basic generation service provider with the excess generation of the facility. The facility may designate the proportionate share of the excess electricity generated to credit each of the designated end-use customers. **The owner of a facility who sells or delivers power to an end-use customer pursuant to the provisions of this section shall not be considered a public utility** pursuant to R.S.48:2-13 or P.L.1999, c. 23 (C.48:3-49 *et al.*).”⁴⁷⁵

Exception: Electric Vehicle Service Equipment

“Electric vehicle service equipment” or “EVSE” is defined as “the equipment, including the cables, cords, conductors, connectors, couplers, enclosures, attachment plugs, power outlets, switches and controls, network interfaces, and point of sale equipment and associated apparatus designed and used for the purpose of transferring energy from the electric supply system to a plug-in electric

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² *Id.*

⁴⁷³ N.J. STAT. ANN. § 48:3-110.

⁴⁷⁴ N.J. STAT. ANN. § 48:3-51.

⁴⁷⁵ N.J. STAT. ANN. § 48:3-112.

vehicle. ‘EVSE’ may deliver either alternating current or direct current electricity consistent with fast charging equipment standards.”⁴⁷⁶

“Unless otherwise provided in Title 48 of the Revised Statutes, or any other federal or State law, an entity owning, controlling, operating, or managing electric vehicle service equipment shall not be deemed an electric public utility solely because of such ownership, control, operation, or management. The charging of a plug-in electric vehicle shall be deemed a service and not a sale of electricity by an electric power supplier or basic generation service provider pursuant to P.L.1999, c. 23 (C.48:3-49 et al.).”⁴⁷⁷

NEW MEXICO

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No (considered but rejected) |
| RTO/ISO Membership? | Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, 40% by 2025, 100% zero-carbon by 2045 ⁴⁷⁸ |
| Net Metering Regulations? | Yes (mandatory) ⁴⁷⁹ |

Definitions

The New Mexico “Public Utility Act” (New Mexico Statutes, Chapter 62, Article 3) defines “**public utility**” to include “every person not engaged solely in interstate business and, except as stated in Sections 62-3-4 and 62-3-4.1 NMSA 1978, that may own, operate, lease or control: (1) any plant, property or facility for the **generation, transmission or distribution, sale or furnishing to or for the public of electricity** for light, heat or power or other uses . . . [and] (6) any plant, property or facility for the sale or furnishing to or for the public of goods or services to reduce the consumption of or demand for electricity or natural gas, and is either a public utility under the definitions found in Paragraph (1) or (2) of this subsection, or is an alternative energy efficiency provider as described in Section 62-17-7 NMSA 1978.”⁴⁸⁰

Judicial Interpretation

The New Mexico Supreme Court has held that to determine whether an entity is furnishing services “**to or for the public,**” the test is “whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it. The public or private character of the enterprise does not depend, however, on the number of persons by whom it is used, but on whether or not it is open to the use and service of all members of the public who may require it, to the extent of its capacity.”⁴⁸¹

Exception: Service to Oneself, Employees, or Tenants

⁴⁷⁶ N.J. STAT. ANN. § 48:25-2.

⁴⁷⁷ N.J. STAT. ANN. § 48:25-10.

⁴⁷⁸ N.M. STAT. ANN. §§ 62-15, 62-16 (West 2021).

⁴⁷⁹ *New Mexico Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/284> (last updated May 31, 2017).

⁴⁸⁰ N.M. STAT. ANN., *supra* n. 478, § 62-3-3(G).

⁴⁸¹ *Griffith v. Pub. Serv. Comm’n*, 520 P.2d 269, 271 (N.M. 1974) (citations omitted).

The first exception noted in the “public utility” definition above is provided in Section 62-3-4, which states that “the term ‘public utility’ or ‘utility’, when used in the Public Utility Act, **shall not include any person not otherwise a public utility who furnishes the service or commodity only to that person or that person's employees or tenants**, when such service or commodity is not resold to or used by others, or who engages in the retail distribution of natural gas or electricity for vehicular fuel.”⁴⁸²

Exception: Renewable Energy Distributed Generation Facilities

The Public Utility Act includes a section stating that:

“A. Notwithstanding any other provision of the Public Utility Act to the contrary, a person not otherwise a public utility **shall not be deemed to be a public utility** subject to the jurisdiction, control or regulation of the commission and the provisions of the Public Utility Act solely because the person owns or controls all or any part of any **renewable energy distributed generation facility** that:

- (1) is located on the host's site;
- (2) produces electric energy used at the host's site and sold to the host or the host's tenants or employees located at the host's site; and
- (3) shares a common point of connection with the electric utility serving the area and the host or the host's tenants and employees served by the renewable energy distributed generation facility.

B. Nothing contained in this section shall be interpreted to prohibit the sale of energy produced by the renewable energy distributed generation facility to the electric utility serving the area in which the renewable energy distributed generation facility is located.

C. As used in this section:

- (1) “host” means the customer of a public utility who uses the electric energy produced by a renewable energy distributed generation facility and occupies the site upon which the renewable energy distributed generation facility is located;
- (2) “renewable energy distributed generation facility” means a facility that produces electric energy by the use of renewable energy and that is sized to supply no more than one hundred twenty percent of the average annual consumption of electricity by the host at the site of the renewable energy distributed generation facility in accordance with applicable interconnection rules; and
- (3) “site” means all the contiguous property owned or leased by the host, without regard to interruptions in contiguity caused by easements, public thoroughfares, transportation rights of way or utility rights of way.”⁴⁸³

⁴⁸² N.M. STAT. ANN., *supra* n. 478, § 62-3-4(A).

⁴⁸³ N.M. STAT. ANN. § 62-13-13.1.

This exception was added by the New Mexico legislature in 2010, in response to a Public Service Commission proceeding addressing the issue of third-party power purchase agreements.⁴⁸⁴

Exception: Generation and Transmission Cooperatives

In general, “the sale, furnishing or delivery of gas, water or electricity by any person to a utility for resale to or for the public shall be subject to regulation by the commission but only to the extent necessary to enable the commission to determine that the cost to the utility of the gas, water or electricity at the place where the major distribution to the public begins is reasonable and that the methods of delivery of the gas, water or electricity are adequate; provided, however, that **nothing in this subsection shall be construed to permit regulation by the commission with respect to a generation and transmission cooperative**, except location control pursuant to Section 62-9-3 NMSA 1978 and limited rate regulation to the extent provided in Subsection D of this section, or of production or sale price at the wellhead of gas or petroleum.”⁴⁸⁵

A “**generation and transmission cooperative**” is defined as “a person with generation or transmission facilities either organized as a rural electric cooperative pursuant to Laws 1937, Chapter 100 or the Rural Electric Cooperative Act or organized in another state and providing sales of electric power to member cooperatives in this state.”⁴⁸⁶

Subsection D states that “New Mexico rates proposed by a generation and transmission cooperative shall be filed with the commission in the form of an advice notice, a copy of which shall be simultaneously served on all member utilities,” and includes additional provisions regarding limited rate regulation.⁴⁸⁷

NEW YORK

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | NYISO |
| Renewable Portfolio Standard? | Yes, 70% by 2030, 100% zero-emissions by 2040 ⁴⁸⁸ |
| Net Metering Regulations? | Yes (mandatory Value of Distributed Energy Resource tariffs) ⁴⁸⁹ |

Definitions

The New York Public Service Law states that “the term ‘**utility company**’ or ‘**public utility company**’ is used to avoid repetitions in a provision applying to one or more persons or corporations operating an agency or agencies for public service, and who or which is or are subject to the jurisdiction, supervision and regulations prescribed by or pursuant to provisions of this

⁴⁸⁴ Stiles, *supra* n. 113, at 939.

⁴⁸⁵ N.M. STAT. ANN., *supra* n. 478, § 62-6-4(B).

⁴⁸⁶ N.M. STAT. ANN. § 62-6-4(E).

⁴⁸⁷ N.M. STAT. ANN. § 62-6-4(D).

⁴⁸⁸ N.Y. EVNTL. CONSERV. LAW § 75-0109 (McKinney 2021).

⁴⁸⁹ *New York Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/453> (last updated Jan. 5, 2019).

chapter other than article 11; such term being so used only as a general term descriptive of such a person or corporation.”⁴⁹⁰

More specifically, “**electric corporation**” is defined to include “every corporation, company, association, joint-stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad corporation generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others) owning, operating or managing any electric plant except where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others; or except where electricity is generated by the producer solely from one or more co-generation, small hydro or alternate energy production facilities or distributed solely from one or more of such facilities to users located at or near a project site.”⁴⁹¹

The term “**electric plant**” is defined to include “all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat or power; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”⁴⁹²

The “jurisdiction, supervision, powers and duties “ of the **New York Public Service Commission (PSC)** extend “to the manufacture, conveying, transportation, sale or distribution of gas (natural or manufactured or mixture of both) and electricity for light, heat or power, to gas plants and to electric plants and to the persons or corporations owning, leasing or operating the same,” and to “a corporation or person owning or holding a majority of the stock of a common carrier, gas corporation or electrical corporation subject to the jurisdiction of the public service commission shall be subject to the supervision of the public service commission in respect of the relations between such common carrier, gas corporation or electrical corporation and such owners or holders of a majority of the stock thereof . . .”⁴⁹³

New York Public Service Law Article 4 (“**Provisions Relating to Gas and Electric Corporations; Regulation of Price of Gas and Electricity**,” addressing rate-making and other PSC authority) “shall apply to the manufacture, conveying, transportation and furnishing of gas (natural or manufactured or mixture of both) for light, heat or power and the generation, furnishing and transmission of electricity for light, heat or power.”⁴⁹⁴

For purposes of New York Public Service Law Article 2 (“**Residential Gas, Electric and Steam Utility Service**,” addressing a limited set of consumer protection measures), “a reference to a gas corporation, an electric corporation, a utility company, or a utility corporation shall include, but is not limited to, any entity that, in any manner, sells or facilitates the sale or furnishing of gas or electricity to residential customers. No provision of this article or of this chapter authorizes or permits the provision of gas or electricity service by any such corporation or other entity in any

⁴⁹⁰ N.Y. PUB. SERV. LAW § 2(23) (McKinney 2021).

⁴⁹¹ N.Y. PUB. SERV. LAW § 2(13).

⁴⁹² N.Y. PUB. SERV. LAW § 2(12).

⁴⁹³ N.Y. PUB. SERV. LAW § 5(1).

⁴⁹⁴ N.Y. PUB. SERV. LAW § 64.

manner other than in full compliance with the provisions of this article or to authorize the commission to waive compliance with any requirement of this article for any such corporation or other entity.”⁴⁹⁵

Judicial Interpretation: Competitive Energy Service Companies Excluded from “Electrical Corporation” Definition

In New York’s deregulated electricity market, **energy service companies (ESCOs)** are non-utility suppliers that “sell energy commodities directly to consumers by using the utilities’ delivery infrastructure.”⁴⁹⁶ The Public Service Commission had argued “that ESCOs fall within the definitions of ‘gas corporations’ and ‘electric corporations’ set forth in Public Service Law § 2 such that they are subject to the PSC’s direct rate-making authority under Public Service Law article 4.”⁴⁹⁷ However, in 2019 the Court of Appeals of New York rejected this argument, noting that “by definition, gas and electric corporations are entities or persons that own, operate or manage a ‘gas plant’ or ‘electric plant,’” defined “as encompassing ‘all real estate, fixtures *and* personal property’ used for, among other things, the sale of gas and electricity . . . Section 2 does not state that a plant consists of ‘real estate, fixtures *or* personal property’ used to do the same, which is how the PSC reads the statute for purposes of this appeal. Thus, the PSC’s reading of section 2 contradicts the plain statutory language.”⁴⁹⁸

That said, the court also held that “because the PSC is empowered to regulate utilities’ transportation of gas and electricity and created the ESCO markets for the benefit of consumers, and because the legislature has delegated to the PSC the authority to condition ESCOs’ eligibility to access utility lines on such terms and conditions that the PSC determines to be just and reasonable, it follows that the PSC has authority to prohibit utilities from distributing overpriced products by conditioning ESCOs’ access on a price cap. That is, the statutory framework permits the PSC, pursuant to its authority to regulate the energy market, to impose a price cap on ESCOs as a condition of eligibility . . . although the PSC has no direct rate-making authority over ESCOs. . . .”⁴⁹⁹

Exception: Supply to Oneself or Tenants

As stated above, the definition of “electric corporation” excludes instances “where electricity is generated or distributed by the producer solely on or through private property for railroad or street railroad purposes or for its own use or the use of its tenants and not for sale to others.”⁵⁰⁰

Exception: Co-Generation, Small Hydro, and Alternate Energy Production Facilities

As stated above, the definition of “electric corporation” excludes instances “where electricity is generated by the producer solely from one or more co-generation, small hydro or alternate energy

⁴⁹⁵ N.Y. PUB. SERV. LAW § 53.

⁴⁹⁶ *Nat’l Energy Marketers Ass’n v. Pub. Serv. Comm’n*, 126 N.E.3d 1041, 1044 (N.Y. 2019), *rehearing denied*, 132 N.E.3d 1090 (N.Y. 2019).

⁴⁹⁷ *Id.* at 1047.

⁴⁹⁸ *Id.*

⁴⁹⁹ *Id.* at 1050.

⁵⁰⁰ N.Y. PUB. SERV. LAW, *supra* n. 490, § 2(13).

production facilities or distributed solely from one or more of such facilities to users located at or near a project site.”⁵⁰¹

The term “**co-generation facility**” is defined to include “any facility with an electric generating capacity of up to eighty megawatts, and including any facility with an electric generating capacity of up to one hundred twenty megawatts located at a project site within an air terminal operated by the port authority of New York and New Jersey and wholly contained within a city having a population of one million or more, which produces electricity and useful thermal energy solely for sale to the port authority of New York and New Jersey, for use at the airport, for sale to an electric utility, and/or for sale to the power authority of the state of New York, together with any related facilities located at the same project site, which is fueled by coal, gas, wood, alcohol, solid waste refuse-derived fuel, water or oil, to the extent any such oil fueled facility was fueled by oil prior to the effective date of this subdivision and there is no increase in the amount of oil used at the facility or to the extent oil is used as a backup fuel for such facility, and which simultaneously or sequentially produces either electricity or shaft horsepower and useful thermal energy which is used solely for industrial and/or commercial purposes.”⁵⁰²

The term “**alternate energy production facility**” is defined to include “any solar, wind turbine, fuel cell, tidal, wave energy, waste management resource recovery, refuse-derived fuel, wood burning facility, or energy storage device utilizing batteries, flow batteries, flywheels or compressed air, together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts, which produces electricity, gas or useful thermal energy.”⁵⁰³

The term “**small hydro facility**” is defined to include “any hydroelectric facility, together with any related facilities located at the same project site, with an electric generating capacity of up to eighty megawatts.”⁵⁰⁴

“The term ‘**related facilities**’ shall mean any land, work, system, building, improvement, instrumentality or thing necessary or convenient to the construction, completion or operation of any co-generation, alternate energy production or small hydro facility and include also such transmission or distribution facilities as may be necessary to conduct electricity, gas or useful thermal energy to users located at or near a project site.”⁵⁰⁵

Exception: Rural Electric Cooperatives

The **New York Rural Electric Cooperative Law** states that “cooperatives and foreign corporations doing business in this state pursuant to this chapter shall be exempt in all respects from the jurisdiction and control of the public service commission of this state and shall not be subject to the provisions of the public service law. Each cooperative, however, shall file with the public service commission an annual report verified by the oath of the president, vice-president,

⁵⁰¹ N.Y. PUB. SERV. LAW § 2(13).

⁵⁰² N.Y. PUB. SERV. LAW § 2(2-a).

⁵⁰³ N.Y. PUB. SERV. LAW § 2(2-b).

⁵⁰⁴ N.Y. PUB. SERV. LAW § 2(2-c).

⁵⁰⁵ N.Y. PUB. SERV. LAW § 2(2-d).

treasurer, secretary, general manager, or receiver, if any.”⁵⁰⁶

NORTH CAROLINA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | PJM Interconnection (only part of state) |
| Renewable Portfolio Standard? | Yes, 12.5% by 2021 ⁵⁰⁷ |
| Net Metering Regulations? | Yes (mandatory) ⁵⁰⁸ |

Definitions

Chapter 62 (“Public Utilities”) of the North Carolina General Statutes defines “**public utility**” to include “a person, whether organized under the laws of this State or under the laws of any other state or country, now or hereafter owning or operating in this State equipment or facilities for: 1. Producing, generating, transmitting, delivering or furnishing electricity, piped gas, steam or any other like agency for the production of light, heat or power to or for the public for compensation; provided, however, that the term ‘public utility’ shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is either for (i) a person's own use and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation or (ii) a person who constructs or operates an eligible solar energy facility on the site of a customer's property and leases such facility to that customer, as provided by and subject to the limitations of Article 6B of this Chapter.”⁵⁰⁹

Moreover, “the term ‘public utility’ shall for rate-making purposes include any person producing, generating or furnishing any of the foregoing services to another person for distribution to or for the public for compensation.”⁵¹⁰

Judicial Interpretation

In 2017, the North Carolina Court of Appeals held (in a decision affirmed by the North Carolina Supreme Court) that a nonprofit was “acting as a public utility” by operating a system of solar panels on a church’s property through a power purchase agreement, whereby the solar panels remained the property of the nonprofit (NC WARN) and the church compensated NC WARN based on the amount of electricity produced.⁵¹¹

In considering the statutory definition of “public utility,” the court concluded that “there is no doubt that NC WARN owns and operates equipment (a system of solar panels) which produces electricity and that NC WARN receives compensation from the Church in exchange for the

⁵⁰⁶ N.Y. RURAL ELEC. COOP. LAW § 67 (McKinney 2021).

⁵⁰⁷ N.C. GEN. STAT. ANN. § 62-133.8 (West 2021).

⁵⁰⁸ *North Carolina Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/1246> (last updated Dec. 12, 2019).

⁵⁰⁹ N.C. GEN. STAT. ANN., *supra* n. 507, § 62-3(23)(a).

⁵¹⁰ N.C. GEN. STAT. ANN. § 62-3(23)(b).

⁵¹¹ *State ex rel. Utils. Comm'n v. N.C. Waste Awareness & Reduction Network*, 805 S.E.2d 712, 714 (N.C. Ct. App. 2017), *aff'd per curiam*, 812 S.E.2d 804 (N.C. 2018).

electricity produced by the system. The dispute here is whether NC WARN is producing electricity ‘for the public,’ therefore, making it a ‘public utility.’”⁵¹²

The court cited a 1978 North Carolina Supreme Court case, *State ex rel. Utils. Comm'n v. Simpson*, for the proposition that:

“a person might still be offering his services to the ‘public’ even when he serves only a selected class of persons,” and that “within the context of a selected class of consumers . . . whether an entity or individual is providing service to the public depends . . . on the regulatory circumstances of the case . . . [including] (1) nature of the industry sought to be regulated; (2) type of market served by the industry; (3) the kind of competition that naturally inheres in that market; and (4) effect of non-regulation or exemption from regulation of one or more persons engaged in the industry.”⁵¹³

In holding that NC WARN was providing service to the public, the court relied most heavily on the fourth *Simpson* factor, stating that “although NC WARN at the present date is only providing its services to a small number of organizations in the Greensboro area, if it were allowed to generate and sell electricity to cherry-picked non-profit organizations throughout the area or state, that activity stands to upset the balance of the marketplace. Specifically, such a stamp of approval by this Court would open the door for other organizations like NC WARN to offer similar arrangements to other classes of the public, including large commercial establishments, which would jeopardize regulation of the industry itself.”⁵¹⁴

Exception: Leasing of Eligible Solar Facility

As stated above, “the term ‘public utility’ shall not include . . . a person who constructs or operates an eligible **solar energy facility on the site of a customer's property and leases such facility to that customer**, as provided by and subject to the limitations of Article 6B of this Chapter.”⁵¹⁵

Article 6B, the “**Distributed Resources Access Act**,” declares “that as a matter of public policy it is in the interest of the State to encourage the leasing of solar energy facilities for retail customers and subscription to shared community solar energy facilities.”⁵¹⁶ This Act defines a “**solar energy facility**” as an “electric generating facility leased to a customer generator lessee that meets the following requirements:

- a. Generates electricity from a solar photovoltaic system and related equipment that uses solar energy to generate electricity.
- b. Is limited to a capacity of (i) not more than the lesser of 1,000 kilowatts (kW) or one hundred percent (100%) of contract demand if a nonresidential customer or (ii) not more than 20 kilowatts (kW) or one hundred percent (100%) of estimated electrical demand if a residential customer.

⁵¹² *Id.*

⁵¹³ *Id.* at 715 (internal citation and quotation omitted).

⁵¹⁴ *Id.* at 716.

⁵¹⁵ N.C. GEN. STAT. ANN., *supra* n. 507, § 62-3(23)(a).

⁵¹⁶ N.C. GEN. STAT. ANN. § 62-126.2.

- c. Is located on a premises owned, operated, leased, or otherwise controlled by the customer generator lessee that is also the premises served by the solar energy facility.
- d. Is interconnected and operates in parallel phase and synchronization with an offering utility authorized by the Commission to provide retail electric service to the premises and has been approved for interconnection and parallel operation by that public utility.
- e. Is intended only to offset no more than one hundred percent (100%) of the customer generator lessee's own retail electrical energy consumption at the premises.
- f. Meets all applicable safety, performance, interconnection, and reliability standards established by the Commission, the public utility, the National Electrical Code, the National Electrical Safety Code, the Institute of Electrical and Electronics Engineers, Underwriters Laboratories, the Federal Energy Regulatory Commission, and any local governing authorities.”⁵¹⁷

“**Premises**” is defined as “the building, structure, farm, or facility to which electricity is being or is to be furnished. Two or more buildings, structures, farms, or facilities that are located on one tract or contiguous tracts of land and that are utilized by one electric customer for commercial, industrial, institutional, or governmental purposes shall constitute one ‘premises,’ unless the electric service to the building, structures, farms, or facilities are separately metered and charged.”⁵¹⁸

The Act provides that “each electric public utility shall file for Commission approval revised net metering rates for electric customers that (i) own a renewable energy facility for that person's own primary use or (ii) are customer generator lessees.”⁵¹⁹ A “**customer generator lessee**” is defined as “a lessee of a solar energy facility.”⁵²⁰

The North Carolina Utilities Commission does still have authority over lessors of solar energy facilities: “no person shall engage in the leasing of a solar energy facility without having applied for and obtained a certificate authorizing those operations from the Commission. The application for a certificate of authority to engage in business as an electric generator lessor shall be made in a form prescribed by the Commission and accompanied by the fee required pursuant to G.S. 62-300(a)(16).”⁵²¹

Exception: Electric Generating Facility for Own Use

As stated above, “the term ‘public utility’ shall not include persons who construct or operate an electric generating facility, the primary purpose of which facility is . . . [for] **a person's own use** and not for the primary purpose of producing electricity, heat, or steam for sale to or for the public for compensation.”⁵²²

Exception: Service to Oneself, Employees, or Tenants

⁵¹⁷ N.C. GEN. STAT. ANN. § 62-126.3(14).

⁵¹⁸ N.C. GEN. STAT. ANN. § 62-126.3(12).

⁵¹⁹ N.C. GEN. STAT. ANN. § 62-126.4.

⁵²⁰ N.C. GEN. STAT. ANN. § 62-126.3(4).

⁵²¹ N.C. GEN. STAT. ANN. § 62-126.7(a).

⁵²² N.C. GEN. STAT. ANN. § 62-3(23)(a)(1).

“The term ‘public utility,’ except as otherwise expressly provided in this Chapter, shall not include . . . any person not otherwise a public utility who **furnishes such service or commodity only to himself, his employees or tenants when such service or commodity is not resold to or used by others**; provided, however, that any person other than a nonprofit organization serving only its members, who distributes or provides utility service to his employees or tenants by individual meters or by other coin-operated devices with a charge for metered or coin-operated utility service shall be a public utility within the definition and meaning of this Chapter with respect to the regulation of rates and provisions of service rendered through such meter or coin-operated device imposing such separate metered utility charge.”⁵²³

In a 2019 declaratory ruling, **the North Carolina Utilities Commission construed this landlord/tenant exception narrowly**, stating that:

“the intent of the legislature in adopting N.C.G.S. § 62-3(23)d was to create a narrow exception and convenient arrangement for a landlord to place and maintain retail electric service provided by a public utility, electric membership corporation, or municipality in the landlord's name, pay the deposit, pay the electric bill, and include compensation for the electric service in the amount of rent paid by the tenant . . . it is clear that the Act does not contemplate that one in the business of being a utility, furnishing service with its own facilities, is to be permitted to serve its tenants at rates and on terms that are not set and overseen by the Commission . . . Construing the landlord/tenant exception to find that any person renting property and charging for the cost of utility service in a flat rent charge without regard to whether such person is a public utility would be an expansive construction of a narrow exception and would constitute statutory interpretation in a vacuum. It would ignore the express proviso ‘any person not otherwise a public utility.’”⁵²⁴

Exception: Electric Membership Corporations

“The term ‘public utility,’ except as otherwise expressly provided in this Chapter, shall not include a municipality, an authority organized under the North Carolina Water and Sewer Authorities Act, [or an] **electric or telephone membership corporation**.”⁵²⁵

That said, the North Carolina Utilities Commission does “have the authority to regulate electric membership corporations as provided in G.S. 117-18.1.”⁵²⁶

Exception: Resale of Electricity by Campground or Marina

“The term ‘public utility’ shall not include the resale of electricity by (i) a campground operated primarily to serve transient occupants, or (ii) a marina; provided that (i) the campground or marina charges no more than the actual cost of the electricity supplied to it, (ii) the amount of electricity used by each campsite or marina slip occupant is measured by an individual metering device, (iii) the applicable rates are prominently displayed at or near each campsite or marina slip, and (iv) the campground or marina only resells electricity to campsite or marina slip occupants.”⁵²⁷

⁵²³ N.C. GEN. STAT. ANN. § 62-3(23)(d).

⁵²⁴ *In re Cube Yadkin Generation, LLC*, No. M-100, 2019 WL 4261586, at *26 (N.C. P.U.C. Sept. 4, 2019).

⁵²⁵ N.C. GEN. STAT. ANN., *supra* n. 507, § 62-3(23)(d).

⁵²⁶ N.C. GEN. STAT. ANN. § 62-53.

⁵²⁷ N.C. GEN. STAT. ANN. § 62-3(23)(h).

Exception: Electric Vehicle Charging Stations

“The term ‘public utility’ shall not include a person who uses an electric vehicle charging station to resell electricity to the public for compensation, provided that all of the following apply:

1. The reseller has procured the electricity from an electric power supplier, as defined in G.S. 62-133.8(a)(3), that is authorized to engage in the retail sale of electricity within the territory in which the electric vehicle charging service is provided.
2. All resales are exclusively for the charging of plug-in electric vehicles.
3. The charging station is immobile.
4. Utility service to an electric vehicle charging station shall be provided subject to the electric power supplier's terms and conditions.

Nothing in this sub-subdivision shall be construed to limit the ability of an electric power supplier to use electric vehicle charging stations to furnish electricity for charging electric vehicles. Any increases in customer demand or energy consumption associated with transportation electrification shall not constitute found revenues for an electric public utility.”⁵²⁸

NORTH DAKOTA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO; Southwest Power Pool |
| Renewable Portfolio Standard? | Voluntary target, 10% by 2015 ⁵²⁹ |
| Net Metering Regulations? | Yes (mandatory) ⁵³⁰ |

Definitions

Title 49 (“Public Utilities”) of the North Dakota Century Code defines “**public utility**” as “any association, person, firm, corporation, limited liability company, or agency engaged or employed in any business enumerated in this title.”⁵³¹

Chapter 49-03 (“Electric Utility Franchise”) defines “**electric public utility**” as “a privately owned supplier of electricity offering to supply or supplying electricity to the general public.”

The “general jurisdiction of the commission [**North Dakota Public Service Commission**] shall extend to and include . . . electric utilities engaged in the generation and distribution of light, heat, or power.”⁵³²

Exception: Rural Electric Cooperatives

⁵²⁸ N.C. GEN. STAT. ANN. § 62-3(23)(n).

⁵²⁹ N.D. CENT. CODE ANN. § 49-02-24 *et seq.* (West 2021).

⁵³⁰ *North Dakota Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/285> (last updated May 26, 2017).

⁵³¹ N.D. CENT. CODE ANN., *supra* n. 529, § 49-01-01(3).

⁵³² N.D. CENT. CODE ANN. § 49-02-01.

A “rural electric cooperative” is defined as “any electric cooperative organized under chapter 10-13. An electric cooperative, composed of members as prescribed by law, shall not be deemed to be an electric public utility.”⁵³³ Instead, rural electric cooperatives are governed by Title 10 (“Corporations”), Chapter 10-13 (“Electric Cooperative Corporations”).⁵³⁴

Exception: Nonprofit Utilities

While the “general jurisdiction of the commission shall extend to and include . . . electric utilities engaged in the generation and distribution of light, heat, or power,”⁵³⁵ “nothing in this chapter or in chapter 49-21 authorizes the commission to make any order affecting rates, contracts, services rendered, adequacy, or sufficiency of facilities, or the rules or regulations of any public utility owned and operated by the state or by any city, county, township, or other political subdivision of the state or a **public utility, that is not operated for profit.**”⁵³⁶

OHIO

Regulatory Environment At-a-Glance

| | |
|-------------------------------|----------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 8.5% by 2026 ⁵³⁷ |
| Net Metering Regulations? | Yes (mandatory) ⁵³⁸ |

Definitions

Title XLIX (“Public Utilities”) of the Ohio Revised Code defines “**public utility**” to include “every corporation, company, copartnership, person, or association, the lessees, trustees, or receivers of the foregoing, defined in section 4905.03 of the Revised Code, including any public utility that operates its utility not for profit,” other than a series of specific exceptions.⁵³⁹

Section 4905.03 states that “any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is . . . an **electric light company**, when engaged in the business of supplying electricity for light, heat, or power purposes to consumers within this state, including supplying electric transmission service for electricity delivered to consumers in this state, but excluding a regional transmission organization approved by the federal energy regulatory commission.”⁵⁴⁰

⁵³³ N.D. CENT. CODE ANN. § 49-03-01.5(6).

⁵³⁴ N.D. CENT. CODE ANN. § 10-13-01 *et seq.*

⁵³⁵ N.D. CENT. CODE ANN. § 49-02-01.

⁵³⁶ N.D. CENT. CODE ANN. § 49-02-01.1.

⁵³⁷ OHIO REV. CODE ANN. § 4928.64 *et seq.* (West 2021).

⁵³⁸ *Ohio Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/36> (last updated Jan. 11, 2016).

⁵³⁹ OHIO REV. CODE ANN., *supra* n. 537, § 4905.02(A).

⁵⁴⁰ OHIO REV. CODE ANN. § 4905.03.

Under Ohio’s “**Competitive Electric Retail Service**” law, an “**electric light company**” has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but excludes any self-generator to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.”⁵⁴¹

An “**electric utility**” is defined as “an electric light company that has a certified territory and is engaged on a for-profit basis either in the business of supplying a noncompetitive retail electric service in this state or in the businesses of supplying both a noncompetitive and a competitive retail electric service in this state. ‘Electric utility’ excludes a municipal electric utility or a billing and collection agent.”⁵⁴²

An “**electric services company**” is defined as “an electric light company that is engaged on a for-profit or not-for-profit basis in the business of supplying or arranging for the supply of only a competitive retail electric service in this state. ‘Electric services company’ includes a power marketer, power broker, aggregator, or independent power producer but excludes an electric cooperative, municipal electric utility, governmental aggregator, or billing and collection agent.”⁵⁴³

“**Retail electric service**” is defined as “any service involved in supplying or arranging for the supply of electricity to ultimate consumers in this state, from the point of generation to the point of consumption. For the purposes of this chapter, retail electric service includes one or more of the following ‘service components’: generation service, aggregation service, power marketing service, power brokerage service, transmission service, distribution service, ancillary service, metering service, and billing and collection service.”⁵⁴⁴

Moreover, “for the purposes of this chapter, a retail electric service component shall be deemed a **competitive retail electric service** if the service component is competitive pursuant to a declaration by a provision of the Revised Code or pursuant to an order of the public utilities commission authorized under division (A) of section 4928.04 of the Revised Code. Otherwise, the service component shall be deemed a **noncompetitive retail electric service**.”⁵⁴⁵

Exception: Self-Generators

As stated above, under Ohio’s “Competitive Electric Retail Service” law, an “**electric light company**” has the same meaning as in section 4905.03 of the Revised Code and includes an electric services company, but **excludes any self-generator** to the extent that it consumes electricity it so produces, sells that electricity for resale, or obtains electricity from a generating facility it hosts on its premises.”⁵⁴⁶

A “self-generator” is defined as “an entity in this state that owns or hosts on its premises an electric generation facility that produces electricity primarily for the owner's consumption and that may

⁵⁴¹ OHIO REV. CODE ANN. § 4928.01(A)(7).

⁵⁴² OHIO REV. CODE ANN. § 4928.01(A)(11).

⁵⁴³ OHIO REV. CODE ANN. § 4928.01(A)(9).

⁵⁴⁴ OHIO REV. CODE ANN. § 4928.01(A)(27).

⁵⁴⁵ OHIO REV. CODE ANN. § 4928.01(B).

⁵⁴⁶ OHIO REV. CODE ANN. § 4928.01(A)(7).

provide any such excess electricity to another entity, whether the facility is installed or operated by the owner or by an agent under a contract.”⁵⁴⁷

Regulatory Exception: Landlord/Tenant Arrangements

The Ohio Public Utilities Commission (PUC) has “adopted the following three-part test” to determine if a landlord is “operating as a public utility:

- 1) Does the landlord avail itself of the special benefits available to public utilities (e.g. — public franchise, public right of way, or the right of eminent domain in the construction or operation of its service)?
- (2) Does the landlord only provide the utility service to its tenants rather than the general public?
- (3) Is the provision of the utility service clearly ancillary to the landlords' primary business?”⁵⁴⁸

Based on those factors, many landlord/tenant “arrangements are not subject to this Commission's regulatory jurisdiction because these service providers are not public utilities, but private operations which do not offer services to the general public.”⁵⁴⁹

In 2002, the Ohio Supreme Court held that this PUC “decision simply affirmed the right of landlords and tenants to enter into lease agreements that appoint the landlord to secure, resell, and redistribute electric service to its tenants,” a decision not affected by passage of S.B. 3, the Ohio Electric Restructuring Act.⁵⁵⁰

Exception: Nonprofit Utilities

The definition of “public utility” excludes “an electric light company that operates its utility not for profit,” “a public utility, other than a telephone company, that is owned and operated exclusively by and solely for the utility's customers,” and “a public utility that is owned or operated by any municipal corporation.”⁵⁵¹

OKLAHOMA

Regulatory Environment At-a-Glance

| | | |
|-------------------------------|--|----------------------------|
| Retail Electric Competition? | No | |
| RTO/ISO Membership? | Southwest Power Pool | |
| Renewable Portfolio Standard? | Voluntary target, 15% by 2015 ⁵⁵² | |
| Net Metering Regulations? | Yes | (mandatory) ⁵⁵³ |

⁵⁴⁷ OHIO REV. CODE ANN. § 4928.01(A)(32).

⁵⁴⁸ *Brooks v. Toledo Edison Co.*, 169 P.U.R.4th 179 (Ohio P.U.C. May 8, 1996).

⁵⁴⁹ *Id.*

⁵⁵⁰ *FirstEnergy Corp. v. PUC.*, 775 N.E.2d 485, 487 (Ohio 2002).

⁵⁵¹ OHIO REV. CODE ANN., *supra* n. 537, § 4905.02(A).

⁵⁵² OKLA. STAT. ANN. tit. 17, § 801.1 *et seq.* (West 2021).

⁵⁵³ *Oklahoma Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/286> (last updated Nov. 30, 2018),

Definitions

Title 7 (“Corporation Commission”), Chapter 8 (“Water, Heat, Light and Power Companies” of the Oklahoma Statutes defines “**public utility**” to “include every corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, except as hereinafter provided, and except cities, towns, or other bodies politic, that now or hereafter may own, operate, or manage any plant or equipment, or any part thereof, directly or indirectly, for public use, or may supply any commodity to be furnished to the public . . . For the production, transmission, delivery or furnishing of heat or light with gas.”⁵⁵⁴

The Rural Electric Supplier Certified Territory Act, which establishes exclusive service areas for retail electric suppliers in unincorporated areas, defines “**retail electric supplier**” as “any person, firm, corporation, association or cooperative corporation, exclusive of municipal corporations or beneficial trusts thereof, engaged in the furnishing of **retail electric service**,” defined as “electric service furnished to a consumer for ultimate consumption, but does not include wholesale electric energy furnished by an electric supplier to another electric supplier for resale.”⁵⁵⁵

Judicial Interpretation: Landlord/Tenant Exception

The Oklahoma Supreme Court has held that landlords selling electric service to their tenants do not qualify as public utilities. In a 1980 case, the court considered an appeal of shopping center operators that were “selling electric service to tenants of their shopping centers as an ancillary service,” which was “not being furnished to the general public.”⁵⁵⁶ In holding that such operators were “not ‘public utilities’ as that term is used in 17 O.S.1971, s 151,” the court looked to decisions of other state supreme courts and “note[d] that it has been consistently found . . . that **landlords who only submeter electricity to their tenants are not public utilities**.”⁵⁵⁷

Notwithstanding the non-utility classification of those landlords, the court also held that “under its regulatory authority, the Commission has the power to prohibit submarketing by prohibiting the sale of electricity for resale.”⁵⁵⁸

Regulatory Interpretation: Small Power Production, Co-Generation, and Third-Party Owned Distributed Generation Facilities

In regulations, the Oklahoma Corporation Commission has **excluded qualified small power producers and cogenerators from its definition of a public utility**: “cogenerators and small power producers (producers) as defined and qualified under Section 201 of the Public Utility Regulatory Policies Act (PURPA) of 1978 . . . shall not be utilities as defined elsewhere in the Chapter.”⁵⁵⁹

In 2018, the Oklahoma Attorney General relied on that regulation in issuing an opinion that “if a third-party owned distributed generation system is a qualified small power production facility or cogeneration facility under the Public Utility Regulatory Policies Act, see 16 U.S.C. §§

⁵⁵⁴ OKLA. STAT. ANN. tit. 17, *supra* n. 552, § 151.

⁵⁵⁵ OKLA. STAT. ANN. tit. 17, § 158.22.

⁵⁵⁶ *Baker v. Pub. Serv. Co.*, 606 P.2d 567, 568 (Okla. 1980).

⁵⁵⁷ *Id.* at 571.

⁵⁵⁸ *Id.* at 572.

⁵⁵⁹ OKLA. ADMIN. CODE 165:35-29-1(a) (2021).

796(17)(C), (18)(B); 18 C.F.R. Part 292, the third-party owner would not be a ‘utility’ under Oklahoma Corporation Commission rules.”⁵⁶⁰

However, that same opinion also considered whether distributed generation systems would fall within the Rural Electric Supplier Certified Territory Act’s definition of “retail electric supplier”—and thereby be operating illegally if within the “unincorporated certified territory of another retail electric supplier.”⁵⁶¹ The A.G. concluded that **“a third-party owner of a distributed generation source that *sells electricity* to a consumer pursuant to a power purchase agreement would be a ‘retail electric supplier,’”** but “the third-party owner of a distributed generation source that *leases equipment* to a consumer would not be a ‘retail electric supplier.’”⁵⁶²

The A.G. also concluded that “third-party ownership of distributed generation systems are [sic] permissible in the incorporated areas under both a lease agreement and power purchase agreement,” but noted that “such arrangements may be subject to municipal franchise requirements” if using public streets or ways.⁵⁶³

Exception: Surplus Manufacturing Plant Electricity in Washington County

The section defining a “public utility” also provides that “in Washington County, where any corporation, association, company, individuals, their trustees, lessees, or receivers, successors or assigns, is engaged in the private business of manufacturing any products other than those hereinbefore defined, and in the manufacture of such products operate and maintain private electric or water plants for its own power and electrical energy or water used in its manufacturing plant, without the right of eminent domain and without the use of streets, highways or public property, it **may contract upon terms and prices approved by Corporation Commission the sale of a bona fide surplus of electrical energy** or water developed in such private plants to any public utility engaged in manufacturing and distributing electrical energy in Washington County, Oklahoma, **without becoming a public utility.**”⁵⁶⁴

Exception: Certain Rural Electric Cooperatives

The **Rural Electric Cooperative Act** provides that “cooperative, nonprofit, membership corporations may be organized under this act for the purpose of supplying electric energy and promoting and extending the use thereof in rural areas. Corporations organized under this act and corporations which become subject to this act in the manner hereinafter provided are hereinafter referred to as ‘cooperatives.’”⁵⁶⁵

Within the **Rural Electric Supplier Certified Territory Act**, an “**association or cooperative corporation**” is defined to “mean any association or cooperative corporation doing business under the Rural Electric Cooperative Act.”⁵⁶⁶ The Rural Electric Supplier Certified Territory Act grants the Oklahoma Corporation Commission “general supervision over all associations or cooperative

⁵⁶⁰ Att’y Gen. Op. No. 2018-5, 2018 WL 3203371, at *8 (Okla. A.G. June 26, 2018).

⁵⁶¹ *Id.* at *3.

⁵⁶² *Id.* (emphasis added).

⁵⁶³ *Id.* at *4.

⁵⁶⁴ OKLA. STAT. ANN. tit. 17, *supra* n. 552, § 151.

⁵⁶⁵ OKLA. STAT. ANN. tit. 18, § 437.1.

⁵⁶⁶ OKLA. STAT. ANN. tit. 17, § 158.22(8).

corporations as defined herein with power to fix and establish rates and to prescribe rules affecting their services, operation, and the management and conduct of their business.”⁵⁶⁷

However, “the provisions of this section shall not be applicable to generation and transmission associations or cooperative corporations, or transmission associations or cooperative corporations.”⁵⁶⁸ Moreover, “**the member-consumers of a rural electric cooperative**” can elect “**to exempt themselves from regulation by the Commission**” by following a specified voting procedure.”⁵⁶⁹ Any “cooperative which has exempted itself from Commission regulation shall file and maintain a copy of all current rates and charges with the Oklahoma Corporation Commission,” and “the Commission shall retain jurisdiction over all cooperatives who have voted to exempt themselves from Commission regulation: a. for all purposes relating to certified territories established under the Retail Electric Supplier Certified Territory Act, and b. for proceedings brought by a regulated utility relating to alleged discriminatory or anti-competitive rates established by an exempt cooperative, or relating to actions to acquire existing customers of a regulated utility using such rates.”⁵⁷⁰

OREGON

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | Partial (only for large commercial and industrial customers) |
| RTO/ISO Membership? | None (part of Northwest Power Pool) |
| Renewable Portfolio Standard? | Yes, 25% by 2025, 50% by 2040 ⁵⁷¹ |
| Net Metering Regulations? | Yes (mandatory) ⁵⁷² |

Definitions

Title 57 “(Utility Regulation)”, Chapter 757 (“Utility Regulation Generally”) of the Oregon Revised Statutes defines “**public utility**” to include “any corporation, company, individual, association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the production, transmission, delivery or furnishing of heat, light, water or power, directly or indirectly to or for the public, whether or not such plant or equipment or part thereof is wholly within any town or city” and “any corporation, company, individual or association of individuals, which is party to an oral or written agreement for the payment by a public utility, for service, managerial construction, engineering or financing fees, and having an affiliated interest with the public utility.”⁵⁷³

⁵⁶⁷ OKLA. STAT. ANN. tit. 17, § 158.27(A).

⁵⁶⁸ OKLA. STAT. ANN. tit. 17, § 158.27(A).

⁵⁶⁹ OKLA. STAT. ANN. tit. 17, § 158.27(E).

⁵⁷⁰ OKLA. STAT. ANN. tit. 17, § 158.27(E).

⁵⁷¹ OR. REV. STAT. ANN. § 469A (West 2021).

⁵⁷² *Oregon Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/39> (Dec. 12, 2019).

⁵⁷³ OR. REV. STAT. ANN., *supra* n. 571, § 757.005(1)(a).

For the purposes of Oregon’s “Direct Access Regulation” (restructuring the retail electricity market), an “**electric utility**” is defined as “an electric company or consumer-owned utility that is engaged in the business of distributing electricity to retail electricity consumers in this state.”⁵⁷⁴

An “**electric company**” is defined as “an entity engaged in the business of distributing electricity to retail electricity consumers in this state, but does not include a consumer-owned utility.”⁵⁷⁵ A “**consumer-owned utility**” is defined as “a municipal electric utility, a people’s utility district or an electric cooperative.”⁵⁷⁶ A “**retail electric customer**” is defined as “the end user of electricity for specific purposes such as heating, lighting or operating equipment, and includes all end users of electricity served through the distribution system of an electric utility on or after July 23, 1999, whether or not each end user purchases the electricity from the electric utility.”⁵⁷⁷

Exception: Electricity Service Suppliers

The definition of public utility “does not include . . . an electricity service supplier, as defined in ORS 757.600.”⁵⁷⁸ In Oregon’s deregulated electricity market, that “Direct Access Regulation” defines “electricity services” as “electricity distribution, transmission, generation or generation-related services.”⁵⁷⁹ “Electricity service supplier” is defined as “a person or entity that offers to sell electricity services available pursuant to direct access to more than one retail electricity consumer. ‘Electricity service supplier’ does not include an electric utility selling electricity to retail electricity consumers in its own service territory.”⁵⁸⁰

“A person or other entity shall not act as an electricity service supplier unless the person or entity is certified by the Public Utility Commission,” and “the commission, by rule, shall establish standards for certification of persons or other entities as electricity service suppliers in this state.”⁵⁸¹

Exception: Solar and Wind Resources

The definition of public utility “does not include . . . any corporation, company, individual or association of individuals providing heat, light or power . . . **from solar or wind resources to any number of customers.**”⁵⁸²

Exception: Service to Fewer Than 20 Residential Customers

The definition of public utility “does not include . . . any corporation, company, individual or association of individuals providing heat, light or power . . . from any energy resource to fewer than 20 customers, if it began providing service to a customer prior to July 14, 1985 [or] **from any**

⁵⁷⁴ OR. REV. STAT. ANN. § 757.600(13).

⁵⁷⁵ OR. REV. STAT. ANN. § 757.600(11).

⁵⁷⁶ OR. REV. STAT. ANN. § 757.600(4).

⁵⁷⁷ OR. REV. STAT. ANN. § 757.600(29).

⁵⁷⁸ OR. REV. STAT. ANN. § 757.005(1)(b)(H).

⁵⁷⁹ OR. REV. STAT. ANN. § 757.600(15).

⁵⁸⁰ OR. REV. STAT. ANN. § 757.600(16).

⁵⁸¹ OR. REV. STAT. ANN. § 757.649(1)(a).

⁵⁸² OR. REV. STAT. ANN. § 757.005(1)(b)(C).

energy resource to fewer than 20 residential customers so long as the corporation, company, individual or association of individuals serves only residential customers.”⁵⁸³

Exception: Cogeneration and Small Power Production Facilities

The definition of public utility “does not include . . . a qualifying facility on account of sales made under the provisions of ORS 758.505 to 758.555.”⁵⁸⁴ Those provisions define a “qualifying facility” as “a cogeneration facility or a small power production facility.”⁵⁸⁵

“**Cogeneration facility**” is defined as “a facility that:

- (a) Produces, through the sequential use of energy, electric energy and useful thermal energy including but not limited to heat or steam, used for industrial, commercial, heating or cooling purposes; and
- (b) Is more than 50 percent owned by a person who is not an electric utility, an electric holding company, an affiliated interest or any combination thereof.”⁵⁸⁶

“**Small power production facility**” is defined as “a facility that:

- (a) Produces energy primarily by the use of biomass, waste, solar energy, wind power, water power, geothermal energy or any combination thereof;
- (b) Is more than 50 percent owned by a person who is not an electric utility, an electric utility holding company, an affiliated interest or any combination thereof; and
- (c) Has a power production capacity that, together with any other small power production facility located at the same site and owned by the same person, is not greater than 80 megawatts.”⁵⁸⁷

Those provisions also reiterate that “a qualifying facility shall not become a public utility within the meaning of ORS 757.005 on account of sales made under ORS 543.610, 757.005 and 758.505 to 758.555.”⁵⁸⁸

Exception: People’s Utility Districts and Electric Cooperatives

“For purposes of ORS chapter 757, the term ‘public utility’ does not include a people's utility district organized under ORS chapter 261 or an electric cooperative organized under ORS chapter 62.”⁵⁸⁹

That said, for purposes of Oregon’s “Direct Access Regulation,” municipal utilities, people’s utility districts, and electric cooperatives all fall under the definition of “consumer-owned utility,” and thereby under the definition of “electric utility.”⁵⁹⁰

⁵⁸³ OR. REV. STAT. ANN. § 757.005(1)(b)(C).

⁵⁸⁴ OR. REV. STAT. ANN. § 757.005(1)(b)(D).

⁵⁸⁵ OR. REV. STAT. ANN. § 758.505(8).

⁵⁸⁶ OR. REV. STAT. ANN. § 758.505(2).

⁵⁸⁷ OR. REV. STAT. ANN. § 758.505(9).

⁵⁸⁸ OR. REV. STAT. ANN. § 758.555.

⁵⁸⁹ OR. REV. STAT. ANN. § 757.006.

⁵⁹⁰ OR. REV. STAT. ANN. § 757.600.

Regulatory Interpretation: Third-Party Power Purchase Agreements

In 2008, the Oregon Public Utilities Commission (PUC) addressed “whether a third-party PPA [power purchase agreement] should be considered a ‘public utility’ under state law.”⁵⁹¹

Specifically, the PUC considered the following structure:

“[A]n investor pays the up-front cost of solar generating facilities, retains ownership of the facilities, and benefits from multiple subsidies available under state and federal law. The investor sells electricity generated from the facilities to its customer, who is the owner or occupant of the premises on which the facilities are located. The customer, in turn, enters into a net-metering agreement with an electric utility, using the electricity from the solar facilities to offset some of the load it would otherwise purchase from the electric utility. This arrangement makes the development of solar power affordable for both the investor and the customer. The structure also makes solar power more affordable for certain entities that cannot themselves take advantage of tax credits, such as governmental and non-profit entities.”⁵⁹²

The PUC “conclude[d] that a customer is not required to own a net-metering facility or a portion of the facility to be considered a ‘customer-generator’ under ORS 757.300” and that “neither the statute itself nor existing Commission rules place any limitations on third-party ownership of net-metering facilities.”⁵⁹³ The PUC also determined that such a structure **would not be regulated as “an electricity service supplier,”** because “an electricity seller must provide both electricity and ancillary services in order to provide ‘direct access’ under ORS 757.600(16),” whereas this structure would “not use the utility’s distribution system” and therefore have “no need for ancillary services.”⁵⁹⁴ The PUC applied the “solar and wind resources” exception described above (ORS 757.005(1)(b)(C)(iii)) to conclude that the operator of the “solar photovoltaic facility that generates electricity using solar power” is **“not a ‘public utility’** under Oregon law.”⁵⁹⁵

PENNSYLVANIA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--------------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 18% by 2020-2021 ⁵⁹⁶ |
| Net Metering Regulations? | Yes (mandatory) ⁵⁹⁷ |

Definitions

Pennsylvania’s Public Utility Code (Title 66) defines “**public utility**” to include “any person or corporations now or hereafter owning or operating in this Commonwealth equipment or facilities

⁵⁹¹ Stiles, *supra* n. 113, at 938.

⁵⁹² *In re Honeywell Int’l, Inc. et al.*, Order No. 08-388, 2008 WL 3020892 (Or. P.U.C. July 31, 2008).

⁵⁹³ *Id.*

⁵⁹⁴ *Id.*

⁵⁹⁵ *Id.*

⁵⁹⁶ 66 PA. CONS. STAT. ANN. § 2814 (West 2021).

⁵⁹⁷ *Pennsylvania Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/65> (last updated Nov. 26, 2018).

for: (i) Producing, generating, transmitting, distributing or furnishing natural or artificial gas, electricity, or steam for the production of light, heat, or power to or for the public for compensation.”

For purposes of Chapter 28 (“Restructuring of Electric Utility Industry”), an “**electric distribution company**” is defined as “the public utility providing facilities for the jurisdictional transmission and distribution of electricity to retail customers, except building or facility owners/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related electric power services to occupants of the building or facility.”⁵⁹⁸

Judicial Interpretation

The Pennsylvania Supreme Court has held that the statutory phrase “to or for the public for compensation” implies “the population at large, not a single corporate entity.”⁵⁹⁹ That said, if an entity currently supplying “one customer only” was “engaged in activity designed to secure others,” then it could be subject to public utility regulation if it “held itself out as a public utility.”⁶⁰⁰ Similarly, the court has held that the distinction between a public entity and business entity is that the public utility holds itself out to the public generally and may not refuse any legitimate demand for service.⁶⁰¹

Specifically, the court held in a case involving “the owner of an apartment complex which proposes to render service to its tenants and to no one else” that such service would be “private in nature,” not falling under public utility regulation regardless of whether the owner’s “charge is included in a flat rental or determined through submetering.”⁶⁰²

Exception: Electric Generation Supplier Companies

In Pennsylvania’s deregulated electricity market, the term public utility “does not include . . . electric generation supplier companies, except for the limited purposes as described in sections 2809 (relating to requirements for electric generation suppliers) and 2810 (relating to revenue neutral reconciliation).”⁶⁰³

Chapter 28 (“Restructuring of Electric Utility Industry”) defines an “**electric generation supplier**” as “a person or corporation, including municipal corporations which choose to provide service outside their municipal limits except to the extent provided prior to the effective date of this chapter, brokers and marketers, aggregators or any other entities, that sells to end-use customers electricity or related services utilizing the jurisdictional transmission or distribution facilities of an electric distribution company or that purchases, brokers, arranges or markets electricity or related services for sale to end-use customers utilizing the jurisdictional transmission and distribution facilities of an electric distribution company. The term excludes building or facility

⁵⁹⁸ 66 PA. CONS. STAT. ANN., *supra* n. 596, § 2803.

⁵⁹⁹ *Bethlehem Steel Corp. v. Pub. Serv. Comm’n*, 552 Pa. 134, 142 (1998).

⁶⁰⁰ *Id.* at 143.

⁶⁰¹ *Commonwealth v. Lafferty*, 233 A.2d 256 (Pa. 1967).

⁶⁰² *Drexelbrook Assocs. v. Pub. Serv. Comm’n*, 212 A.2d 237, 239–40 (Pa. 1965).

⁶⁰³ 66 PA. CONS. STAT. ANN., *supra* n. 596, § 102.

owner/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related power services to occupants of the building or facility. The term excludes electric cooperative corporations except as provided in 15 Pa.C.S. Ch. 74 (relating to generation choice for customers of electric cooperatives).”⁶⁰⁴

Exception: Service to Oneself or Building Occupants

The term public utility “does not include . . . any person or corporation, not otherwise a public utility, who or which furnishes service only to himself or itself.”⁶⁰⁵

The term also “does not include . . . any building or facility owner/operators who hold ownership over and manage the internal distribution system serving such building or facility and who supply electric power and other related electric power services to occupants of the building or facility.”⁶⁰⁶ Similarly, for purposes of Chapter 28 (“Restructuring of Electric Utility Industry”), the definition of an “electric distribution company” does not include “building or facility owners/operators that manage the internal distribution system serving such building or facility and that supply electric power and other related electric power services to occupants of the building or facility.”⁶⁰⁷

Exception: Cooperative Associations

Pennsylvania’s Public Utility Code provides that nonprofit cooperative associations – without limitation – are expressly excluded from the statute’s public utility definition, which “**does not include . . . any bona fide cooperative association** which furnishes service only to its stockholders or members on a nonprofit basis.”⁶⁰⁸ Pennsylvania’s statutes provide both general provisions for forming for profit and nonprofit cooperative corporations⁶⁰⁹ and separate specific provisions for rural electric cooperatives.⁶¹⁰ The latter statute also includes a specific exclusion from utility regulation.⁶¹¹ The broad provision of the Public Utility Code which excludes cooperatives from its scope does not appear to be limited to non-profit corporations formed under the rural electric co-operative statute.

RHODE ISLAND

Regulatory Environment At-a-Glance

| | |
|-------------------------------|-----------------------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 38.5% by 2035 ⁶¹² |

⁶⁰⁴ 66 PA. CONS. STAT. ANN. § 2803.

⁶⁰⁵ 66 PA. CONS. STAT. ANN. § 102.

⁶⁰⁶ 66 PA. CONS. STAT. ANN. § 102.

⁶⁰⁷ 66 PA. CONS. STAT. ANN. § 2803.

⁶⁰⁸ 66 PA. CONS. STAT. ANN. § 102.

⁶⁰⁹ 15 PA. CONS. STAT. ANN. § 7101 *et seq.*

⁶¹⁰ 15 PA. CONS. STAT. ANN. § 7301 *et seq.*

⁶¹¹ 15 PA. CONS. STAT. ANN. § 7335.

⁶¹² R.I. GEN. LAWS ANN. §§ 39-26-1 *et seq.* (West 2021).

Net Metering Regulations? Yes (mandatory)⁶¹³

Definitions

Title 39 (“Public Utilities and Carriers”) of the General Laws of Rhode Island vests “in the public utilities commission and the division of public utilities and carriers the exclusive power and authority to supervise, regulate, and make orders governing the conduct of companies **offering to the public in intrastate commerce energy**, communication, and transportation services and water supplies.”⁶¹⁴

Title 39 defines “**public utility**” to include “every company that is an electric distribution company.”⁶¹⁵ An “**electric distribution company**” is defined as “a company engaging in the distribution of electricity or owning, operating, or controlling distribution facilities and shall be a public utility pursuant to § 39-1-2(20).”⁶¹⁶ “**Distribution facility**” is defined as any “plant or equipment used for the distribution of electricity and which is not a transmission facility.”⁶¹⁷

For purposes of Chapter 20 (“Ownership of Electric Generating Facilities”), an “electric utility” is defined as “any individual, partnership, corporation, association, or entity, or subdivision thereof, private, governmental or other, wherever resident or organized, primarily engaged in the generation and sale or purchase and sale of electricity, or the transmission thereof, for ultimate consumption by the public.”⁶¹⁸

Exception: Nonregulated Power Producers

In Rhode Island’s deregulated electricity market, a “**nonregulated power producer**” is defined as “a company engaging in the business of producing, manufacturing, generating, buying, aggregating, marketing or brokering electricity for sale at wholesale or for retail sale to the public; provided however, that companies which negotiate the purchase of electric generation services on behalf of customers and do not engage in the purchase and resale of electric generation services shall be excluded from this definition. A nonregulated power producer **shall not be subject to regulation as a public utility except as specifically provided** in the general laws.”⁶¹⁹

For example, the Rhode Island Public Utilities Commission “shall establish regulations applicable to nonregulated power producers that are selling electricity in this state that are necessary to meet (directly or through contract) the operating and reliability standards of the regional power pool.”⁶²⁰

Moreover, the “Nonregulated Power Producer Consumer Bill of Rights” (Chapter 26.7) requires nonregulated power producers to provide consumers with certain information and meet certain consumer protection standards.⁶²¹

⁶¹³ *Rhode Island Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/287> (last updated Nov. 16, 2018).

⁶¹⁴ R.I. GEN. LAWS ANN., *supra* n. 612, § 39-1-1(c).

⁶¹⁵ R.I. GEN. LAWS ANN. § 39-1-2(20).

⁶¹⁶ R.I. GEN. LAWS ANN. § 39-1-2(12).

⁶¹⁷ R.I. GEN. LAWS ANN. § 39-1-2(10).

⁶¹⁸ R.I. GEN. LAWS ANN. § 39-20-2(5).

⁶¹⁹ R.I. GEN. LAWS ANN. § 39-1-2(19).

⁶²⁰ R.I. GEN. LAWS ANN. § 39-1-27.1(b)(1).

⁶²¹ R.I. GEN. LAWS ANN. § 39-26.7-6.

Exception: Third-Party Financers of Net Metering Systems

Chapter 26.4 (“Net Metering”) defines a “**third-party, net-metering financing arrangement**” as “the financing of eligible net-metering systems or community remote-net-metering systems through lease arrangements or power/credit purchase agreements between a third party and renewable self-generator, except for those entities under a public entity net-metering finance arrangement. A third party engaged in providing financing arrangements related to such net-metering systems with a public or private entity **is not a public utility** as defined in § 39-1-2.”

A “**renewable self-generator**” means “an electric distribution service customer of record for the eligible net-metering system or community remote-net-metering system at the eligible net-metering-system site which system is primarily designed to produce electrical energy for consumption by that same customer at its distribution service account(s), and/or, with respect to community remote-net-metering systems, electrical energy which generates net-metering credits to be applied to offset the eligible credit-recipient account usage.”⁶²²

A “**third party**” means “any person or entity, other than the renewable self-generator, who or that owns or operates the eligible net-metering system or community remote-net-metering system on the eligible net-metering-system site for the benefit of the renewable self-generator.”⁶²³

This chapter defines an “**eligible net-metering system**” as:

“a facility generating electricity using an eligible net-metering resource that is reasonably designed and sized to annually produce electricity in an amount that is equal to, or less than, the renewable self-generator's usage at the eligible net-metering-system site measured by the three-year (3) average annual consumption of energy over the previous three (3) years at the electric-distribution account(s) located at the eligible net-metering-system site. A projected annual consumption of energy may be used until the actual three-year (3) average annual consumption of energy over the previous three (3) years at the electric-distribution account(s) located at the eligible net-metering-system site becomes available for use in determining eligibility of the generating system. The eligible net-metering system may be owned by the same entity that is the customer of record on the net-metered accounts or may be owned by a third party that is not the customer of record at the eligible net-metering system site and which may offer a third-party, net-metering financing arrangement or net-metering financing arrangement, as applicable. Notwithstanding any other provisions of this chapter, any eligible net-metering resource: (i) Owned by a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative or (ii) Owned and operated by a renewable-generation developer on behalf of a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative through net-metering financing arrangement shall be treated as an eligible net-metering system and all accounts designated by the public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative for net metering shall be treated as accounts eligible for net metering within an eligible net-metering-system site.”⁶²⁴

⁶²² R.I. GEN. LAWS ANN. § 39-1-2(20).

⁶²³ R.I. GEN. LAWS ANN. § 39-1-2(21).

⁶²⁴ R.I. GEN. LAWS ANN. § 39-26.4-2(5).

An “**eligible net-metering resource**” means an “eligible renewable-energy resource, as defined in § 39-26-5 including biogas created as a result of anaerobic digestion, but, specifically excluding all other listed eligible biomass fuels.”⁶²⁵

An “**eligible net-metering-system site**” means:

“the site where the eligible net-metering system or community remote net-metering system is located or is part of the same campus or complex of sites contiguous to one another and the site where the eligible net-metering system or community remote-net-metering system is located or a farm in which the eligible net-metering system or community remote-net-metering system is located. Except for an eligible net-metering system owned by or operated on behalf of a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative through a net-metering financing arrangement, the purpose of this definition is to reasonably assure that energy generated by the eligible net-metering system is consumed by net-metered electric service account(s) that are actually located in the same geographical location as the eligible net-metering system. All energy generated from any eligible net-metering system is, and will be considered, consumed at the meter where the renewable-energy resource is interconnected for valuation purposes. Except for an eligible net-metering system owned by, or operated on behalf of, a public entity, educational institution, hospital, nonprofit, or multi-municipal collaborative through a net-metering financing arrangement, or except for a community remote-net-metering system, all of the net-metered accounts at the eligible net-metering-system site must be the accounts of the same customer of record and customers are not permitted to enter into agreements or arrangements to change the name on accounts for the purpose of artificially expanding the eligible net-metering-system site to contiguous sites in an attempt to avoid this restriction. However, a property owner may change the nature of the metered service at the accounts at the site to be master metered in the owner's name, or become the customer of record for each of the accounts, provided that the owner becoming the customer of record actually owns the property at which the account is located. As long as the net-metered accounts meet the requirements set forth in this definition, there is no limit on the number of accounts that may be net metered within the eligible net-metering-system site.”⁶²⁶

A “**community remote-net-metering system**” is defined as:

“a facility generating electricity using an eligible net-metering resource that allocates net-metering credits to a minimum of one account for system associated with low or moderate housing eligible credit recipients, or three (3) eligible credit-recipient customer accounts, provided that no more than fifty percent (50%) of the credits produced by the system are allocated to one eligible credit recipient, and provided further at least fifty percent (50%) of the credits produced by the system are allocated to the remaining eligible credit recipients in an amount not to exceed that which is produced annually by twenty-five kilowatt (25 kW) AC capacity. The community remote-net-metering system may transfer credits to eligible credit recipients in an amount that is equal to or less than the sum of the usage of the eligible credit recipient accounts measured by the three-year (3) average annual consumption of energy over the previous three (3) years. A projected annual

⁶²⁵ R.I. GEN. LAWS ANN. § 39-26.4-2(4).

⁶²⁶ R.I. GEN. LAWS ANN. § 39-26.4-2(6).

consumption of energy may be used until the actual three-year (3) average annual consumption of energy over the previous three (3) years at the eligible credit recipient accounts becomes available for use in determining eligibility of the generating system. The community remote-net-metering system may be owned by the same entity that is the customer of record on the net-metered account or may be owned by a third party.”⁶²⁷

Exception: Adjacent Sites Providing Electricity to State-Owned Facilities

“[T]he term ‘public utility’ shall not include any company . . . producing and/or distributing thermal energy and/or electricity to a state owned facility from a plant located on an adjacent site regardless of whether steam lines cross a public highway.”⁶²⁸

SOUTH CAROLINA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | None |
| Renewable Portfolio Standard? | Voluntary target, 2% by 2021 ⁶²⁹ |
| Net Metering Regulations? | Yes (mandatory) ⁶³⁰ |

Definitions

Title 58, Chapter 27 (“Electric Utilities and Electric Cooperatives”) of the Code of Laws of South Carolina defines “**electric utility**” to include “persons and corporations, their lessees, assignees, trustees, receivers, or other successors in interest owning or operating in this State equipment or facilities for generating, transmitting, delivering, or furnishing electricity for street, railway, or other public uses or for the production of light, heat, or power to or for the public for compensation; but it shall not include an electric cooperative or a consolidated political subdivision and shall not include a person, corporation, or municipality furnishing electricity only to himself or itself, their residents, employees, or tenants when such current is not resold or used by others.”⁶³¹

The term “**public**” is defined as “the public generally or any limited portion of the public, including a person, corporation, or municipality.”⁶³²

An “**electric supplier**” is defined as “any electrical utility other than a municipality, any electric cooperative other than an electric cooperative engaged primarily in the business of furnishing electricity to other electric cooperatives for resale to other electric consumers, and any consolidated political subdivision owning or operating an electric plant or system for furnishing of electricity to the public for compensation.”⁶³³

⁶²⁷ R.I. GEN. LAWS ANN. § 39-26.4-2(1).

⁶²⁸ R.I. GEN. LAWS ANN. § 39-1-2(20).

⁶²⁹ S.C. CODE ANN. § 58-39-130 (2021).

⁶³⁰ *South Carolina Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/3041> (last updated Jan. 25, 2016).

⁶³¹ S.C. CODE ANN., *supra* n. 629, § 58-27-10(7).

⁶³² S.C. CODE ANN. § 58-27-10(6).

⁶³³ S.C. CODE ANN. § 58-27-610(1).

Exception: Service to Oneself, Residents, Employees, or Tenants

As stated above, the definition of “electric utility” does “not include a person, corporation, or municipality furnishing electricity only to himself or itself, their residents, employees, or tenants when such current is not resold or used by others.”⁶³⁴

Exception: Electric Cooperatives

As stated above, the definition of “electric utility” does “not include an electric cooperative.”⁶³⁵ Title 33, Chapter 49 (“Electric Cooperatives”) provides that “cooperative nonprofit membership corporations may be organized under this chapter for the purpose of supplying electric energy and promoting and extending the use thereof.”⁶³⁶

As noted by the South Carolina Supreme Court in 2010, after the most recent 2004 amendment of the **Electric Cooperative Act**:

[The Act] provides that an electric cooperative has the authority to provide electricity only in rural areas. S.C.Code Ann. § 33–49–250. Section 33–49–250 provides two exceptions: the “annexation exception” and the “principal supplier” exception. The annexation exception states that if a cooperative is providing electricity to premises in an area that is later annexed by a municipality, that cooperative may “continue serving all premises then being served.” S.C.Code Ann. § 33–49–250(1). The principal supplier exception states that if a cooperative is serving a city or town of less than 2,500 persons, it will continue to have the right to serve that area even if the population later exceeds 2,500 persons.⁶³⁷

Exception: Lease of Renewable Electric Generation Facility

Enacted in 2014 and amended in 2019, South Carolina’s “Lease of Renewable Electric Generation Facilities Program” provides that:

“An entity that owns a renewable electric generation facility, located on a premises or residence owned or leased by an eligible customer-generator lessee to serve the electric energy requirements of that particular premises or residence or to enable the customer-generator lessee to obtain a credit for or engage in the sale of energy from the renewable electric generation facility to that customer-generator lessee's retail electric provider or its designee, shall be permitted to lease such facility exclusively to a customer-generator lessee under a lease, provided that the entity complies with the terms, conditions, and restrictions set forth within this article and holds a valid certificate issued by the Office of Regulatory Staff. **An entity owning renewable electric generation facilities in compliance with the terms of this article shall not be considered an ‘electrical utility’** under Section 58-27-10 if the renewable electric generation facilities are only made available to a customer-generator lessee for the customer-generator lessee's use on the customer-generator lessee's premises or the residence where the renewable electric

⁶³⁴ S.C. CODE ANN. § 58-27-10(7).

⁶³⁵ S.C. CODE ANN. § 58-27-10(7).

⁶³⁶ S.C. CODE ANN. § 33-49-210.

⁶³⁷ *City of Newberry v. Newberry Elec. Co-op., Inc.*, 692 S.E.2d 510, 512 (S.C. 2010).

generation facilities are located, or for the sale of energy to that customer-generator lessee's retail electric provider or its designee, and pursuant to a lease.”⁶³⁸

A “**customer-generator lessee**” here “means the lessee of a renewable electric generation facility which: (1) generates electricity from a renewable energy resource; (2) has an electrical generating system with a capacity of: (a) not more than the lesser of one thousand kilowatts (1,000 kW AC) or one hundred percent of contract demand if a nonresidential customer; or (b) not more than twenty kilowatts (20 kW AC) if a residential customer; (3) is located on a premises or residence owned, operated, leased, or otherwise controlled by the customer-generator lessee that is also the premises or residence served by the renewable electric generation facility” and meets other requirements regarding use of electricity and safety, performance, interconnection, and reliability.⁶³⁹

These provisions “shall not be construed as allowing any sales of electricity from renewable electric generation facilities directly to any customer of any retail electric provider by the owner . . . The electrical output from any renewable electric generation unit leased pursuant to this program shall be the sole and exclusive property of the customer-generator lessee.”⁶⁴⁰

Moreover, “to comply with the terms of this article, each customer-generator lessee renewable electric generation facility shall serve only one premises or residence, and shall not serve multiple customer-generator lessees or multiple premises or residences.”⁶⁴¹ Any “owner of a renewable electric generation facility subject to any lease entered into outside of this program shall be considered an ‘electrical utility’ under Section 58-27-10.”⁶⁴²

Finally, these provisions “related to leased generation facilities shall not apply to:

- (a) facilities serving a single premises that are not interconnected with a retail electric provider;
- (b) facilities owned by customer-generators but financed by a third party; or
- (c) facilities used exclusively for standby emergency service or participation in an approved standby generation program operated by a retail electric provider.”⁶⁴³

(2) The commission may promulgate regulations consistent with this section interpreting the scope of these exceptions as to electrical utilities.

SOUTH DAKOTA

Regulatory Environment At-a-Glance

| | |
|------------------------------|--------------------|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | MISO; South Dakota |

⁶³⁸ S.C. CODE ANN., *supra* n. 629, § 58-27-2610(A).

⁶³⁹ S.C. CODE ANN. § 58-27-2600(A).

⁶⁴⁰ S.C. CODE ANN. § 58-27-2610(E).

⁶⁴¹ S.C. CODE ANN. § 58-27-2610(C).

⁶⁴² S.C. CODE ANN. § 58-27-2610(D).

⁶⁴³ S.C. CODE ANN. § 58-27-2610(H)(1).

Renewable Portfolio Standard? Voluntary target, 10% by 2015⁶⁴⁴
Net Metering Regulations? No

Definitions

Title 49, Chapter 49-34a (“Gas and Electric Utilities Regulation” of the South Dakota Codified Laws defines “**public utility**” as “any person operating, maintaining, or controlling in this state equipment or facilities for the purpose of providing gas or electric service to or for the public in whole or in part, in this state. However, the term does not apply to an electric or gas utility owned by a municipality, political subdivision, or agency of the State of South Dakota or any other state or a rural electric cooperative as defined in § 47-21-1 for the purposes of §§ 49-34A-2 to 49-34A-4, inclusive, §§ 49-34A-6 to 49-34A-41, inclusive, and § 49-34A-62.”⁶⁴⁵

This chapter also defines “**electric utility**” as “any person operating, maintaining, or controlling in this state, equipment or facilities for providing electric service to or for the public including facilities owned by a municipality.”⁶⁴⁶

“**Electric service**” is defined as “electric service furnished to a customer for ultimate consumption, but not including wholesale electric service furnished by an electric utility to another electric utility for resale.”⁶⁴⁷

Exception: Rural Electric Cooperatives

As stated above, the term “public utility . . . does not apply to . . . a rural electric cooperative as defined in § 47-21-1 for the purposes of §§ 49-34A-2 to 49-34A-4, inclusive, §§ 49-34A-6 to 49-34A-41, inclusive, and § 49-34A-62.”⁶⁴⁸

The South Dakota Public Utilities Commission therefore “has authority over [a rural electric cooperative] for determining whether its service is adequate or to make territorial assignments,” but “it has no authority over [a rural electric cooperative] with regard to rates.”⁶⁴⁹

Section 47-21-1 defines “**cooperative**” as “any corporation organized under this chapter or which becomes subject to this chapter in the manner hereinafter provided,” and “**rural area**” as “any area certified to a rural electric cooperative under the provisions of chapter 49-34A, or an area in which it is permitted to serve under the provisions of chapter 49-34A.”⁶⁵⁰

Such cooperatives “may generate, manufacture, purchase, acquire, accumulate, and transmit electric energy, and may distribute, sell, supply, and dispose of electric energy to its members, to governmental agencies and political subdivisions, and to other persons.”⁶⁵¹

⁶⁴⁴ S.D. CODIFIED LAWS §§ 49-34A-94, 49-34A-101 *et seq.* (West 2021).

⁶⁴⁵ S.D. CODIFIED LAWS § 49-34A-1(12).

⁶⁴⁶ S.D. CODIFIED LAWS § 49-34A-1(7).

⁶⁴⁷ S.D. CODIFIED LAWS § 49-34A-1(6).

⁶⁴⁸ S.D. CODIFIED LAWS § 49-34A-1(12).

⁶⁴⁹ *In re: Nw. Pub. Serv. Co.*, 560 N.W.2d 925, 929 (S.D. 1997) (citing S.D. CODIFIED LAWS, *supra* n. 644, § 49-34A-6 to 49-34A-26, inclusive).

⁶⁵⁰ S.D. CODIFIED LAWS, *supra* n. 644, § 47-21-1.

⁶⁵¹ S.D. CODIFIED LAWS § 47-21-62.

TENNESSEE

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | PJM Interconnection (only part of state) |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | No |

Definitions

Title 65, Chapter 64 (“Regulation of Public Utilities by Commission”) of the Tennessee Code defines “**public utility**” to include “every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state . . . gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof.”⁶⁵²

For purposes of the “Geographic Territories of Electric Utility Systems” law, enacted in 1989 to “require that electric service to a particular geographic area be provided by a single electric system,”⁶⁵³ a “**public electric system**” is defined to include “electric and community service cooperatives, municipal electric systems, and every individual, co-partnership, association, corporation or joint stock company, their lessees, trustees or receivers, appointed by any court whatsoever, that own, operate, manage, or control any electric power system, plant, or equipment within Tennessee affected by and dedicated to public use.”⁶⁵⁴

Judicial and Regulatory Interpretation

The Tennessee Supreme Court has found it “abundantly clear” that “the terms ‘public use’ and ‘public utility’ are synonyms.”⁶⁵⁵ Accordingly, in 2017 the Tennessee Attorney General issued an opinion concluding that the same “public use” analysis would apply equally to the questions of whether “a **solar electricity generating facility that provides power directly and exclusively to owners and/or tenants located on the same or adjacent premises**” was a “public electric system” and whether it was a “public utility.”⁶⁵⁶

That opinion stated that:

Whether an entity should be deemed to have dedicated its property to public use is a question that turns on the specific facts of each particular case. Just because its services are available to the public does not necessarily make the service provider a public utility. Similarly, an entity that sells all its product or services under contract to public utilities (which in turn sell that product to consumers) is not by that fact alone a public utility. On the other hand, the number of customers is not controlling; a facility is not rendered non-public just because a limited number of customers may have occasion to buy its services .

⁶⁵² TENN. CODE ANN. § 65-4-101(6)(A) (West 2021).

⁶⁵³ TENN. CODE ANN. § 65-34-101(2).

⁶⁵⁴ TENN. CODE ANN. § 65-34-102(5).

⁶⁵⁵ *Memphis Natural Gas Co. v. McCanless*, 194 S.W.2d 476, 479-80 (Tenn. 1946).

⁶⁵⁶ Tenn. Op. Att’y Gen. No. 17-25 (Apr. 10, 2017).

. . the question is whether the utility holds itself out (expressly or implicitly) as engaged in supplying its product or services to the public in general or to a limited portion of the public, as opposed to holding itself out as serving or prepared to serve only particular individuals . . . The fact that it provides power ‘directly and exclusively to owners and/or tenants located on the same or adjacent premises’ is just one of many factors to be considered but is not alone determinative of whether or not its property is affected by and dedicated to public use.”⁶⁵⁷

Exception: Rural Electric Cooperatives

The term “public utility . . . shall not be construed to include the following nonutilities,” including “(v) Any cooperative organization not organized or doing business for profit, cooperative association not organized or doing business for profit, or cooperative corporation not organized or doing business for profit. For purposes of this subdivision (6)(A)(v), ‘cooperative’ shall mean only those nonprofit cooperative entities organized under or otherwise subject to the **Rural Electric and Community Services Cooperative Act**, compiled in chapter 25, part 2 of this title, or the Telephone Cooperative Act, compiled in chapter 29 of this title.”⁶⁵⁸

The Rural Electric and Community Services Cooperative Act defines “**cooperative**” or “cooperatives” as “one (1) or more nonprofit cooperative membership corporations heretofore or hereafter organized under or otherwise subject to this chapter.”⁶⁵⁹ Such cooperatives must have a primary purpose of “supplying or furnishing at wholesale or retail, electric power and energy services to, and promoting the efficient use and conservation thereof by, one (1) or more patrons” or of “supplying, furnishing or exchanging wholesale power and energy to or with any other entity.”⁶⁶⁰

TEXAS

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | Yes |
| RTO/ISO Membership? | ERCOT; Southwest Power Pool |
| Renewable Portfolio Standard? | Yes, goal of 10,000 MW by 2025 achieved ⁶⁶¹ |
| Net Metering Regulations? | Yes (voluntary) ⁶⁶² |

⁶⁵⁷ *Id.*

⁶⁵⁸ TENN. CODE ANN., *supra* n. 652, § 65-4-101(6)(A).

⁶⁵⁹ TENN. CODE ANN. § 65-25-102(4).

⁶⁶⁰ TENN. CODE ANN. § 65-25-104(a)(1).

⁶⁶¹ TEX. UTIL. CODE ANN. § 39.904 (West 2021).

⁶⁶² *Austin Energy Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/327> (last updated Apr. 25, 2015); *Green Mountain Energy Renewable Rewards Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/4176> (last updated Apr. 20, 2015); *City of Brenham Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/4587> (last updated Apr. 27, 2015); *El Paso Electric Company Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/5545> (last updated Nov. 30, 2018); *San Antonio City Public Service Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/5547> (last updated Apr. 27, 2015).

Definitions

The Texas Public Utility Regulatory Act defines a “**public utility**” or “utility” to include “an electric utility, as that term is defined by Section 31.002.”⁶⁶³

Section 31.002 defines “**electric utility**” to mean “a person or river authority that owns or operates for compensation in this state equipment or facilities to produce, generate, transmit, distribute, sell, or furnish electricity in this state. The term includes a lessee, trustee, or receiver of an electric utility and a recreational vehicle park owner who does not comply with Subchapter C, Chapter 184,¹ with regard to the metered sale of electricity at the recreational vehicle park,” with a list of specific exceptions described in relevant part below.⁶⁶⁴

Exception: Qualifying Cogenerators and Small Power Producers

The term “electricity utility . . . does not include . . . (B) a qualifying facility.”⁶⁶⁵ A “**qualifying facility**” is defined as “a qualifying cogenerator or qualifying small power producer.”⁶⁶⁶

The terms “**qualifying cogenerator**” and “**qualifying small power producer**” have the meanings assigned those terms by 16 U.S.C. Sections 796(18)(C) and 796(17)(D). A qualifying cogenerator that provides electricity to a purchaser of the cogenerator’s thermal output is not for that reason considered to be a retail electric provider or a power generation company.”⁶⁶⁷

Exception: Power Generation Companies

The term “electricity utility . . . does not include . . . (C) a power generation company.”⁶⁶⁸ A “**power generation company**” is defined as “a person, including a person who owns or operates a distributed natural gas generation facility, that:

(A) generates electricity that is intended to be sold at wholesale, including the owner or operator of electric energy storage equipment or facilities to which Subchapter E, Chapter 35, applies;

(B) does not own a transmission or distribution facility in this state other than an essential interconnecting facility, a facility not dedicated to public use, or a facility otherwise excluded from the definition of “electric utility” under this section; and

(C) does not have a certificated service area, although its affiliated electric utility or transmission and distribution utility may have a certificated service area.”⁶⁶⁹

Exception: Wholesale Generators

The term “electric utility . . . does not include . . . (D) an exempt wholesale generator.”⁶⁷⁰ An “**exempt wholesale generator**” is defined as “a person who is engaged directly or indirectly

⁶⁶³ TEX. UTIL. CODE ANN., *supra* n. 661, § 11.004.

⁶⁶⁴ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁶⁵ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁶⁶ TEX. UTIL. CODE ANN. § 31.002(14).

⁶⁶⁷ TEX. UTIL. CODE ANN. § 31.002(13).

⁶⁶⁸ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁶⁹ TEX. UTIL. CODE ANN. § 31.002(10).

⁶⁷⁰ TEX. UTIL. CODE ANN. § 31.002(6).

through one or more affiliates exclusively in the business of owning or operating all or part of a facility for generating electric energy and selling electric energy at wholesale and who:

(A) does not own a facility for the transmission of electricity, other than an essential interconnecting transmission facility necessary to effect a sale of electric energy at wholesale; and

(B) has:

(i) applied to the Federal Energy Regulatory Commission for a determination under 15 U.S.C. Section 79z-5a; or

(ii) registered as an exempt wholesale generator as required by Section 35.032.”⁶⁷¹

Exception: Power Marketers

The term “electric utility . . . does not include . . . (E) a power marketer.”⁶⁷² A “**power marketer**” is defined as “a person who:

(A) becomes an owner of electric energy in this state for the purpose of selling the electric energy at wholesale;

(B) does not own generation, transmission, or distribution facilities in this state;

(C) does not have a certificated service area; and

(D) has:

(i) been granted authority by the Federal Energy Regulatory Commission to sell electric energy at market-based rates; or

(ii) registered as a power marketer under Section 35.032.”⁶⁷³

Exception: Certain River Authority Affiliates

The term “electric utility . . . does not include . . . (F) a **corporation described by Section 32.053** to the extent the corporation sells electricity exclusively at wholesale and not to the ultimate consumer.”⁶⁷⁴

Section 32.053 “applies only to a corporation that: (1) sells electricity exclusively at wholesale, and not to ultimate consumers; (2) is authorized by Chapter 152, Water Code; and (3) acts on behalf of a river authority.”⁶⁷⁵

Exception: Electric Cooperatives

The term “electric utility . . . does not include . . . (G) an electric cooperative.”⁶⁷⁶

⁶⁷¹ TEX. UTIL. CODE ANN. § 31.002(7).

⁶⁷² TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁷³ TEX. UTIL. CODE ANN. § 31.002(11).

⁶⁷⁴ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁷⁵ TEX. UTIL. CODE ANN. § 32.053(a).

⁶⁷⁶ TEX. UTIL. CODE ANN. § 31.002(6).

An “**electric cooperative**” is defined as “(A) a corporation organized under Chapter 161 or a predecessor statute to Chapter 161 and operating under that chapter; or (B) a corporation organized as an electric cooperative in a state other than Texas that has obtained a certificate of authority to conduct affairs in the State of Texas.”⁶⁷⁷

Chapter 161 provides that “electric cooperative may engage in rural electrification by:

(1) furnishing electric energy to any person for delivery to a dwelling, structure, apparatus, or point of delivery that is:

(A) located in a **rural area**; and

(B) not receiving central station service, even if the person is receiving central station service at other points of delivery;

(2) furnishing electric energy to a person desiring that service in a municipality or unincorporated city or town, rural or nonrural, served by the cooperative and in which central station service was not available at the time the cooperative began furnishing electric energy to the residents of the municipality or unincorporated city or town;

(3) assisting in the wiring of the premises of persons in rural areas or the acquisition, supply, or installation of electrical or plumbing equipment in those premises; or

(4) furnishing electric energy, wiring facilities, or electrical or plumbing equipment or service to another electric cooperative or to the members of another electric cooperative.”⁶⁷⁸

“**Rural area**” is defined as “an area, including both farm and nonfarm population of the area, that is not located in:

(A) a municipality having a population greater than 1,500; or

(B) an unincorporated city, town, village, or borough having a population greater than 1,500.”⁶⁷⁹

Exception: Retail Electric Providers

The term “electric utility . . . does not include . . . (H) a retail electric provider.”⁶⁸⁰ A “**retail electric provider**” is defined as “a person that sells electric energy to retail customers in this state. A retail electric provider may not own or operate generation assets.”⁶⁸¹

Chapter 39, “Restructuring of Electric Utility Industry,” provides a process for certification of retail electric providers by the Texas Public Utility Commission.⁶⁸²

Exception: Service to Oneself, Employees, or Tenants

⁶⁷⁷ TEX. UTIL. CODE ANN. § 11.003(9).

⁶⁷⁸ TEX. UTIL. CODE ANN. § 161.122.

⁶⁷⁹ TEX. UTIL. CODE ANN. § 161.002(7).

⁶⁸⁰ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁸¹ TEX. UTIL. CODE ANN. § 31.002(17).

⁶⁸² TEX. UTIL. CODE ANN. § 39.352.

The term “electric utility . . . does not include . . . (J) a person not otherwise an electric utility who: (i) furnishes an electric service or commodity **only to itself, its employees, or its tenants as an incident of employment or tenancy**, if that service or commodity is not resold to or used by others.”⁶⁸³

Exception: Sale to Electric Utility

The term “electric utility . . . does not include . . . (J) a person not otherwise an electric utility who . . . (ii) owns or operates in this state equipment or facilities to **produce, generate, transmit, distribute, sell, or furnish electric energy to an electric utility**, if the equipment or facilities are used primarily to produce and generate electric energy for consumption by that person.”⁶⁸⁴

Exception: Recreational Vehicle Parks

The term “electric utility . . . does not include . . . (J) a person not otherwise an electric utility who . . . (iii) owns or operates in this state a **recreational vehicle park that provides metered electric service** in accordance with Subchapter C, Chapter 184.”⁶⁸⁵

Exception: Distributed Renewable Generation Less Than Own Consumption Amount

One relevant provision of Chapter 39, “Restructuring of Electric Utility Industry,” is that “neither a **retail electric customer that uses distributed renewable generation** nor the owner of the distributed renewable generation that the retail electric customer uses is an electric utility, power generation company, or retail electric provider for the purposes of this title and neither is required to register with or be certified by the commission if at the time distributed renewable generation is installed, the estimated annual amount of electricity to be produced by the distributed renewable generation is less than or equal to the retail electric customer's estimated annual electricity consumption.”⁶⁸⁶

“**Distributed renewable generation**” is defined as “electric generation with a capacity of not more than 2,000 kilowatts provided by a renewable energy technology, as defined by Section 39.904, that is installed on a retail electric customer's side of the meter.”⁶⁸⁷

“For distributed renewable generation owners in areas in which customer choice has been introduced, the distributed renewable generation owner must sell the owner’s surplus electricity produced to the retail electric provider that serves the distributed renewable generation owner's load at a value agreed to between the distributed renewable generation owner and the provider that serves the owner's load . . .”⁶⁸⁸

UTAH

Regulatory Environment At-a-Glance

| | |
|------------------------------|----|
| Retail Electric Competition? | No |
|------------------------------|----|

⁶⁸³ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁸⁴ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁸⁵ TEX. UTIL. CODE ANN. § 31.002(6).

⁶⁸⁶ TEX. UTIL. CODE ANN. § 39.916(k).

⁶⁸⁷ TEX. UTIL. CODE ANN. § 39.916(a)(1).

⁶⁸⁸ TEX. UTIL. CODE ANN. § 39.916(j).

| | |
|-------------------------------|--|
| RTO/ISO Membership? | None (part of Northwest Power Pool) |
| Renewable Portfolio Standard? | Voluntary target, 20% by 2025 ⁶⁸⁹ |
| Net Metering Regulations? | Yes (mandatory net billing) ⁶⁹⁰ |

Definitions

Title 54 (“Public Utilities”) of the Utah Code defines “**public utility**” to include “every railroad corporation, gas corporation, electrical corporation, distribution electrical cooperative, wholesale electrical cooperative, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, and independent energy producer not described in Section 54-2-201 where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state for domestic, commercial, or industrial use.”⁶⁹¹

Moreover, “if any railroad corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation, or independent energy producer not described in Section 54-2-201, **performs a service for or delivers a commodity to the public**, it is considered to be a public utility, subject to the jurisdiction and regulation of the commission and this title.”⁶⁹² More specifically, “if a gas corporation, independent energy producer not described in Section 54-2-201, or electrical corporation **sells or furnishes gas or electricity to any member or consumers within the state, for domestic, commercial, or industrial use, for which any compensation or payment is received**, it is considered to be a public utility, subject to the jurisdiction and regulation of the commission and this title.”⁶⁹³

An “**electrical corporation**” (covered by the definition of public utility) is defined to include “every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state.”⁶⁹⁴

An “**electric plant**” includes “all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.”⁶⁹⁵

A “**distribution electrical cooperative**” (covered by the definition of public utility) is defined as “an electrical corporation that:

- (a) is a cooperative;

⁶⁸⁹ UTAH CODE ANN. §§ 54-17-101 *et seq.*, 10-19-101 *et seq.* (West 2021).

⁶⁹⁰ *Utah Net Billing Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/743> (last updated Mar. 27, 2019).

⁶⁹¹ UTAH CODE ANN., *supra* n. 689, § 54-2-1(22)(a).

⁶⁹² UTAH CODE ANN. § 54-2-1(22)(b)(i).

⁶⁹³ UTAH CODE ANN. § 54-2-1(22)(b)(ii).

⁶⁹⁴ UTAH CODE ANN. § 54-2-1(8)(a).

⁶⁹⁵ UTAH CODE ANN. § 54-2-1(9).

(b) conducts a business that includes the retail distribution of electricity the cooperative purchases or generates for the cooperative's members; and

(c) is required to allocate or distribute savings in excess of additions to reserves and surplus on the basis of patronage to the cooperative's:

(i) members; or

(ii) patrons.”⁶⁹⁶

A “**wholesale electrical cooperative**” (covered by the definition of public utility” is defined to include “every electrical corporation that is:

(a) in the business of the wholesale distribution of electricity it has purchased or generated to its members and the public; and

(b) required to distribute or allocate savings in excess of additions to reserves and surplus to members or patrons on the basis of patronage.”⁶⁹⁷

That said, the Utah Public Service Commission “does not have the authority under the provisions of this title to regulate, fix, or otherwise approve or establish the rates, fares, tolls, or charges of a wholesale electrical cooperative,” but “this section applies only to the rates, fares, tolls, or charges and does not exempt wholesale electrical cooperatives from other areas of regulation under this title including, but not limited to, regulation having an indirect effect on rates, fares, tolls, or charges but which does not constitute an approval or establishment of them.”⁶⁹⁸

Exception: Serve to Oneself, Tenants, or Association of Units Owners

The term “electrical corporation” does “not include . . . (ii) where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's tenants, or the use of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.”⁶⁹⁹

The Condominium Ownership Act defines “**association of unit owners**” or “association” to mean “all of the unit owners: (a) acting as a group in accordance with the declaration and bylaws; or (b) organized as a legal entity in accordance with the declaration.”⁷⁰⁰

“**Declaration**” is defined to mean, “the instrument by which the property is submitted to the provisions of this act, as it from time to time may be lawfully amended.”⁷⁰¹

“**Unit owner**” is defined to mean “the person or persons owning a unit in fee simple and an undivided interest in the fee simple estate of the common areas and facilities in the percentage specified and established in the declaration or, in the case of a leasehold condominium project, the

⁶⁹⁶ UTAH CODE ANN. § 54-2-1(7).

⁶⁹⁷ UTAH CODE ANN. § 54-2-1(40).

⁶⁹⁸ UTAH CODE ANN. § 54-4-1.1.

⁶⁹⁹ UTAH CODE ANN. § 54-2-1(8)(b).

⁷⁰⁰ UTAH CODE ANN. § 57-8-3(2).

⁷⁰¹ UTAH CODE ANN. § 57-8-3(16).

person or persons whose leasehold interest or interests in the condominium unit extend for the entire balance of the unexpired term or terms.”⁷⁰²

The term “**eligible customer's tenant or affiliate**” means “one or more tenants or affiliates:

- (a) of an eligible customer; and
- (b) who are primarily engaged in an activity:
 - (i) related to the eligible customer's core mining or industrial businesses; and
 - (ii) performed on real property that is:
 - (A) within a 25-mile radius of the electric plant described in Subsection (10)(a)(ii); and
 - (B) owned by, controlled by, or under common control with, the eligible customer.”⁷⁰³

Similarly, the term “electrical corporation” does “not include . . . (iii) an eligible customer who provides electricity for the eligible customer's own use or the use of the eligible customer's tenant or affiliate; or (iv) a nonutility energy supplier who sells or provides electricity to: (A) an eligible customer who has transferred the eligible customer's service to the nonutility energy supplier in accordance with Section 54-3-32; or (B) the eligible customer's tenant or affiliate.”⁷⁰⁴

Exception: Electric Vehicle Battery Charging Services

A May 2020 amendment⁷⁰⁵ provided that the term “public utility” does “not include an entity that **sells electric vehicle battery charging services**:

- (i) if the entity obtains the electricity for the electric vehicle battery charging service, including any electricity from an electricity storage device:
 - (A) from a large-scale electric utility or an electrical corporation in whose service area the electric vehicle battery charging service is located; and
 - (B) under an established tariff for rates, charges, and conditions of service; and
- (ii) unless the entity conducts another activity in the state that subjects the entity to the jurisdiction and regulation of the commission as a public utility.”⁷⁰⁶

The term “electrical corporation” has the same exception.⁷⁰⁷

Exception: Independent Energy Producers

⁷⁰² UTAH CODE ANN. § 57-8-3(42).

⁷⁰³ UTAH CODE ANN. § 54-2-1(11).

⁷⁰⁴ UTAH CODE ANN. § 54-2-1(8)(b).

⁷⁰⁵ 2020 Laws of Utah c. 217, § 1 (“H.B. 396 Electric Vehicle Charging Infrastructure Amendments”).

⁷⁰⁶ UTAH CODE ANN., *supra* n. 689, § 54-2-1(22)(i).

⁷⁰⁷ UTAH CODE ANN. § 54-2-1(8)(b).

The term “public utility” does “not include an independent energy producer that is not subject to regulation by the commission as a public utility under Section 54-2-201.”⁷⁰⁸ The term “electrical corporation” does “not include: (i) an independent energy producer.”⁷⁰⁹

An “**independent energy producer**” is defined as “every electrical corporation, person, corporation, or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage an independent power production or cogeneration facility.” An “**independent power production facility**” is defined as “a facility that: (a) produces electric energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding sources; or (b) is a qualifying power production facility.”

A “**qualifying power production facility**” is defined as a facility that “is a **qualifying small power production facility** under federal law” and “produces electrical energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding sources” and “has a power production capacity that, together with any other facilities located at the same site, is no greater than 80 megawatts.”⁷¹⁰

A “**cogeneration facility**” is defined as “(a) . . . a facility that produces: (i) electric energy; and (ii) steam or forms of useful energy, including heat, that are used for industrial, commercial, heating, or cooling purposes; and (b) is a qualifying cogeneration facility under federal law.”⁷¹¹

Section 54-2-201 provides that “an **independent energy producer is exempt from regulation by the commission as a public utility** for an independent power production facility if the independent energy producer produces a commodity or delivers a service:

- (a) solely for the use of a state-owned facility;
- (b) not for sale to the public, without charge, solely for the use of:
 - (i) the independent energy producer;
 - (ii) an independent energy producer's tenant; or
 - (iii) an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act;
- (c) for sale solely to an electrical corporation or other wholesale purchaser; or
- (d)(i) for use by:
 - (A) an entity the independent energy producer controls, is controlled by, or is an affiliate of; or
 - (B) a user located on real property that the independent energy producer manages or controls; and
- (ii) for use on real property that is contiguous to, or is separated only by a public road or easement from, real property that the independent energy producer owns or controls.”⁷¹²

⁷⁰⁸ UTAH CODE ANN. § 54-2-1(22)(j).

⁷⁰⁹ UTAH CODE ANN. § 54-2-1(8)(b)(i).

⁷¹⁰ UTAH CODE ANN. § 54-2-1(25).

⁷¹¹ UTAH CODE ANN. § 54-2-1(3).

⁷¹² UTAH CODE ANN. § 54-2-201(2).

In addition to those exceptions, “an independent energy producer that supplies energy, for direct consumption by a customer, via a customer generation system, is exempt from regulation by the commission as a public utility for an independent power production facility if” a series of conditions (described below) are met.⁷¹³ A “**customer generation system**” is defined as:

- (a) . . . an eligible facility that is used to supply energy to or for a specific customer that:
 - (i) has a generating capacity of:
 - (A) not more than 25 kilowatts for a residential facility; or
 - (B) not more than two megawatts for a non-residential facility, unless the governing authority approves a greater generation capacity;
 - (ii) is located on, or adjacent to, the premises of the electrical corporation's customer, subject to the electrical corporation's service requirements;
 - (iii) operates in parallel and is interconnected with the electrical corporation's distribution facilities;
 - (iv) is intended primarily to offset part or all of the customer's requirements for electricity; and
 - (v) is controlled by an inverter; and
- (b) includes an electric generator and its accompanying equipment package.”⁷¹⁴

An “**eligible facility**” is defined as “a facility that uses energy derived from one of the following to generate electricity: (a) solar photovoltaic and solar thermal energy; (b) wind energy; (c) hydrogen; (d) organic waste; (e) hydroelectric energy; (f) waste gas and waste heat capture or recovery; (g) biomass and biomass byproducts, except for the combustion of: (i) wood that has been treated with chemical preservatives such as creosote, pentachlorophenol, or chromated copper arsenate; or (ii) municipal waste in a solid form; (h) forest or rangeland woody debris from harvesting or thinning conducted to improve forest or rangeland ecological health and to reduce wildfire risk; (i) agricultural residues; (j) dedicated energy crops; (k) landfill gas or biogas produced from organic matter, wastewater, anaerobic digesters, or municipal solid waste; or (l) geothermal energy.”⁷¹⁵

The conditions for exception referenced above are that “an independent energy producer that supplies energy, for direct consumption by a customer, via a customer generation system, is exempt from regulation by the commission as a public utility” if:

- (a) the customer is:
 - (i) a United States governmental entity, including an entity of the United States military;
 - (ii) a state entity, including a political subdivision of the state;
 - (iii) a state institution of higher education;

⁷¹³ UTAH CODE ANN. § 54-2-201(3).

⁷¹⁴ UTAH CODE ANN. § 54-15-102(3).

⁷¹⁵ UTAH CODE ANN. § 54-15-102(4).

- (iv) a school district, charter school, or an entity within the state system of public education;
 - (v) a federal income tax exempt charitable organization under 26 U.S.C. Sec. 501(c)(3) that can provide proof of the entity's tax-exempt status; or
 - (vi) a residential customer participating in a net metering program in an area served by an electrical corporation with more than 200,000 retail customers in the state;
- (b) the customer generation system is:
 - (i) for use on the real property where the customer generation system is located; and
 - (ii) designed to supply a maximum amount of electricity equal to the lesser of:
 - (A) 90% of the customer's average annual electricity consumption, based on an annualized billing period; or
 - (B) the maximum amount allowed under a net metering program, as defined in Section 54-15-102;
- (c) the independent energy producer notifies the customer, before installing the customer generation system, of:
 - (i) the total cost a customer is required to pay for the customer generation system, including an interconnection cost; and
 - (ii) the potential for a change in:
 - (A) the amount the customer pays for energy from a public utility; and
 - (B) customer fees associated with net metering and generation;
- (d) the independent energy producer enters into an interconnection agreement:
 - (i) with a public utility that provides retail electric service to the real property on which the customer generation system is located; and
 - (ii) that is subject to approval by a public utility's governing authority; and
- (e) except for a customer described in Subsection (3)(a)(vi), the independent energy producer installs the customer generation system by December 31, 2021.⁷¹⁶

Exception: Property Leased to Public Utility

The term “public utility” does “not include any person that is otherwise considered a public utility under this Subsection (22) solely because of that person's ownership of an interest in an electric plant, cogeneration facility, or small power production facility in this state if all of the following conditions are met:

- (A) the ownership interest in the electric plant, cogeneration facility, or small power production facility is leased to:
 - (I) a public utility, and that lease has been approved by the commission;
 - (II) a person or government entity that is exempt from commission regulation as a public utility; or

⁷¹⁶ UTAH CODE ANN. § 54-2-201(3).

- (III) a combination of Subsections (22)(e)(i)(A)(I) and (II);
- (B) the lessor of the ownership interest identified in Subsection (22)(e)(i)(A) is:
 - (I) primarily engaged in a business other than the business of a public utility; or
 - (II) a person whose total equity or beneficial ownership is held directly or indirectly by another person engaged in a business other than the business of a public utility; and
- (C) the rent reserved under the lease does not include any amount based on or determined by revenues or income of the lessee.”⁷¹⁷

Exception: Financing of Electric Plant, Small Power Production Facility, or Cogeneration Facility

The term “public utility” does “not include **any person that provides financing for, but has no ownership interest in** an electric plant, small power production facility, or cogeneration facility. In the event of a foreclosure in which an ownership interest in an electric plant, small power production facility, or cogeneration facility is transferred to a third-party financier of an electric plant, small power production facility, or cogeneration facility, then that third-party financier is exempt from classification as a public utility for 90 days following the foreclosure, or for a longer period that is ordered by the commission. This period may not exceed one year.”⁷¹⁸

VERMONT

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | ISO New England |
| Renewable Portfolio Standard? | Yes, 55% by 2017, 75% by 2032 ⁷¹⁹ |
| Net Metering Regulations? | Yes (mandatory) ⁷²⁰ |

Definitions

Title 30, Chapter 5 (“State Policy; Plans; Jurisdiction and Regulatory Authority of Commission and Department”) of the Vermont Statutes regulates “**companies**” defined to include “individuals, partnerships, associations, corporations, and municipalities owning or conducting any public service business or property used in connection therewith and covered by the provisions of this chapter,” as well as “electric cooperatives organized and operating under chapter 81 of this title, the Vermont Public Power Supply Authority to the extent not inconsistent with chapter 84 of this title, and the Vermont Hydroelectric Power Authority to the extent not inconsistent with chapter 90 of this title.”⁷²¹

⁷¹⁷ UTAH CODE ANN. § 54-2-1(22)(e)(i).

⁷¹⁸ UTAH CODE ANN. § 54-2-1(22)(f).

⁷¹⁹ VT. STAT. ANN. tit. 30, § 8001 *et seq.* (West 2021).

⁷²⁰ *Vermont Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/41> (last updated July 2, 2018).

⁷²¹ VT. STAT. ANN. tit. 30, *supra* n. 719, § 201(1).

More specifically, “the Department of Public Service shall supervise and direct the execution of all laws relating to **public service corporations** and firms and individuals engaged in such business, including the . . . interconnection and interchange of facilities of **electric companies** under sections 210, 213, and 214 of this title . . . representation of the State in the negotiations and proceedings for the **procurement of electric energy from any source outside this State and from any generation facility inside the State** under sections 211 and 212 of this title . . . siting of electric generation and transmission facilities under section 248 of this title . . . and supervision and regulation of the organization and operation of **electric cooperatives** under chapter 81 of this title.”⁷²²

Title 30 further provides that “the Public Utility Commission and the Department of Public Service shall have jurisdiction over the following described companies within the State, their directors, receivers, trustees, lessees, or other persons or companies owning or operating such companies and of all plants, lines, exchanges, and equipment of such companies used in or about the business carried on by them in this State as covered and included herein . . .

(1) A company engaged in the **manufacture, transmission, distribution, or sale of gas or electricity directly to the public** or to be used ultimately by the public for lighting, heating, or power and so far as relates to their use or occupancy of the public highways.

(2) That part of the business of a company that consists of the manufacture, transmission, distribution, or sale of gas or electricity directly to the public or to be used ultimately by the public for lighting, heating, or power and so far as relates to their use or occupancy of the public highways.”⁷²³

Exception: Electric Vehicle Charging

“[T]he [Public Utility] Commission and Department [of Public Service] shall not have jurisdiction over persons otherwise not regulated by the Commission that are engaged in the siting, construction, ownership, operation, or control of a **facility that sells or supplies electricity to the public exclusively for charging a plug-in electric vehicle**, as defined in 23 V.S.A. § 4(85). These persons may charge by the kWh for owned or operated electric vehicle supply equipment, as defined in section 201 of this title, but shall not be treated as an electric distribution utility just because electric vehicle supply equipment charges by the kWh.”⁷²⁴

23 V.S.A. § 4(85) defines “**plug-in electric vehicle**” as “a motor vehicle that can be powered by an electric motor drawing current from a rechargeable energy storage system, such as from storage batteries or other portable electrical energy storage devices provided that the vehicle can draw recharge energy from a source off the vehicle such as electric vehicle supply equipment. A ‘plug-in electric vehicle’ includes both a motor vehicle that can only be powered by an electric motor drawing current from a rechargeable energy storage system and a motor vehicle that can be powered by an electric motor drawing current from a rechargeable energy storage system but also has an onboard combustion engine.”⁷²⁵

⁷²² VT. STAT. ANN. tit. 30, § 2(a).

⁷²³ VT. STAT. ANN. tit. 30, § 203.

⁷²⁴ VT. STAT. ANN. tit. 30, § 203(7).

⁷²⁵ VT. STAT. ANN. tit. 23, § 4(85).

Partial Exception: Net Metering Systems

Section 248 of Title 30 provides that “no company, as defined in section 201 of this title [see above], may:

(A) in any way purchase electric capacity or energy from outside the State:

(i) for a period exceeding five years, that represents more than three percent of its historic peak demand, unless the purchase is from a plant as defined in section 8002 of this title that produces electricity from renewable energy as defined under section 8002; or

(ii) for a period exceeding 10 years, that represents more than 10 percent of its historic peak demand, if the purchase is from a plant as defined in section 8002 of this title that produces electricity from renewable energy as defined under section 8002; or

(B) invest in an electric generation facility, energy storage facility, or transmission facility located outside this State unless the Public Utility Commission first finds that the same will promote the general good of the State and issues a certificate to that effect.”⁷²⁶

However, a separate provisions states that the Public Utility Commission shall “establish standards and procedures governing application for and **issuance or revocation of a certificate of public good for net metering systems** under the provisions of section 248 of this title. In establishing these standards and procedures:

(A) The rules **may waive the requirements of section 248 of this title that are not applicable to net metering systems, including criteria that are generally applicable to public service companies** as defined in this title.

(B) The rules may modify notice and hearing requirements of this title as the Commission considers appropriate.

(C) The rules shall seek to simplify the application and review process as appropriate, including simplifying the application and review process to encourage group net metering systems when the system is at least 50 percent owned by the customers who receive the bill credits for the electricity generated by the system”⁷²⁷

VIRGINIA

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | Partial (only customers using >5 MWh a year or 100% renewable energy) |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | Yes, 100% by 2045 (Phase II utilities) or 2050 (Phase I utilities) ⁷²⁸ |

⁷²⁶ VT. STAT. ANN. tit. 30, § 248(a)(1).

⁷²⁷ VT. STAT. ANN. tit. 30, § 8010(c)(3).

⁷²⁸ VA. CODE ANN. § 56-585.2 (West 2021).

Net Metering Regulations? Yes (mandatory)⁷²⁹

Definitions

Title 56 (“Public Service Companies” of the Code of Virginia defines “public service corporation” or “**public service company**” to include “gas, pipeline, electric light, heat, power and water supply companies, sewer companies, telephone companies, and all persons authorized to transport passengers or property as a common carrier.”⁷³⁰

More specifically, Chapter 10 (“Heat, Light, Power, Water and Other Utility Companies Generally”) provides that the term “**public utility**” shall “mean and embrace every corporation (other than a municipality), company, individual, or association of individuals or cooperative, their lessees, trustees, or receivers, appointed by any court whatsoever, that now or hereafter may own, manage or control any plant or equipment or any part of a plant or equipment within the Commonwealth for the conveyance of telephone messages or for the production, transmission, delivery, or furnishing of heat, chilled air, chilled water, light, power, or water, or sewerage facilities, either directly or indirectly, to or for the public.”⁷³¹

However, “public utility . . . shall not be construed to include any corporation created under the provisions of Title 13.1 [“Corporations”] unless the articles of incorporation expressly state that the corporation is to conduct business as a public service company.”⁷³²

For the purposes of the Virginia Electric Utility Regulation Act, an “**electric utility**” means “any person that generates, transmits, or distributes electric energy for use by retail customers in the Commonwealth, including any investor-owned electric utility, cooperative electric utility, or electric utility owned or operated by a municipality.”⁷³³ “**Distribute,**” “**distributing,**” or “**distribution of**” electric energy is defined as “the transfer of electric energy through a retail distribution system to a retail customer.”⁷³⁴ “**Retail customer**” is defined as “any person that purchases retail electric energy for its own consumption at one or more metering points or nonmetered points of delivery located in the Commonwealth.”⁷³⁵

A “**supplier**” is separately defined as “any generator, distributor, aggregator, broker, marketer, or other person who offers to sell or sells electric energy to retail customers and is licensed by the [State Corporation] Commission to do so, but it does not mean a generator that produces electric energy exclusively for its own consumption or the consumption of an affiliate.”⁷³⁶

Exception: Lease or Financing of Property

⁷²⁹ *Virginia Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/40> (last updated Nov. 16, 2018).

⁷³⁰ VA. CODE ANN., *supra* n. 728, § 56-1.

⁷³¹ VA. CODE ANN. § 56-232(A)(1).

⁷³² VA. CODE ANN. § 56-232(A)(3).

⁷³³ VA. CODE ANN. § 56-576.

⁷³⁴ *Id.*

⁷³⁵ *Id.*

⁷³⁶ *Id.*

In general, “as a condition of doing business in the Commonwealth, each person except a default service provider seeking to sell, offering to sell, or selling electric energy to any retail customer in the Commonwealth, on and after January 1, 2002, shall obtain a license from the Commission to do so.”⁷³⁷ However, “a license **shall not be required solely for the leasing or financing of property used in the sale of electricity** to any retail customer in the Commonwealth.”⁷³⁸

Exception: Third-Party Partial Requirements Power Purchase Agreements

The Virginia Electric Utility Regulation Act provides that “**third-party partial requirements power purchase agreements**, the purpose of which is to finance the purchase of renewable generation facilities by eligible customer-generators through the sale of electricity, shall be permitted pursuant to the provisions of this section **only for those retail customers and nonjurisdictional customers of the electric cooperative** that are exempt from federal income taxation, unless otherwise permitted by § 56-585.4. No person shall offer a third-party partial requirements power purchase agreement in the service territory of an electric cooperative without fulfilling the registration requirements set forth in this section and complying with applicable Commission rules.”⁷³⁹ Further, “no registered provider [of such third-party power purchase agreements] by virtue of that status alone, shall be considered a public utility or competitive service provider for purposes of this title.”⁷⁴⁰

Accordingly, the State Corporation Commission has promulgated regulations stating that “**no PPA provider** [defined as a person registered with the commission’s Division of Public Utility Regulation to offer third-party partial requirements power purchase agreements to customers] shall, by virtue of that status alone, **be considered a public utility or competitive service provider** for purposes of Title 56 of the Code of Virginia.”⁷⁴¹

Exception: Small Power Producers

“Notwithstanding any provision of law to the contrary, no person, firm, corporation, or other entity shall be deemed a public utility or public service company, solely by virtue of engaging in production, transmission, or sale at retail of electric power as a **qualifying small power producer using renewable or nondepletable primary energy sources** within the meaning of regulations adopted by the Federal Energy Regulatory Commission in implementation of the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617) and not exceeding 7.5 megawatts of rated capacity, nor solely by virtue of serving as an aggregator of the production of such small power producers, provided that the portion of the output of any qualifying small power producer which is sold at retail **shall not be sold to residential consumers**.”⁷⁴²

Exception: Electric Vehicle Charging Service

⁷³⁷ VA. CODE ANN. § 56-587(A).

⁷³⁸ *Id.*

⁷³⁹ VA. CODE ANN. § 56-594.01(K).

⁷⁴⁰ VA. CODE ANN. § 56-594.01(L)(2).

⁷⁴¹ 20 VA. ADMIN. CODE §5-315-77(O) (2021).

⁷⁴² VA. CODE ANN., *supra* n. 728, § 56-232(B).

“The Commission shall not regulate or prescribe the rates, charges, and fees for the provision of **retail electric vehicle charging service** provided by any agency as defined in § 2.2–128, persons, localities, or school boards other than public service corporations.”⁷⁴³

“Electric vehicle charging service” is defined as “the replenishment of the battery of a plug-in electric motor vehicle, which replenishment occurs by plugging the motor vehicle into an electric power source in order to charge or recharge its battery.”⁷⁴⁴

Exception: Own Consumption

For purposes of the Utility Facilities Act, which governs certificates of public convenience and necessity, the “term ‘public utility’ does not include . . . any company generating and distributing electric energy exclusively for its own consumption.”⁷⁴⁵

Exception: Combined Heat and Power to Tenants

For purposes of the Utility Facilities Act, the “term ‘public utility’ does not include . . .

Any company (A) which **furnishes electric service together with heating and cooling services, generated at a central plant installed on the premises to be served**, to the tenants of a building or buildings located on a single tract of land undivided by any publicly maintained highway, street or road at the time of installation of the central plant, and (B) which does not charge separately or by meter for electric energy used by any tenant except as part of a rental charge. Any company excluded by this subdivision from the definition of ‘public utility’ for the purposes of this chapter nevertheless shall, within 30 days following the issuance of a building permit, notify the State Corporation Commission in writing of the ownership, capacity and location of such central plant, and it shall be subject, with regard to the quality of electric service furnished, to the provisions of Chapters 10 (§ 56–232 et seq.) and 17 (§ 56–509 et seq.) and regulations thereunder and be **deemed a public utility for such purposes, if such company furnishes such service to 100 or more lessees.**”⁷⁴⁶

Exception: Farm Waste-to-Energy Technology

For purposes of the Utility Facilities Act, the “term ‘public utility’ does not include . . .

A farm or aggregation of farms that owns and operates facilities within the Commonwealth for the generation of electric energy from waste-to-energy technology. As used in this subdivision, (i) ‘farm’ means any person that obtains at least 51 percent of its annual gross income from agricultural operations and produces the agricultural waste used as feedstock for the waste-to-energy technology, (ii) ‘agricultural waste’ means biomass waste materials capable of decomposition that are produced from the raising of plants and animals during agricultural operations, including animal manures, bedding, plant stalks, hulls, and vegetable matter, and (iii) ‘waste-to-energy technology’ means any technology, including

⁷⁴³ VA. CODE ANN. § 56-232.2:1.

⁷⁴⁴ VA. CODE ANN. § 56-1.

⁷⁴⁵ VA. CODE ANN. § 56-265.1(b).

⁷⁴⁶ *Id.*

but not limited to a methane digester, that converts agricultural waste into gas, steam, or heat that is used to generate electricity on-site.”⁷⁴⁷

Exception: Electric Energy Storage

For purposes of the Utility Facilities Act, which governs certificates of public convenience and necessity, the “term ‘public utility’ does not include . . . a company, other than an entity organized as a public service company, that provides **storage of electric energy that is not for sale to the public.**”⁷⁴⁸

WASHINGTON

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | None (part of Northwest Power Pool) |
| Renewable Portfolio Standard? | Yes, 100% GHG-neutral by 2030, 100% renewable or zero-emitting by 2045 ⁷⁴⁹ |
| Net Metering Regulations? | Yes (mandatory) ⁷⁵⁰ |

Definitions

Title 80 (“Public Utilities”) of the Revised Code of Washington defines “**public service company**” to include “every gas company, electrical company, telecommunications company, wastewater company, and water company.”⁷⁵¹

An “**electrical company**” is defined to “include[] any corporation, company, association, joint stock association, partnership and person, their lessees, trustees or receivers appointed by any court whatsoever (other than a railroad or street railroad company generating electricity solely for railroad or street railroad purposes or for the use of its tenants and not for sale to others), and every city or town owning, operating or managing any electric plant for hire within this state.”⁷⁵²

An “**electric plant**” is defined to include “all real estate, fixtures and personal property operated, owned, used or to be used for or in connection with or to facilitate the generation, transmission, distribution, sale or furnishing of electricity for light, heat, or power for hire; and any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”⁷⁵³

The Washington Utilities and Transportation Commission has jurisdiction to “regulate in the public interest, as provided by the public service laws, the rates, services, facilities, and practices

⁷⁴⁷ *Id.*

⁷⁴⁸ *Id.*

⁷⁴⁹ WASH. REV. CODE ANN. § 19.285 (West 2021).

⁷⁵⁰ *Washington Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/42> (last updated Dec. 12, 2019).

⁷⁵¹ WASH. REV. CODE ANN., *supra* n. 749, § 80.04.010(23).

⁷⁵² WASH. REV. CODE ANN. § 80.04.010(12).

⁷⁵³ WASH. REV. CODE ANN. § 80.04.010(11).

of all persons engaging within this state in the business of supplying any utility service or commodity **to the public for compensation.**”⁷⁵⁴

For purposes of some provisions, such as Electric Utility Resource Plans and greenhouse gas emissions performance standards, an “**electric utility**” means a consumer-owned or investor-owned utility.”⁷⁵⁵ A “**consumer-owned utility**” is defined to include “a municipal electric utility formed under Title 35 RCW, a public utility district formed under Title 54 RCW, an irrigation district formed under chapter 87.03 RCW, a cooperative formed under chapter 23.86 RCW, a mutual corporation or association formed under chapter 24.06 RCW, a port district formed under Title 53 RCW, or a water-sewer district formed under Title 57 RCW, that is engaged in the business of distributing electricity to one or more retail electric customers in the state.”⁷⁵⁶ An “**investor-owned utility**” is defined as “a corporation owned by investors that meets the definition in RCW 80.04.010 and is engaged in distributing electricity to more than one retail electric customer in the state.”⁷⁵⁷

Regulatory Interpretation

In 2011, the Washington Utilities and Transportation Commission issued an order regarding a complaint that an RV park was “illegally re-selling electricity at rates higher than authorized by [the electric utility’s] tariff.”⁷⁵⁸ The Commission said “we can only conclude that flat rent that includes utilities does not amount to reselling electricity,” but noted that “other situations can be more complicated.”⁷⁵⁹ The Commission also made a finding of fact that “Salmon Shores RV Park is not conducting business subject to the Commission’s jurisdiction. It is not a ‘public service company’ or an ‘electrical company’ as those terms are defined in RCW 80.04.010 and as those terms otherwise are used in Title 80 RCW.”⁷⁶⁰

Exception: Cogeneration Facilities

The definition of “public service company” notes that “ownership or operation of a cogeneration facility does not, by itself, make a company or person a public service company.”⁷⁶¹

The definition of “electrical company” does “not include a company or person employing a cogeneration facility solely for the generation of electricity for its own use or the use of its tenants or for sale to an electrical company, state or local public agency, municipal corporation, or quasi municipal corporation engaged in the sale or distribution of electrical energy, but not for sale to others, unless such company or person is otherwise an electrical company.”⁷⁶²

A “**cogeneration facility**” is defined as “any machinery, equipment, structure, process, or property, or any part thereof, installed or acquired for the primary purpose of the sequential

⁷⁵⁴ WASH. REV. CODE ANN. § 80.01.040(3).

⁷⁵⁵ WASH. REV. CODE ANN. § 19.280.020(6).

⁷⁵⁶ WASH. REV. CODE ANN. § 19.280.020(4).

⁷⁵⁷ WASH. REV. CODE ANN. § 19.280.020(10).

⁷⁵⁸ *Binkley v. Salmon Shores RV Park*, 2011 WL 509881, at *1 (Wash. U.T.C. Feb. 10, 2011).

⁷⁵⁹ *Id.* at *2.

⁷⁶⁰ *Id.*

⁷⁶¹ WASH. REV. CODE ANN. *supra* n. 749, § 80.04.010(23).

⁷⁶² WASH. REV. CODE ANN. § 80.04.010(12).

generation of electrical or mechanical power and useful heat from the same primary energy source or fuel.”⁷⁶³

Exception: Electric Vehicle Charging Facilities

“The commission shall not regulate the rates, services, facilities, and practices of an entity that offers battery charging facilities to the public for hire; if: (1) That entity is not otherwise subject to commission jurisdiction as an electrical company; or (2) that entity is otherwise subject to commission jurisdiction as an electrical company, but its battery charging facilities and services are not subsidized by any regulated service. An electrical company may offer battery charging facilities as a regulated service, subject to commission approval.”⁷⁶⁴

Title 80 defines “**battery charging facility**” to include “a ‘battery charging station’ and a ‘rapid charging station’ as defined in RCW 82.08.816.”⁷⁶⁵

In RCW 82.08.816, a “**battery charging station**” is defined as “an electrical component assembly or cluster of component assemblies designed specifically to charge batteries within electric vehicles, which meet or exceed any standards, codes, and regulations set forth by chapter 19.28 RCW and consistent with rules adopted under RCW 19.27.540.”⁷⁶⁶

A “**rapid charging station**” is defined as “an industrial grade electrical outlet that allows for faster recharging of electric vehicle batteries through higher power levels, which meets or exceeds any standards, codes, and regulations set forth by chapter 19.28 RCW and consistent with rules adopted under RCW 19.27.540.”⁷⁶⁷

Exception: Electric Service Cooperatives

Title 23, Chapter 23.86 (“Cooperative Associations”) defines a “**locally regulated utility**” as an “**electric service cooperative** organized under this chapter and not subject to rate or service regulation by the utilities and transportation commission.”⁷⁶⁸ An “electric service cooperative” is not separately defined in this chapter, but the chapter generally provides that “any number of persons may associate themselves together as a cooperative association, society, company or exchange, with or without capital stock, for the transaction of any lawful business on the cooperative plan.”⁷⁶⁹

These cooperatives are subject to some regulatory requirements: “All rates, terms, and conditions made, demanded or received by a locally regulated utility for attachments to its poles must be just, reasonable, nondiscriminatory and sufficient. A locally regulated utility shall levy attachment

⁷⁶³ WASH. REV. CODE ANN. § 80.04.010(4).

⁷⁶⁴ WASH. REV. CODE ANN. § 80.28.320.

⁷⁶⁵ WASH. REV. CODE ANN. § 80.04.010(3).

⁷⁶⁶ WASH. REV. CODE ANN. § 82.08.816(4)(a).

⁷⁶⁷ WASH. REV. CODE ANN. § 82.08.816(4)(d).

⁷⁶⁸ WASH. REV. CODE ANN. § 23.86.400(1)(b).

⁷⁶⁹ WASH. REV. CODE ANN. § 23.86.020.

space rental rates that are uniform for the same class of service within the locally regulated utility service area.”⁷⁷⁰

However, “nothing in this section shall be construed or is intended to confer upon the utilities and transportation commission any authority to exercise jurisdiction over locally regulated utilities.”⁷⁷¹

Partial Exception: Community Solar Companies

Title 80 includes specialized provisions for “**community solar companies**,” meaning “a person, firm, or corporation, **other than an electric utility** or a community solar cooperative, that owns a community solar project and provides community solar project services to project participants.”⁷⁷² Here, “electric utility” means “a consumer-owned utility or investor-owned utility as those terms are defined in RCW 19.280.020” (see above).⁷⁷³

A “**community solar project**” is defined as “a solar energy system that has a direct current nameplate generating capacity that is no larger than one thousand kilowatts.”⁷⁷⁴ A “**solar energy system**” is defined as “any device or combination of devices or elements that rely upon direct sunlight as an energy source for use in the generation of electricity.”⁷⁷⁵

“**Community solar project services**” are defined as “the provision of electricity generated by a community solar project, or the provision of the financial benefits associated with electricity generated by a community solar project, to multiple project participants, and may include other services associated with the use of the community solar project such as system monitoring and maintenance, warranty provisions, performance guarantees, and customer service.”⁷⁷⁶

“**Project participant**” means “a customer who enters into a lease, power purchase agreement, loan, or other financial agreement with a community solar company in order to obtain a beneficial interest in, other than direct ownership of, a community solar project.”⁷⁷⁷

Rather than being subject to traditional utility regulation, community solar companies “must register with the commission before engaging in business,”⁷⁷⁸ and “the commission may adopt rules that describe the manner by which it will register a community solar company, ensure that the terms and conditions of community solar projects or community solar project services comply with the requirements of chapter 36, Laws of 2017 3rd sp. sess., establish the community solar company’s responsibilities for responding to customer complaints and disputes, and adopt annual reporting requirements.”⁷⁷⁹

WEST VIRGINIA

⁷⁷⁰ WASH. REV. CODE ANN. § 23.86.400(2).

⁷⁷¹ WASH. REV. CODE ANN. § 23.86.400(3).

⁷⁷² WASH. REV. CODE ANN. § 80.28.370(1).

⁷⁷³ WASH. REV. CODE ANN. § 80.28.370(4).

⁷⁷⁴ WASH. REV. CODE ANN. § 80.28.370(2).

⁷⁷⁵ WASH. REV. CODE ANN. § 80.28.370(6).

⁷⁷⁶ WASH. REV. CODE ANN. § 80.28.370(3).

⁷⁷⁷ WASH. REV. CODE ANN. § 80.28.370(5).

⁷⁷⁸ WASH. REV. CODE ANN. § 80.28.375(2).

⁷⁷⁹ WASH. REV. CODE ANN. § 80.28.375(7).

Regulatory Environment At-a-Glance

| | |
|-------------------------------|--------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | PJM Interconnection |
| Renewable Portfolio Standard? | No (repealed in 2015) |
| Net Metering Regulations? | Yes (mandatory) ⁷⁸⁰ |

Definitions

Chapter 24 (“Public Service Commission”) of the Code of West Virginia defines “**public utility**” to “mean and include any person or persons, or association of persons, however associated, whether incorporated or not, including municipalities, engaged in any business, whether herein enumerated or not, which is, or shall hereafter be held to be, a public service.”⁷⁸¹

“The jurisdiction of the [Public Service] Commission shall extend to all public utilities in this state,” including “any utility engaged in **any of the following public services** . . . generation and transmission of electrical energy by hydroelectric or other utilities for service to the public, whether directly or through a distributing utility; supplying water, gas, or electricity by municipalities or others.”⁷⁸²

Judicial Interpretation

The West Virginia Supreme Court of Appeals has held that “the term ‘public utility’ . . . implies a public use, carrying with it the duty to serve the public and to treat all persons alike, and it precludes the idea of service which is private in its nature and is not to be obtained by the public . . . Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern.”⁷⁸³ Moreover, “the test as to whether or not a person, firm or corporation is a public utility is that to be such there must be a dedication or holding out either express or implied that such person, firm, or corporation is engaged in the business of supplying his or its product or services to the public as a class or any part thereof as distinguished from the serving of only particular individuals; and to apply this test the law looks at what is being done, not to what the utility or person says it is doing.”⁷⁸⁴

Partial Exception: Certain Wholesale Generators

Chapter 24 includes several exceptions for various categories of wholesale generators:

“(d) Any other provisions of this chapter to the contrary notwithstanding:

- (1) An owner or operator of an electric generating facility located or to be located in this state that has been designated as an **exempt wholesale generator** under applicable federal law, or will be so designated prior to commercial operation of the facility, and for which such facility the owner or operator **holds a certificate of public convenience and**

⁷⁸⁰ West Virginia Net Metering Program Overview, DSIRE, <https://programs.dsireusa.org/system/program/detail/2380> (last updated Nov. 14, 2018).

⁷⁸¹ W. VA. CODE ANN. § 24-1-2 (West 2021).

⁷⁸² W. VA. CODE ANN. § 24-2-1(a).

⁷⁸³ *Preston Cty. Light & Power Co. v. Renick*, 113 S.E.2d 378, 385 (W. Va. 1960).

⁷⁸⁴ *Aff'd Const. Trades Found. v. Pub. Serv. Comm'n*, 565 S.E.2d 778, 780 (W. Va. 2002) (citing *Wilhite v. Pub. Serv. Comm'n*, 149 S.E.2d 273 (W. Va. 1966)).

necessity issued by the commission on or before July 1, 2003, is subject to § 24-2-11c(e) through § 24-2-11c(j) of this code as if the certificate of public convenience and necessity for the facility were a siting certificate issued under § 24-2-11c of this code and **is not otherwise subject to the jurisdiction of the commission** or to the provisions of this chapter with respect to the facility except for the making or constructing of a material modification thereof as provided in § 24-2-1(d)(5) of this code.

(2) Any person, corporation, or other entity that intends to construct or construct and operate an electric generating facility to be located in this state that has been designated as an **exempt wholesale generator** under applicable federal law, or will be so designated prior to commercial operation of the facility, and for which facility the owner or operator **does not hold a certificate of public convenience and necessity issued by the commission on or before July 1, 2003**, shall, prior to commencement of construction of the facility, obtain a siting certificate from the commission pursuant to the provisions of § 24-2-11c of this code in lieu of a certificate of public convenience and necessity pursuant to the provisions of § 24-2-11 of this code. An owner or operator of an electric generating facility as is described in this subdivision for which a siting certificate has been issued by the commission is subject to § 24-2-11c(e) through § 24-2-11c(j) of this code and **is not otherwise subject to the jurisdiction of the commission** or to the provisions of this chapter with respect to the facility except for the making or constructing of a material modification thereof as provided in § 24-2-1(d)(5) of this code.

(3) An owner or operator of an electric generating facility located in this state that had not been designated as an exempt wholesale generator under applicable federal law prior to commercial operation of the facility that **generates electric energy solely for sale at retail outside this state or solely for sale at wholesale** in accordance with any applicable federal law that preempts state law or solely for both sales at retail and sales at wholesale and that **had been constructed and had engaged in commercial operation on or before July 1, 2003**, **is not subject to the jurisdiction of the commission** or to the provisions of this chapter with respect to the facility, regardless of whether the facility subsequent to its construction has been or will be designated as an exempt wholesale generator under applicable federal law: Provided, That the owner or operator is subject to § 24-2-1(d)(5) of this code if a material modification of the facility is made or constructed.

(4) Any person, corporation, or other entity that intends to construct or construct and operate an electric generating facility to be located in this state that has not been or will not be designated as an exempt wholesale generator under applicable federal law prior to commercial operation of the facility that **will generate electric energy solely for sale at retail outside this state or solely for sale at wholesale** in accordance with any applicable federal law that preempts state law or solely for both sales at retail and sales at wholesale and that had not been constructed and **had not been engaged in commercial operation on or before July 1, 2003**, shall, prior to commencement of construction of the facility, obtain a siting certificate from the commission pursuant to the provisions of § 24-2-11c of this code in lieu of a certificate of public convenience and necessity pursuant to the provisions of § 24-2-11 of this code. An owner or operator of an electric generating facility as is described in this subdivision for which a siting certificate has been issued by the commission is subject to § 24-2-11c(e) through § 24-2-11c(j) of this code and **is not otherwise subject to the jurisdiction of the commission** or to the provisions of this

chapter with respect to the facility except for the making or constructing of a material modification thereof as provided in § 24-2-1(d)(5) of this code.”⁷⁸⁵

Partial Exception: Electric Cooperatives

“The rates and charges of **electric cooperatives** . . . are not subject to the rate approval provisions of § 24-2-4 or § 24-2-4a of this code, but are subject to the limited rate provisions of this section,” which provides (in short) that “all rates and charges set by electric cooperatives . . . shall be just, reasonable, applied without unjust discrimination between or preference for any customer or class of customer and based primarily on the costs of providing these services,” that “all rates and charges shall be based upon the measured or reasonably estimated cost of service and the equitable sharing of those costs between customers based upon the cost of providing the service received by the customer, including a reasonable plant-in-service depreciation expense,” and that electric cooperatives must follow certain procedures and filing requirements for adoption of rates and charges.⁷⁸⁶ The Commission has the authority to review grievances raised by customers.⁷⁸⁷

While electric cooperatives are not specifically defined, in general “three or more qualified persons engaged in the production of agricultural products or the provision of goods and services may form a cooperative association with or without capital stock.”⁷⁸⁸

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Regulatory Environment At-a-Glance

| | |
|-------------------------------|---------------------------------|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | MISO |
| Renewable Portfolio Standard? | Yes, 10% by 2015 ⁷⁸⁹ |
| Net Metering Regulations? | Yes (mandatory) ⁷⁹⁰ |

Definitions

Chapter 196 (“Regulation of Public Utilities”) of the Wisconsin Statutes defines “**public utility**” to mean “every corporation, company, individual, association, their lessees, trustees or receivers appointed by any court, and every sanitary district, town, village or city that may own, operate, manage or control any toll bridge or all or any part of a plant or equipment, within the state, for the production, transmission, delivery or furnishing of heat, light, water or power either directly or indirectly to or for the public.”⁷⁹¹

For purposes of renewable resources provisions, an “**electric utility**” is defined as “a public utility that sells electricity at retail.”⁷⁹² For purposes of regulation of large electric generating facilities

⁷⁸⁵ W. VA. CODE ANN., *supra* n. 781, § 24-2-1(d).

⁷⁸⁶ W. VA. CODE ANN. § 24-2-4b(a)-(b).

⁷⁸⁷ W. VA. CODE ANN. § 24-2-4b(c)-(d).

⁷⁸⁸ W. VA. CODE ANN. § 19-4-2.

⁷⁸⁹ WIS. STAT. ANN. § 196.378 (West 2021).

⁷⁹⁰ *Wisconsin Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/235> (last updated Nov. 30, 2018).

⁷⁹¹ WIS. STAT. ANN., *supra* n. 789, § 196.01(5)(a).

⁷⁹² WIS. STAT. ANN. § 196.378(1)(d).

(meaning “electric generating equipment and associated facilities designed for nominal operation at a capacity of 100 megawatts or more”), an “**electric utility**” is defined as “any public utility, as defined in s. 196.01, which is involved in the generation, distribution and sale of electric energy, and any corporation, company, individual or association, and any cooperative association, which owns or operates, or plans within the next 3 years to construct, own or operate, facilities in the state.”⁷⁹³

Judicial and Regulatory Interpretation

The Wisconsin Supreme Court has held that building owners “furnishing heat, light, and power to the **tenants of their own building**” are not rendered public utilities by serving only “a limited class defined by the relation of landlord and tenants.”⁷⁹⁴ The court noted that “whether or not the use is for the public does not necessarily depend upon the number of consumers; for there may be only one, and yet the use be for the public . . . If the product of the plant is intended for and open to the use of all the members of the public who may require it, to the extent of its capacity, the fact that only one or two thereof consume the entire product renders the plant none the less a public utility.”⁷⁹⁵ In contrast, “a landlord may furnish it to a hundred tenants, or, incidentally, to a few neighbors, without coming either under the letter or the intent of the law.”⁷⁹⁶

The court later “extended” that holding “to a large apartment complex,” emphasizing that “the proposed service of electricity” even to hundreds of tenants still “would be private in nature.”⁷⁹⁷

The Wisconsin Public Service Commission has received requests to issue declaratory rulings on whether “**third-party financed solar distributed generation systems**” fall within the Wis. Stat. § 196.01(5) definition of public utility.⁷⁹⁸ However, the Commission has exercised its discretion to decline to open a docket to consider the question, concluding that the question presents “broad public policy considerations that are better addressed through the legislative process than through the Commission's declaratory ruling process.”⁷⁹⁹

Exception: Cooperative Associations

The definition of “public utility” explicitly “does not include . . . a **cooperative association** organized under ch. 185 for the purpose of producing or furnishing heat, light, power or water to its members only.”⁸⁰⁰

Chapter 185 provides that “cooperatives may be organized under this chapter for any lawful purpose except banking and insurance, but subject to statutes relating to the organization of specified kinds of corporations.”⁸⁰¹ A section on “Extensions of Credit by Electric Cooperatives for Certain Projects” defines “**electric cooperative**” as “an association incorporated under this

⁷⁹³ WIS. STAT. ANN. §§ 196.491(1)(g), 196.491(1)(d).

⁷⁹⁴ *Cawker v. Meyer*, 133 N.W. 157, 158–59 (Wis. 1911).

⁷⁹⁵ *Id.* at 159.

⁷⁹⁶ *Id.*

⁷⁹⁷ *City of Sun Prairie v. Pub. Serv. Comm'n*, 154 N.W.2d 360, 363 (Wis. 1967).

⁷⁹⁸ For an example of such requests, *see, e.g., In re Sunrun Inc.*, No. 9300-DR-103, 2019 WL 522689, at *6 (Wis. P.S.C. Feb. 4, 2019).

⁷⁹⁹ *Id.* at *6.

⁸⁰⁰ WIS. STAT. ANN., *supra* n. 789, § 196.01(5)(b)(1).

⁸⁰¹ WIS. STAT. ANN. § 185.02.

chapter or authorized to do business in this state that carries on the business of generating, transmitting, or distributing electric energy to its members at wholesale or retail.”⁸⁰²

Electric cooperatives are subject to certain Chapter 196 provisions regarding “energy efficiency and renewable resource programs,”⁸⁰³ “renewable resources,”⁸⁰⁴ “transmission system requirements,”⁸⁰⁵ and “avoidance of duplication in electric facilities.”⁸⁰⁶

Exception: Facilities Leased to Public Utilities by Affiliates

The definition of “public utility” explicitly does not include “a person that owns an electric generating facility or improvement to an electric generating facility that is subject to a leased generation contract, as defined in s. 196.52(9)(a)3., unless the person furnishes, directly to the public, telecommunications or sewer service, heat, light, water or power or, by means of pipes or mains, natural gas.”⁸⁰⁷ Section 196.52 defines a “**leased generation contract**” as “a contract or arrangement or set of contracts or arrangements under which an affiliated interest of a public utility agrees with the public utility to construct or improve an electric generating facility and to lease to the public utility land and the facility for operation by the public utility.”⁸⁰⁸ The term “**affiliated interest**” means any of the following:

- (a) Any person owning or holding directly or indirectly 5 percent or more of the voting securities of the public utility.
- (b) Any person in any chain of successive ownership of 5 percent or more of voting securities of the public utility.
- (c) Every corporation 5 percent or more of whose voting securities is owned by any person owning 5 percent or more of the voting securities of the public utility or by any person in any chain of successive ownership of 5 percent or more of voting securities of the public utility.
- (d) Any person who is an officer or director of the public utility or of any corporation in any chain of successive ownership of 5 percent or more of voting securities of the public utility.
- (e) Any corporation operating a public utility, a railroad, or a servicing organization for furnishing supervisory, construction, engineering, accounting, legal and similar services to public utilities or railroads, which has one or more officers or one or more directors in common with the public utility, and any other corporation which has directors in common with the public utility if the number of such directors of the corporation is more than one-third of the total number of the public utility's directors.
- (f) Any person whom the commission determines as a matter of fact after investigation and hearing to be actually exercising any substantial influence over the policies and actions of the public utility even if such influence is not based upon stockholding, stockholders, directors or officers as specified under pars. (a) to (e).

⁸⁰² WIS. STAT. ANN. § 185.995(1)(a).

⁸⁰³ WIS. STAT. ANN. § 196.374.

⁸⁰⁴ WIS. STAT. ANN. § 196.378.

⁸⁰⁵ WIS. STAT. ANN. § 196.485.

⁸⁰⁶ WIS. STAT. ANN. § 196.495.

⁸⁰⁷ WIS. STAT. ANN. § 196.01(5)(b)(6).

⁸⁰⁸ WIS. STAT. ANN. § 196.52(9)(a)(3).

(g) Any other person whom the commission determines as a matter of fact after investigation and hearing to be actually exercising substantial influence over the policies and actions of the public utility in conjunction with one or more other persons with whom they are related by ownership, by blood or adoption or by action in concert that together they are affiliated with such public utility for the purpose of this section, even though no one of them alone is so affiliated under pars. (a) to (f).

(h) Any subsidiary of the public utility. In this paragraph, “subsidiary” means any person 5 percent or more of the securities of which are directly or indirectly owned by a public utility.⁸⁰⁹

WYOMING

Regulatory Environment At-a-Glance

| | |
|-------------------------------|---|
| Retail Electric Competition? | No |
| RTO/ISO Membership? | Southwest Power Pool (only part of state) |
| Renewable Portfolio Standard? | No |
| Net Metering Regulations? | Yes (mandatory) ⁸¹⁰ |

Definitions

Title 37 (“Public Utilities”) of the Wyoming Statutes defines “**public utility**” to include “every person that owns, operates, leases, controls or has power to operate, lease or control . . . any plant, property or facility for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat or power, including any conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power.”⁸¹¹

Judicial Interpretation

The Wyoming Supreme Court has noted that the Wyoming definition’s use of the phrase “‘directly or indirectly to or for the public,’ rather than just ‘to or for the public’” is broader than “similar statutes in other states.”⁸¹² However, the court has not grappled with the specific boundaries of this definition. Instead, the court has noted the general principle that the words “to the public” when used in a “statute regulating public utilities have been defined as ‘sales to sufficient of the public to clothe the operation with a public interest,’” and concluding that “any alteration” of this “long-standing” principle “is properly a question for the legislature.”⁸¹³

Exception: Lease of Facilities to Public Utility

The “public utility” definition notes that “none of the provisions of this chapter shall apply to . . . any person who is not otherwise affiliated with a utility, that owns, leases, controls or has power

⁸⁰⁹ WIS. STAT. ANN. § 196.52(1).

⁸¹⁰ *Wyoming Net Metering Program Overview*, DSIRE, <https://programs.dsireusa.org/system/program/detail/553> (last updated Nov. 30, 2018).

⁸¹¹ WYO. STAT. ANN. § 37-1-101(a)(vi) (West 2021).

⁸¹² *Bridle Bit Ranch Co. v. Basin Elec. Power Co-op.*, 118 P.3d 996, 1010–11 (Wyo. 2005) (citing *Phillips Petroleum Co. v. Pub. Serv. Comm’n*, 545 P.2d 1167, 1171–72 (Wyo. 1976)).

⁸¹³ *Id.*

to lease or control any plant, property or facility which, **in a transaction approved or authorized by the commission, is leased to one (1) or more public utilities**, and is to be operated by the lessee or lessees for the generation, transmission, distribution, sale or furnishing to or for the public of electricity for light, heat, power or other utility purposes.”⁸¹⁴

Exception: Supply to Oneself or Tenants

The “public utility” definition notes that “none of the provisions of this chapter shall apply to . . . the generation, transmission or distribution of electricity, or to the manufacture or distribution of gas, or to the furnishing or distribution of water, nor to the production, delivery or furnishing of steam or any other substance, by a producer or other person, for the **sole use of a producer or other person, or for the use of tenants of a producer or other person and not for sale to others**. Such exemptions shall not apply to metered or other direct sales of a utility commodity by a producer or other person to his tenants.”⁸¹⁵

Partial Exception: Cooperative Electric Utilities

A “**cooperative electric utility**” is defined as “any nonprofit, member-owned cooperative engaged in the business of distributing energy, including any energy related commodity currently approved under rules and regulations of the public service commission and any future energy related commodities approved by the public service commission, in the state of Wyoming.”⁸¹⁶

Cooperative electric utilities with net annual sales less than two billion kilowatt hours “may adopt a **resolution for exemption from public service commission retail rate regulation** and submit the resolution to the member owners for a vote.”⁸¹⁷ That said, “any cooperative exempted under W.S. 37-17-103 shall apply energy retail rates equally to all member owners in the same rate class. In the event a cooperative does not apply energy retail rates equally, regardless of state boundaries, the cooperative will immediately be subject to rate regulation by the Wyoming public service commission.”⁸¹⁸

Moreover, “any cooperative electric utility exempt from public service commission retail rate regulation **shall remain subject to this article, all other provisions of Wyoming public utility law and the authority of the commission**.”⁸¹⁹

Exception: Net Metering Customer-Generators

An Act on “Net Metering” provides that “a person acting as a customer-generator under this act shall not be considered a ‘public utility’ as defined by W.S. 37-1-101.”⁸²⁰ A “**customer-generator**” is defined as “a user of a net metering system.”⁸²¹ A “**net metering system**” is defined as “a facility for the production of electrical energy that:

- (A) Uses as its fuel either solar, wind, biomass or hydropower;

⁸¹⁴ WYO. STAT. ANN., *supra* n. 811, § 37-1-101(a)(vi)(H).

⁸¹⁵ WYO. STAT. ANN. § 37-1-101(a)(vi)(H).

⁸¹⁶ WYO. STAT. ANN. § 37-17-101(a)(i).

⁸¹⁷ WYO. STAT. ANN. § 37-17-103(a).

⁸¹⁸ WYO. STAT. ANN. § 37-17-104(f).

⁸¹⁹ WYO. STAT. ANN. § 37-17-102(a).

⁸²⁰ WYO. STAT. ANN. § 37-16-101(b).

⁸²¹ WYO. STAT. ANN. § 37-16-101(a)(ii).

- (B) Has a generating capacity of not more than twenty-five (25) kilowatts;
- (C) Is located on the customer-generator's premises;
- (D) Operates in parallel with the electric utility's transmission and distribution facilities;
and
- (E) Is intended primarily to offset part or all of the customer-generator's requirements for electricity.”⁸²²

For the purposes of this act, an “electric utility” means “any electrical company, irrigation district or electric cooperative that is engaged in the business of distributing electricity to retail electric customers in the state.”⁸²³ An “electrical company” means “any person, corporation or governmental subdivision, excluding municipalities, authorized and operating under the constitution and laws of the state of Wyoming which is primarily engaged in the generation or sale of electric energy.”⁸²⁴ An “electric cooperative” means “any nonprofit, member-owned cooperative organized under the laws of the state of Wyoming and engaged in the business of distributing electric energy in the state of Wyoming.”⁸²⁵

⁸²² WYO. STAT. ANN. § 37-16-101(a)(viii).

⁸²³ WYO. STAT. ANN. § 37-16-101(a)(v).

⁸²⁴ WYO. STAT. ANN. § 37-16-101(a)(iii).

⁸²⁵ WYO. STAT. ANN. § 37-16-101(a)(iv).