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COVID-19 Crisis Clouds Future For Electricity Sector

By **Keith Goldberg**

Law360 (April 29, 2020, 7:37 PM EDT) -- The COVID-19 pandemic has the power sector facing ratepayer and contractual headaches due to declining U.S. electricity demand, coupled with increased cybersecurity risks due to more key utility employees working remotely.

Utilities around the country are losing revenue, with regional grid operators reporting double-digit percentage drops in electricity demand as the coronavirus has ground much of the U.S. economy to a halt. But experts say efforts to recoup that money from ratepayers could be a drawn-out, politically charged process for both utilities and their regulators.

Meanwhile, the decrease in demand, or load, raises the question of whether utilities can fulfill the obligations of power purchase agreements they've inked with project owners.

The power industry's problems aren't nearly as acute as the coronavirus-fueled demand issues crushing the oil and gas industry, especially since electricity demand is generally lower in the spring. But the longer the pandemic wreaks havoc on projected electricity demand, the cloudier the forecast will be for the electricity sector.

"There's no silver lining in any of this, but if you had to have this sort of load reduction in any month, you'd pick it to be about now," said Wilkinson Barker Knauer LLP senior adviser Tony Clark, a former commissioner at the Federal Energy Regulatory Commission and state utility regulator. "The more that this drags on into summertime, when loads are typically the highest ... it becomes more problematic."

Here, Law360 examines three issues the power sector may confront during the pandemic.

Ratemaking Battles Lie Ahead

The COVID-19 pandemic is denting utility revenues in myriad ways, especially from the decreased demand from commercial and industrial consumers that tend to use more power and pay higher rates than residential consumers. Utilities are also losing revenue because of voluntary and mandated efforts not to cut off residential customers who can't pay their bills.

Utilities could seek to recoup that money by filing for new rates with state regulators or filing for emergency rider payments for short-term costs to be tacked on to existing customer bills. Neither path will be easy, especially as the pandemic stresses the finances of residential and business consumers alike, experts say.

"It's going to be a huge problem, and it raises the ugly question of who's going to pay for this," Holland & Knight LLP energy and environmental partner Tara Kaushik said. "It ultimately has to be resolved by the [state utility] regulators or by the state legislatures."

Earlier this month, Washington, D.C.'s consumer advocate urged the city's Public Service Commission to put the rate case of D.C.'s main utility on hold during the COVID-19 pandemic. Expect a wave of similar requests, experts say.

"Across the board, we're all struggling with the cases that are in process," said David Springe, executive director of the National Association of State Utility Consumer Advocates. "Do you stop them, do you go forward with them, should there be a rate increase at this time?"

Experts also said not to expect many new rate cases until the country is largely reopened. In most instances, rates are based on forecast electricity consumption for a typical, "test" year, but the COVID-19 pandemic has turned that into a giant question mark.

"I don't know what you use as your test year," Clark said. "We're going to need to figure out what the new normal is."

That is, will the coronavirus-fueled shifts in electricity be a short-term blip or herald a long-term change? If it's the latter, it won't just be rate increase fights that regulators will have to referee, experts say.

"If you see sustained demand changes over the coming years, then I could see bigger fights, because utilities would be incentivized to change more significantly the way their rates are structured," said White & Case LLP partner Jane Rueger, who focuses on electricity and natural gas issues.

Power Purchase Agreements in Peril?

With COVID-19 removing a chunk of electricity demand, utilities and other holders of power purchase agreements may have to confront the possibility that they won't need all the electricity they've contracted to buy from a generator such as a wind or solar project.

While experts don't think that will necessarily threaten the viability of most existing PPAs, it could force negotiations between the contracting parties about whether some of a PPA's key obligations can be amended or relaxed, such as the obligation to take a certain amount of electricity at a certain time.

"This type of issue raises questions about how the agreement is structured and, for example, the extent to which the force majeure provisions are triggered," Morgan Lewis & Bockius LLP energy partner Levi McAllister said.

Rueger said one key issue with many PPAs is allocating the risk of negative power pricing between the power producer and buyer. In some commercial contracts, corporate buyers have said that if the locational marginal price — which reflects the value of power at different locations on the grid — is negative at the point the electricity is delivered, they won't take it, she said.

"People are going to be looking at their PPAs. Who's going to be taking the negative pricing risk? Is there a right to curtail electricity during that period?" Rueger said. "It depends on what market you're in."

Kaushik, the Holland & Knight attorney, said inking new PPAs — whether the buyer is a utility or a corporation — will be increasingly difficult for as long as the pandemic depresses electricity demand.

"A lot of my deals that involve PPAs — the ones that are well underway with negotiations — are continuing to close, but the ones that are not are sort of on pause," Kaushik said. "And I suspect that's an industrywide thing right now."

Cybersecurity Risks Grow as Workers Stay Home

While utility workers have been deemed essential workers by the federal government during the COVID-19 pandemic, more and more employees tasked with keeping the grid up and running are working remotely.

On an April 23 conference call with reporters, officials at the North American Electric Reliability Corp., which oversees the reliability of the U.S. bulk power system at FERC's behest, said the industry has seen a rise in malicious activity and that the opportunity for grid cyberattacks will only increase as remote work increases.

Yet FERC recently approved a request by NERC to defer the implementation of several grid reliability standards scheduled to take place later this year. That includes three Critical Infrastructure Protection, or CIP, reliability standards related to cybersecurity.

Matt Duncan, a senior manager for resilience and policy coordination at NERC's Electricity Information Sharing and Analysis Center, said the delay is prudent given the more immediate concern of increased cybersecurity threats posed by a spike in remote working. He said that the electricity industry has been proactive in strengthening their defenses during the pandemic.

"The standards implementation delay doesn't mean they're not implementing those procedures right now," Duncan said on the conference call. "I think entities were adopting the architecture to meet those standards. We have always said our CIP standards are a baseline."

Regardless, the increased remote work due to COVID-19 creates potential liability and regulatory headaches for utilities, transmission companies and other industry members, experts say.

"We're in a new world, where we need to have more of our important folks working remotely," Rueger, the White & Case attorney, said. "How do we remain in compliance with these cybersecurity regulations?"

--Editing by Kelly Duncan and Alanna Weissman.

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