The Attorney’s Role in NERC Reliability Standards Compliance

Speakers:

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Evolution of Mandatory Standards
- Voluntary Industry Best Practices
- Merchant Generators and Transmission Owners
- Blackouts
- Congressional action
OVERVIEW OF RELIABILITY STANDARDS
REGULATORY FRAMEWORK

› Role of FERC
  ▪ Energy Policy Act of 2005
  ▪ Participation in Development of Standards
  ▪ Participation in Audits
  ▪ Oversight of Penalties and Sanctions

› Role of NERC
  ▪ Transforming Industry Guidelines into Legal Requirements
  ▪ Drafting Technical Standards for Public Policy Goals
  ▪ Balancing Regional Variability with National Mandates

OVERVIEW OF RELIABILITY STANDARDS
REGULATORY FRAMEWORK

› Compliance
  ▪ Good Utility Practice
  ▪ Objective Metrics
  ▪ Subjective Interpretations

› Enforcement
  ▪ NERC Penalty Calculator
  ▪ Subjective Penalties
AUDITS

- Pre-Audit
  - Assembling Audit Record
  - Best Evidence
  - Preparing Subject Matter Experts

- On-Site Audits
  - Limited Interaction
  - Support of Subject Matter Experts
  - Responding to New Data Requests

OVERSIGHT OF COMPLIANCE PROGRAMS

- Who is the Senior Management Official in charge of your NERC compliance programs?
  - Do they understand their role? Are they the right person for the job?
  - Where should the responsibility rest?
  - FERC Policy Statements on Enforcement and Compliance
  - ABA Task Force on Corporate Responsibility
REPORTING UP AND RISK MANAGEMENT

- Reporting to Committees, Boards or City Councils
- Annual reporting to Financial Auditors
  - Who knows about what your company is doing to comply with the NERC standards? Who ought to know? Who would benefit from knowing more?
  - Lessons from Caremark, Federal Sentencing Guidelines for Organizations
- Risk management

INTERNAL AUDITS

- What is your utility’s compliance goal?
  - According to the FERC Policy Statements, an ongoing process for auditing compliance should also be part of your NERC compliance program.
  - Internal audits can be done by an internal audit department, compliance staff, legal staff or combinations depending on the size of the organization.
MAINTAINING A “CULTURE OF COMPLIANCE”

- The NERC Annual Plan includes “compliance culture and program” as one of the six components of risk based audit criteria.
- Key points from the FERC Policy Statements on Enforcement and Compliance include, “Does the company have an established, formal program for internal compliance?” “Is it well documented and widely disseminated within the company?”

Is compliance something you do because you have to, or is it an essential part of everything you do?
**ISSUES WITH SELF-REPORTING**

- Benefits and Risks of Self Reporting
  - Self-reporting as a mitigating and compounding factor
  - What is your utility’s philosophy or policy regarding self-reporting?
  - Legal restrictions that may impact your utility’s stance on fines and penalties

- Screening the issue to determine if self-reporting is needed
  - Vetting a potential self-report
  - Subject Matter Expert “Tunnel Vision”
  - Consulting other utilities, legal counsel for assistance

- Setting the stage for future negotiations to resolve the potential violation
RESOLVING POTENTIAL VIOLATIONS

- Writing the mitigation plan
  - Purpose: To correct and prevent a re-occurrence of the violation
  - Look to the Regional Reliability Organization’s CMEP for the required contents
- Review with a critical eye
  - Are we committing to too much? Is our proposal reasonable to address the risk to the bulk electric system? Are there lower cost, less time consuming alternatives?

RESOLVING POTENTIAL VIOLATIONS

- Negotiating the mitigation plan
- Is there an alternative route to resolve the PV?
- To litigate or not litigate?
EMERGING LEGAL CHALLENGES

- Statutory Construction / Interpretation
  - Plain Meaning Rule
  - Mischief Rule
  - Golden Rule
  - Judicial Interpretation
  - Authentic Interpretation

EMERGING LEGAL CHALLENGES

- NERC Penalty Calculator
  - Unpublished and Flexible
  - Assessing Risk and Accepting Settlement Offers
- Multiple Sanctions for Single Offenses
- FERC Role in Outage Investigations
- FERC Role in Developing Standards