



## MEMORANDUM

To: Human Resources & Governance Committee  
From: Chad V. Seely, Vice President, General Counsel and Corporate Secretary  
Date: April 11, 2016  
Re: Item 5 – Review of ERCOT Antitrust Policies

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In December 2014, ERCOT Legal informed the Human Resources and Governance (HR&G) Committee of its efforts to review, with the assistance of outside counsel, the potential antitrust risks facing ERCOT, its employees, and the stakeholders serving on ERCOT's committees and subcommittees. The review concluded that, so long as ERCOT acts within the scope of its authority under federal and state law, no antitrust risk is likely to arise, given the applicability of the "state action" exemption and its associated corollary, the *Noerr* exemption. ERCOT Legal noted that it intended to undertake a review of its training programs, guidelines, and corporate standards as a consequence of this analysis.

ERCOT Legal has completed its review of these materials and standards and has concluded that the following changes are appropriate:

- Elimination of Corporate Standard 1.10, Antitrust Compliance Corporate Standard, in favor of a minor revision to Corporate Standard 1.7.3, Code of Conduct, which would simply note the potential for civil or criminal antitrust liability as one potential consequence of disclosing confidential information;
- Elimination of Guideline 1.10, Antitrust Guidelines for Members of ERCOT Committees, Subcommittees, and Working Groups, in favor of a *Statement of Position on Antitrust Issues for Members of ERCOT Committees, Subcommittees, and Working Groups*, which will be posted on the Governance page of the ERCOT website;
- Revision of the Antitrust Admonition to reflect that antitrust liability arising out of participation in stakeholder groups should be a concern only when ERCOT exceeds its authority under federal or state law; and
- Revision of ERCOT's employee ethics training program materials to remove all antitrust-related content.

ERCOT Legal discussed the proposed changes to the Antitrust Guideline and Antitrust Admonition at the March 31, 2016 meeting of the Technical Advisory Committee (TAC). TAC members suggested only one minor revision to the Admonition, which ERCOT agreed to incorporate. ERCOT intends to proceed with the implementation of these changes as soon as practicable and will notify TAC when these revisions become effective.

ERCOT's proposed updates to the Antitrust Admonition and Antitrust Guideline are attached. We look forward to discussing these changes with HR&G next week.

Antitrust Admonition

~~To avoid raising concerns about antitrust liability, participants in ERCOT activities should refrain from proposing any action or measure that would exceed ERCOT's authority under federal or state law. For additional information, stakeholders should consult the *Statement of Position on Antitrust Issues for Members of ERCOT Committees, Subcommittees, and Working Groups*, which is posted on the ERCOT website. 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. The ERCOT Board has approved guidelines for members of ERCOT Committees, Subcommittees and Working Groups to be reviewed and followed by each Market Participant attending ERCOT meetings. If you have not received a copy of these Guidelines, an electronic version is available at <http://www.ercot.com/about/governance/index.html>.<sup>1</sup> Please remember your ongoing obligation to comply with all applicable laws, including the antitrust laws.~~

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Disclaimer

All presentations and materials submitted by Market Participants or any other Entity to ERCOT staff for this meeting are received and posted with the acknowledgement that the information will be considered public in accordance with the ERCOT Websites Content Management Operating Procedure.

<sup>1</sup>The document is available at <http://www.ercot.com/about/governance/index.html>.

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**STATEMENT OF POSITION ON ANTITRUST GUIDELINES ISSUES 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. Antitrust laws are intended to promote competition in markets, and violations of these laws can result in severe criminal penalties and civil liabilities for individuals and their companies.~~

~~As discussed in a memorandum provided by ERCOT's outside counsel,<sup>1</sup> the judicially recognized state action exemption is likely to protect ERCOT stakeholders from antitrust liability with respect to their participation in the development of ERCOT Protocols and other standards so long as approved standards fall within the scope of ERCOT's authority under the Public Utility Regulatory Act, Public Utility Commission rules, and applicable federal laws, including NERC Reliability Standards. Among other things, these laws authorize ERCOT to ensure the reliability and adequacy of the ERCOT system and to establish and enforce requirements for the operation and oversight of the markets for the production and sale of electricity. Proposals that pursue these objectives should raise no antitrust concern. The fact that one proposal or another may incidentally benefit one or more entities at the expense of others is not itself expected to raise an antitrust concern as long as the proposal falls within the scope of ERCOT's legal authority.~~

~~Stakeholder advocacy activities in ERCOT committees, subcommittees, and working groups should also be protected under the *Noerr* exemption from antitrust liability, which recognizes a private party's right to petition for changes to 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**

<sup>1</sup> See Memorandum of September 25, 2014 from Steve Baron, Baron Consulting & Legal Services to Chad V. Seely and Nathan Bigbee re Antitrust laws' applicability to the Electric Reliability Council of Texas, Inc. This memorandum is available at <http://www.ercot.com/about/governance/index.html>.

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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 10 years for individuals, fines to individuals of up to \$1,000,000, and corporate fines of up to \$100,000,000. 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](#) [this statement of position](#), please contact the ERCOT Legal Department.

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**DISCLAIMER**

*This document is not intended as legal advice for you or your company. If you need legal advice, you should consult with your attorney.*

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