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10-in-10 Hot Topics in Energy

Attorneys General Investigations and Enforcement in the Energy Sector

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This is the final issue of WilmerHale's 10-in-10 Hot Topics in Energy Series. Over the past 10 weeks, our attorneys have shared insights on current and emerging issues affecting the US energy sector. Attorneys from across various practice groups at the firm have offered their take on several issues including congressional investigations, the impact of key regulatory reforms, and emerging trends in domestic litigation and international arbitration. Read our other recent publications.

Traditionally, regulation of the energy sector has occurred at the federal level and through specialized state regulatory bodies. However, attorneys general are playing an increasingly prominent role in regulating energy and environmental activity within their states. In particular, they have used their broad state law consumer and investor protection powers in enforcement actions ranging from deceptive marketing claims to environmental protection. State AGs also have played a more visible role in resisting—or, in some instances, supporting—deregulation efforts at the federal level. Energy sector participants must therefore consider potential AG actions when making business decisions. This alert addresses state actions in four areas: alleged fraudulent and deceptive practices, climate change accountability, environmental contamination, and federal energy policy challenges.

Investigation of Energy Supply Companies' Marketing Practices

Most state AGs enforce state laws barring unfair and/or deceptive practices. Those statutes, most of which are broadly written, are largely modeled after Section 5 of the Federal Trade Commission Act.[1] Available remedies include traditional equitable remedies like disgorgement and restitution, along with statutory penalties that can be assessed on a per violation basis and can be quite substantial. As is typical with government enforcement actions, there are typically fewer requirements for a successful claim brought by an AG than for one brought by a private plaintiff; for instance, in many states the AG does not need to prove injury or reliance.[2]

[1] 15 U.S.C. §§ 41-58.

[2] *See, e.g.*, ALASKA STAT. ANN. § 45.50.471; ARIZ. REV. STAT. ANN. § 44-1522(A); DEL. CODE ANN. tit. 6, § 2513(a); 815 ILL. COMP. STAT. ANN. § 505/2; IOWA CODE ANN. § 714.16(2)(a); KAN. STAT. ANN. § 50-626(b); KY. REV. STAT. ANN. § 367.170; MINN. STAT. ANN. § 325F.69(1); MO. ANN. STAT. § 407.020(3); NEV. REV. STAT. ANN. § 598.0915; N.D. CENT. CODE ANN. § 51-15-02; S.C. CODE ANN. § 39-5-110(a), (c); W. VA. CODE ANN. § 46A-6-102(7)(M).

Competitive energy supply companies have been the subject of AG investigations and lawsuits alleging unfair business practices, fraud and racketeering. Competitive suppliers purchase electricity on the open market and then sell it to consumers, advertising to potential customers through a variety of means, often including door-to-door marketing. Traditional utilities continue to deliver the energy to consumers, but in deregulated markets consumers can choose to purchase their energy either directly from the utility or through a competitive supplier.

The office of Massachusetts AG Maura Healey has been a prominent critic of competitive retail suppliers and their marketing practices. In March 2018, Healey's office concluded a multiyear investigation into those practices, finding that electric customers in Massachusetts who switched to a competitive supplier paid $176.8 million more than if they had purchased power directly from their traditional utility. The report recommends that the legislature end the competitive market for retail electricity; [3] retailers have responded by pointing to subsidies that affect the pricing of default services, and highlighting limitations in the investigatory parameters.

Not surprisingly, AG Healey has aggressively policed competitive suppliers in the Commonwealth. In October 2018, AG Healey sued Starion Energy,[4] alleging that the company used deceptive bait-and-switch tactics to entice Massachusetts residents to change from their utility to another energy supplier and then charged customers more than promised. The lawsuit asserts that the company overcharged more than 117,000 customers, collecting from them at least $30.6 million in total, more than they would have paid at their local utility's standard rate. The lawsuit comes on the heels of previous settlements with two other competitive suppliers that allegedly engaged in various deceptive and unfair sales tactics.

A series of New York AGs also have investigated competitive suppliers. In 2017, New York AG Eric Schneiderman reached an agreement with Energy Plus Holdings LLC and Energy Plus Natural Gas LLC (collectively, Energy Plus) after his investigation found that Energy Plus's consumer mailings and email advertisements falsely promised competitive energy rates and that the company's telemarketers made other misleading promises to customers.[5] AG Barbara Underwood followed suit, reaching a settlement with Ambit Energy Holdings, LLC, Ambit Marketing, LLC, and Ambit New York, LLC, regarding similar deceptive marketing practices in 2018. Current New York AG Letitia James recently announced the distribution of refund checks to consumers pursuant to the Energy Plus settlement.[6]

New York and Massachusetts are not alone. In March 2018, Illinois AG Lisa Madigan filed a lawsuit against alternative retail energy supplier Major Energy Electric Services (Major Energy).[7] According

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[3] Massachusetts Attorney General's Office, *Are Consumers Benefiting from Competition?* (March 2018).
[4] Complaint, *Commonwealth of Massachusetts v. Starion Energy, Inc. et al.*, Case No. 1884CV03199 (Mass. Oct. 15, 2018).
[5] NY State Office of the Attorney General, "A.G. Schneiderman Announces $800K Settlement With Energy Service Company That Falsely Advertised Lower Utility Bills" (Aug. 30, 2017).
[6] NY State Office of the Attorney General, "Attorney General James Announces Restitution and Penalty Payments From Multiple Energy Service Companies for Consumer Fraud" (Feb. 21, 2019).
[7] *People of the State of Illinois, ex rel. Lisa Madigan v. Major Energy Elec. Servs. LLC*, No. 2018CH04549 (Ill. Mar. 9, 2018).

to the lawsuit, Major Energy employed deceptive hard-sell tactics to lure thousands of customers in Commonwealth Edison's northern Illinois territory away from their original utilities, convincing them to switch to Major Energy's service; nearly all the customers who switched ended up paying higher prices. The action against Major Energy was the fourth by that state's AG against suppliers in recent years.

Renewable energy suppliers also have been the subject of AG interest. For example, in 2018, New Mexico AG Hector Balderas named Vivint Solar in a 17-count civil complaint that included allegations of unfair business practices, fraud and racketeering.[8] AG Balderas's investigation uncovered evidence that the company had employed high-pressure sales techniques and procedures that were designed to mislead and bind customers to 20-year contracts under which rates increased by over 72 percent over the life of the agreement.

Amid the uptick in AG investigations into competitive suppliers, some states are considering energy deregulation. For instance, a political committee in Florida put forth a petition for a ballot measure introducing retail competition and allowing customers more options to produce solar electricity themselves. In a responsive filing to the state supreme court in March 2019, Florida AG Ashley Moody opposed the initiative, pointing to the efforts of the Massachusetts and Illinois AGs described above, and to the effects of deregulation in California.

Continued expansion of electricity supply competition, coupled with aggressive marketing tactics, likely will lead to more state consumer protection action by AGs. To avoid AG enforcement actions, energy supply companies and utilities with direct relationships with consumers should pay particular attention to their marketing practices and promises regarding projected savings. Customer solicitation efforts should be examined with particular care to ensure that they are accurate and that any disclaimers are sufficiently prominent such that customers are likely to read them in conjunction with any other messaging. That is particularly true for companies with operations in multiple states, since marketing and sales requirements may differ.

Fossil Fuel Companies and Climate Change

As concerns about climate change increasingly pervade every sector of the economy, AGs have employed their broad statutory powers to investigate statements made by fossil fuel companies regarding climate change and the financial and operational impact of regulatory efforts to mitigate climate change. AGs also have supported efforts by private plaintiffs and municipalities to use tort law to hold fossil fuel companies responsible for the impacts of climate change.

Climate Change Disclosures Investigations

The New York AG's office has been the most aggressive in investigating climate change disclosures by public fossil fuel companies, drawing on its authority under state securities law to

[8] *State of New Mexico, ex rel. Hector H. Balderas v. Vivint Solar Developer, LLC*, Case No. 2018-cv-01936 (N.M. Mar. 8, 2018).

police such statements. Those efforts, which began under AG Andrew Cuomo and continued under AG Eric Schneiderman, have required companies with carbon-intensive operations to disclose potential financial risks posed by regulatory efforts to mitigate climate change.

Schneiderman's successor, AG Barbara Underwood, continued those efforts last year by filing suit against ExxonMobil following a three-year investigation,[9] the legitimacy of which ExxonMobil vigorously contested. Massachusetts AG Maura Healey is pursuing a similar investigation, and District of Columbia AG Karl Racine has announced a plan to investigate statements regarding the effects of ExxonMobil products on climate change.

We expect that this will be a continued area of AG interest in the next several years. Energy companies should devote increased attention not only to their representations regarding climate change but also to their statements regarding the impact of climate change regulations on their operations and finances.

Climate Change Impact Litigation

At the same time, a significant number of AGs around the country have filed amicus briefs supporting or opposing lawsuits against major fossil fuel companies, in which localities allege knowing contributions to the harmful effects of climate change.

For example, city attorneys for Oakland and San Francisco filed suit against several energy producers in September 2017.[10] Those lawsuits claim that the defendant companies knew about harmful effects of combustion of fossil fuels, yet continued to produce and sell fossil fuels and engaged in efforts to discredit climate science. The cities asserted that the California coast would suffer related environmental consequences including sea level rise, increased storms and more frequent flooding, and sought an order requiring the energy producers to fund abatement and remediation efforts. New York City filed a similar lawsuit against five energy companies in January 2018.[11] The California and New York City lawsuits were dismissed by respective US district courts based on findings that the judicial branch is not the appropriate arbiter of climate change issues, and both are now under appeal.[12] And these are not the only cases that have been filed: localities in Colorado, Maryland, Rhode Island and Washington State have filed their own suits.

These cases have split AGs along party lines. In the California case, 15 Republican AGs filed an amicus brief supporting the energy producers' motion to dismiss. The brief argued that the suit presented non-justiciable political questions about the proper balance for regulating emissions, and that certain of the localities' claims were preempted by federal statutes that delegate the authority

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[9] *The People of the State of New York, by Barbara Underwood v. Exxon Mobil Corp.*, Index No. 452044/2018, (N.Y. Oct. 24, 2018).
[10] *People of the State of California v. BP et al.* (San Francisco), Case No. CGC 17-561370 (Cal. Super. Ct. Sept. 19, 2017); *People of the State of California v. BP et al.* (Oakland), Case No. RG17875889 (Cal. Super. Ct. Sept. 19, 2017).
[11] *City of New York v. BP P.L.C. et al.*, Case No. 18-cv-182 (JFK) (S.D.N.Y. Jan. 9, 2018).
[12] *City of Oakland and City of San Francisco, v. BP P.L.C. et al.*, Case No. 18-cv-16663 (9th Cir. Mar. 20, 2019); *City of New York v. BP P.L.C. et al.*, Case No. 18-2188 (2nd Cir. Nov. 8, 2018).

to regulate carbon emissions to the US Environmental Protection Agency. A separate coalition of 11 Democratic AGs filed an amicus brief in support of the localities' positions, arguing that courts (including state courts) should play a role in forcing accountability for climate change. In the New York case, a coalition of Republican AGs filed an amicus brief in support of the energy companies, while New York AG Underwood led a group of Democratic AGs in authoring a brief in support of New York City's appeal.

Whether the localities' claims are viable remains to be seen, but it is clear that AGs will play a visible role in climate change litigation, and use their authority as chief law officers of their respective states to take positions on the applicability of state law to climate change impacts.

Pipeline Siting and Regulatory Enforcement

Siting and constructing new oil and gas pipelines can be a difficult undertaking—as can be the operation of existing pipelines—due in part to opposition from diverse coalitions concerned with property rights, public health and safety, and fossil fuel dependence. Against this backdrop, and with intrastate pipelines garnering increased attention, AGs are increasingly using their legal powers in efforts to weigh in on siting and environmental issues related to pipelines.

Siting Issues

Sponsors of proposed pipelines have encountered siting-based challenges involving state AGs, elected officials and agencies. In one high-profile example, North Dakota's AG sued the developer of the Dakota Access pipeline—a $3.8 billion project to move North Dakota oil through South Dakota and Iowa to a shipping point in Illinois—claiming that the developer's ownership of agricultural land violated a state law prohibiting large corporations from owning farmland the company owns.[13] AG Wayne Stenehjem seeks monetary penalties and an order that the developer must sell the land within a year or face additional fines; the suit is moving slowly but is slated for trial in December 2019.

In Michigan, Enbridge Energy Partners has sought permits for a new segment of pipeline, which would replace piping that has lain along the bottom of Lakes Huron and Michigan for decades, with pipeline extending through a proposed tunnel through the channel that links the two lakes. Both the existing and proposed pipelines have drawn fierce criticism from environmental groups, native tribes and tourism-related businesses fearful of a rupture. Latest to join in opposition are AG Dana Nessel, who issued a March 2019 opinion determining that state authority to approve the tunnel was unconstitutional,[14] and Governor Gretchen Whitmer, who signed an executive directive[15] ordering all state departments to stop all activity related to the tunnel. As a result, the project is unlikely to proceed unless its proponents file suit against the state to invalidate the attorney general's and governor's actions.

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[13] *Wayne Stenehjem, et al. v. Dakota Access, LLC*, Case No. 30-2018-CV-00612 (N.D. July 3, 2018).
[14] AG Dana Nessel Opinion No. 7309, *available at* https://www.michigan.gov/documents/ag/7309_-_SIGNED_650660_7.pdf.
[15] State of Michigan, Office of the Governor, Executive Directive No. 2019-13.

Developers and utilities also are encountering siting-related difficulties in New York. The AG has played a role in some of those matters, including the Constitution Pipeline, which received federal approval in December 2014 that was conditioned on state water quality approval. After the state denied that certification, the project sponsors appealed to the Second Circuit, which ultimately agreed with the state AG's arguments that New York should retain appropriate authority to protect its waters and natural resources.[16] In June 2018, Constitution asked the Federal Energy Regulatory Commission (FERC) to "rehear" its earlier decision not to overrule New York. FERC declined to rehear its earlier decision, so Constitution appealed the case to the US Court of Appeals for the District of Columbia, which granted a motion to remand the matter back to FERC in February 2019.[17]

In some instances, siting difficulties have led to downstream issues that impact utilities and consumers. For example, in New York, utility Con Edison was forced to issue a moratorium on new natural gas service in southern Westchester County, which it attributed in part to limited pipeline capacity in the area.

Environmental Concerns

Environmental contamination associated with pipelines remains an active area of AG investigation and enforcement. Most recently, in March 2019, Pennsylvania's AG Josh Shapiro announced that his office opened a criminal investigation into construction of a 350-mile liquefied natural gas pipeline project across southern Pennsylvania. Sunoco Pipeline and its parent company, Energy Transfer Partners, already have been assessed more than $13 million in fines for polluting waterways and using construction methods not approved by Pennsylvania regulators, and have received several temporary shutdown orders from state agencies.

In 2017, Ohio AG Mike DeWine filed a lawsuit[18] on behalf of the Ohio Environmental Protection Agency (Ohio EPA) against Rover Pipeline LLC alleging violations of state water pollution control laws and failure to comply with Ohio EPA orders by polluting state waters while constructing a natural gas pipeline in the state. The lawsuit seeks a court order requiring the pipeline developer to apply for state permits, comply with the environmental plans approved and ordered by the Ohio EPA, and pay civil penalties of $10,000 per day per violation. The developer and its subcontractors have argued that only FERC, not the Ohio EPA, has the power to regulate an interstate pipeline. The court has yet to rule on the issue of jurisdiction.

Although state governors and federal regulators often feature more prominently in pipeline matters, state AGs' broad legal powers to protect state residents from harm and the AGs' role in representing state environmental agencies provide opportunities for increased involvement. Entities that seek to permit, construct or operate pipelines should view state AGs as a key stakeholder and

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[16] *Constitution Pipeline Co. v. New York State Dept. of Environ. Conservation*, Case No. 16-1568 (2nd Cir. Aug. 18, 2017).
[17] *Constitution Pipeline Company, LLC v. FERC*, Case No. 18-1251 (D.C. Cir. Feb. 25, 2019).
[18] *State of Ohio, ex rel. Michael DeWine Ohio Attorney General v. Rover Pipeline LLC*, Case No. 17-cv-02216 (Ohio Nov. 3, 2017).

adopt a proactive approach by engaging in a case-by-case assessment of the relevant AG powers, which can differ depending on the circumstances (e.g., siting vs. operation issues) and state.

Federal Energy Policy Challenges

Democratic state AGs have been actively challenging many of the Trump Administration's energy and environmental priorities. Among other efforts, AGs are resisting the Administration's efforts to expand offshore drilling and are battling to keep Obama-era emissions standards in place.

Offshore Drilling

Many state AGs—especially those in coastal states—oppose the prospect of offshore oil and gas drilling, and have joined forces to challenge federal efforts to expand areas of the ocean available for that purpose.

Following an April 2017 Executive Order issued by President Trump,[19] the Department of the Interior proposed opening large swaths of ocean along the Atlantic and Pacific coasts to drilling. That proposal would reverse President Obama's withdrawal[20] of large sections of outer continental shelf—the submerged offshore area between state coastal and international waters—from drilling, and in some instances would make available areas in which drilling had been banned long before.

As discussed in a recent client alert, the Administration's expansion efforts were set back by a March 2019 ruling that the Executive Order was unlawful and exceeded the President's authority. The opinion[21] by Judge Sharon L. Gleason of the US District Court for the District of Alaska concluded that President Obama's 2015 and 2016 withdrawal from the drilling of about 120 million acres of Arctic Ocean and about 3.8 million acres in the Atlantic "will remain in full force and effect unless and until revoked by Congress." Although that decision is likely to be appealed, it rendered large areas of the Arctic and Atlantic oceans immediately unavailable for exploration and thus represents a win for state AGs opposed to those activities in other lawsuits and policy actions.

On the East Coast, the Trump Administration authorized seismic testing for oil and gas as a precursor to drilling authorizations. In late 2018, ten East Coast AGs—including both Democrats and Republicans—moved to join a lawsuit[22] filed by environmental groups to block such testing. The AGs objected both to the potential harm to marine life and to the offshore drilling that could follow. Industry responded by contending that seismic testing is necessary to update decades-old geological findings with the use of better technology, and by pointing to previous government findings indicating that testing does not harm marine mammals.

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[19] Exec. Order 13795 Implementing an America-First Offshore Energy Strategy, 82 CFR 20815.
[20] Exec. Order 13754 Northern Bering Sea Climate Resilience, 81 CFR 90669.
[21] Order re Motions for Summary Judgment, *League of Conservation Voters, et al. v. Donald Trump et al.*, Case No. 3:17-cv-00101-SLG (D. Alaska Mar. 29, 2019).
[22] Proposed Complaint-in-Intervention, *South Carolina Coastal Conservation League et al. v. Wilbur Ross et al.*, Case No. 2:18-cv-03326-RMG (D.S.C. Dec. 20, 2018).

On the West Coast, California's AG Xavier Becerra submitted a comment letter[23] to the Trump Administration in 2018, arguing that opening California's coasts to new offshore drilling would be unjustified, unprecedented and ill-advised. AG Becerra emphasized that the state's coastal economy—which represents more than 10 percent of the national GDP—would be jeopardized by drilling in federal waters, and challenged the Department of the Interior to make a distinction between California and Florida, the latter of which Interior Secretary Ryan Zinke announced he would remove from leasing consideration due to the state's tourism-focused economy.

The debate over offshore oil and gas exploration and drilling remains lively, with no clear end in sight. AGs in coastal states likely will continue to exercise strong resistance to offshore drilling, despite the federal government's efforts to encourage it.

Vehicle Emissions Standards

The Trump Administration has proposed (i) relaxing the schedule of increasingly stringent vehicle emissions and fuel economy standards set by the Obama Administration and (ii) eliminating California's authority (via the California Air Resources Board) to set emissions standards more stringent than their federal counterparts.[24] Automakers generally have encouraged California and the current Administration to compromise, while taking differing positions regarding the feasibility of achieving the reductions required by current standards and the appropriate resolution to the dispute.

If the Administration ultimately acts to limit California's regulatory authority, the state AG will file suit, likely supported by at least 20 other states, many of which have adopted the California standards. Impacts of the regulatory uncertainty during the pendency of any litigation would be widely felt, as it could affect demand for alternative fuel vehicles and the charging infrastructure on which such vehicles rely, as well as the efficacy of state alternative fuel vehicle programs.

Conclusion

Over the past two years, AG investigation and enforcement in the energy sector has reflected a diverse spectrum of concerns, ranging from electricity costs to environmental contamination. Looking forward, such actions will likely continue to proliferate as state AGs elevate their constituents' priorities—even when those concerns differ from (or even controvert) federal priorities. AGs from both sides of the aisle act on traditional concerns regarding fairness and safety that animate competitive supplier and pipeline investigations. At the same time, the Trump Administration's deregulatory agenda has given Democratic AGs in particular the impetus to assert themselves in the energy space—often resulting in litigation against the federal government that has ripple effects throughout industry and the national economy. Energy sector participants should

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[23] AG Xavier Becerra Letter to Bureau of Ocean Energy Management re 2019-2024 Draft Proposed Outer Continental Shelf Oil and Gas Leasing Program and Notice of Intent to Prepare a Programmatic Environmental Impact Statement (BOEM-2017-0074) (March 9, 2018).

[24] The Safer Affordable Fuel-Efficient (SAFE) Vehicles Rule for Model Years 2021–2026 Passenger Cars and Light Trucks, 83 CFR 48578.

remain apprised of AG priorities and embrace proactive engagement and project planning as AGs take on bigger investigation and enforcement roles across the sector.

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