

The Human Resources and Governance (HR&G) Committee is expected to consider HR&G Committee Agenda Item 7:

Recommendation regarding Proposed Modifications to Form Employee Ethics and Confidentiality Agreement and Form Ethics Agreement for Directors and Segment Alternates

at its meeting on June 11, 2018.

The Board of Directors is expected to hear this matter as part of the HR&G Committee Report at the Board meeting on June 12, 2018.

Attached are the Board materials in relation to these agenda items.



Date: June 5, 2018
To: Board of Directors
From: Chad V. Seely, Vice President, General Counsel and Corporate Secretary
Subject: Form Employee Ethics and Confidentiality Agreement and Form Ethics Agreement for Directors and Segment Alternates

Issue for the ERCOT Board of Directors

ERCOT Board of Directors Meeting Date: June 12, 2018

Item No.: 15.2

Issue:

Whether the Board of Directors (Board) of Electric Reliability Council of Texas, Inc. (ERCOT) should approve modifications to the ERCOT Employee Ethics and Confidentiality Agreement (Employee Agreement) and ERCOT Ethics Agreement for Directors and Segment Alternates (Director Agreement) proposed by ERCOT Legal in order to comply with the Defend Trade Secrets Act of 2016.

Background/History:

Summary

The Defend Trade Secrets Act of 2016 (the Act) grants owners of confidential financial, business, scientific, technical, economic, and engineering information the right to bring suit to protect their trade secrets from misappropriation in federal court under federal law. The Act also provides immunity to whistleblowers who disclose trade secrets in confidence to governmental officials or attorneys, in connection with reporting or investigating suspected violations of law.

In order to comply with the Act, employers must provide notice of the immunity set forth in the Act to employees and consultants in agreements that govern the use of trade secret or confidential information. The Employee Agreement and Director Agreement utilized by ERCOT govern the use of confidential information by employees and Directors/Segment Alternates, respectively. Accordingly, the agreements must include notice of the immunity provided under the Act in order to comply with federal law. Notice of the immunity provision is also a prerequisite to certain remedies available under the Act.

Based on the express requirement in the Act that employers provide notice of immunity to employees and consultants in agreements governing the use of trade secret and/or confidential information, as well as to ensure all remedies under the Act remain available, ERCOT Legal recommends the Employee Agreement and Director Agreement be revised in order to conform to federal law.

The Act

The Act, codified at 18 U.S.C. § 1836 et seq., is a federal statute that permits the “owner” of a “trade secret” to file suit in federal court in order to protect a trade secret from “misappropriation.” 18 U.S.C. § 1836(b)(1). The Act, for the first time, created a uniform federal trade secret misappropriation cause of action and granted federal courts original jurisdiction to hear such claims. “Owner” is defined as “the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed” 18 U.S.C. § 1839(4). “Trade secret” is defined broadly to include “all forms and types of financial, business, scientific, technical, economic, or engineering information . . . if the owner thereof has taken reasonable measures to keep such information secret[] and the information derives independent economic value, actual or potential, from not being generally known . . . by another person who can obtain economic value from the disclosure of the information” 18 U.S.C. § 1839(3). “Misappropriation” means (1) “acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means” or (2) “disclosure or use of a trade secret of another without express or implied consent by a person who [] used improper means to acquire knowledge of the trade secret” 18 U.S.C. § 1839(5). The definition of “improper means” is broad enough to include the mere breach of a duty to maintain secrecy/confidentiality. 18 U.S.C. § 1839(6).

The Act contains a provision that grants individuals criminal and civil immunity in connection with the disclosure of trade secrets made in confidence to governmental officials and attorneys for purposes of reporting or investigating a suspected violation of law, or in a sealed court filing. 18 U.S.C. § 1833(b). The Act further provides “**[a]n employer shall provide notice of the immunity set forth in this subsection in any contract or agreement with an employee that governs the use of a trade secret or other confidential information.**” 18 U.S.C. § 1833(b)(3)(A) (emphasis added). “If an employer does not comply with the notice requirement . . . the employer may not be awarded exemplary damages or attorneys fees . . . in an action against an employee to whom notice was not provided.” 18 U.S.C. § 1833(b)(3)(C). The term “employee” not only includes traditional employees, but also any individual working as a contractor or consultant. 18 U.S.C. § 1833(b)(4).

Proposed Amendment to Employee Agreement and Director Agreement

ERCOT’s Employee Agreement and Director Agreement both govern the use of confidential information. The Act requires agreements governing the use of confidential information provide notice of the immunity set forth in the Act. In order to comply with the Act’s notice requirement, ERCOT Legal proposes the following language be included in the Employee Agreement and Director Agreement:

Disclosure of Trade Secret Information

Under the Defend Trade Secrets Act of 2016 (the “Act”), an individual may not be held criminally or civilly liable under any federal or state trade secret law for disclosure of a trade secret as defined in the Act: (i) made in confidence to a government official or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law; and/or (ii) in a lawsuit filing made under seal. In addition, an individual suing an employer for retaliation based on the reporting of a suspected violation of law may disclose a trade secret to his or her attorney and use the trade secret information in the court proceeding, so long as any document containing the trade secret is filed under seal and the individual does not disclose the trade secret except pursuant to court order.

In addition, slight formatting changes were made to the Employee Agreement and Director Agreement. ERCOT Legal intends to amend the ERCOT Consultant Ethics and Confidentiality Agreement with the same language identified above.

Key Factors Influencing Issue:

The Act provides immunity to individuals who disclose trade secrets in confidence to governmental officials or attorneys in connection with reporting or investigating suspected violations of law. In any agreement between an employer and an employee or consultant that governs the use of trade secret or confidential information, employers are required to provide notice of the immunity provision set forth in the Act. The Employee Agreement and Director Agreement both govern the use of confidential information. In order to comply with the Act, and avail itself of the remedies available therein, ERCOT must provide notice of the immunity available under the Act in both agreements. Accordingly, based on the express notice requirement of the Act, the Employee Agreement and Director Agreement should be amended in order to conform to existing federal law. Because ERCOT Legal proposes changes to the Employee Agreement and Director Agreement, a vote of the Board is required to approve revised versions of the agreements.

ERCOT Legal recommends the modifications identified in the Employee Agreement, which is attached as **Attachment A**. The Employee Agreement revisions do not alter or diminish the ethical requirements or obligations of ERCOT employees included in prior versions of the Employee Agreement. Rather, the revisions conform the agreement to existing federal law.

ERCOT Legal also recommends the modifications identified in the Director Agreement, which is attached as **Attachment B**. The Director Agreement revisions do not alter or diminish the ethical requirements or obligations of ERCOT Directors and Segment Alternates included in prior versions of the Director Agreement. Rather, the revisions conform the agreement to existing federal law.

Conclusion/Recommendation:

ERCOT Legal will request that the Human Resources and Governance (HR&G) Committee review the revised Employee Agreement (**Attachment A**), at its June 11, 2018 meeting, and vote to recommend its approval by the Board at its June 12, 2018 meeting. ERCOT Legal recommends that the Board approve the proposed changes to the Employee Agreement to become effective upon Board approval.

ERCOT Legal will request that the HR&G Committee review the revised Director Agreement (**Attachment B**), at its June 11, 2018 meeting, and vote to recommend its approval by the Board at its June 12, 2018 meeting. ERCOT Legal recommends that the Board approve the proposed changes to the Director Agreement to become effective upon Board approval.



ELECTRIC RELIABILITY COUNCIL OF TEXAS, INC.
BOARD OF DIRECTORS RESOLUTION

WHEREAS, after its meeting on June 11, 2018, the Human Resources and Governance (HR&G) Committee of the Board of Directors (Board) of Electric Reliability Council of Texas, Inc. (ERCOT) has recommended modifications to the ERCOT Employee Ethics and Confidentiality Agreement (Employee Agreement) in the form attached hereto;

WHEREAS, after due consideration of the alternatives, the Board deems it desirable and in the best interest of ERCOT to approve such modifications to the ERCOT Employee Agreement;

WHEREAS, after its meeting on June 11, 2018, the HR&G Committee of the Board of ERCOT has recommended modifications to the ERCOT Ethics Agreement for Directors and Segment Alternates (Director Agreement) in the form attached hereto; and

WHEREAS, after due consideration of the alternatives, the Board deems it desirable and in the best interest of ERCOT to approve such modifications to the ERCOT Director Agreement;

THEREFORE, BE IT RESOLVED, that the Board hereby approves the modifications to the ERCOT Employee Agreement and Director Agreement consistent with the forms attached to this resolution, effective upon Board approval.

CORPORATE SECRETARY'S CERTIFICATE

I, Vickie G. Leady, Assistant Corporate Secretary of ERCOT, do hereby certify that, at its June 12, 2018 meeting, the ERCOT Board passed a motion approving the above Resolution by _____.

IN WITNESS WHEREOF, I have hereunto set my hand this ____ day of June 2018.

Vickie G. Leady
Assistant Corporate Secretary

EMPLOYEE ETHICS AND CONFIDENTIALITY AGREEMENT

Employees of Electric Reliability Council of Texas, Inc. (“ERCOT”) must conduct ERCOT’s business with integrity and objectivity toward ERCOT, and all ERCOT Members and Market Participants. That is why ERCOT requires employees to annually affirm their commitment to the ethical standards that are essential to working at ERCOT. Before completing this Employee Ethics Agreement, you should review the ERCOT Code of Conduct and ERCOT Corporate Standard (CS) 7.6, *Information Protection Corporate Standard* and participate in any associated ethics training.

If you have questions or concerns about the requirements or prohibitions in the ERCOT Code of Conduct, please contact ERCOT Legal, or file an anonymous report through EthicsPoint (www.ethicspoint.com or 1-866-384-4277). For questions about the requirements in CS7.6, please contact ERCOT Legal.

Use and Return of Proprietary Information

I acknowledge that I may have access to ERCOT Confidential information (as defined in CS7.6, *Information Protection Corporate Standard*) in order to perform my job. To protect ERCOT Confidential information, I agree as follows:

- A. I shall hold ERCOT Confidential information in strict confidence and shall exercise reasonable care to prevent unauthorized disclosure to others.
- B. I shall not directly or indirectly disclose ERCOT Confidential information to others, except ERCOT directors, officers and other ERCOT employees who require access to such information in order to perform job functions, unless first authorized to do so in writing by ERCOT.
- C. I shall not reproduce ERCOT Confidential information or use it commercially or for any purpose other than the performance of my duties for ERCOT.
- D. I shall notify ERCOT immediately upon discovery of any unauthorized use or disclosure of ERCOT Confidential information and cooperate in any reasonable way to help ERCOT regain possession of the ERCOT Confidential information and prevent further unauthorized use or disclosure.
- E. Upon ERCOT’s request or upon termination of my employment at ERCOT, I shall deliver to ERCOT all drawings, notes, documents, equipment and materials received from ERCOT or originating from ERCOT operations, and shall permanently delete all electronic copies of such information from my personal computers, storage devices, external file transfer sites, personal e-mail and document sharing/storage accounts.

Notwithstanding the forgoing, my disclosure of ERCOT Confidential information in response to a subpoena, court order, law enforcement investigation, or civil investigative demand shall not be deemed a violation of this agreement. I shall promptly inform ERCOT Legal prior to ~~and prior to~~ any such disclosure, unless impracticable to do so.

ERCOT reserves the right to take disciplinary action, up to and including termination, for any violations of this agreement.

Disclosure of Trade Secret Information

Under the Defend Trade Secrets Act of 2016 (the “Act”), an individual may not be held criminally or civilly liable under any federal or state trade secret law for disclosure of a trade secret as

defined in the Act: (i) made in confidence to a government official or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law; and/or (ii) in a lawsuit filing made under seal. In addition, an individual suing an employer for retaliation based on the reporting of a suspected violation of law may disclose a trade secret to his or her attorney and use the trade secret information in the court proceeding, so long as any document containing the trade secret is filed under seal and the individual does not disclose the trade secret except pursuant to court order.

Disclosure of Potential Conflicts of Interest

ERCOT company policy requires all employees to disclose any employment or independent contracting services for a Market Participant that involve an employee’s child, spouse or domestic partner, parent, sibling, or any other individual who lives in the employee’s household. A listing of ERCOT Market Participants is available at: <http://www.ercot.com/mktparticipants>.

ERCOT also encourages employees to disclose other potential conflicts that may call into question an employee’s ability to conduct ERCOT’s business without the appearance of Conflicts of Interest with Market Participants or Vendors to ERCOT. Examples of potential conflicts are discussed in CS5.18, *ERCOT’s Conflict of Interest Corporate Standard*. Management evaluates employee disclosures to determine whether, based upon the employee’s job responsibilities, any Conflict of Interest exists (and whether to take any steps to address it).

(Please complete this Disclosure section even if you have no potential conflicts to disclose.)

Check this box if you have no Conflicts of Interest to report.

Potential Conflicts of Interest:

Name of Person or Entity: Relationship to Employee:

Description of Potential Conflict:

Potential Conflicts of Interest:

Name of Person or Entity: Relationship to Employee:

Description of Potential Conflict:

Employee Agreement

By checking the box below, I confirm that have read and understand the ERCOT Code of Conduct and CS7.6, *Information Protection Corporate Standard*, and have participated in any associated ethics training required by ERCOT. I agree to conduct myself in accordance with the principles and standards discussed in the ERCOT Code of Conduct and CS7.6, *Information Protection Corporate Standard*, and I have made any required disclosures below.

I agree to the foregoing terms.

Signature

Date

Ethics Agreement for Directors and Segment Alternates

Electric Reliability Council of Texas, Inc. (“ERCOT”) is a Texas non-profit corporation organized pursuant to the Texas Non-Profit Corporation Act. ERCOT has been formed for the limited purpose of: promoting the reliable and efficient operations of electric power systems, ensuring open access for all users of the ERCOT transmission and distribution systems on a non-discriminatory basis, coordinating activities within the region of the Electric Reliability Council of Texas and as liaison to the North American Electric Reliability Corporation, performing the functions of an Independent Organization, and engaging in any lawful act and activity consistent with the foregoing for which corporations may be formed under the Texas Non-Profit Corporation Act. ERCOT is certified as the Independent Organization for the ERCOT Region by the Public Utility Commission of Texas (“PUCT”).

The management of ERCOT is vested in a Board of Directors (“Board”) and such committees of the Board that the Board may, from time to time, establish. It is the duty of the Board to initiate any specific action required, in their opinion, to fulfill the purposes of ERCOT as stated above, within the limitations of the Articles of Incorporation, applicable laws and the Bylaws, as may be amended from time to time.

Potential Conflicts of Interest

Each Director and Segment Alternate of ERCOT shall have an affirmative duty to disclose to the Board, any actual or potential conflicts of interest of the Director, Segment Alternate, or his employer where, and to the extent that, such conflicts or potential conflicts directly or indirectly affect any matter that comes before the Board as required by the Bylaws. A Director or Segment Alternate with a direct interest in a matter, personally or via his employer, or by having a substantial financial interest in a person with a direct interest in a matter, shall recuse himself from deliberations and actions on the matter in which the conflict arises and shall abstain on any vote on the matter and not otherwise participate in a decision on the matter. A direct interest is a specific interest of a person or entity in a particular matter, provided that an interest that is common to entities in the Market Segment of a Director or Segment Alternate or a general interest of some or all Market Participant Directors or Segment Alternates in a matter does not constitute direct interest. Any disclosure of a direct interest by a Director or Segment Alternate shall be noted in the minutes of the Board meeting at which the direct interest is disclosed. Mere attendance at the meeting, if the Director or Segment Alternate recuses himself from the deliberation and action on the matter in which the conflict arises, shall not constitute participation.

Each Director and Segment Alternate must disclose all personal relationships (including household member or family member (spouse, parent, child, or sibling, including step and adoptive relatives) relationships) with ERCOT vendors to the Board. Such relationships include: current ties (within the last two years) as a director, officer, or employee of an ERCOT vendor; direct business relationships, other than retail customer

relationships, with an ERCOT vendor; and directly or indirectly owning or holding at least five percent (5%) of voting securities of an ERCOT vendor.

ERCOT may not make any loan to a Director or Segment Alternate of ERCOT. A Director or Segment Alternate may lend money to and otherwise transact business with, ERCOT except as otherwise provided by the Bylaws, the Articles of Incorporation, and applicable law. Such a person transacting business with ERCOT has the same rights and obligations relating to those matters as other persons transacting business with ERCOT. If a Director, a Segment Alternate, or member of his immediate family is an officer or director, is employed by, or owns or has a beneficial interest in more than ten percent of the stock in a bank or other financial institution that would otherwise be a Qualified Institution (as defined in ERCOT's Investment Corporate Standard), such Director or Segment Alternate shall provide full disclosure of such stock holdings or relationship in documented form to be filed with the permanent records of ERCOT. ERCOT may not borrow money from, or otherwise transact business with, a Director or a Segment Alternate unless the transaction is described fully in a legally binding instrument and is in ERCOT's best interests. ERCOT may not borrow money from, or otherwise transact business with, a Director or a Segment Alternate without full disclosure of all relevant facts and without the Board's approval, not including the vote of any person having a personal interest in the transaction.

Independence of Unaffiliated Directors

Unaffiliated Directors of ERCOT are required to maintain independence of any Market Participant in the ERCOT Region. Requirements of such independence include, but are not limited to, the following:

- An Unaffiliated Director or family member (any spouse, parent, spouse of a parent, child or sibling, including step and adoptive relatives and household member) shall not have the following:
 - Current or recent ties (within the last two years) as a director or officer of a Market Participant or its Affiliates;
 - Current or recent ties (within the last two years) as an employee of an ERCOT Member or North American Electric Reliability Corporation-Registered Entity operating in the ERCOT Region;
 - Direct business relationships, other than retail customer relationships, with a Market Participant or its Affiliates; and
 - To the extent that an Unaffiliated Director or family member (any spouse, parent, spouse of a parent, child or sibling, including step and adoptive relatives) living in the same household or any other household member owns stocks or bonds of Market Participants, these must be divested or placed in a blind trust prior to being seated on the Board.
- An Unaffiliated Director shall not have any relationship that would interfere with the exercise of independent judgment in carrying out the responsibilities of an ERCOT Board member, including the Delegated Authority pursuant to the Bylaws.

Prohibited Acts

As long as ERCOT exists, no Director or Segment Alternate may:

- Do any act in violation of the Articles of Incorporation or the Bylaws.
- Do any act in violation of a binding obligation of ERCOT except with the Board's prior approval.
- Do any act with the intention of harming ERCOT or any of its operations.
- Receive an improper personal benefit from the operation of ERCOT.
- Use ERCOT's assets, directly or indirectly, for any purpose other than in furtherance of ERCOT's exempt purposes.
- Wrongfully transfer or dispose of ERCOT property, including intangible property such as good will.
- Use ERCOT's name (or any substantially similar name) or any trademark or trade name adopted by ERCOT, except on behalf of ERCOT in the ordinary course of its business or as a reference to the ERCOT Region.
- Disclose any of ERCOT's or ERCOT Member's business practices, trade secrets, or any other confidential or proprietary information not generally known to the business community to any person not authorized to receive it.
- Take any action, without written notice to Members and reasonable time for Members to respond, that would cause another ERCOT Member that is not a "public utility" under the Federal Power Act or ERCOT itself to become a "public utility" under the Federal Energy Regulatory Commission ("FERC") rules or become subject to any plenary jurisdiction of FERC.

Violations of these prohibited acts may lead to sanction, suspension, expulsion or termination after a hearing as described in Article 3 of the Bylaws.

Disclosure of Trade Secret Information

Under the Defend Trade Secrets Act of 2016 (the "Act"), an individual may not be held criminally or civilly liable under any federal or state trade secret law for disclosure of a trade secret as defined in the Act: (i) made in confidence to a government official or to an attorney, solely for the purpose of reporting or investigating a suspected violation of law; and/or (ii) in a lawsuit filing made under seal. In addition, an individual suing an employer for retaliation based on the reporting of a suspected violation of law may disclose a trade secret to his or her attorney and use the trade secret information in the court proceeding, so long as any document containing the trade secret is filed under seal and the individual does not disclose the trade secret except pursuant to court order.

The Ethics Agreement is not intended to alter in any way the duties, obligations and rights of Directors or Segment Alternates as set forth in the Articles of Incorporation, Bylaws and applicable law, as they may be amended from time to time, nor does it create any third party rights, claims or causes of action. To the extent, if any, that the



Ethics Agreement is inconsistent with the Articles of Incorporation, Bylaws or applicable law, the Articles of Incorporation, Bylaws and applicable laws, as they may be amended from time to time, shall control. Directors and Segment Alternates will be required to reaffirm the Ethics Agreement on an annual basis.

By my signature I, _____,
acknowledge that I have read and understand the above Ethics Agreement and agree to be bound by its terms.

Director/Segment Alternate Signature: _____

Date: _____