

# LAW WEEK COLORADO

## Push and Pull Between Marijuana, Energy Industries

Marijuana drains power grid, while power drains cash from marijuana industry

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Marijuana production currently makes up 50 percent of new electricity load growth in Colorado, which has brought a host of legal challenges at the intersection of the two industries. One expert says although the challenges seem to bring more questions than answers, those questions are still worth discussing.

"I guess this is the problem with marijuana law," said Crystal McDonough, an attorney and owner of McDonough Law who practices in energy and natural resources. "Sometimes you have more questions than you do answers."

McDonough spoke on a panel at the Energy Bar Association's annual conference this past spring to discuss the intersection of the marijuana and electric utilities industries in Colorado. She said some of the biggest legal questions for utilities providers include those concerning liability for facilitating illegal marijuana operations, rate-setting and issues that come with handling large amounts of cash.

### STOLEN POWER

McDonough said although she doesn't know the full extent of the problem, she has discovered through her research that utility companies in Colorado have experienced marijuana operations using sophisticated techniques to steal power from the grid. The operations doing so, she said, are likely businesses operating illegally, which certainly still exist even in Colorado. She explained utility companies have different rates for different types of customers, such as residential, commercial or industrial users. Marijuana-growing operations are likely considered by providers to be most adjacent to industrial or business consumers and consume large amounts of electricity.

McDonough said electricity accounts for 50 percent of a grower's expenses. She said stolen energy has significant legal implications for rate-setting because it costs the providers money, who must determine how those costs pass on to all their customers. Regulations on the providers affect measures they could feasibly take to mitigate the costs their regular cus-

tomers must bear as a result of stolen energy while still meeting the "just and reasonable" standard for public utilities rates set by Title 40 of the Colorado Revised Statutes. As an example, providers of public utilities have to request permission from the state utilities commission to raise rates, while co-ops and municipalities do not need to.

"It might not be a big deal, depending on how much is being stolen," McDonough said. "If it's a small amount that's being stolen, the harm might not be that great. But if it's a larger amount, then what? How is that treated and handled?"

Other states that have legalized recreational marijuana are also thinking about the intersection of cannabis production and energy. Last spring, the California Public Utilities Commission put on two panel discussions for marijuana and energy industry professionals from California, Washington, Oregon and Colorado to discuss how to reconcile energy conservation with the large amounts of power used by marijuana cultivation.

### A CASH FLOW PROBLEM

The fact that many marijuana businesses operate solely in cash also brings its own set of legal challenges for utilities companies. The IRS has a specific form required to document cash payments over \$10,000, intended to track potential criminal activity such as tax evasion, and McDonough said another consideration for utilities providers is ensuring they have adequate safety policies for employees who must make the large cash deposits. She added the employees handling cash could also face legal challenges from any marijuana residue that ends up on their hands, and it's not uncommon now for them to wear gloves while doing it.

"When everything first hit, I think there was a lot to figure out. ... I think the companies that deal in cash are getting a handle on it," McDonough



CRYSTAL MCDONOUGH

said. "I think they have a pretty good handle on it now. They have best practices, and they train their employees on how to manage that, but I think it's definitely worth the conversation."

### RELEVANCE DESPITE UNCERTAINTY

One of the most uncertain issues is whether utility companies can be held liable for aiding and abetting marijuana operations. McDonough said she believes the question is more theoretical than practical because the companies do not have intent to facilitate any illegal activity by the operations and moreover, liability is likely not a large concern for the utilities industry. But she said the issue's relevancy is in the context of the current federal political environment because the Trump Administration has taken a different stance than the previous presidency on going after states that have decriminalized or legalized marijuana.

"Under the previous administration, there was a different climate," said McDonough. "If Jeff Sessions and the federal government decide to take a heavier hand and start enforcing federal law, I think that's really the bigger question, is what then? ... Otherwise I don't think we would even be discussing it." •

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Indoor view of a marijuana-grow facility. Marijuana production makes up half of the electricity load growth in Colorado. / LAW WEEK FILE