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General Chapters:

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Green Energy Policy in the Northeastern United States

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The United States has yet to adopt a nationwide regulatory strategy to minimise greenhouse gas ("GHG") emissions. Although a patchwork of federal programmes aim to encourage energy efficiency and spur renewable resource development, Congressional gridlock has thwarted any attempt to develop a comprehensive national climate change regime. As a result of this vacuum in national climate policy, many states have begun to fill this void by taking the initiative to develop their own state-level programmes to reduce greenhouse gas emissions and encourage renewable energy development. The United States legal system is unique in that (absent federal legislation or constitutional prohibition) the individual states may regulate as they see fit. This system, known as the federalist system, has permitted states to develop their own climate-related initiatives. As Supreme Court Justice Brandeis remarked many years ago, "it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country". *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). Of all the states experimenting with climate initiatives, the states of the U.S. Northeast serve as some of the most novel and innovative examples of state-level climate policy.

The Northeast, for purposes of this chapter, is comprised of eight states: New York; New Jersey; Connecticut; Massachusetts; Rhode Island; Vermont; New Hampshire; and Maine. Together, the Northeast has a population of more than 42 million people and covers an area larger than 348,000 square kilometers, making it the most densely populated region in the United States. Due to the dense population and a lack of naturally occurring resources, the Northeast imports most of its fossil fuels from other regions in North America and from overseas. Moreover, the Northeast lacks much of the inherent renewable resource potential enjoyed elsewhere in North America. Unlike the American Southwest, the Northeast's solar potential is low. Additionally, the Northeast's wind potential pales in comparison to the significant wind potential of the American Midwest. Despite these odds, and perhaps because of them, the Northeast has been ahead of the curve in developing policies to curb climate change and spur renewable development. This chapter aims to describe the key green energy programmes adopted by the Northeastern states and discuss their history and effectiveness.

Failure at the Federal Level: Federal Climate Change Policy

The United States has yet to pass any national legislation comprehensively addressing climate change. As a result, the U.S. has been forced to make do with its existing regulatory programmes to combat climate change. In 2007, the United States Supreme Court, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), rejected the Bush Administration's position that the Environmental Protection Agency ("EPA") cannot regulate greenhouse gas emissions under the federal Clean Air Act. The Court concluded that greenhouse gases are air pollutants covered by the Clean Air Act and directed the EPA to determine whether or not greenhouse gas emissions from motor vehicles cause or contribute to air pollution which may reasonably be anticipated to endanger the public health or welfare.

Two years later, the Obama Administration's EPA issued a formal Endangerment Finding (the "Finding") that greenhouse gas pollution threatens public health and the environment. This Finding allowed EPA to adopt greenhouse gas standards for new motor vehicles, which imposed more stringent fuel economy standards on automobile manufacturers. The Finding also triggered the requirement that EPA regulate greenhouse gas emissions from certain major stationary sources of air pollution, such as power plants and natural gas and oil production facilities.

Since issuing its Endangerment Finding, EPA has adopted a greenhouse gas reporting regulation and rules for imposing GHG standards on new and modified major stationary sources of greenhouse gases. EPA has also proposed carbon pollution standards for new power plants, and the agency is taking other actions to adopt regulations governing greenhouse gases. Unfortunately, the Clean Air Act, which was last substantially amended in 1990, is not well-suited to the efficient regulation of GHGs. It does not clearly authorise a cap and trade programme or other market-based policies to minimise GHG emissions. Therefore, until Congress acts to adopt new legislation to address climate change more directly, EPA can only use the crude tools available under the Clean Air Act to set limits on greenhouse gas emissions.

Despite the failure of federal policymakers to develop a comprehensive national climate change or renewable energy policy, the federal government has also utilised several existing and modified energy programmes to support renewable energy and energy efficiency advances. For example, the U.S. government has set energy efficiency standards for appliances and other products for years. In response to climate concerns, the U.S. Department of Energy under the Obama Administration has tightened those standards to reduce overall energy consumption. Moreover, the United States has successfully been able to pass through Congress several tax and other financial incentives that have proven vital to the robust development of renewable energy in the United States. The most significant of these federal financial incentives include the investment tax credit and bonus depreciation. The federal

business energy investment tax credit ("ITC"), which was expanded by the American Recovery and Reinvestment Act of 2009, allows project owners to take credits equal to 10% to 30% for eligible systems placed in service on or before December 31, 2016. The American Taxpayer Relief Act of 2012 allows a 50% first-year bonus depreciation for property placed in service from 2008 to 2013, with the remaining 50% of the adjusted basis of the property to be depreciated over the ordinarily applicable depreciation schedule. These two federal financial incentives have significantly encouraged the deployment of renewable energy technologies over the past few years. The continuation of these renewable energy incentives, however, is uncertain in view of the federal government's need to address its long term budget crisis.

Innovation and Experimentation: The Development of State Renewable Energy Programmes

Background: The PURPA Era

The United States has been encouraging deployment of renewable and efficient energy projects even before the relatively recent concerns surrounding climate change. Spurred by a growing dependence on foreign oil in the early 1970s, the United States adopted the Public Utilities Regulatory Policies Act of 1978 ("PURPA") to encourage investment in domestic and renewable sources of energy. PURPA was the earliest known form of feed-in tariff that required the electric utilities to purchase power from renewable energy generators and co-generators, referred to as "qualifying facilities", at the utilities' projected avoided wholesale cost of acquiring needed energy or capacity (whether by purchase or by construction of new facilities). The purpose of the PURPA tariff was to incentivise the development of renewable energy generation and efficient co-generation by requiring utilities to enter into long-term contracts with qualifying facilities that were intended to approximate the "avoided cost" to the utilities. These long-term contracts made it possible for renewable energy developers to secure financing for their projects because the project output could be sold to the utilities at an attractive and secure long-term price.

In the early 1990s, however, as the cost of coal and nuclear generation plummeted, PURPA contracts became no longer attractive to the utilities. As wholesale prices declined, so did the avoided cost rates, which led to reduced competitiveness of renewable energy projects. In an interesting turn of events, however, as the influence of PURPA contracts declined, a number of state-level renewable energy policies began to emerge coincident with the deregulation of the electricity markets and the re-emergence of environmental concerns in the United States, particularly in the Northeastern United States.

The States as Renewable Energy Laboratories

With the decline of the PURPA era, and the lack of leadership at the federal level, state policymakers began to experiment with market-based mechanisms to stimulate renewable energy market competition. In the late 1990s, the Northeastern states began a number of experiments to reduce dependence on fossil fuels and minimise greenhouse gas emissions. The major state mandated market-based mechanisms emerging out of the post-PURPA era included Renewable Portfolio Standards, Public Benefits Funds, Net Metering and streamlined Interconnection Standards.

Renewable Portfolio Standards

A Renewable Portfolio Standard ("RPS") is a state renewable energy policy that mandates that the state's electric utilities (and competitive retail generation suppliers) obtain a certain percentage of their electricity supply from eligible renewable energy sources. In most states, the RPS percentage increases steadily over time. Also, the RPS does not set a specific price that the electric utilities and competitive suppliers must pay for the renewable energy, but instead provides for competition among the renewable energy generation suppliers to ensure that renewable energy is secured at the lowest possible cost. As the RPS is a state policy mandate, electric utilities and competitive suppliers are required to demonstrate compliance with the RPS requirements on an annual basis. In the case where the utilities or competitive suppliers do not meet the renewable energy goals mandated by the RPS, these electric utilities and competitive suppliers are required to pay a penalty commonly called an alternative compliance payment ("ACP") that effectively caps the cost of RPS compliance when demand exceeds supply.

In the Northeastern states, the original purpose of the RPS mandate was to help these states move away from their over-reliance on fossil fuels. The RPS helps the states to meet their environmental goals by promoting renewable energy technologies that eliminate or reduce carbon dioxide emissions. Deploying more renewable energy generating sources to replace fossil fuel-fired plants also helps to improve overall air quality where these facilities are located. In addition, the RPS mandates stimulate local economic development by encouraging renewable energy technologies that support particular state-based industries. For example, the Connecticut RPS includes fuel cells powered by natural gas as an eligible renewable energy technology to support Connecticut-based fuel cell manufacturers. Other policy justifications for the RPS mandate include energy security, and increasing long-term rate stability and reducing fluctuating energy prices by increasing the use of renewable energy technologies, such as solar and wind, which do not require fuel.

Most RPS mandates in the Northeastern states utilise tradable renewable energy credits ("RECs") as the main mechanism for the utilities and competitive suppliers to comply with the RPS mandate and to facilitate compliance tracking. A REC is created for every megawatt-hour of renewable energy that is generated. A REC can be traded separately from the underlying electricity generated and is essentially a tool to monetise the "green" or "environmental" attribute of the electricity generated. The Northeastern states have been leaders in creating RPS REC markets, which are traded on established trading platforms such as the New England Independent System Operator, NEPOOL GIS.

RPS programmes generally include a broad swath of eligible renewable technologies. As the competitive REC market establishes a transparent uniform REC price across all technologies, the lowest cost technology will often enjoy widespread deployment, while the higher cost technologies enjoy less robust build-out. In the Northeast United States, this resulted in significant construction of biomass, wind and other lower cost technology, but limited the development of solar projects.

To address this dilemma, states such as New Jersey and Massachusetts created Solar Carve-out Programs within their RPS systems to encourage the development of solar generation. These innovative Solar Renewable Energy Credit ("SREC") programmes operate as "mini" RPSs in which solar is the only qualifying technology. Accordingly, the solar carve-out programmes provide SREC payments (in addition to REC payments) to solar facilities, creating an additional financial incentive. By providing an

additional revenue stream available only to solar technologies, the solar carve-out acts to encourage solar development by shielding a certain percentage of solar from competition with other (lower cost) renewable technologies such as wind or biomass. The inherent design of New Jersey's solar carve-out, however, created boom and bust cycles, making solar projects receiving SRECs difficult to finance. The Massachusetts SREC programme, which followed New Jersey's, attempted to correct this failing by instituting a SREC floor and complex SREC stabilisation model. Massachusetts' innovation in correcting the negative aspects of the New Jersey SREC programme provides a prime example of how the individual states serve as laboratories for the development of renewable energy policy.

Long-term Contracts

A weakness of the RPS, however, is that it often proves inadequate to support project financing. Even for projects where the developer can show a strong REC-backed revenue stream that would make the project economically viable, banks and other financial institutions are wary to lend or invest money in the project. This is due to the volatility of REC prices and concern that policymakers may change the RPS in future years of the project.

Connecticut recently addressed this problem by instituting a solicitation process for long-term (15 years) contracts for the RECs produced by the renewable energy projects. The solicitation is based on a declining auction process in which the utilities are required to stack the projects from the lowest to highest REC bids, and select the lowest bid projects until a predetermined block of money is expended. Connecticut offers long-term contracts to a variety of zero and low emitting technologies, referred to as Z-REC and L-REC projects, respectively. This benefits the state because it ensures that the lowest cost projects will be selected in each solicitation, and it benefits project developers because they are provided with a long-term bankable REC sales contract with the utility. The major disadvantages of this programme, however, are the limited number of projects supported by this ratepayer funded programme, and the relatively small size of projects (up to 1 MW for Z-RECs and 2 MW for L-RECs) that qualify.

Public Benefits Funds and the Green Bank

Concurrent with electric deregulation, most states in the Northeastern United States also created financing programmes for renewable energy projects and energy efficiency measures by establishing Public Benefits Funds ("PBF"). PBF programmes are funded through a special "surcharge" on the electric customer utility bill and are usually assessed on the customer based on the amount of electricity used. The size of the PBF can vary from state to state. For example, the Massachusetts Renewable Energy Trust Fund is supported by a surcharge of $0.0005 per kilowatt-hour ("kWh") imposed on all electric customers in Massachusetts. Connecticut's PBF charges no less than $0.001 per kWh. PBFs are usually administered through the local electric utility or through a state or quasi-state authority. These funds often authorise investment in solar, wind, biomass, combined heat and power ("CHP") and other projects that seek to deploy renewable or energy efficient technologies. The funds often provide grants, contracts, loans, equity investments, energy production credits, bill credits and other incentives.

The advantage of a PBF is that it is flexible and can direct funds to programmes and initiatives important to state policymakers. The disadvantage of a PBF is that it is subject to the political whims of the policymakers, and in tough economic times they are often "raided" to support a state's general revenue fund. Another disadvantage of a PBF is that it is a "fixed" pool of money and is subject to oversubscription, thus resulting in boom and bust cycles in funding available for green energy industry initiatives.

In order to reduce reliance on grants, rebates and other subsidies, and to leverage the limited PBF dollars with private investment dollars, Connecticut is experimenting with the Clean Energy Finance and Investment Authority ("CEFIA"), which is essentially a "green bank" using approximately $30 million in ratepayer funding each year to attract hundreds of millions of dollars of private capital. CEFIA invests its resources in green initiatives and projects to attract and deploy capital to finance the clean energy goals of Connecticut and implement strategies that lower the cost of clean energy to make it more accessible and affordable to consumers. The green bank is designed to reduce reliance on grants, rebates and other subsidies, and move toward innovative low-cost financing of clean energy deployment.

The Connecticut Property Assessed Clean Energy programme ("C-PACE") is another innovative programme in Connecticut that is designed to help commercial, industrial and multi-family property owners access affordable, long-term financing for smart energy upgrades to their buildings, including energy efficiency and renewable energy generation systems. C-PACE allows building owners to finance clean energy improvements to their properties by placing a voluntary assessment on their property tax bill. This way, property owners pay for the clean energy improvements over time through an additional charge on their property tax bill and the repayment obligation transfers automatically to the next owner if the property is sold. The capital provided under the C-PACE programme is secured by a lien on the property, so low-interest, long-term capital can be raised from the private sector with no government financing.

Net Metering and Virtual Net Metering

The Northeastern states have also promulgated state net metering laws. Net metering allows an electric customer (or third-party investor) owning a small, on-site, renewable electric power generator, to bank surplus renewable electric generation to offset grid-based electric energy purchases provided by the electric utility. Generally, with net metering, an electric customer's net excess generation during a monthly billing period is carried to the following month as a kilowatt-hour credit. At the end of an annualised period, the electric utility pays the electric customer for any remaining net excess generation based on the utility's avoided-cost rate. In some states, the net excess is calculated based on a time-of-use/generation basis, which can significantly increase the financial benefits of net metering for customers.

Net metering aggregation, also known as virtual net metering ("VNM"), involves the ability of an electric customer owning a small on-site renewable energy generator to combine (or aggregate) multiple electric accounts for the purpose of offsetting energy use at multiple locations. Such aggregation improves the electric customer's financial benefit resulting from the on-site renewable electricity generation system. Virtual net metering improves the opportunity for an electric customer to develop a larger renewable electricity project and place it where such asset is best located. This can significantly improve the electric customer's financial benefit from the system. For example, under virtual net metering aggregation, a town or city can install a wind or solar energy generation system at a local park, and assign the generation from the system to various accounts, such as its schools, the wastewater treatment plant or the town hall.

States have taken varied approaches regarding the extent to which they permit net metering and virtual net metering. For example, Connecticut permits net metering, but limits and restricts VNM to municipalities only. Massachusetts, on the other hand, permits all customers to virtual net meter. However, it places "caps" on the ultimate amount of generation that may be net metered within the state. The "cap" varies dependent upon whether the entity is public or private and permits far more public and municipal net metered generation. This allows government entities to invest in large renewable energy projects, which may subsequently be virtual net metered to all of a town's various customer accounts.

Interconnection Standards

Interconnection standards are technical requirements for connecting solar and other renewable generation systems to the electrical grid. These rules apply to both renewable energy customers and utilities. In the Northeastern states, the interconnection process was complex and/or expensive, and it was a significant barrier to bringing renewable energy generating systems online. The concern for state policymakers was that the ability to interconnect to the grid on a cost-effective and timely basis affected the feasibility of renewable energy projects. In the last five years, however, interconnection standards have been simplified and streamlined to allow the deployment of distributed renewable energy systems without compromising electrical system safety and reliability.

Feed-In Tariffs

In the United States, including the Northeast, the use of Feed-in Tariffs ("FITs") is not the preferred policy approach to promoting renewable energy, because they set a fixed price; rather than allowing market mechanics to regulate the cost of energy. Instead, policymakers have adopted the RPS as the preferred policy instrument for advancing renewable energy, due to the RPS's more market-based approach. Despite these pitfalls, two states in New England have FITs, Vermont and Rhode Island. Vermont's FIT requires all Vermont retail electricity providers to purchase electricity generated by eligible renewable energy facilities through the Sustainably Priced Energy Enterprise Development ("SPEED") Program via long-term contracts with fixed standard offer rates. The Vermont Public Service Board established interim standard offer rates and final standard offer rates. Projects are eligible up to 2.2 MW, until 127.5 MW of cumulative capacity is reached. The long-term contracts are 10 to 25 years for solar and 10 to 20 years for all other technologies. Similar to Vermont, Rhode Island's FIT requires the electric utilities to solicit proposals and enter into long-term contracts for capacity, energy and environmental attributes from new renewable energy facilities. The electric utilities will be required to enter into long-term contracts for 90 MW of capacity by 2014, of which 3 MW must come from in-state solar facilities.

The Regional Greenhouse Gas Initiative

In response to concerns about climate change and the lack of any federal legislative action to directly reduce GHG emissions, the six New England states, as well as New York, New Jersey, Maryland and Delaware agreed in 2008 to implement the first mandatory cap and trade carbon market in the United States, known as the Regional Greenhouse Gas Initiative ("RGGI"). RGGI, which is generally based on the European Union's Emissions Trading System, was intended, in part, to serve as a model for a national system for the United States. RGGI covers only the electric utility industry sector in the participating states. Carbon dioxide ("CO2") allowances are not distributed for free, but rather are sold at auctions that are held regularly during each three-year control period. The first control period ran from 2009 to 2011, with allowance prices generally being below $2 per tonne of CO2. Funds raised through the auctions are distributed to the participating states, and each state, by regulation, decides how to use the auction proceeds. Most of the funds raised by the auction are used to invest in renewable energy infrastructure and energy efficiency resources. According to the RGGI website, www.RGGI.org, the RGGI states invested approximately $617 million in energy efficiency and renewable energy projects during the first three years of the programme.

In 2011, Governor Chris Christie announced that New Jersey would withdraw from RGGI, because he believed that RGGI was ineffective in combating global warming. He argued that the programme does nothing more than tax electricity used by New Jersey residents. In February 2013, RGGI proposed changes to the programme after completing a comprehensive two-year programme review. The proposed changes include a reduction in the regional CO2 cap from 165 million tonnes to 91 million tonnes, the establishment of a cost containment reserve if allowance prices exceed certain levels, and updates to the RGGI offset programme, including establishment of a new forestry offset protocol. The amended programme also proposes ways to reduce the excess supply of allowances, which resulted in part from the economic recession, and to evaluate mechanisms to address the use of electricity imported from non-RGGI states, including Pennsylvania and now New Jersey.

RGGI differs from the renewable energy programmes adopted by the various Northeastern states in two important respects. First, it is a coordinated regional programme, with each state adopting the model regulations drafted by the RGGI organisation. Second, it provides a disincentive to using fossil fuels to generate electricity, particularly for less efficient electric generators, rather than providing direct incentives for renewable energy. However, the funds raised by the states through the RGGI auctions provide financial support for energy efficiency and renewable energy programmes in the region.

Conclusion

The Northeastern states have refused to wait for Congress to agree on a nationwide approach to climate change. Instead, they have pursued a range of green energy policy initiatives designed not only to begin the monumental task of combating climate change, but also to stimulate local economic development, improve energy security, stabilise energy prices and minimise impacts to public health and the environment. In moving forward in developing their own climate polices, the states are truly serving as a laboratory to implement social and economic experiments that one day may be adopted by the United States and other governments.

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