

**UNITED STATES OF AMERICA**  
**FEDERAL ENERGY REGULATORY COMMISSION**

**Workshop on Regulatory Compliance ) Docket No. AD08-5-000**

**POST-WORKSHOP COMMENTS OF THE EDISON ELECTRIC INSTITUTE**

The Edison Electric Institute (“EEI”) is pleased to submit these comments following the workshop on regulatory compliance held on July 8, 2008. EEI is the trade association for shareholder-owned electric companies. EEI's United States member companies serve almost 95 percent of the ultimate customers in the shareholder owned segment of the industry and nearly 70 percent of all electric utility ultimate customers in the nation. EEI's members are committed to compliance with the Commission's requirements.

EEI thanks the Commission for holding the workshop on this important topic. The large attendance at the workshop, likely in excess of 300 people, demonstrates the interest in and commitment of the regulated entities to establishing effective compliance programs and a culture of compliance. Given the importance of establishing an effective compliance program to both the Commission and EEI's members, there are likely to be other important issues for discussion in the future. This should be the start of a dialogue on these issues and not the last word. Therefore, to continue this process, EEI is submitting these comments on several issues arising

out of the workshop and the Commission's recently issued Revised Policy Statement on Enforcement.<sup>1</sup>

A first step in establishing a compliance program is a thorough understanding of the requirements with which a company must comply. From the perspective of regulated entities, it is essential that the Commission should, as Chairman Kelliher stated, "be clear in [its] regulatory requirements."<sup>2</sup> Chairman Kelliher expressed similar views at the Enforcement Conference in November 2007 and in his statement accompanying the revised Notice of Proposed Rulemaking on Standards of Conduct where he stated "the Commission has a duty to try to be clear in its regulatory requirements."<sup>3</sup>

To assist regulated entities in developing compliance programs, the Commission should also identify its highest compliance priorities. EEI strongly agrees with Commissioner Moeller concurrence on the Revised Enforcement Policy, where he stated:

One area of future improvement may be in the guidance that the Commission provides the industry on its enforcement priorities. I believe that the Commission can and should provide more guidance on our enforcement priorities in a manner that classifies the severity and significance of prohibited conduct. While all violations of our rules and regulations are serious and subject to enforcement, given limited resources, we should identify and prioritize the types of violations that are most harmful.<sup>4</sup>

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<sup>1</sup> Revised Policy Statement on Enforcement, 124 FERC ¶61,156 (May 15, 2008) ("Revised Enforcement Policy").

<sup>2</sup> Statement of Chairman Joseph T. Kelliher on Enforcement Package, May 15, 2008.

<sup>3</sup> Statement of Chairman Joseph T. Kelliher on Standards of Conduct for Transmission Providers, Docket No. RM07-1-000, March 20, 2008.

<sup>4</sup> Moeller, Commissioner *concurring*, Revised Enforcement Policy.

On several occasions including at the Enforcement Conference, industry has asked the Commission to identify its perspective on the highest risk, greatest priority regulatory requirements. We understand that the Commission has stated that a matrix approach or other form of reference was not practical due to the number of regulations and various types of potential violations. Regulated entities face the same challenges in assessing their compliance responsibilities. Therefore Commission guidance on its regulatory priorities would be helpful.

EEI also believes that compliance with Commission requirements, as with other regulatory requirements with which a company must comply, is more likely to be improved or ensured through guidance and training rather than the use of substantial penalties. The imposition of more and larger penalties may not provide a greater incentive for industry to comply and may result in reduced self-reporting. While approaches to compliance vary, the industry takes the need for effective compliance programs very seriously. As stated at the workshop, most violations are not the result of willful wrongdoing but demonstrate the need for clear requirements and effective compliance programs that provide guidance and training to employees.

Given the importance of establishing and demonstrating a commitment to and culture of compliance, regulated entities are eager for guidance from the Commission on this issue. The Commission should identify the basic elements it would expect to find as demonstrating a culture of compliance. Compliance program elements could include the items identified in the Revised Enforcement Policy, which parallel those found in the Federal Sentencing Guidelines. These are primarily the same items identified by the presenters at the workshop. They include senior management commitment, identification of regulatory responsibilities, adequate training, written

policies or guidelines, monitoring plans, record retention, communications, reporting, and compliance assessment. However, identifying elements of a compliance program is not sufficient. If the Commission is going to evaluate compliance programs, it should give more guidance as to what it looks for in making such an evaluation. The Commission should provide examples, for instance, of what it looks for in determining whether senior management fully supports compliance or for a compliance program to be independent.

The Commission should also recognize that companies can design compliance programs that meet the Commission's suggested elements without adopting a "cookie cutter" or "one size fits all" approach. In the Revised Enforcement Policy, the Commission offered "suggested actions, which point to a strong compliance culture and which may aid companies in structuring their compliance programs, bearing in mind that each case is unique and no one size fits all." Revised Enforcement Policy at P 59. Companies vary in many respects, including the size, nature of the business, organization, and the number and types of Commission regulations to which they are subject. Companies can develop many ways to implement an effective compliance program. Effective compliance programs may come in different "shapes and sizes" and may not look alike but may be completely adequate and effective to meet the compliance obligations of the respective companies.<sup>5</sup>

In two recent settlements, as part of the remedy, the Commission required the companies to retain independent external consultants to assist in developing and implementing a

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<sup>5</sup> At the November 2007 Enforcement Conference, and again in Chairman Kelliher's statement accompanying release of the Revised Enforcement Policy, the Shell Energy Trading compliance program was referenced in the context of providing best practices for compliance programs. As far as EEI is aware, the Shell program has not been made available for review by other interested entities. We hope that the Commission will work with Shell and others to make their compliance programs available as a resource.

comprehensive regulatory compliance program and to spend specific dollar amounts in these efforts.<sup>6</sup> EEI does not address the appropriateness of these requirements as remedies in these or other settlements of investigations. However, the Commission should not, as part of its “generic” guidance on compliance programs, set monetary guidelines on how much should be spent on compliance programs. It is not meaningful to compare individual compliance programs on the basis of dollars spent as there are so many variables involved, such as the extent to which a particular company is subject to Commission regulation or the size and scope of the company’s operations.

Similarly, retaining independent consultants should not be expected to be a general requirement of establishing a strong compliance program. While EEI shares the concern expressed at the conference that it can be challenging to get the “right people into the right jobs,”<sup>7</sup> we believe that individual companies are in the best position to assess their needs for resources, including outside consultants. As the panelists at the workshop demonstrated, companies have excellent resources in-house to design and implement compliance programs. Compliance staff of regulated companies collaborate not only with colleagues within their own company but with their counterparts at other utilities and companies in other industries through a variety of programs and organizations. Such programs offer a cost effective way to share ideas,

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<sup>6</sup> *In re Edison Mission*, 123 FERC ¶61,170 (2008) at P 30; *Duquesne Light Company*, 123 FERC ¶61,221 (2008) at P 23.

<sup>7</sup> Comments of Michael Berry.

learn from the experience of other companies and industries, and provide information helpful to benchmarking.<sup>8</sup>

EEI also wishes to clear up any possible confusion with regard to the use of the term “risk analysis” at the workshop. Risk analysis is not used to decide which regulations to follow. In the context of developing a compliance program, as pointed out by several presenters at the workshop, a company uses risk analysis as a tool to design and implement effective compliance programs and to enhance and ensure the continued success of existing compliance programs. Risk analysis helps companies identify new or revised regulations. For example, a Commission order may require changes to existing training programs. Risk analysis is used to identify and prioritize regulatory risks and to help determine areas where the company may need to strengthen its compliance program in response to the changed requirements. Recognizing that a company is required to comply with all applicable Commission regulations, a company undertakes a risk analysis to determine the areas of its operations and compliance program that it needs to address to ensure compliance. Risk analysis, therefore, enhances compliance activities. It is not used to eliminate or diminish a company’s focus on any regulatory compliance obligation.

The issue of tying regulatory compliance to personnel assessments and compensation was also discussed in the Revised Enforcement Policy and at the workshop. Panelist Jeff Guldner noted that at some point, the potential for penalties in performance assessments and compensation may discourage business personnel from self-reporting. Thus, he noted that tying

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<sup>8</sup> EEI member companies have formed such a group to share information and ideas concerning effective compliance programs.

compliance to incentive programs must be carefully done to minimize such unintended consequences. In addition, numerous speakers at the workshop emphasized the importance of having compliance personnel embedded with the operating personnel, as it allows for on-going informal training and facilitates self-reporting. Should the compliance personnel become viewed as “the enemy” due to the potential for compensation reductions and other severe disciplinary action, then such a result would impair their ability to become truly embedded within the business units. Accordingly, there can be a tension between tying compensation to compliance and the value that the Revised Enforcement Policy places on self-reporting. Revised Enforcement Policy at P 60.

While we agree that there is a role for compensation adjustments and disciplinary actions, the Commission should recognize that there needs to be some flexibility and balancing of these aspects of an effective compliance program. Merely adopting large compensation penalties for regulatory violations might actually harm a company’s culture of compliance. Instead of automatic penalties for violations, there needs to be some recognition of the circumstances, such as whether there was intentional wrongdoing or gross negligence or a pattern of violations or neglect of compliance responsibilities as well as whether the employee self-reported the problem.

EEI hopes that these comments will be part of a continuing discussion between the Commission and regulated entities about the important issues involved in developing and maintaining effective regulatory compliance programs and a culture of compliance.

Respectfully submitted,

EDISON ELECTRIC INSITUTE

/s/

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