Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

California: At The Vanguard Of Regulation

Law360, New York (March 03, 2015, 3:33 PM ET) --

Some of the nation's most sweeping regulatory changes got their start in the Golden State. In 2015, looking ahead means looking west, where energy and health care top the regulatory agenda.

Frank R. Lindh

Electricity generation in particular is always top of mind in California, and in 2015 it will be no different. California isn't an island, but it's unique in its degree of energy independence, given its size and concentration of population along the coast and inland valleys. As a result, California officials are accustomed to choosing where to locate power plants and which energy sources to use for generation. But as the Federal Energy Regulatory Commission looks to ensure reliability in the West, it also wants a say.

In response, California is pursuing an innovative solution. The state's independent system operator (ISO) and public utilities commission (PUC) have established a framework for balancing oversight. If adopted by the PUC, the framework will preserve for the PUC the primary role of overseeing contracting for new capacity. Where there are gaps, the ISO will have authority to procure power to meet demand in specific areas.

This framework avoided what could have been lengthy and contentious litigation between state and federal authorities, something that has plagued other regions. The California framework should be a welcome development for power-plant developers, because it sets clear rules, roles, and stability.

Laying Up Energy

But as California pursues more wind and solar power, it faces the challenge of ensuring capacity when the wind isn't blowing or the sun isn't shining. One answer is energy storage on an unprecedented scale. Prompted by state legislation, in 2013 the PUC adopted rules requiring utilities to procure hundreds of megawatts of storage. Numerous storage technologies are in development, including lithium-based batteries and compressed air.

In fact, we're seeing a land rush for energy-storage capacity. This could revolutionize the energy industry, and it means tremendous opportunities for entrepreneurs who develop viable technologies. But there remain engineering issues to work out. For starters, there will need to be technical studies and new rules related to how these storage resources connect to the grid, help with grid reliability, and charge.

Energy storage will also help drive California's push toward micro-grids — geographically isolated energy infrastructures, often powered by more distributed, less centralized generation. The topic of much energy-industry speculation in recent years, the micro-grid will likely come of age in 2015 and 2016.

Energy in the Balance

Still, among the most dynamic energy developments in California is the establishment of an energy imbalance market (EIM). The western grid is managed by 38 balancing authorities, each responsible for syncing supply and demand in its region. Dramatic growth in wind and solar means energy supplies can vary hour by hour, straining the system. An EIM automatically dispatches resources across balancing authorities in real time.

The California ISO has implemented the first western EIM, with PacifiCorp's two balancing authorities as the initial participants. The market went live in November 2014, synchronizing systems across eight western states.

The EPA's proposed Clean Power Plan, under Section 111(d) of the Clean Air Act, will require all states to work more collaboratively. An EIM is a good first step, and it's an opportunity that balancing authorities in several regions will want to consider.

Health Care Conscious

But energy isn't the only area of regulatory experimentation for the Golden State. California has been among the most innovative states in health care, particularly in adapting to the Affordable Care Act. Most provisions of the ACA went into effect by Jan. 1, 2014. In 2015, the focus will be on implementation. And California's experiments and experiences have implications for the rest of the country.

One example is Cal MediConnect, a three-year pilot by the state's Department of Health Care Services (DHCS) and the federal Centers for Medicare & Medicaid Service. The program will coordinate care for the 1 million "dual eligibles" covered under Medicare and Medi-Cal with the goal of providing better overall care. Eligible individuals must enroll in a managed-care plan unless they specifically opt out. This comes on the heels of DHCS's shift to provide all Medi-Cal services in a managed care environment via contracts with private health plans.

The implementation of health care exchanges and the expansion of Medicaid have raised issues for health plans, providers and regulators alike. California regulators are looking at whether health plans have adequate provider networks to meet the needs of people who have enrolled in their products. Network adequacy can be particularly challenging in California, with providers reluctant to contract in some rural areas.

Providers have their own concerns. If they're excluded from a health plan network, they may no longer have access to patients they otherwise could serve. In some states, providers have been suing insurers based on exclusion from networks. In California, some providers aren't certain whether they're in a network, and this has caused confusion for both providers and members. Recent concerns over networks for the California exchange drove the passage of legislation requiring health plan regulators to review each network annually. This could result in a big increase in workload for health plans and their regulators.

Health plans, for their part, will increasingly emphasize financial arrangements under which providers will be expected to take on financial risk, including global risk for the end-to-end services provided to plan members. Many California providers have embraced this approach by obtaining special licenses that authorize the assumption of global risk. The big challenge for providers that do this is recognizing that they're in a heavily regulated industry that requires them to maintain financial reserves and deal with continuous scrutiny by regulators.

Of course, coordinated care in which providers work collaboratively is what's intended under the ACA. And in many cases, such implications of the ACA will play out first in California. California-based insurers and providers are helping to spread these trends across the nation.

Because of its large size, population and economy, as well as its typically progressive stance, California will remain at the vanguard of regulation in 2015. Especially in active arenas like energy and health care, the rest of the country would be wise to watch how regulatory issues play out in California.

—By Gary L. Baldwin, Kevin B. Kroeker, Frank R. Lindh and Nancy Saracino, Crowell & Moring LLP

Nancy Saracino and Frank Lindh are partners in Crowell & Moring's energy group. Kevin Kroeker is a partner and Gary Baldwin is counsel in firm's health care group.

This article was also published in the Crowell & Moring Regulatory Forecast 2015.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.