

## Energy

### Investigations, Compliance and Defense

# Recent Storm Disruptions of the Energy Sector – Possible Investigations and Regulatory Actions

By: [Glenn Rippie](#), [Reid J. Schar](#), and [Thomas S. O'Neill](#)

The unprecedented winter storm and icy temperatures that struck the southwest have overwhelmed portions of our bulk power system. Millions of Americans in Texas and other states ranging from the Dakotas to Kentucky and Alabama whose bulk power systems are managed by the Electric Reliability Council of Texas, the Southwest Power Pool, and the Midcontinent Independent System Operator are experiencing widespread and prolonged blackouts. Thermal and renewable generators became inoperable, gas supplies tightened, and prices and load, spurred by heating demand, spiked to record levels. At the state and national level, governments swiftly announced intention to investigate and prevent a recurrence. The Federal Energy Regulatory Commission (FERC) and the North American Electric Reliability Corporation (NERC) announced on Tuesday a joint inquiry into the readiness and performance of the bulk-power system and its generators. And, in Texas, Governor Abbott quickly called for state legislative and regulatory investigations and action.

While the attention so far has centered on remedial actions, the aftermath will surely include investigation of management actions and regulatory proceedings. Litigation will focus on who should bear the many billions in costs that will result. Based on experience with other regional grid and supply failures, there could be a range of legal and regulatory reactions.

- FERC has begun a formal inquiry into the events, in coordination with the NERC. It is likely that this and similar inquiries, including inquiries under the jurisdiction of Texas concerning the ERCOT area, will not only seek to understand the root causes of these tragic events, but to implement changes in market structures and rules, and in planning, design, and operational standards. Parties found to have violated existing mandatory rules may also be subject to serious penalties.
- State regulators, legislatures, and other officials across the region will push to understand how this happened and apportion blame. Regulators can be expected to investigate utility planning, hedging, and risk management practices in addition to the adequacy of reserves and the resiliency of generators. The resulting investigations can range from relatively neutral fact-finding missions to audits, contested investigations, complaints, and “show cause” proceedings aimed at aggressively uncovering and punishing perceived imprudence and inaction. While the larger resiliency issues are truly regional and national, that is unlikely to deter state commissions, attorneys general, or private parties suffering losses from questioning actions of utilities and generation owners, and seeking to impose losses and penalties on parties they see as at fault.
- The nature and magnitude of the potential financial losses can also spur litigation claims by investors, claiming that management failed to act prudently to mitigate, or hedge against, the costs of the event, or that they failed to adequately disclose risks to the market.
- Retail utilities with fuel clauses or other rates that “automatically” adjust for supply costs will be subject to investigations aimed at determining whether and to what extent their supply costs should be passed through to customers. There will be intense pressure on regulators to avoid or mitigate the impact on customers, especially during these already challenging times, and disallowance of costs that would otherwise pass through will be a tempting option.
- Retail utilities that rely on fixed or test year based rates to recover significant portions of fuel and

other supply costs will be under intense cost pressure. The typical remedy of seeking a rate increase may be ill suited for this circumstance and utilities in this position should consider the full range of regulatory options to improve their financial position.

- In deregulated territories, delivery utilities and POLR providers should prepare for shifts in load responsibility as competitive retail providers react to potentially crippling losses by shedding customers, or simply ceasing operations, and customers generally search for rates and service plans perceived as more stable. Sometimes, market participants may be insolvent, creating additional potential losses.
- Regulators, as well as utilities and other retail service providers, will search for tools to spread out the costs to be borne by customers. Innovative rate and financing options can help mitigate both actual bill impact and the perceived need for precipitous regulatory intervention.
- Prompt analysis of insurance coverage—which may vary greatly depending on the nature of the exposure and the type of claim made—and timely action to assert and protect that coverage, is critical.

This list is by no means exclusive. But, across the spectrum of risks, adopting a proactive posture is critical. Steps taken now—including to document past actions and decisions, preserve evidence, to take legal steps to mitigate losses or responsibility for losses, and to develop proactive regulatory strategies—can help reduce your risks and make a meaningful difference to how well your company weathers this crisis.

## Our Service

Jenner & Block's Energy Practice and Investigations, Compliance and Defense Practice work seamlessly to provide energy industry clients—utilities, generators, and other market participants—counsel and representation in the full range of management, prudence, and rate investigations, in matters relating to system standards and market design, and in developing and executing legal and regulatory strategies to protect balance sheets and recover challenged costs, including when they have been faced with unplanned fuel and supply cost challenges or weather and storm-related unit and system interruptions. We stand ready to assist as the sector responds to the intense public, legal, investor, and regulatory scrutiny which will follow the recent events.



---

## Contact Us



**Glenn Rippie**

[grippie@jenner.com](mailto:grippie@jenner.com) | [Download V-Card](#)



**Reid J. Schar**

[rschar@jenner.com](mailto:rschar@jenner.com) | [Download V-Card](#)



**Thomas S. O'Neill**

[toneill@jenner.com](mailto:toneill@jenner.com) | [Download V-Card](#)

Meet Our Energy Team

Meet Our Investigations, Compliance and Defense Team

---

**Practice Leaders**

**Suedeem G. Kelly**

Co-chair, Energy

[skelly@jenner.com](mailto:skelly@jenner.com)

[Download V-Card](#)

**Randall E. Mehrberg**

Co-chair, Energy

[rmehrberg@jenner.com](mailto:rmehrberg@jenner.com)

[Download V-Card](#)

**Matthew E. Price**

Co-chair, Energy

[mprice@jenner.com](mailto:mprice@jenner.com)

[Download V-Card](#)

**Anthony S. Barkow**

Co-chair, Investigations,  
Compliance and Defense

[abarkow@jenner.com](mailto:abarkow@jenner.com)

[Download V-Card](#)

**David Bitkower**

Co-chair, Investigations,  
Compliance and Defense

[dbitkower@jenner.com](mailto:dbitkower@jenner.com)

[Download V-Card](#)

**Christine Braamskamp**

Co-chair, Investigations,  
Compliance and Defense

[cbraamskamp@jenner.com](mailto:cbraamskamp@jenner.com)

[Download V-Card](#)

**Erin R. Schrantz**

Co-chair, Investigations,  
Compliance and Defense

[eschrantz@jenner.com](mailto:eschrantz@jenner.com)

[Download V-Card](#)

**Andrew Weissmann**

Co-chair, Investigations,  
Compliance and Defense

[aweissmann@jenner.com](mailto:aweissmann@jenner.com)

[Download V-Card](#)