

## **ANTITRUST GUIDELINES FOR MEMBERS OF ERCOT COMMITTEES, SUBCOMMITTEES AND WORKING GROUPS**

It is ERCOT's policy and expectation that all persons participating in ERCOT activities (including all ERCOT meetings, committee meetings, conference calls, email communications and informal discussions) comply with the antitrust laws. These Antitrust Guidelines are designed to assist members of and participants in ERCOT committees and working groups in recognizing conduct that may violate the antitrust laws. ERCOT strictly prohibits market participants and their employees who are participating in ERCOT activities from using their participation in ERCOT activities as a forum for engaging in practices or communications that violate the antitrust laws.

### **A. Purpose of the Antitrust Laws**

The purpose of the antitrust laws is to preserve the competitive marketplace. A violation of the antitrust laws, even if not intended, will harm ERCOT, the employer of the individual committing the violation and the individual committee member as well. Courts fine individuals and normally impose prison sentences for violation of the antitrust laws. An understanding of the antitrust laws is therefore essential.

### **B. The Antitrust Laws**

Federal and Texas state antitrust laws govern your participation in ERCOT activities. Two of the most important laws are the federal Sherman Act and the Texas Free Enterprise and Antitrust Act, both of which prohibit conspiracies in restraint of trade. Violations can result in felony convictions and imprisonment of up to 3 years for individuals, fines to individuals of up to \$350,000, and corporate fines of up to \$10,000,000. Private citizens can sue under the antitrust laws and can be awarded three times the amount of damages proved. When a monetary gain or loss results from unlawful conduct, the fine can be increased to twice the gross gain to the defendant or twice the loss to the "victim."

### **C. Relationships with Competitors**

Agreements between competitors that restrain trade violate the Sherman Act and the Texas Free Enterprise and Antitrust Act. In order to have an agreement there must be at least two parties. The agreement need not be explicit. An agreement can be inferred from a course of conduct. For example, if a company exchanges its price list with a competitor, and the prices charged by the two firms become uniform, an illegal agreement can be inferred. The courts have held that the result of uniform prices is sufficient proof of an agreement even though there is no direct evidence of an actual meeting of the minds. Criminal convictions have been based on such circumstantial evidence.

1. Competitors cannot agree to fix prices. Any agreement between competitors that sets, or impacts prices is illegal. It is illegal even if the prices are fixed at a reasonable level or a maximum price is established. It is no defense that there is price competition which is causing losses and that the agreement to control prices saves the industry from self-destruction.

Illegal price fixing agreements include: (a) an agreement among competitors establishing the price at which any one of them would sell product to an individual or group of customers; (b) an agreement among potential bidders for some to refrain from bidding or to submit complementary bids.

Agreements that impact prices indirectly are also illegal and include: (a) an agreement between competitors to establish uniform discounts; and (b) an agreement between competitors to eliminate credit terms to all accounts.

2. Competitors cannot agree to boycott a third party. Agreements between competitors to boycott another business are illegal. For example, two competitors may not agree to refuse to sell to a customer who stocks product of a third competitor. Two competitors cannot agree to establish "industry standards" which foreclose products of a third competitor.
3. Competitors cannot agree to divide markets or customers or limit or allocate production. Agreements between competitors to divide geographic markets or customers or limit or allocate production are illegal. The agreement is illegal even if lower prices result.

**D. Monopolization, Attempts to Monopolize and Conspiracies to Monopolize**

The act of monopolizing, attempting to monopolize or conspiring to monopolize is unlawful under the Sherman Act and the Texas Free Enterprise & Antitrust Act. A monopoly is a company with the power to raise prices at will or to exclude competitors from the market. A monopoly is not illegal under the antitrust laws but the act of becoming a monopoly or maintaining monopoly power may be. If the monopoly power is acquired or maintained by factors that are economically inevitable, it is legal. Factors that are economically inevitable include economies of scale, advantages over competitors that result from vertical integration, and advantages that result from vigorous and fair competition or superior skill and management.

**E. Reporting Violations**

If you have reason to believe that the antitrust laws may have been violated, it is your responsibility to report the questionable conduct to the ERCOT Legal Department.

**F. Questions and Advice**

If you have any questions about these antitrust guidelines please contact the ERCOT Legal Department.