

The Business Magazine
For The Chief Legal Officer

CORPORATE COUNSEL

corpcounsel.com • April 2007

ALM

ON THE JOB

FIRST PERSON

By Arthur I. Anderson,
Gregory K. Lawrence, and William F. Weld

It's Not Easy Being Green

GLOBAL WARMING is “unequivocal”—and we caused it, according to the United Nations Intergovernmental Panel

on Climate Change.

Al Gore gets it. Politicians as different as Mike Bloomberg and Arnold Schwarzenegger are locked in mortal combat with greenhouse gas emissions—and with each other, for the honor of leading the charge. They get it. Forward-looking CEOs

In the global push for clean energy, the law department must be the nerve center.

suddenly you need to get it, too. You can no longer be nonchalant about the imperative of energy efficiency, any more than you can boast about being computer illiterate.

Energy efficiency and sustainability are becoming imperatives at all levels

of government—and rightfully so, given the consequences of escalating energy costs, global warming, and increasing greenhouse gas emissions, not to mention the geopolitical implications of relying on unstable, even hostile sources of energy supply. Leading corporations such as Wal-Mart Stores, Inc., are driving the change with green energy and sustainability initiatives that have global ramifications for suppliers and distributors and their employees. You may say, “What’s it to me if John Q. and Suzie Q. Public want to reduce their personal carbon footprint? It doesn’t affect my bottom line.”

Wrong. Think of it as a “double bottom line.” Your company has to hit its numbers, to be sure. But it has to meet the energy imperatives of the twenty-first century as well. To borrow a phrase from the Bible, there will be only two types of companies in the struggle to survive today’s energy crisis: the quick and the dead.

Corporations must reinvent the way they deal with energy—starting today. They must move swiftly to master increasingly complex energy and efficiency markets, emerging energy technologies, and myriad regulatory initiatives. Consumers and



William Brown

investors expect nothing less; regulators too. Just as Congress and the Securities and Exchange Commission have done with Sarbanes-Oxley and environmental liability disclosures, so legislators and regulators, with one eye on the news media, will soon join the fray and compel disclosures about corporate America’s energy efficiency.

As a matter of good corporate governance, corporations today must seriously consider the creation of a single high-level energy

officer position—call it the “CEE” (chief of energy efficiency). Some corporations are adding “green” responsibilities to the CIO role. The immediate concerns, however, are novel and complex enough that, in most instances, they merit a full-time, high-level officer with authority to drive major dollars-and-cents decisions across multiple corporate divisions. And whether or not your company chooses to create a new CEE position, your law department is the transformation nerve center.

Why are we at a critical moment for counsel? Let’s look at what’s on your plate. New conservation, energy efficiency, and renewable energy programs are up and running—and making it possible to capture significant new revenue streams. What should the overall plan of your legal department be? In many regions, companies that invest in “demand response” technology can earn payments for real-time energy use reductions, sometimes called “negawatts” (negative megawatts). Installing a system that can reduce power voltage or usage in response to real-time power market signals may quickly pay for itself and then add to your bottom line.

Existing state standards mandate that an increasing percentage of the power delivered to consumers must be generated by renewable sources (e.g., wind, solar, biomass). Participants in these markets may want to meet their mandate by purchasing your company’s renewable energy credits (RECs), assuming your strategy includes renewable power purchases and REC rights. Will you be positioned to sell?

By reducing demand for fossil fuel power sources through demand response, conservation, and renewable purchases, you can reduce your “carbon footprint.” You may then become eligible for greenhouse gas emission reduction credits, which can be banked and sold in organized markets. A European emissions “cap and trade” market already exists, with some regions in the United States already following in earnest.

These new revenue streams for your bottom line, it should be noted, come on top of cost savings attainable simply through energy use conservation. Participation in these markets will put

tough new issues on your desk related to real estate development, new construction and financing, taxes, energy and equipment purchasing, technology and intellectual property, data management and security, and, of course, the management of public perception and goodwill, including advocacy before regulatory and legislative bodies.

Corporate counsel will need a comprehensive understanding of the multilevel energy regulatory and market structures domestically and internationally in order to help the CEE analyze incentives, trading markets, and revenue streams, which in turn will drive investment decisions regarding conservation, renewables, and energy efficiency measures.

Various geographic markets, such as New England, New York, the lower Mid-Atlantic, and California, will each have their own evolving mix of demand response payments, tradable renewable and potential emissions credits, and other conservation incentives. In some regions, you can essentially sell your energy efficiency and renewable power attributes directly into organized markets. New England and the Mid-Atlantic regions have developed demand response and renewable credit markets. New England and California are pressing forward now with cap and trade emissions markets. This is the wave of the none-too-distant future.

How will you finance the capital costs associated with your new initiatives? Energy marketers are more than willing to use your good credit rating to create lease programs for energy efficiency measures, which allow your local managers to forgo any up-front capital expenditures but entail a sharing of revenues. The same is true of traditional utilities, who will put in energy-efficiency measures, but then may pay cents on the dollar for the value of your reduced usage. With a comprehensive “green” financing plan, your CFO may get a better interest rate and avoid having to share the cost reduction benefits and new revenues.

Who “owns” the corporate good behavior associated with renewable or emissions credits—your company? Or your vendor, your renewable power supplier,

your utility, or your landlord? You will need to negotiate with vendors who will want a piece of additional revenues, renewable credits, emissions reductions, and control over data and intellectual property associated with installed energy efficiency measures. If a vendor develops a state-of-the-art energy IT system for you that ties the impact of your energy efficiency measures to point-of-sale and employee productivity data, can the vendor then turn around and sell the system to your biggest competitor? To capture demand response revenues, is it best to become a member of the regional wholesale power markets where you have operations, and then sell your negawatts directly into those markets? Or should you outsource this function to a scheduler or power marketer? What’s the credit and default risk exposure associated with direct participation in these markets? What is the “market” regarding revenue sharing, service fees, and rights to data if you instead negotiate scheduling and agency agreements?

Corporate counsel will have their hands full mastering, then coordinating, across departments, this globally driven transition to energy efficiency and sustainability. Adding a new high-level officer to the mix, a CEE, can make it easier for you to tackle the systematic organizational change key to a successful enterprise-wide, cross-silo energy efficiency strategy.

The upside? Making money while doing good. If you take advantage of it and ride the wave, the energy efficiency revolution can easily enhance your company’s bottom line. You may even sleep a little better, knowing that this corporate transformation will help address global threats to our planet for generations to come. Pretty good for a day’s pay.

Arthur I. Anderson is counsel with, and Gregory K. Lawrence and William F. Weld (a former governor of Massachusetts) are partners with, McDermott Will & Emery. Anderson and Lawrence are based in the firm’s Boston office. Weld is in the New York office.

Reprinted with permission from the May 2007 edition of CORPORATE COUNSEL. © 2007 ALM Properties, Inc. All rights reserved. Further duplication without permission is prohibited. For information, contact 212-545-6111 or visit www.almreprints.com. #016-04-07-0001