

## THE INCREASINGLY COMPLEX ROLE OF THE UTILITY CONSUMER ADVOCATE

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**Synopsis:** The authors, both former state utility consumer advocates, explore the ways in which the role of the utility consumer developed and has evolved in response to transformational changes in the energy field. Most state utility consumer advocate offices were established in the 1970s in response to the Energy Crisis of that time period, and a public sentiment that the average utility consumer did not have an adequate voice in the process of setting utility rates and developing utility policy. This article, which focuses primarily on the electricity sector, details the rise of regulation in that sector, and details the jurisdiction and features of most utility consumer advocates. In other words, what is a state utility consumer advocate? Most advocates offices have a consumer-focused mandate, are structurally separated from the regulator – usually a state public utilities commission – and have the ability to appeal decisions from that regulator. This structure is intended to give a state utility consumer advocate independence from the regulator so that the advocate can challenge the decisions of the regulator that do not serve the interests of the consumer. It is also intended to insulate the advocate from political influence or reprisals for taking positions that may be unpopular or adverse to a powerful special interest. Of course, as discussed, that independence and political insulation is at times more theoretical than actual, as most state utility consumer advocates have found themselves in political hot water at least occasionally.

The authors interviewed ten current and former state utility consumer advocates and added their own reflections to illuminate the increasingly complex role of an advocate in today's electric sector. The electric sector no longer involves a rather straightforward grid that generates electricity at large central station power facilities and delivers it through the grid to the end user. Now, electricity can flow both out of and into the grid from the consumer, if the consumer is also generating electricity. There are also new and developing technologies involving electric vehicles, charging stations, renewable resources, net metering, demand response, storage, and solar interconnections. This increasing complexity challenges the state utility consumer advocate to understand the issues and participate in the policy formulation around these issues, often with a thinly staffed office.

With the rise of renewable power and distributed energy resources including “behind the meter” solar installations for residential consumers, state utility consumer advocates also face growing fractures within classes of consumers. For

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example, many advocates find themselves caught between residential consumers who want increasing financial support such behind the meter resources and those residential consumers that cannot participate in programs supporting behind the meter resources for financial or other reasons. In many cases, state utility consumer advocates will work to understand both sides but focus more on low-income consumers who do not have other means of advocacy.

Advocates are also facing a host of new forums in which they must advocate. While the traditional utility rate case before a state public utility commission remains the foundation for setting electric rates, other proceedings inform and impact consumers with respect to electric rates and policy. In the jurisdictions surveyed, advocates described working groups, public meetings, interagency task forces, legislative hearings, and press conferences as being essential to their effectiveness as advocates. This transition away from litigated proceedings has further increased the scope of a state utility consumer advocate's duties and responsibilities.

Despite the changing landscape of the electric sector – or rather, because of it – the work of the state utility consumer advocate remains more important than ever. In a sector with near constant evolution and change, and an increasing multiplicity of issues, voices, and forums affecting consumers, a voice dedicated solely to the consumer perspective is an essential voice in the wilderness.

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## I. INTRODUCTION

The work of the utility consumer advocate has traditionally had an inherently David vs. Goliath feel: sparsely funded and thinly staffed public agencies or non-profits charged with representing consumers in adversarial proceedings are pitted against deep-pocketed utility companies that include some of the largest corporations in the world.<sup>1</sup> The bulk of a consumer advocate's work historically focused

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1. Michael Murphy & Francine Sevel, *The Role of Utility Consumer Advocates in a Restructured Regulatory Environment*, THE NAT'L REGULATORY RESEARCH INST. (Sept. 2004), <https://pubs.naruc.org/pub/FA8626E1-0000-871D-4660-18F3E7238C8A>.

on litigated proceedings before state public service commissions.<sup>2</sup> In these proceedings, utilities hold most of the cards: they can afford teams of lawyers, analysts, and experts to present and defend their case, and parsimoniously dole out the information that advocates need to make theirs.<sup>3</sup> Despite these odds, the presence of dedicated consumer advocates has consistently delivered meaningful wins for their clients, utility customers, in the form of lower rates or greater consumer protections.<sup>4</sup> And though the work is inherently challenging, the advocates' statutory charge to represent consumers gave the work a certain moral clarity.<sup>5</sup> David, faced with Goliath, knew where to direct the sling.

The nature of the work of utility consumer advocates has changed over the past decade.<sup>6</sup> As former utility advocates, we the authors experienced these changes firsthand. We both felt increased demands on our time, our staff, and our skills to perform our jobs adequately, and that to do our jobs well, we would need to approach it differently. In this article, we have attempted to describe these changes, and how we and our former colleagues have responded. To do this, we interviewed ten utility consumer advocates, past and present. Some have retired from long and distinguished careers in advocacy, some have been serving in their positions for years, and some are relatively recent arrivals to utility consumer advocacy. Their thoughts, ideas, and musings are captured here, sometimes in general ways and sometimes with specific attribution. These interviews reinforced – and challenged – our assumptions, but we were struck over and over by the great forethought, deliberation, and passion they brought to their work.

Today, the litigated commission proceeding is no longer the primary focus of many advocates' work, nor are rates the single main concern.<sup>7</sup> While rate cases and setting fair and equitable rates for utility services remains a central component of the work, other forums have risen in importance for consumer advocates.<sup>8</sup> Public policy debates around renewable energy, changing generation fuel mixes, retail competition, and demands for financial support of nuclear facilities rage in state legislatures and agencies. Public demand for – and opposition to – solar panels, wind turbines, hydropower projects, and electric vehicles is vetted in town halls,

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2. *Id.*

3. *Id.*

4. *Id.*

5. While many state consumer advocates are statutorily authorized to represent commercial, industrial, and small business consumers, others are not; the common jurisdiction of virtually every consumer advocate is residential consumers. *Id.* Some consumer advocates, e.g., DC People's Counsel and the Vermont Department of Public Service, are funded by the utilities through "bill back" mechanisms that allow the advocates to hire witnesses, etc., bill their costs to the utility, and the utility gets to include the costs in its rates. VERMONT PUB. SERV. DEP'T, SUSTAINABLE FUNDING FOR THE PUBLIC UTILITY COMMISSION AND THE DEPARTMENT OF PUBLIC SERVICE 4, 24, 29 (Sept. 26, 2018), [https://jfo.vermont.gov/assets/Meetings/Joint-Fiscal-Committee/2018-11-08/aa7a13d868/Sustainable-Funding-for-the-Public-Service-Department-and-the-PUC-\\_Sept-26-2018\\_-v4.pdf](https://jfo.vermont.gov/assets/Meetings/Joint-Fiscal-Committee/2018-11-08/aa7a13d868/Sustainable-Funding-for-the-Public-Service-Department-and-the-PUC-_Sept-26-2018_-v4.pdf).

6. Murphy & Sevel, *supra* note 1.

7. *Id.*

8. Although utility consumer advocates are statutorily authorized in jurisdictions to cover a variety of services from ferries, taxi, garbage collection, natural gas distribution and telecommunications, this article will focus primarily on the utility consumer advocate in the context of the electric sector. *See, e.g.*, ME. STAT. tit. 35-A, § 5101 (1991) (Maine's PUC has the authority to regulate the ferries in Casco Bay).

public hearings, and social media. Regional, national, and global trends push the importance of dialogue and collaboration above the state level. Regional transmission organizations (RTOs) and Independent System Operators (ISOs) create complex bureaucracies which advocates must navigate and staff. This increasing diversity of matters and splintering of arenas for a consumer advocate's work requires monitoring, focus, and participation in far more spaces on far more issues.

In addition, a consumer is no longer just a consumer. The proliferation of distributed generation has blurred the lines between electricity consumer and producer. Advanced metering infrastructure<sup>9</sup> has enabled new rate structures and models for consumer-utility infrastructure and more opportunities for active consumer engagement in their energy consumption. These changes, paired with retail and wholesale competition, have introduced new and often largely unregulated actors to utility consumers. Rising income inequality and energy affordability issues for many residential consumers create emotionally charged debates about participants and nonparticipants, haves and the have nots, those who can and those who cannot. More than ever, consumer advocates confront fractures and even hostilities within customer classes.

The skill set for advocates has also changed. Consumer advocates can no longer afford to maintain the us-versus-them sensibility implicit in the David and Goliath approach. Vigorous advocacy before state commissions remains important, but it is not enough. Advocates must now collaborate, convene, debate, educate, opine, and lobby in entirely new ways to adequately represent consumer interests. It is this last change that is perhaps the greatest shift in the role of the consumer advocate: David now must frequently drop the sling and rely instead on his (or her) negotiation skills and powers of persuasion to influence, rather than defeat, an entire army of Goliaths.

Through all this change, the need for a dedicated advocate on behalf of consumers remains. The core observation that sparked the creation of utility consumer advocate offices remains true—that absent a voice for consumers, the regulatory process is less likely to produce outcomes that incorporate their interests.

## II. THE ORIGINS OF STATE UTILITY CONSUMER ADVOCATES

While consumer advocates have a long history in many domains, dedicated consumer advocates were not a feature of utility regulation for most of its history. Public utilities have been subject to regulation by state utility commissions for most of the 20<sup>th</sup> century, and the concept of regulating services that are essential for the public welfare is much older.<sup>10</sup> The underlying concept behind this public regulation is that certain essential services tend toward monopoly (or operate more

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9. Office of Electricity Delivery and Energy Reliability, U.S. Dept. of Energy, *Advanced Metering and Customer Systems*, SMARTGRID.GOV (Sept. 2016), [https://www.energy.gov/sites/prod/files/2016/12/f34/AMI%20Summary%20Report\\_09-26-16.pdf](https://www.energy.gov/sites/prod/files/2016/12/f34/AMI%20Summary%20Report_09-26-16.pdf).

10. CHARLES F. PHILLIPS, JR., *THE REGULATION OF PUBLIC UTILITIES* 91 (Public Utilities Reports Inc., 1993).

efficiently as monopolies), and that we cannot rely on the market alone to ensure adequate and reasonable services at affordable prices.<sup>11</sup>

In the United States, widespread state government regulation of common carrier services began following the Civil War, however, with the advent of the populist movement and a revived doctrine of public interest, and the expansion of rail service.<sup>12</sup> Because there were typically only one or two rail companies servicing small and remote areas, rail companies were able to exploit those customers and charge higher rates, sparking a consumer backlash.<sup>13</sup> In response, many states created commissions to regulate railroad rates and protect consumers.<sup>14</sup>

Regulation of electric utilities started at the municipal level, as states typically gave municipalities jurisdiction over streets.<sup>15</sup> Franchises from the municipality were required.<sup>16</sup> Many cities found themselves with multiple electric franchises to stimulate competition, often with competing providers of AC and DC current.<sup>17</sup> By the beginning of the twentieth century, however, it was generally concluded that regulation, rather than competition, was the preferred approach for the future of the burgeoning electric industry.<sup>18</sup> In particular, it was recognized that it made little sense to build forests of competing electric distribution poles and lines in some districts of the city, while others went totally unserved.<sup>19</sup> Electric utilities were deemed to be “natural monopolies” – that is, it was more economical and beneficial to society to have a single electric utility serving a particular geographic area, rather than to let multiple utilities compete against each other to serve the same customers.<sup>20</sup>

States began to exert control over public utilities in the early 1900s, superseding municipal authority and establishing the concept of a certificate of public convenience and necessity.<sup>21</sup> By 1940, all states had established utility regulatory commissions.<sup>22</sup> The landmark case of *Federal Power Commission v. Hope Natural Gas Company* established that rates must be “just and reasonable,” a standard that persists to this day.<sup>23</sup>

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11. *Id.* at 4.

12. *Id.*; see also Darryl G. Stein, *Perilous Proxies: Issues of Scale for Consumer Representation in Agency Proceedings*, 67 N.Y.U. ANN. SURV. AM. L. 513, 520 (2012).

13. PHILLIPS, *supra* note 10, at 92; see also Stein, *supra* note 12 at 520-21.

14. PHILLIPS, *supra* note 10, at 93; see also Stein, *supra* note 12, at 521.

15. David P. Tuttle et al., *The History and Evolution of the U.S. Electricity Industry*, THE UNIV. OF TEX. AT AUSTIN: ENERGY INST. (July 2016), [http://sites.utexas.edu/energyinstitute/files/2016/09/UTAustin\\_FCe\\_History\\_2016.pdf](http://sites.utexas.edu/energyinstitute/files/2016/09/UTAustin_FCe_History_2016.pdf).

16. Lisa M. Vedder, *Electric Utility Financial Basics: An Introductory Primer*, ELEC. UTIL. CONSULTANTS INC. 17 (Feb. 2018).

17. *Id.*

18. Tuttle, *supra* note 15, at 5.

19. *Id.*

20. Sonny Popowsky, *Electricity Service Advocacy*, in WATCHDOGS AND WHISTLEBLOWERS: A REFERENCE GUIDE TO CONSUMER ACTIVISM 186 (Stephen Brobeck & Robert N. Mayer ed., 2017).

21. Vedder, *supra* note 16, at 21.

22. Robert J. Michaels, *Electricity and Its Regulation*, THE LIBRARY OF ECON. & LIBERTY, <https://www.econlib.org/library/Enc/ElectricityandItsRegulation.html>.

23. Vedder, *supra* note 16, at 35; *Federal Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944).

Public utilities commissions (PUCs) were tasked with regulation of public utilities, which are privately owned businesses that provide public services, generally focused on communication, transportation, energy, and waste collection.<sup>24</sup> In exchange for exclusive franchises between these private utility companies and a state or municipality to serve a given geographic area, these businesses were subject to regulation of the rates, terms and conditions by commissions charged with maintaining reasonable and fair prices as well as sufficient quality of service.<sup>25</sup> Much of this work was conducted in ratemaking proceedings, in which commissioners acted in a quasi-judicial role conducting hearings and rendering findings of fact and conclusions of law.<sup>26</sup> While there are many factors and considerations which inform the act of ratemaking, at its most basic, public utilities commissions must balance the interest between the utilities and the consumers: “[i]t is not theory but the impact of the rate order which counts.”<sup>27</sup>

There are many different considerations that go into a commission’s decision on potential rate changes, many of which are identified in Bonbright’s work.<sup>28</sup> He recognized eight areas rate makers should consider and noted that not one of these factors outweighs the other, but rather they must be balanced and “do not readily yield to scientific principles.”<sup>29</sup> In rate cases, commissioners act in their quasi-judicial role during proceedings, with Commissioners as an iteration of administrative law judges, where they “conduct hearings [and] render findings of fact and conclusions of law.”<sup>30</sup>

Utility consumer advocates trace their origin to the 1970s when a confluence of efforts to increase competition, costs related to nuclear generation, and the Energy Crisis of the early 1970s caused sharp and more frequent utility retail rate increases.<sup>31</sup> Between 1974 and 1975, the rates of utilities increased by a record \$22.2 billion dollars, which was more than twice as much as it had increased in previous years.<sup>32</sup> These increases heightened consumer interest in energy prices and prompted calls for utility regulation in the public interest from an organized utility consumer movement.<sup>33</sup>

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24. Jonathan Armiger, *Judicial Review of Public Utility Commissions*, 86 IND. L.J. 1163, 1165 (2011).

25. *Id.*

26. *Id.* (quoting *Simpson Cnty. Water Dist. v. City of Franklin*, 872 S.W.2d 460, 465 (Ky. 1994)).

27. *Hope Nat. Gas Co.*, 320 U.S. at 602.

28. James C. Bonbright, *Principles of Public Utility Rates* 287-95 (Columbia University Press, 1961).

29. *Id.* at 291.

30. Armiger, *supra* note 24, at 1166 (alteration in original).

31. Guy L.F. Holburn & Richard G. Vanden Bergh, *Consumer Capture of Regulatory Institutions: The Creation of Public Utility Consumer Advocates in the United States*, 126 PUB. CHOICE 45, 47 (2006) (“Beginning in the 1970s, state public utility commissions (PUCs) came under pressure from the utilities to rapidly authorize rate increase requests as continuously rising fuel and other costs eroded profits on a quarterly basis. Over a four-year period the number of rate reviews doubled, and by 1980 electric utility rate increase requests had risen to a level of approximately \$11 billion, more than 10 times the level in 1970.”).

32. Richard L. Goodman, *The Role of Consumer Advocacy before the Public Utilities*, 8 Cap. U. L. Rev. 213, 213 (1978); see also ELECTRIC AND GAS UTILITY RATE AND FUEL ADJUSTMENT CLAUSE INCREASE, 94th Cong., 2d Sess., at vii (1976) (prepared for the Senate Committee on Governmental Operations).

33. Murphy & Sevel, *supra* note 1, at 3; see also J. Jonathan Schraub, *Office of Public Counsel: Institutionalizing Public Interest Representation in State Government*, 64 GEO. L. J. 895 (1976); Stein, *supra* note 12.

From the 1970s through the 1990s, state legislatures reacted to this consumer pressure by enacting legislation which, in a majority of states, created independent utility consumer advocacy offices and gave the consumer advocate standing in utility proceedings.<sup>34</sup> These state offices, which now exist in more than 40 states and the District of Columbia, were created in order to remedy the perceived unfairness of a regulatory system in which utilities were well-represented by lawyers, experts, and utility personnel in matters such as rate increase requests before state public utility commissions, but the consumers who paid the utility bills were not.<sup>35</sup> The addition of a consumer advocate reflected a concern that the structure of a Commission proceeding was not well suited to balance the interests of the utility and its customers in proceedings in which customers were un- or underrepresented.<sup>36</sup>

Proponents of these offices highlighted the significant obstacles to effective consumer participation before utility commissions. Effective participation in complex regulatory proceedings required expertise in administrative law, engineering, and economic and financial theory that were not widely available. Even assuming that consumers possessed the technical expertise, actually participating in a regulatory proceeding required a commitment of time both in and out of the hearing room that consumers likewise lacked.<sup>37</sup> While spiraling utility costs had a major impact on the household budgets of many consumers, the costs to individual consumers were generally not enough to justify investing the time and energy to participate in a utility rate proceeding, or hire counsel and experts to do so on their behalf, even though the impact for residential consumers as a class might be quite large.<sup>38</sup> And even with time and expertise, for an individual residential customer, the dollar amounts at issue would not justify the effort. Finally, an individual consumer's concerns may not reflect the concerns of consumers as a whole, or may struggle to make a larger claim to represent the interests of all consumers even if their concerns were broadly shared.<sup>39</sup> In short, effective consumer advocacy before PUCs created a classic collective action problem.<sup>40</sup>

State consumer advocate offices were created in order to level the playing field and give consumers a chance to have their voices heard in an effective manner.<sup>41</sup> The position varies from state to state in both implementation and title: across the country, utility consumer advocate offices are structured as independent

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34. Holburn & Vanden Bergh, *supra* note 31, at 47.

35. Murphy & Sevel, *supra* note 1, at 8.

36. Stein, *supra* note 12, at 513, 532.

37. *Id.* at 536.

38. Popowsky, *supra* note 20.

39. *See* Stein, *supra* note 12, at 515.

40. Keith Dowding, *Collective Action Problem*, ENCYCLOPEDIA BRITANNICA, INC. (Mar. 7, 2013), <https://www.britannica.com/topic/collective-action-problem-1917157/Incentives-and-disincentives-of-collective-action>.

41. Murphy & Sevel, *supra* note 1, at 3.

state agencies, divisions of state attorneys general, or as non-profit consumer utility boards (CUBs).<sup>42</sup>

This history is important in understanding the structure and mandate of utility consumer advocate offices, and the challenges posed by changing conditions. Utility consumer advocates were designed to effectively advocate in the types of proceedings used to establish utility rates in the late 1970s and early 1980s: quasi-judicial process with commission acting as adjudicator; a common, broadly defined consumer interest; an adversarial framework; and an opportunity for judicial appeal if things go wrong. These typical commission proceedings at that time included rate cases, affiliate proceedings, and merger approvals.

The modern consumer advocate was created as a fix to an administrative process, the utility rate case,<sup>43</sup> that was perceived as broken. The addition of consumer advocate actively and vigorously advocating for the consumer interest ensured that this interest would be appropriately accounted for in the commission's decision which would balance consumer and utility interest. Many consumer advocates still believe this oppositional role in a rate case is still their most essential responsibility.

The specific procedures vary from state to state, but in the typical utility rate case, the utility makes an application for a rate increase before the state's public utility commission.<sup>44</sup> The state commissions serve as decisionmaker, usually after a hearing on the evidence held by an administrative law judge.<sup>45</sup> That hearing on the application is akin to a civil court case and delves into the application in great detail.<sup>46</sup> All parties, including commission staff, have an opportunity to question the utility's witnesses (usually key utility personnel and outside experts retained by the utility) as to various aspects of the application.<sup>47</sup> Though these proceedings were structured like a court case, until the late 1970s, there was no party dedicated to representing consumers for most of their early history.<sup>48</sup> This vision of the rate case framework, with the utility presenting its case, the commission serving as the judicial decisionmaker, and the consumer advocate vigorously cross-examining the utility supported by other interested parties, would achieve optimum—or at least improved—results for the public. The addition of the utility consumer advocate brought utility proceedings in line with the American legal system's civil and criminal courts, which also rely on adversarial processes to render justice.

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42. *Id.* at 11, fig. 4. (Sept. 2004). Six states do not have any independent representation through any of these means. Fifteen states are represented by attorney generals, twenty-seven states are represented by independent consumer advocates, and three states are represented by nonprofit public corporations. While their purposes are similar as noted above, consumer advocates that are located within the attorney general's office often enforce more general consumer protection laws. *Id.* at 9-10.

43. James H. Cawley & Norman J. Kennard, *A Guide to Utility Ratemaking*, PENN. PUB. UTIL. COMM'N (2018), [http://www.puc.pa.gov/General/publications\\_reports/pdf/Ratemaking\\_Guide2018.pdf](http://www.puc.pa.gov/General/publications_reports/pdf/Ratemaking_Guide2018.pdf).

44. PHILLIPS, *supra* note 10, at 196.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

Utility consumer advocates in the United States have three attributes in common: 1) an explicit “constitutional” charge to represent consumers, 2) structural separation from the regulator, and 3) standing and the ability to appeal decisions.<sup>49</sup> These core attributes are captured in the Constitution of the National Association of State Utility Consumer Advocates (NASUCA), as the core requirements necessary for state offices to become a member.<sup>50</sup> Taken together, they are the essential attributes for effective representation of consumers before utility commissions.

#### A. *Consumer Mandate*

A consumer advocate’s primary charge is to advocate for reasonably priced utility service that is adequate and reliable.<sup>51</sup> In most states that employ a consumer advocate, the advocate represents all utility consumers in the state, though in a minority of states the consumer advocate is limited to representing residential, agricultural, and small business interests.<sup>52</sup> State consumer advocate offices<sup>53</sup> have enacting legislations generally with similar purposes.<sup>54</sup> For example, the authority for Maine consumer advocate office stems from Chapter 17, titled “Public Advocate.”<sup>55</sup> This statute states that the public advocate’s purpose is to review, investigate, and make appropriate recommendations to the PUC in respect to reasonableness of rates, services, terms and conditions, mergers, and more.<sup>56</sup> Massachusetts, where the office is within the attorney general’s office, has a nearly identical purpose for their consumer advocate, which states that advocate may intervene, appear, and participate on behalf of any group of consumers of utility companies regarding rates.<sup>57</sup>

A well-defined mission is helpful in guiding the work of any organization, but these missions reflect an underlying assumption of how the regulatory process is expected to work. Most such missions assume the existence of and the ability to define a general consumer interest, at minimum, for a broad class of customers. Utilities present their own case, consumers present theirs, and it is a commission’s task to balance these competing interests in setting just and reasonable rates. For example, in New Jersey, the public advocate is explicitly intended to represent

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49. Save for nonprofit public corporations which are funded through independent and member donations. See CITIZENS UTIL. BD., WHAT DONATIONS SUPPORT, <https://cubwi.org/give/what-donations-support/>.

50. See generally NAT’L ASS’N OF STATE UTIL. CONSUMER ADVOCATES, CONSTITUTION OF THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES (Nov. 2016), <https://www.nasuca.org/nwp/wp-content/uploads/2016/11/NASUCA-Constitution-11-2016.pdf>.

51. Murphy & Sevel, *supra* note 1, at 12.

52. *Id.* at 14.

53. Either within the attorney general’s office, as independent counsel, or as a nonprofit corporation.

54. See Holburn & Vanden Bergh, *supra* note 31, at 48, Table 1 (2006) (containing a list of enacting legislation).

55. The names of these offices vary from state to state, but this article will address them as consumer advocates. Me. Rev. Stat. Ann. tit. 35-A § 1702 (2019).

56. *Id.* § 1702(1).

57. Mas. Gen. Laws Ann. ch.12 §11E (West 2012).

those consumers who would otherwise be underrepresented in utility proceedings.<sup>58</sup>

Every consumer advocate with whom we spoke noted the way in which their mission provides a continual touchstone for their work. There are frequently times when a consumer advocate must decide what position to take on a proposed action that is politically popular. For example, in 2013, top administration officials in Connecticut proposed legislation that would auction off the rights to more than 800,000 residential electricity accounts to independent electric suppliers.<sup>59</sup> The auction was expected to bring as much as \$100 million in new revenue to the state budget at a time when the state was facing a severe deficit.<sup>60</sup> Author Elin Katz was Connecticut's Consumer Counsel at the time and vigorously opposed the auction because consumer protection concerns and the forced switching of residential accounts to unregulated actors.<sup>61</sup>

"When I publicly opposed the auction, I was definitely going out on a limb," Katz said.<sup>62</sup> "I was opposing our governor's signature proposal to fill a \$100 million gap in the budget. However, I had extensive discussions with my staff about what was best for consumers and in the end, it wasn't a close call because of the potential consumer harm. I knew I would draw the ire of the Governor's Office and legislators because of the amount of money at stake. So I swallowed hard, as I knew it was risky for my office, but my first responsibility is to the consumers I represented."<sup>63</sup>

Other consumer advocates speak of the same tension between doing what is best for consumers and what is less risky for their office and their staffs. "We have to put the mission first in lieu of the organizational interest," said Mark Toney, Executive Director of California's The Utility Reform Network. "If it's not true to the mission, then no point in having it."<sup>64</sup>

### *B. Structural Separation from the Regulator*

The NASUCA Constitution describes this structural separation as "operat[ion] independently of state utility regulatory commission(s) with respect to

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58. See N.J. REV. STAT. § 52:27EE-49 (2013) ("It is the intent of the Legislature that the resources of the Division of Rate Counsel be devoted to the maximum extent possible to ensuring adequate representation of the interests of those consumers whose interests would otherwise be inadequately represented in matters within the jurisdiction of the Division of Rate Counsel.").

59. Robert Miller, *State considers an energy auction*, CT POST (Mar. 18, 2013), <https://www.ctpost.com/local/article/State-considers-an-energy-auction-4364776.php>.

60. *Id.*

61. Brian Dowling, *State's Top Consumer Advocates Step Out Against \$100M Electricity Auction*, HARTFORD COURANT (May 20, 2013), <https://www.courant.com/business/hc-xpm-2013-05-30-hc-electricity-auction-katz-jepsen-20130529-story.html>.

62. Interview with Elin Katz, Managing Director of Utilities and Associate General Counsel at Tilson (Mar. 3, 2020).

63. *Id.*

64. Interview with Mark Toney, Executive Director of California's The Utility Reform Network (Feb. 18, 2020).

policy determination, hiring and firing of personnel and fiscal control.”<sup>65</sup> Forty-five states have consumer advocate offices that are independent from the PUC.<sup>66</sup> States vary in where they vest this power, if not with the commission, many advocates are appointed by the governor, some by the legislature, some by lower-level executives.<sup>67</sup> Some states further limit abuse of the appointment power through requirement of industry expertise, a bar on *ex parte* communications, and mandated plans to solicit public input.<sup>68</sup> In Connecticut, for example, the Consumer Counsel “shall be an elector of this state and shall have demonstrated strong commitment and involvement in efforts to safeguard the rights of the public.”<sup>69</sup> In other states, the consumer advocates serve at the pleasure of the appointing power, whereas others further insulate the office from interference by limiting the circumstances under which an advocate may be removed.<sup>70</sup> There is no known research on the relative efficacy of a consumer advocate based on their degree of independence or statutory experience requirements, although there is general consensus among the advocates we spoke with that having some kind of structural protection from termination without cause provides more freedom to take unpopular or contentious positions.

The requirement of structural separation is a legacy of the forum in which the work of consumer advocates was expected to be performed: litigated administrative proceedings. There is no inherent reason that the work of representing consumers must be outside of the PUC. Indeed, in the experience of the authors, many commission staff, and even commissioners themselves look out for the interests of consumers in the performance of their work. Many state commissions have dedicated consumer affairs divisions that serve exactly this function for individual consumer concerns.<sup>71</sup> In many states, commissions have substantially greater resources than the advocates’ offices which absent such separation, could be brought to bear on behalf of consumers.

But in litigated proceedings, this structural separation serves a number of purposes. Unlike regulators, independent consumer advocates have no legal obligation to balance the interests of consumers.<sup>72</sup> This purity of purpose provides a robust counterbalance to the utilities’ own self-interest, that allows regulators to make fully informed decisions. For the consuming public, it provides a sense that someone is looking out for their interests. Finally, an independent advocate can exercise its ability to appeal a Commission’s decision to a higher authority without fear of reprisal.

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65. NAT’L ASS’N OF STATE UTIL. CONSUMER ADVOCATES, *supra* note 50.

66. Murphy & Sevel, *supra* note 1, at 9.

67. Stein, *supra* note 12, at 554-55.

68. *Id.* at 553-54.

69. Conn. Gen. Stat. § 16-2a(d) (2012).

70. INST. OF PUB. UTIL., MICHIGAN STATE UNIV., IPU-MSU DATABASE ON CONSUMER ADVOCATES IN THE U.S. (2020), <http://ipu.msu.edu/research>.

71. Murphy & Sevel, *supra* note 1, at 24.

72. Stein, *supra* note 12, at 522.

### C. Ability to Appeal Decisions

The ability to appeal decisions is another element vital to the function of consumer advocates.<sup>73</sup> The statutes from which consumer advocates derive their authority usually allow the advocates to not only intervene and have standing in administrative proceedings of the PUCs, but also grant authority to appeal decisions of the commissions.<sup>74</sup> The only exceptions to the ability to appeal are in Alaska and Mississippi.<sup>75</sup> This right to appeal commission decisions is significant because this ensures that a commission's decision could be scrutinized under the judicial review of the state court under the state's administrative procedures.<sup>76</sup> This power supercharges the consumer advocates work in a litigated administrative proceeding. It is not over when the commission renders its decision: independent consumer advocates may continue their advocacy in the state court on the record they built in the agency proceeding.<sup>77</sup>

Advocates have used this power to great effect, such as Pennsylvania's former Consumer Advocate Sonny Popowski, who appealed the Pennsylvania's PUC decision, which had denied the Consumer Advocate's argument that a recently enacted law<sup>78</sup> prohibited construction and expansion of public utility facilities to be included in rates charged to consumers.<sup>79</sup> Mr. Popowski appealed the decision to the Pennsylvania Supreme Court, who reversed the PUC's decision.<sup>80</sup> After subsequent appeals by the utility companies, Mr. Popowski successfully defended his argument and Pennsylvania consumers at the United States Supreme Court, demonstrating just how vital it is for the consumer advocate to have the right to appeal commission decisions.<sup>81</sup>

## III. HOW THE WORK OF A CONSUMER ADVOCATE HAS CHANGED: REFLECTIONS FROM THE FIELD

In preparing this article, we spoke with current and former consumers advocates from across the country, in a variety of office structures.<sup>82</sup> We spoke with

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73. Murphy & Sevel, *supra* note 1, at 2.

74. *Id.* at Table 1, Column 6.

75. *Id.* at 14.

76. *Id.*

77. See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

78. 66 PA. CONS. STAT. § 1315 (1988).

79. *Duquesne Light Co.*, 488 U.S. 299.

80. *Barasch v. Penn. Pub. Util. Comm'n*, 532 A.2d 325 (Pa. 1987).

81. *Duquesne Light Co.*, 488 U.S. 299.

82. In preparing this article, we spoke with the following current and former consumers advocates: Richard Berkley, Executive Director, New York Public Utility Law Project; Stefanie Brand, Director of New Jersey Division of Rate Counsel; Paula Carmody, People's Counsel for the State of Maryland; Bryce Freeman, Administrator, Wyoming Office of Consumer Advocate; Jorge Fuentes, Director, Residential Utility Consumer Office; David Kolata, Executive Director, Illinois Citizens Utility Board; Sonny Popowsky, former Consumer Advocate; David Springe, Executive Director, National Association of State Utility Consumer Advocates, and former Consumer Counsel, Kansas Citizens' Utility Ratepayer Board; Rebecca Tepper, Chief of Energy and Telecommunications Division, Massachusetts Attorney General's Office; and Mark Toney, Executive Director, The Utility Reform Network of California. From these conversations, we have heard echoed the same sentiments

them off the record,<sup>83</sup> although there are instances in which we quote a particular consumer advocate, always with their permission. All of the utility consumer advocates surveyed, but particularly those with the longest tenures, agreed that the nature of their work had fundamentally changed over the last decade. We have grouped these obligations into three main categories: increasing complexity, fracturing of consumer interest, and the transition away from litigated proceedings.

#### A. *Increasing Complexity*

First, the work of a consumer advocate had become far more complex than ever before. The advocates we spoke to cited in the sheer number of dockets and proceedings that their offices needed to track, and the diversity of the subject matter expertise they needed to do their job effectively. Each could name issues that now required intense staff time and specialized consultants that simply were not part of their book in prior decades, including utility bankruptcy proceedings, rates for electric vehicle charging, utility billing software, offshore wind, and the rules and theory governing wholesale electricity markets.

This growing complexity has made the core work of a consumer advocate, bringing specialized expertise to bear on behalf of consumers in litigated proceedings, more challenging as the breadth of specialized expertise required has grown. This expansion has strained offices with limited staff and limited budgets for outside consultants. Advocates have responded by cultivating a new array of external consultants on issues. NASUCA has hosted specialized briefings on issues such as Reliability Metrics and Reliability Value-Based Planning, Electrification and Electric Vehicle Public Charging Infrastructure, and Utility Distribution Planning,<sup>84</sup> and where possible, worked to develop common positions and resources that are relevant across its member offices. These efforts mirror similar efforts by the National Association of Regulatory Utility Commissioners to educate their members on emerging issues through forums and creation of reference handbooks.<sup>85</sup>

“I keep this ‘Topics of Interest’ form to keep track of who’s doing what and all of the issues we are working on. There are 37 items currently on the list,” said Rebecca Tepper, Chief of Energy and Telecommunications Division, Massachusetts Attorney General’s Office, “and about 22 of them are ‘new’ issues in the last

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as reflected in our own experience: that effective consumer advocacy now requires far more than participation in utility rate cases.

83. These interviews were conducted on February 18, February 19, February 25, February 27, February 28, March 2, and March 3, 2020. These were personal phone interviews of the advocates listed in fn. 82, conducted by the authors on the dates noted. Because the authors asked the advocates to speak freely and off the record, information from these interviews will be cited simply as “Interviews” to protect the confidentiality of the source. The only exception are the quotes attributed to specific advocates contained herein that are cited with the speaker’s express consent.

84. See NAT’L ASSOC. OF STATE UTIL. CONSUMER ADVOCATES, NASUCA RESOURCES; WEBINARS, <https://www.nasuca.org/resources/webinars/>.

85. See NAT’L ASSOC. OF REGULATORY UTIL. COMM’RS, OUR PROGRAMS, <https://www.naruc.org/our-programs/overview/>.

15, 20 years; issues we would not have even thought about 15 or 20 years ago. Issues like net metering, demand response, storage, and solar interconnections.”<sup>86</sup>

In some cases, offices sought additional funding or brought on additional staff to meet these new demands. For example, the Illinois Citizens Utility Board (CUB) relies on grants and foundation funding to address the broad swath of issues before it.<sup>87</sup> “The biggest change is that we do a lot more consumer outreach,” said the CUB’s Executive Director David Kolata. “We do 500 events a year.”<sup>88</sup> His office has eleven staff members whose full-time job is conducting events.<sup>89</sup> For example, during the COVID-19 Crisis of 2020, the CUB office launched “Virtual Utility Bill Clinics” so consumers could email, mail, or fax their utility bills to CUB staffers, and they analyzed them for potential ways to save and give people clean energy tips.<sup>90</sup> Surely these type of consumer advocacy activities are beyond the scope of the imagination of the early consumer advocates.

### B. *Fracturing of Consumer Interests*

Second, the advocates we spoke to generally agreed that recent years have brought a greater diversity of consumer interests, even among residential customers, though they were split on whether that has complicated the task of representing the interests of utility customers generally. This fracturing of the consumer interest showed up in several types of policy matters. The first were in policies intended to incentivize deployment of new technologies, which can create winners and losers by shifting costs between customers within a rate class.

Several of the advocates we spoke to specifically cited net metering<sup>91</sup> as a policy that provided benefits to one class of residential customers—those who were able to install distributed generation—at the expense of those who did not. Net metering in most states is structured as compensation to electric customers with solar panels who provide excess energy to the grid.<sup>92</sup> When a customer’s generation exceeds their usage, electricity from the customer flows back to the grid. The customer essentially sells their excess back to the grid and the customer’s bill is reduced in a one-to-one ratio for that amount offsetting electricity consumed by the customer at a different time during the same billing cycle.<sup>93</sup> There is controversy around net metering because the customer uses excess generation to offset electricity that the customer otherwise would have to purchase at

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86. Interview with Rebecca Tepper, Chief of Energy and Telecommunications Division, Mass. Att’y General’s Off. (Feb. 25, 2020).

87. CITIZENS UTIL. BOARD, FUNDING, <https://www.citizensutilityboard.org/funding/>.

88. Interview with David Kolata, Executive Director of Citizens Util. Board (Feb. 19, 2020).

89. *Id.*

90. David Kolata, CUB Executive Director, *A message from CUB’s Executive Director: Responding to COVID-19*, CITIZENS UTIL. BOARD (Mar. 13, 2020), <https://www.citizensutilityboard.org/blog/2020/03/13/cubs-response-to-the-coronavirus/>.

91. Chandra Shah, NREL, *Net Metering*, ENERGY.GOV (May 8, 2014), [https://www.energy.gov/sites/prod/files/2014/05/f15/fupwg\\_may2014\\_net\\_metering.pdf](https://www.energy.gov/sites/prod/files/2014/05/f15/fupwg_may2014_net_metering.pdf). (citing DATABASE OF STATE INCENTIVES FOR RENEWABLES & EFFICIENCY, GLOSSARY, <http://www.dsireusa.org/glossary/>).

92. *Id.*

93. *Id.*

the utility's full retail rate.<sup>94</sup> Most states require net metering by statute, but state policies vary widely.<sup>95</sup> Many consumer advocates feel that reimbursing solar consumers at the full retail rate, without any discount to cover the cost of operating the electric grid that enables this two-way flow of electricity, results in a shifting of those operating costs from solar consumers to non-solar consumers. This potentially pits residential consumers with solar panels against those without. One very experienced consumer advocate noted that this dynamic brings new voices to any stakeholder process on net metering, including solar developers, environmental groups, representatives of other renewable technologies seeking similar compensation strategies, and special interest groups representing solar consumers.<sup>96</sup> "We never saw used to see that many stakeholders in a proceeding before," he said.<sup>97</sup> Another consumer advocate noted that rooftop solar policies like net metering took up 90% of his office's last rate case.<sup>98</sup> He saw communities pitted against one another.<sup>99</sup> The utility sided with one group of communities and his office sided with another.<sup>100</sup> "The atmosphere made it very difficult to work on the relationships" with the various constituencies, one of the core competencies in a rate case.<sup>101</sup>

Proceedings involving rate designs to incentivize electric vehicles or allow customers (so-called "pro-sumers") to take advantage of time shifting raised similar concerns about protecting non-participants from costs created by those who choose to or are able to participate in the particular program.<sup>102</sup> As more and more residential consumers are segmented off into special interest groups, the remaining pools of non-participants continues to shrink.<sup>103</sup> This raises particular concern for low-income consumers who typically do not have the resources or the ability participate in such programs.<sup>104</sup> "For people who are not interested in or can't afford to participate in the grid of the future, do they get left with the detritus of the system, get stuck paying for the parts of the grid that everyone else has abandoned?" mused David Springe, Executive Director, National Association of State Utility Consumer Advocates, and former Consumer Counsel, Kansas Citizens' Utility Ratepayer Board.<sup>105</sup> "There's increasing pressure to add capital to the system but also an expectation that there will be fewer and fewer people to pay for it."<sup>106</sup>

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94. *Id.*

95. Shah, *supra* note 91.

96. Interviews, *supra* note 83.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. Interviews, *supra* note 83.

102. Interview with David Springe, Executive Director, National Association of State Utility Consumer Advocates (Mar. 3, 2020).

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

More broadly, several advocates noted that policies enacted to reflect policy preferences on matters not directly related to electricity rates often had the effect of increasing electricity rates. For example, state policies intended to favor certain types of generation, either to achieve carbon reduction goals, or to maintain the economic and employment benefits offered by large scale nuclear and coal facilities. For example, a recently passed Wyoming bill<sup>107</sup> requires utilities to make a good faith effort to sell coal plants before retiring them, otherwise they will not get decommissioning funds when they do retire the plants. “Under this bill, if a retiring coal fired power plant is sold, and the purchaser enters an agreement to provide one or more industrial customers energy that would otherwise have been provided by a public utility, the total gross intrastate revenue available for assessment to fund the [Public Service Commission] would be reduced by the amount of those sales,” the Wyoming Legislative Service Office reported.<sup>108</sup>

Moreover, in these scenarios while rates went up for all customers, many advocates felt this burden would fall disproportionately by low income customers, who would need to devote a relatively larger portion of their income to meet their energy burden. “I tell people that I live at the intersection of climate change and income inequality.”<sup>109</sup> These poignant words from Stefanie Brand, the Director of the Division of Rate Counsel for New Jersey, capture perfectly one of the central tensions faced by every consumer advocate with whom we spoke: how to balance energy affordability with necessary actions to address climate change.<sup>110</sup> Most consumer advocates hear on almost a daily basis from consumers who struggle to pay their bills – low-income consumers, the elderly, those with medically dependent needs, and those who may work full-time but still find themselves unable to pay their electric bills. Often in these proceedings, parties—including customers—whose positions differed from that of an advocate on a specific issue would question whether the consumer advocate was really representing consumers. “I’ve been accused of being a climate change denier!” said Brand.<sup>111</sup>

While all the advocates acknowledged this fracturing of the consumer interest, they responded in different ways. Some felt strongly that they did not have difficulty identifying the consumer interest they were charged with representing. In some cases, their office’s governing statute or mission provided guidance about what to do when customer interests diverged. In Maine, the Public Advocate statute provides a hierarchy of interests the office should represent, should the interests of various consumer constituencies differ: first, low income customers, then residential, then small business, and finally any “[o]ther consumers whose interests the Public Advocate finds to be inadequately represented.”<sup>112</sup> Another prime

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107. S.B. 21, 65 Leg. (Wyo. 2020) (enacted March 10, 2020, effective July 1, 2021).

108. Brendan LaChance, *Wyoming to Require Utilities to Attempt to Sell Coal-Fired Power Plants Prior to Retiring*, OIL CITY NEWS (Mar. 11, 2020), <https://oilcity.news/wyoming/legislature/2020/03/11/wyoming-to-require-utilities-to-attempt-to-sell-coal-fired-power-plants-prior-to-retiring/>.

109. Interview with Stefanie Brand, the Director of the Division of Rate Counsel for New Jersey (Feb. 19, 2020).

110. *Id.*

111. *Id.*

112. ME. Rev. Stat. Ann. Tit. 35-A, § 1702-A(3) (2020).

example of this is The Public Utility Law Project (PULP).<sup>113</sup> This organization works to represent those consumers who may often be overlooked, such as low-income and rural consumers.<sup>114</sup> PULP provides not only legal representation to these consumers in electric, natural gas, telephone, and other utility related matters, but also educational material.<sup>115</sup> Some advocates looked to see who else was represented in a given matter, and then crafted their position to reflect the interests of those who were not otherwise represented. Several felt that consumers generally wanted low, stable rates, and that supporting policies that resulted in those outcomes would always be in the interest of most consumers. Stephanie Brand commented that her office “advocate[s] for the have nots,” and that their statute dictates “where the interests diverge, we represent those who are not otherwise represented.”<sup>116</sup>

### C. Transitioning Away from Litigated Proceedings

Third, all the advocates noted the work of setting energy policy, and by extension rates, was increasingly happening outside of the traditional forum of the litigated PUC proceeding. More and more often, the decisions that would have the biggest impacts on customers’ rates were happening not in formal rate cases or adversarial proceedings, but in Commission-lead working groups, formal inquiries, and stakeholder groups, or often state legislatures themselves. Advocates who waited until the traditional rate case or other litigated proceeding to fight would find the battle had already been lost.

In states with wholesale electricity markets,<sup>117</sup> advocating on issues that affected energy prices meant active participation in the stakeholder processes administered by the regional transmission organizations. Some advocates had joined as members and dedicated staff, some hired consultants to keep them informed. The most robust example of this being the Consumer Advocates of the PJM States (CAPS).<sup>118</sup> “CAPS is a non-profit organization [that] represent[s] . . . 13 PJM States and the District of Columbia.”<sup>119</sup> “In each [of the PJM states], the electricity costs paid by consumers is at least partly determined by the tariff and rules under

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113. NEW YORK’S UTIL. PROJECT, ABOUT US, <https://utilityproject.org/about/>.

114. *Id.*

115. *Id.*; see also Murphy & Sevel, *supra* note 1, at 18 (quoting Nora Mead Brownell, *Unplugged: Pennsylvania’s Experience*, THE SAN DIEGO UNION TRIBUNE (Jan. 28, 2001) (“One of the keys to Pennsylvania’s success was a strong consumer education program. Not only did we run an effective mass media campaign at the statewide level, but we also used surrogates to help us in our local education efforts. The results were and remain impressive, a 95 percent awareness and understanding about how to shop for electricity. Of more than a half-million customers who shopped for a new supplier, Pennsylvania’s program was able to meet unique customer demands for those with environmental concerns. More than 80,000 customers have selected “green” power, bringing new investment to the state in the form of wind farms.”).

116. Interview with Stefanie Brand, the Director of the Division of Rate Counsel for New Jersey (Feb. 19, 2020).

117. FED. ENERGY REG. COMM’N, ELECTRIC POWER MARKETS (Feb. 25, 2020), <https://www.ferc.gov/market-assessments/mkt-electric/overview.asp>.

118. CONSUMER ADVOCATES OF THE PJM STATES, WHO WE ARE (2017), <http://pjm-advocates.org/>.

119. *Id.*

which PJM operates.”<sup>120</sup> Their mission is to “actively engage in the PJM stakeholder process and at the Federal Energy Regulatory Commission to ensure that the prices we pay for reliable, wholesale electric service are reasonable.”<sup>121</sup>

The move out of litigated proceedings into stakeholder processes posed a variety of challenges to advocates. Not least was the time and resources required to participate and place consumers at parity with all other stakeholder voices. As Paula Carmody, People’s Counsel for the State of Maryland, observed, “We used to just deal with rate cases. Now we are dealing with working groups on net energy metering, pre-paid pilots, electric vehicles, community solar, etc., etc. Now there’s just this pancaking of the work. We’re dealing with ten to twelve working groups within a year.”<sup>122</sup>

Stakeholder processes also had the effect of placing consumers at parity with a variety of other interests, surrendering the historical privilege of representing consumers in a proceeding intended to balance consumer interests with those of the utility. In these processes, a consumer advocate is just one voice among many. For example, in New England, consumer advocates representing consumers in 4 of the 6 New England states are members of the End User stakeholder class, which includes Connecticut, Maine, Massachusetts, and New Hampshire.<sup>123</sup> Legislatures, administrative agencies, local governments, third-party retailers of energy-related services, special interest advocacy groups, Wall Street investors, and activist consumers all have increasingly active and frequently powerful voices within the industry.<sup>124</sup> More broadly, the core competencies and structures of litigation around which utility consumer advocates were built are not necessarily adapted to these less structured proceedings.

Advocates have responded by, where possible, staffing up to meet the growing time demands. But as much of energy policy has moved out of the traditional rate case framework and into a political sphere, so too many advocates have worked to increase their influence outside the hearing rooms. This approach requires an entirely different approach and skill set for consumer advocates.

In these new forums, the ability to build coalitions is a crucial skill. Some advocates have found that their broad consumer mandate makes them attractive partners for other groups with more narrow agendas. By convening coalitions, advocates are able to have more influence than they would alone. “One of our

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120. *Id.*

121. *Id.*

122. Interview with Paula Carmody, People’s Counsel for the State of Maryland (Mar. 2, 2020).

123. Interview with Tim Schneider, General Counsel of Tilson (Mar. 3, 2020).

124. See, e.g., Hil Anderson, *EEI rallies Wall Street with sunny prospects for electric utilities*, DAILYENERGYINSIDER (Feb. 5, 2020), <https://dailyenergyinsider.com/reports/24122-eei-rallies-wall-street-with-sunny-prospects-for-electric-utilities/>; Dick Davies & John Farrell, *Maine Voices: Consumer utility takeover will break CMP/Iberdrola stranglehold*, PRESSHERALD.COM (May 21, 2019), <https://www.pressherald.com/2019/05/21/maine-voices-consumer-utility-takeover-will-break-cmp-iberdrola-stranglehold/>; Morten Springborg, *Solar Photovoltaic Power System and Disruption in Energy Markets*, WHITE PAPER 2015 Q4, WORLDWIDE ASSET MGMT, [https://cworldwide.com/media/PDF/WP\\_Solar\\_PV\\_Energy\\_market\\_C.pdf](https://cworldwide.com/media/PDF/WP_Solar_PV_Energy_market_C.pdf).

core competencies is the ability to build coalitions,” said one consumer advocate.<sup>125</sup> “On top of what else we do. Even with the utilities. Some people think we should oppose the utility no matter what.”<sup>126</sup>

Similarly, several advocates described partnering with grassroots organizations who could generate phone calls to policy makers or attendance at public meetings. AARP is a regular ally of consumer advocates in many states and regularly attends NASUCA conferences.<sup>127</sup> “AARP is able to turn out dozens of senior citizens in red t-shirts for legislative hearings,” said one consumer advocate.<sup>128</sup> Another consumer advocate created a roundtable with low income advocates and environmental advocates to create dialogue and create a bridge between the two communities.<sup>129</sup> Others, including the authors when they were consumer advocates, worked with local citizen actions groups.

Other advocates have become more adept at using the media to affect outcomes. “I use the press. I have relationships with most regional and local papers. I talk with investigative reporters, utility reporters. I’ll call them once a month, just to say hello. I advocate before the commission, but I also talk to the media and to the public to create public pressure. I think of it as multi-tiered advocacy.”<sup>130</sup> This is how one consumer advocate described his approach to representing consumers.<sup>131</sup>

“As more decisions at the PUC are being made less on the merits, and more and more on political considerations, there is no room to fight this within the confines of a rate case,” said one consumer advocate.<sup>132</sup> “Being right is not sufficient to prevail. In order to prevail, you need power. We don’t want to win on the legal points but lose on the power.”<sup>133</sup>

However, garnering influence and exercising political power outside the realm of a rate case is not without risk, however necessary it may be. Consumer advocates can risk their budgets, their staffs, their jobs, and even the existence of the office itself if they end up on the wrong side of a political issue. “The office is assailed by the state legislature at least every other session, including this year,” said another consumer advocate.<sup>134</sup> “Commissions and advocate offices are increasingly subject to policy activities outside the utility realm.”<sup>135</sup>

In Maine, author Tim Schneider recalled being accosted by a legislative leader who objected to his meeting with some of his members on a bill, who

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125. Interviews, *supra* note 83.

126. *Id.*

127. See, e.g., NAT. ASS’N OF STATE UTIL. CONSUMER ADVOCATES, 2019 ANNUAL MEETING: ATTENDEE LIST (Nov. 17-20, 2019), <https://www.nasuca.org/nwp/wp-content/uploads/2019/11/2019-Annual-Meeting-Attendee-List-v3.pdf>.

128. Interviews, *supra* note 83.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Interviews, *supra* note 83.

134. *Id.*

135. *Id.*

shouted “You’re not being the Public Advocate, you’re . . . advocating!”<sup>136</sup> The Governor’s opposition to this work led to restrictions on his office’s access to funds, and ultimately his departure when the Governor declined to re-appoint him.<sup>137</sup>

Ohio is another cautionary tale. In 2011, Consumer Counsel Janine Migden-Ostrander resigned in protest after Ohio lawmakers chopped the agency’s two-year operating budget from \$8.5 million to \$5.6 million, with an additional \$1.5 million to be taken away the next year.<sup>138</sup> She was forced to cut thirty staff and close a consumer call center.<sup>139</sup> There was also a bizarre legislative “gag order” proposal to prevent the Consumer Counsel from “advocating or promoting positions contrary to the development of competitive markets in Ohio, including state policies pertaining to natural gas.”<sup>140</sup> Migden-Ostrander felt that the oddly restrictive language is a reaction to her office’s insistence that the gas utilities hold annual wholesale auctions to set a benchmark price for natural gas.<sup>141</sup> She ended up resigning in protest after the budget cuts were passed.<sup>142</sup>

To be effective, the consumer advocate is thus forced to navigate increasingly political processes without seeming overtly political. “My best advice would be that maintaining your independence and being nonpartisan are absolutely essential for getting your message out,” said another consumer advocate.<sup>143</sup> “I consider it a badge of honor that I have worked for both Democratic and Republican administrations.”<sup>144</sup>

#### IV. CONCLUSION

Effective state utility consumer advocacy does not always mean pitched battle, despite the David versus Goliath sensibilities that infused the origins of the office. Modern advocacy is rather often a choice to engage and compromise, sometimes in uncomfortable ways, to achieve a better result for consumers. It is the authors’ belief that consumer advocates have always faced this dilemma of whether to go down swinging in noble defeat or to work with stakeholders with disparate interests in hopes of obtaining a better or sometimes “less worse” result for consumers. Given the complexities of the utility field described above, however, those dilemmas are more common, more multi-faceted, and more difficult to navigate. The modern consumer advocate must navigate more issues, in more

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136. Interview with Tim Schneider, General Counsel of Tilson (Mar. 3, 2020).

137. *Id.*

138. Brandon C. Baker, *Ohio Consumers’ Counsel resigns post*, THE NEWS-HERALD (Sept. 21, 2011), [https://www.news-herald.com/news/ohio-consumers-counsel-resigns-post/article\\_20341a8e-b87a-53c2-8f80-749fd7e4b966.html](https://www.news-herald.com/news/ohio-consumers-counsel-resigns-post/article_20341a8e-b87a-53c2-8f80-749fd7e4b966.html).

139. *Id.*

140. John Funk, *Some state lawmakers want to gag the Ohio Consumers’ Counsel and slash her budget*, THE PLAIN DEALER (May 16, 2011), [https://www.cleveland.com/business/2011/05/some\\_state\\_lawmakers\\_want\\_to\\_g.html](https://www.cleveland.com/business/2011/05/some_state_lawmakers_want_to_g.html).

141. *Id.*

142. Allison Grant, *Ohio Consumers’ Counsel Janine Migden-Ostrander resigns*, THE PLAIN DEALER, (Sept. 21, 2011), [https://www.cleveland.com/business/2011/09/ohio\\_consumers\\_counsel\\_janine.html](https://www.cleveland.com/business/2011/09/ohio_consumers_counsel_janine.html).

143. Interviews, *supra* note 83.

144. *Id.*

forums, with more disparate consumer segment to represent. This makes the consumer advocate's job more difficult, but also, more necessary than ever to continually center the consumers' interest in the rapidly evolving utility field. With so disparate stakeholders, forums, and issues competing for influence in the utility sector, the state utility consumer advocate remains a steadfast voice in the relative tumult, the voice in the wilderness for consumers.