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COVID-19 AND CRITICAL INFRASTRUCTURE: AN AGENDA FOR DECISIVE STATE REGULATORY ACTION



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INTRODUCTION

In energy policy, there are conflicts on a wide variety of important topics—distributed energy resource integration, community choice aggregation, deep decarbonization policy, state versus federal jurisdictional disputes and electricity market model debates, to name a few. Indeed, as practitioners in the energy field, we ourselves are often in the middle of the scrum, along with many others, trying to advocate for and advance energy policy initiatives in one direction or another.

But a crisis like COVID-19 brings home realities that are bigger than the regular cast of acronym-laden disputes among the energy regulatory wonks, activists and wish-fulfillers. It raises foundational questions about society, with policymakers across a wide array of arenas facing one of the most—if not the most—daunting public health and economic crises this country and the rest of the world has faced in generations. Society is questioning and discovering which systems are resilient to this crisis and which are more fragile. And looking forward, we collectively must evaluate and understand the necessary steps to emerge from the other side of stay-at-home orders, social distancing requirements, and the economic damage resulting from the pandemic. Although this country—and countries across the globe—are appropriately focused on public health, attention will soon turn to whether and how can we safely, effectively, and durably restart the economy to prevent further job losses and other economic damage. The answers to that question are certainly legion. Here, we offer our thoughts on where utilities fit into these questions.

As the crisis continues, it underscores the importance of reliable energy and communications infrastructure. The electric grid continues to operate during the pandemic. Communications infrastructure supports work, education, and commercial distribution networks. Gas, water, and wastewater utilities continue to function as foundational networks to facilitate modern existence.

These utility networks are foundational for all other areas of the economy, healthcare, and public safety. Energy service is necessary for the healthcare professionals providing critical service who have risen to this challenge. Moreover, without reliable energy service and telecommunications in households, the burden of stay-at-home orders would only be more extreme. In addition to continuing to provide their essential services, utilities have stepped up to the plate by suspending customer disconnections for non-payment in the face of almost certain revenue shortfalls from diminished and different consumption patterns.

In these highly uncertain times, we accept this much as true:

- The economy is severely hampered by the COVID-19 crisis;
- Affordable, reliable, and stable electric power is a foundational building block for the healthcare system, public safety, and the economy; and
- The economics of network industries have certain immovable realities: high fixed costs and ongoing needs for capital to provide ongoing service.

Accordingly, COVID-19 implicates regulatory and operational notions that need no acronym but are complicated in their own right: stability and reliability. This paper endeavors to set an agenda for state regulatory action in the coming weeks and months, with policy actions grounded in a principle of decisive action addressing customer and utility issues to maintain regulatory stability. (1) Striking this balance and fulfilling this principle is undoubtedly nuanced and complicated, but states through their elected officials and utility regulators are in the best position to find that balance for their utilities and utility customers alike. The balance is important in the near-term to protect human health through thoughtful and compassionate disconnection and late-fee suspension policies.

1. Our broad point on the foundational importance of utility networks goes for all historic “utility” networks: electricity, gas, water, wastewater and communications. Because of jurisdictional and technological differences, we focus here on the core state-regulated utilities: electricity and gas.

Different but appropriate consideration must be given to utility health both near-term and long-term. In the near-term, the need for utility company stability is imperative. The electric grid with affordable and reliable power is the backbone that supports efforts to defeat COVID-19 by the frontline responders. The long-term component requires utilities to emerge from this financially healthy so the grid investments that support enhanced reliability, clean energy, and consumer affordability are not lost and can be strengthened into the future. The near-term and the long-term, for both customers and utilities, demands stability through proactive regulation. This paper details some of the efforts that have already taken place at the state level with regard to utilities in response to the COVID-19 pandemic. Furthermore, it provides recommendations regarding actions that policymakers at various levels of government should consider, and some prescriptions that should be avoided.

POLICYMAKERS SHOULD BE PROACTIVE IN BOTH THE SHORT AND LONG TERM

State policymakers (2) should consider both short- and long-term measures in responding to the COVID-19 crisis that support both customers and utilities. While quick and decisive action is necessary under the circumstances, that action should fit into a broad framework with the dual goal of protecting customers and keeping utilities financially and operationally stable.

There are several important short-term approaches to protect customers and support utility stability. As an initial matter, it must be recognized that the most important asset of any essential service provider is its employees. These are the individuals who repair the infrastructure, manage the control rooms and ensure day-to-day operations that maintain utility services. Ensuring their health and safety must be job number one, both for their own well-being, but also as a continuity of operations matter. All levels of government have a responsibility to support utilities in their efforts to keep these workers safe, whether it be through the adequate provision of personal protective gear, or other recognitions of their status as among the most essential of all workers in our society.

Turning to the customers of utilities, given the importance of electricity in the home during this crisis, policymakers should consider appropriate disconnection suspension measures. In some instances, of course, it may not be necessary for policymakers to order such suspensions where utilities have already voluntarily committed to suspending disconnections. Indeed, the Edison Electric Institute has announced that all of its member companies will voluntarily suspend disconnections in response to the pandemic. (3) State policymakers may also want to consider the breadth and depth of their orders: should they suspend disconnections for just residential customers, residential *and* commercial, or for *all* customers, and should the protected group of customers be reconnected free of payment? State commission actions have taken different approaches on these questions, (4) and the protections must be appropriately balanced with the expectation and assumption that any costs of the policy will ultimately be recovered from all customers. We emphasize, however, that the differences likely reflect each states' diverse circumstances and accordingly should vary. Indeed, the value of federalism allows each state to tailor its response to its unique and changing circumstances.

In the short-term, proactive policy measures are also important to provide a strong financial foundation for utilities to be able to effectively provide customer-supporting measures like disconnection suspensions and late fee waivers for reconnection. Taking disconnection suspensions as an example, it is possible

2. By state policymakers we are generally referring to governors, legislators, and utility commissions, and any other state-level officials that make decisions related to utilities.

3. See *COVID-19 Utility Shutoff Suspensions*, National Energy Assistance Directors Association (Mar. 31, 2020), <https://neada.org/utilityshutoffsuspensions/>.

4. See *COVID-19 News and Resources: State Response Tracker*, National Association of Regulatory Utility Commissioners, <https://www.naruc.org/compilation-of-covid-19-news-resources/state-response-tracker/> (last visited Apr. 8, 2020).

(although uncertain at this point) that many customers will need this support mechanism. If a large share of customers is unable to pay bills over the coming months, utilities may run into financing issues, which could lead to cascading problems and undercut the utilities' ability to serve all customers. For example, at the height of the California energy crisis, power generators were unwilling to sell to California's utilities, which led to widespread brownouts. Although the California crisis certainly differed in many respects, it provides the lesson that utilities need to maintain their balance sheets to be able to meet their obligation to serve and continue providing affordable and reliable power. To address this potential problem, state policymakers should incorporate mechanisms for utilities to recover their costs from continuing to serve customers who cannot pay as part of any regulatory package suspending disconnects and late fees. Recovery mechanisms like bad-debt riders, deferred accounting orders, and/or cost trackers are appropriate tools to achieve these objectives. (5)

Preliminary analyses also show that electricity sales volumes are likely to fall substantially as demand (especially commercial and industrial loads) decreases. (6) Consequently, to the extent that utilities' revenues are directly tied to sales (which is still the case in many jurisdictions), they will fall short of their revenue requirements needed to recover fixed costs. It may be too early to understand the depth and durability of these load drops; however, policymakers can ensure the financial stability of utilities by proactively defining mechanisms as discussed in more detail below.

Further, it is easy and perhaps even understandable to naturally set aside consideration of the long-term consequences of COVID-19. These long-term considerations, however, must be part of any proactive state-level agenda to comprehensively consider the regulatory issues driven by COVID-19. The urgency and immediacy of this crisis may initially distract from broader state energy policy goals, but policymakers should consider longer term approaches and tools to render utilities even more prepared to face the next crisis—and reduce the need to respond in an *ad hoc* and hasty manner when it materializes. Several efforts can be advanced on this front to reduce volatility in fixed cost recovery and establish more current cost recovery.

Specific to ratemaking, utilities' revenues are likely to fall where recovery is directly tied to sales. In many industries, a loss of sales will hurt a company's income, but the corresponding reduction in variable costs mitigates the total effect on the bottom line. For network industries like utilities with high fixed costs relative to variable costs, however, the loss of sales volume can be particularly harmful. This is especially true if rate design has dictated that a disproportionate share of fixed costs be recovered through volumetric charges—a fairly common outcome in U.S. regulatory proceedings. Fortunately, there are ways to minimize the problem through proper rate design and cost of service development.

DECOUPLING

Decoupling, which is already employed across a variety of jurisdictions, insulates the utility's revenue recovery from total sales—when the tool is designed properly (and when it is not, it can have the opposite effect where it financially penalizes a utility for incremental and organic growth on the system). Similarly, regulators can redesign rates such that recovering utilities' high fixed costs is not so dependent on volumetric charges. Either approach would reduce the need for immediate patches and fixes in the heat

5. Regulatory policy as a vehicle for social policy can be a fraught undertaking. Nonetheless, we seem to be past that question in the current crisis. The decision has been made to socialize costs and losses from those who cannot afford to pay utility bills in the near-term. With that decision made, the question becomes how to properly and efficiently socialize those losses. Bad-debt riders, deferred accounting orders and cost trackers are all means to accomplish this social goal.

6. See Russell Gold, *U.S. Power Use Weakening After Plunging in Italy Amid Coronavirus*, Wall Street Journal, (Mar. 18, 2020), <https://www.wsj.com/articles/plunge-in-italys-electricity-use-hints-at-coronavirus-risks-facing-u-s-11584532801> (noting that electricity usage in Italy had fallen by 18 percent in one month); Aidan Tuohy, Adrian Kelly, Brian Deaver, Eamonn Lannoye, & Daniel Brooks, COVID-19 BULK SYSTEM IMPACTS: DEMAND IMPACTS AND OPERATIONAL AND CONTROL CENTER PRACTICES 4, EPRI (Mar. 27, 2020) (noting that New York and California had three to seven percent in peak demand and energy usage following lockdowns).

of a crisis. To be sure, policymakers might be wary of engaging in the technical and lengthy proceedings necessary to properly implement these suggestions in the near term, but a holistic response to the COVID-19 crisis and its impact on the utility business counsels that these types of actions be part of the conversation. (7)

GENERAL RATE AND COST OF SERVICE CONSIDERATIONS

There are other proven mechanisms to ensure that critical infrastructure utilities are better able to weather drastic load changes that are the likely result from crises:

- **Avoiding backward-looking test year conventions.** Regulators can move away from using historic test years, which inevitably introduces volatility into the recovery process as conditions change from one year to the next. (8)
- **Look for appropriate opportunities to use riders.** Rate riders for a wide variety of costs can allow for more current recovery while also tracking and accounting for specific costs that vary from year to year.
- **Move towards more progressive ratemaking.** Policymakers should consider implementing formula rates, which can take varying forms but allow the utility to recover costs within a fixed band each year with built-in customer protections, e.g., a netting adjustment (true-up) to account for differences in forecasted and actual amounts, caps on annual revenue increases, and pre-determined terms (e.g., three to five years) after which the utility must request an extension and revisit its tariff to determine opportunities for improvements. This approach is beneficial for utilities and customers alike as it can provide for more current recovery and better reflect the actual cost of service, while also decreasing protracted rate case litigation and attendant expense, which is generally borne by customers.

STATE AND FEDERAL ROLES

A word should be said about the proper role for state and federal level of governments. The utility-customer interface is an area where states should, and are, taking the lead; which should be helpful to federal officials who can instead focus on areas more squarely within their purview. States have the necessary tools to develop and carry out an agenda with the components set forth above. Federal action should support state action, but it should not prescribe a one-size-fits-all approach that may undermine some states' tailored policy choices. Taking suspensions of disconnections as an example, states and utilities have already addressed this issue through strategies that contemplate the unique economic and regulatory backdrop within each state. A federal approach on this issue would risk upending solutions that are already working.

This is not to suggest the federal government cannot play an important—and needed—supporting role. Consumer energy assistance is a long-time—and successful—collaboration between state and federal governments. Increased funding for low income and consumer energy assistance will be needed now, more than ever. Federal resources can be brought to bear in a way that compassionately assists those who are unable to pay their utility bills, while at the same time buttressing the financial stability of this critical infrastructure industry. The same is true for a key federal role in developing innovative clean energy technology and policy. But on the issues that need to occur in the near-term to be responsive to the COVID-19 pandemic, state policymakers can and must be in the driver seat. (9)

7. Moreover, decoupling provides benefits beyond ensuring stability and reliability. Originally designed as an efficiency measure to align utility incentives with energy efficiency, and a properly designed decoupling rate design would still provide that additional benefit.

8. Regulators at the very minimum should utilize historic test years with adjustments to make the cost of service more reflective of current costs.

9. There are other areas, to be sure, where the federal government naturally takes the lead. Federal regulators play a key role in setting the standards that ensure the bulk electric system continues to operate across broad regions of the country at all times, especially during crises. As a matter of both jurisdiction and practicality, this inherently interstate work can only be accomplished federally.

POLICYMAKERS SHOULD AVOID STANDING IDLE AND TAKING A NARROW VIEW OF THE PROBLEMS

State policymakers cannot stand on the sideline and refrain from taking action in this unprecedented crisis—and piecemeal action is likewise insufficient. Mandated or voluntary actions to suspend disconnections are a great start, but are just the beginning of a constructive policy agenda. Indeed, the customer who develops COVID-19 symptoms and must self-quarantine should not have to worry about the lights and the stove staying on. That reliability and stabilizing force played by utilities must be safeguarded by policymakers. Fortunately, it appears that many states have already taken action.

By our latest count, 26 states plus Washington D.C. have ordered some form of relief for customers who are unable to pay their energy bills—and in nearly all jurisdictions, utilities have already voluntarily suspended disconnections. This should not, however, be the only form of action taken by state policymakers.

In constructing a playbook for comprehensive action, policymakers should not focus on utility needs to the exclusion of customer needs or vice versa. On top of customer-protective measures, policymakers must recognize that such measures are not a free lunch; instead, both sides of the equation—customer *and* utility—must be addressed. Namely, suspending customer disconnections requires, by definition, that utilities continue to serve customers without receiving payment in return over the short term, and it is not certain that these customers will be able to pay over the long run if they have lost their jobs. Accordingly, policymakers should ensure that the costs required to protect vulnerable customers will be recovered. Similarly, policymakers should not simply focus on ensuring the financial stability of utilities when a substantial number of customers have lost their jobs, and where there are broader societal issues such as providing essential services to entire communities. Approaches must address both sides of the ledger.

The proactivity needed by state policymakers should have limits, and policymakers should avoid populist temptations to use utilities as piggybanks to finance a broad suite of customer-protection measures only loosely tied to the crisis. It may be tempting to extend and broaden the current suspensions of disconnections policies, or to use the crisis to extract extraneous special interest rents and subsidies that relate to the energy business; but doing these sorts of things will ultimately hurt customers in the long run. It is not clear to what extent policymakers will have an appetite to use utilities to finance larger-scale welfare programs, but at least one proposal from an academic suggests that *all* customers should have a reprieve from paying bills, not just those who are unable to pay. (10) Proposals like these essentially ask utilities to act as a bank of last resort, in which they are required to use their balance sheets to finance massive consumer debt. Contrary to what might be popular opinion, public utilities do not have limitless cash reserves available to absorb all customer bills; by contrast, they require a steady cash flow to pay for their fixed investments in essential grid infrastructure. The last thing policymakers should do to exacerbate the COVID-19 crisis is destabilize critical infrastructure companies by bleeding utilities dry in a matter of months precisely when they are needed most.

MANY STATES ARE TAKING PRODUCTIVE ACTIONS TO SUPPORT CUSTOMERS AND PROVIDE STABILITY FOR UTILITIES

States have already begun taking action consistent with the principles outlined above, though action to date has been focused on the short-term rather than the long-term. There are three camps of state policy action, each of which are incremental to one another with corresponding levels of overall utility policy effectiveness.

10. See Catherine Wolfram, *Can We Stop Paying Utility Bills for a Bit?*, Energy Institute. Blog, UC Berkeley (Mar. 30, 2020), <https://energyathaas.wordpress.com/2020/03/30/can-we-stop-paying-utility-bills-for-a-bit>.

The Suspension States

The first camp is the Suspension States. As noted, 27 jurisdictions have ordered some form of mandatory relief for customers who are unable to pay their energy bills. Some jurisdictions have only required that utilities suspend disconnections, (11) while others have also required utilities to reconnect customers who were recently disconnected. (12) The diversity of approaches extends beyond disconnections; some jurisdictions have also waived reconnection fees, waived late fees, suspended security deposit requirements, and established deferred or flexible payment plans. Different jurisdictions protect only subsets of customers, with others utilizing broader programs covering more customer classes. (13)

The Suspension and Short-Term Action States

The second camp is the Suspension and Short-Term Action States. This group has gone a step beyond suspensions to proactively address the utility side of the coin, albeit in the short-term only. These states include Connecticut, Illinois, Nevada, Maryland, Texas, Wisconsin, and Wyoming. Like the other state policies described above, their approaches also vary, but each state has described or provided an explicit mechanism for utilities to recover their costs from customer relief related to COVID-19. Texas, for example, has moved quickly and already provided for a fee to be charged by each Transmission and Distribution Utility (TDU) that is then passed into a fund from which retail providers may be reimbursed for the costs of the relief program. Connecticut took a different approach with utilities ordered to “maintain a detailed record of costs incurred and revenues lost as [a] result of implementing [the suspension] and may establish a regulatory asset to track incurred costs.” (14)

The Suspension and Comprehensive Action States

The third camp is a party of none—the Suspension and Comprehensive Action States. We have not identified any states that have yet taken a systematic look at long-term approaches to ensuring utility health and stability in response to the COVID-19 crisis. Admittedly, we are only several weeks into this crisis, and various states have adopted some of these regulatory best practices in prior rate case proceedings. But state policymakers should begin contemplating their options for maintaining the viability of their utilities over the long term, using this moment as an opportunity to rededicate themselves to regulatory policies that ensure the stability and viability of these regulated, essential service industries. In so doing, regulators will help ensure resiliency for anything that might come next, and will leave utilities in a financial position on the other side of this crisis such that they can lead on issues of importance to their customers: grid modernization, clean energy, affordability, and reliability. The question, in our view, is who will be the first mover and take decisive action that goes beyond the important suspension and short-term cost recovery action already being taken in several states.

As we continue to navigate and combat this pandemic as a society, policymakers should consider how utilities can be made stable in both the near term, but also with an eye towards designing a regulatory cost recovery framework that prepares the grid for the *next* crisis.

11. These include Kansas, Kentucky, Louisiana, Maryland, Texas, Vermont, and Washington D.C.

12. These include Connecticut, Rhode Island (subject to repayment minimums), and Wisconsin (subject to safety issues).

13. For example, Maryland has applied its customer protections only to residential classes, Colorado’s program protects residential and small business, and Wisconsin’s program applies to all customer classes.

14. *Motion No. 2 – Request to Expand Scope of Docket to Address Issues Arising from the COVID-19 State of Emergency*, in Dkt. No. 20-03-15 (Conn. Pub. Utils. Reg. Auth. Mar. 18, 2020).

[http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/ba28e7d270c7bcbb8525852f007090da?](http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/ba28e7d270c7bcbb8525852f007090da?OpenDocument)

[OpenDocument.](http://www.dpuc.state.ct.us/dockcurr.nsf/8e6fc37a54110e3e852576190052b64d/ba28e7d270c7bcbb8525852f007090da?OpenDocument)