

A BILL TO BE ENTITLED

AN ACT

1
2 relating to regulation of electric generation capacity ownership in
3 the electric power market.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Subsections (a) and (d), Section 39.152,
6 Utilities Code, are amended to read as follows:

7 (a) The commission shall certify a power region if:

8 (1) a sufficient number of interconnected utilities in
9 the power region fall under the operational control of an
10 independent organization as described by Section 39.151;

11 (2) the power region has a generally applicable tariff
12 that guarantees open and nondiscriminatory access for all users to
13 transmission and distribution facilities in the power region as
14 provided by Section 39.203; and

15 (3) no person owns or [~~and~~] controls, or any
16 combination thereof, more than 20 percent of the installed
17 generation capacity located in or capable of delivering electricity
18 to a power region, as determined according to Section 39.154.

19 (d) For a power region outside of ERCOT, a power generation
20 company that is affiliated with an electric utility may elect to
21 demonstrate that it meets the requirements of Subsection (a)(3) by
22 showing that it does not own or [~~and~~] control, or any combination
23 thereof, more than 20 percent of the installed capacity in a
24 geographic market that includes the power region, using the

1 guidelines, standards, and methods adopted by the Federal Energy
2 Regulatory Commission.

3 SECTION 2. Section 39.153, Utilities Code, is amended by
4 adding Subsection (a-1) and amending Subsections (e) and (f) to
5 read as follows:

6 (a-1) Not later than September 30, 2008, each electric
7 utility subject to this section shall sell at auction or otherwise
8 divest additional entitlements to the utility's Texas
9 jurisdictional installed generation capacity so that a utility does
10 not control more than:

11 (1) 20 percent of installed generation capacity in
12 ERCOT; or

13 (2) 25 percent of the installed generation capacity
14 inside an ERCOT zonal boundary or a functional market recognized by
15 the commission.

16 (e) The commission shall adopt rules by December 31, 2000,
17 that define the scope of the initial capacity entitlements to be
18 auctioned and shall adopt additional rules not later than December
19 31, 2007, that define the scope of the auctions necessary to comply
20 with Subsection (a-1). Entitlements may be auctioned in blocks of
21 less than 15 percent. The rules shall state the minimum amount of
22 capacity that can be sold at auction as an entitlement. At a
23 minimum, the rules shall provide that the entitlements:

24 (1) may be sold and purchased in periods of not less
25 than one month nor more than four years;

26 (2) may be resold to any lawful purchaser, except for a
27 retail electric provider affiliated with the electric utility that

1 originally auctioned the entitlement;

2 (3) include no possessory interest in the unit from
3 which the power is produced;

4 (4) include no obligations of a possessory owner of an
5 interest in the unit from which the power is produced; and

6 (5) give the purchaser the right to designate the
7 dispatch of the entitlement, subject to planned outages, outages
8 beyond the control of the utility operating the unit, and other
9 considerations subject to the oversight of the applicable
10 independent organization.

11 (f) The commission shall adopt rules by December 31, 2000,
12 that prescribe the procedure for the auction of the entitlements as
13 required by Subsection (a). If necessary, the commission may adopt
14 additional rules that prescribe the procedure for the auction of
15 the entitlements as required by Subsection (a-1). The rules shall
16 include:

17 (1) a process for conducting the auction or auctions,
18 including who shall conduct it, how often it shall be conducted, and
19 how winning bidders shall be determined;

20 (2) a process for the electric utility to designate
21 which generation units or combination of units are offered for
22 auction;

23 (3) a provision for the utility to establish an
24 opening bid price based on the electric utility's expected cost,
25 with the commission prescribing the means for determining the
26 opening bid price, which may not include return on equity; and

27 (4) a provision that allows a bidder to specify the

1 magnitude and term of the entitlement, subject to the conditions
2 established in Subsection (e).

3 SECTION 3. Section 39.154, Utilities Code, is amended by
4 amending Subsections (a) and (c) and adding Subsection (f) to read
5 as follows:

6 (a) Beginning on the date of introduction of customer
7 choice, a power generation company may not own or ~~[and]~~ control, or
8 any combination thereof, more than 20 percent of the installed
9 generation capacity located in, or capable of delivering
10 electricity to ERCOT, or 25 percent of the installed generation
11 capacity in a power region, zone, or functional market recognized
12 by the commission in the power region.

13 (c) In determining the percentage shares of installed
14 generation capacity under this section, the commission shall
15 combine capacity owned or ~~[and]~~ controlled by a power generation
16 company and any entity that is affiliated with that power
17 generation company within the power region, zone, or functional
18 market recognized by the commission in the power region ~~[reduced by~~
19 ~~the installed generation capacity of those facilities that are made~~
20 ~~subject to capacity auctions under Sections 39.153(a) and (d)]~~.

21 (f) In determining the percentage market shares of
22 installed generation capacity owned or controlled by a power
23 generation company under this section and Section 39.156, the
24 commission shall not include any capacity generated from integrated
25 gasification combined cycle or other similar clean coal
26 technologies.

27 SECTION 4. Subsection (a), Section 39.155, Utilities Code,

1 is amended to read as follows:

2 (a) Each person, municipally owned utility, electric
3 cooperative, and river authority that owns or controls generation
4 facilities and offers electricity for sale in this state shall
5 report to the commission its installed generation capacity, the
6 total amount of capacity available for sale to others, the total
7 amount of capacity under contract to others, the total amount of
8 capacity dedicated to its own use, its annual wholesale power sales
9 in the state, its annual retail power sales in the state, and any
10 other information necessary for the commission to assess market
11 power or the development of a competitive retail market in the
12 state. The commission shall by rule prescribe the nature and detail
13 of the reporting requirements and shall administer those reporting
14 requirements in a manner that ensures the confidentiality of
15 competitively sensitive information.

16 SECTION 5. Subsections (a), (b), (f), and (g), Section
17 39.156, Utilities Code, are amended to read as follows:

18 (a) In this section, "market power mitigation plan" or
19 "plan" means a written proposal by an electric utility or a power
20 generation company for reducing its ownership or ~~[and]~~ control of
21 installed generation capacity as required by Section 39.154.

22 (b) An electric utility or power generation company owning
23 or ~~[and]~~ controlling, or any combination thereof, more than 20
24 percent of the generation capacity located in, or capable of
25 delivering electricity to ERCOT, or 25 percent of the installed
26 generation capacity in a power region, zone, or functional market
27 recognized by the commission in the power region shall file a market

1 power mitigation plan with the commission not later than the 90th
2 day after the date the electric utility's or power generation
3 company's generation capacity exceeds the 20 percent limitation
4 prescribed by this subsection [~~December 1, 2000~~].

5 (f) The commission shall approve, modify, or reject a plan
6 within 180 days after the date of a filing under Subsection (b).
7 [~~The commission may not modify a plan to require divestiture by the~~
8 ~~electric utility or the power generation company.~~]

9 (g) In reaching its determination under Subsection (f), the
10 commission shall consider:

11 (1) the degree to which the electric utility's or power
12 generation company's stranded costs, if any, are minimized;

13 (2) whether on disposition of the generation assets
14 the reasonable value is likely to be received;

15 (3) the effect of the plan on the electric utility's or
16 power generation company's federal income taxes;

17 (4) the effect of the plan on current and potential
18 competitors in the generation market; [~~and~~]

19 (5) whether the plan is consistent with the public
20 interest;

21 (6) the ownership of generation resources in a zone;

22 (7) the control of generation through the use of
23 contracts between affiliated retail electric providers and
24 independent power producers; and

25 (8) the emissions credits owned or controlled in a
26 nonattainment area for national ambient air quality standards.

27 SECTION 6. Section 39.157, Utilities Code, is amended by

1 amending Subsections (a), (b), and (d) and adding Subsection (j) to
2 read as follows:

3 (a) The commission shall monitor market power associated
4 with the generation, transmission, distribution, and sale of
5 electricity in this state. On a finding that market power abuses or
6 other violations of this section have occurred or are presently
7 occurring, the commission shall require, to the extent feasible,
8 refunds to retail customers and disgorgement of revenues received
9 as a result of market power abuses and reasonable mitigation of the
10 market power by ordering the construction of additional
11 transmission or distribution facilities, by seeking an injunction
12 or civil penalties as necessary to eliminate or to remedy the market
13 power abuse or violation as authorized by Chapter 15, by requiring
14 refunds or disgorgement of revenues received as a result of market
15 power abuses, by imposing an administrative penalty as authorized
16 by Chapter 15, or by suspending, revoking, or amending a
17 certificate or registration as authorized by Section 39.356.
18 Section 15.024(c) does not apply to an administrative penalty
19 imposed under this section. In lieu of seeking a civil penalty, as
20 authorized by Chapter 15, the commission may require that a person
21 who has been found by the commission to have engaged in market power
22 abuse pay equivalent funds directly to an existing emergency bill
23 payment assistance program operated by local assistance agencies
24 that are supported by the Texas Department of Housing and Community
25 Affairs. If the market monitor issues a report under Section
26 39.1515 indicating that market power abuses or other violations of
27 this title have occurred or are occurring, the executive director

1 shall promptly approve or reject the findings of the market monitor
2 and pursue all appropriate administrative remedies. Upon finding
3 that market power abuses have occurred and after ordering the
4 appropriate administrative remedies, the commission shall refer
5 the matter to the attorney general for further action, including
6 the imposition of civil penalties, criminal prosecution under
7 Section 15.030, or coordinating and assisting in local criminal
8 prosecution. For purposes of this subchapter, market power abuses
9 are practices by persons possessing market power that are
10 unreasonably discriminatory or tend to unreasonably restrict,
11 impair, or reduce the level of competition, including practices
12 that tie unregulated products or services to regulated products or
13 services or unreasonably discriminate in the provision of regulated
14 services. For purposes of this section, "market power abuses"
15 include predatory pricing, withholding of production, precluding
16 entry, and collusion. A violation of the code of conduct provided
17 by Subsection (d) that materially impairs the ability of a person to
18 compete in a competitive market shall be deemed to be an abuse of
19 market power. The possession of a high market share in a market
20 open to competition may not, of itself, be deemed to be an abuse of
21 market power; however, this sentence shall not affect the
22 application of state and federal antitrust laws.

23 (b) Beginning on the date of introduction of customer
24 choice, a person that owns or controls generation facilities may
25 not own transmission or distribution facilities in this state
26 except for those facilities necessary to interconnect a generation
27 facility with the transmission or distribution network, a facility

1 not dedicated to public use, or a facility otherwise excluded from
2 the definition of "electric utility" under Section 31.002.
3 However, nothing in this chapter shall prohibit a power generation
4 company affiliated with a transmission and distribution utility
5 from owning or controlling generation facilities.

6 (d) Not later than January 10, 2000, the commission shall
7 adopt rules and enforcement procedures to govern transactions or
8 activities between a transmission and distribution utility and its
9 competitive affiliates to avoid potential market power abuses and
10 cross-subsidizations between regulated and competitive activities
11 both during the transition to and after the introduction of
12 competition. Nothing in this subsection is intended to affect or
13 modify the obligations or duties relating to any rules or standards
14 of conduct that may apply to a utility or the utility's affiliates
15 under orders or regulations of the Federal Energy Regulatory
16 Commission or the Securities and Exchange Commission. A utility
17 that is subject to statutes or regulations in other states that
18 conflict with a provision of this section may petition the
19 commission for a waiver of the conflicting provision on a showing of
20 good cause. The rules adopted under this section shall ensure that:

21 (1) a utility makes any products and services, other
22 than corporate support services, that it provides to a competitive
23 affiliate available, contemporaneously and in the same manner, to
24 the competitive affiliate's competitors and applies its tariffs,
25 prices, terms, conditions, and discounts for those products and
26 services in the same manner to all similarly situated entities;

27 (2) a utility does not:

1 (A) give a competitive affiliate or a competitive
2 affiliate's customers any preferential advantage, access, or
3 treatment regarding services other than corporate support
4 services; or

5 (B) act in a manner that is discriminatory or
6 anticompetitive with respect to a nonaffiliated competitor of a
7 competitive affiliate;

8 (3) a utility providing electric transmission or
9 distribution services:

10 (A) provides those services on nondiscriminatory
11 terms and conditions;

12 (B) does not establish as a condition for the
13 provision of those services the purchase of other goods or services
14 from the utility or the competitive affiliate; ~~and~~

15 (C) does not provide competitive affiliates
16 preferential access to the utility's transmission and distribution
17 systems or to information about those systems; and

18 (D) does not act in a manner that in any way
19 suggests or implies that reliability of electric service, or
20 restoration of service to a customer following an outage, is
21 dependent upon a customer receiving service from a competitive
22 affiliate of a utility;

23 (4) a utility does not release any proprietary
24 customer information to a competitive affiliate or any other
25 entity, other than an independent organization as defined by
26 Section 39.151 or a provider of corporate support services for the
27 purposes of providing the services, without obtaining prior

1 verifiable authorization, as determined from the commission, from
2 the customer;

3 (5) a utility does not:

4 (A) communicate with a current or potential
5 customer about products or services offered by a competitive
6 affiliate in a manner that favors a competitive affiliate; or

7 (B) allow a competitive affiliate, before
8 September 1, 2005, to use the utility's corporate name, trademark,
9 brand, or logo unless the competitive affiliate includes on
10 employee business cards and in its advertisements of specific
11 services to existing or potential residential or small commercial
12 customers locating within the utility's certificated service area a
13 disclaimer that states, "(Name of competitive affiliate) is not the
14 same company as (name of utility) and is not regulated by the Public
15 Utility Commission of Texas, and you do not have to buy (name of
16 competitive affiliate)'s products to continue to receive quality
17 regulated services from (name of utility).";

18 (6) a utility does not conduct joint advertising or
19 promotional activities with a competitive affiliate [~~in a manner~~
20 ~~that favors the competitive affiliate~~];

21 (7) a utility is a separate, independent entity from
22 any competitive affiliates and, except as provided by Subdivisions
23 (8) and (9), does not share employees, facilities, information, or
24 other resources, other than permissible corporate support
25 services, with those competitive affiliates unless the utility can
26 prove to the commission that the sharing will not compromise the
27 public interest;

1 (8) a utility's office space is physically separated
2 from the office space of the utility's competitive affiliates by
3 being located in separate buildings or, if within the same
4 building, by a method such as having the offices on separate floors
5 or with separate access, unless otherwise approved by the
6 commission;

7 (9) a utility and a competitive affiliate:

8 (A) may, to the extent the utility implements
9 adequate safeguards precluding employees of a competitive
10 affiliate from gaining access to information in a manner
11 inconsistent with Subsection (g) or (i), share common officers and
12 directors, property, equipment, offices to the extent consistent
13 with Subdivision (8), credit, investment, or financing
14 arrangements to the extent consistent with Subdivision (17),
15 computer systems, information systems, and corporate support
16 services; and

17 (B) are not required to enter into prior written
18 contracts or competitive solicitations for non-tariffed
19 transactions between the utility and the competitive affiliate,
20 except that the commission by rule may require the utility and the
21 competitive affiliate to enter into prior written contracts or
22 competitive solicitations for certain classes of transactions,
23 other than corporate support services, that have a per unit value of
24 more than \$75,000 or that total more than \$1 million;

25 (10) a utility does not temporarily assign, for less
26 than three years [~~one year~~], employees engaged in transmission or
27 distribution system operations to a competitive affiliate [~~unless~~

1 ~~the employee does not have knowledge of information that is~~
2 ~~intended to be protected under this section];~~

3 (11) a utility does not subsidize the business
4 activities of an affiliate with revenues from a regulated service;

5 (12) a utility and its affiliates fully allocate costs
6 for any shared services, corporate support services, and other
7 items described by Subdivisions (8) and (9);

8 (13) a utility and its affiliates keep separate books
9 of accounts and records and the commission may review records
10 relating to a transaction between a utility and an affiliate;

11 (14) assets transferred or services provided between a
12 utility and an affiliate, other than transfers that facilitate
13 unbundling under Section 39.051 or asset valuation under Section
14 39.262, are priced at a level that is fair and reasonable to the
15 customers of the utility and reflects the market value of the assets
16 or services or the utility's fully allocated cost to provide those
17 assets or services;

18 (15) regulated services that a utility provides on a
19 routine or recurring basis are included in a tariff that is subject
20 to commission approval;

21 (16) each transaction between a utility and a
22 competitive affiliate is conducted at arm's length; and

23 (17) a utility does not allow an affiliate to obtain
24 credit under an arrangement that would include a specific pledge of
25 assets in the rate base of the utility or a pledge of cash
26 reasonably necessary for utility operations.

27 (j) After January 1, 2008, a competitive affiliate may not

1 use the utility's corporate name, trademark, brand, or logo or any
2 portion of the utility's corporate name, trademark, brand, or logo
3 if the commission determines that such use may be misleading to
4 customers.

5 SECTION 7. Subsection (a), Section 39.158, Utilities Code,
6 is amended to read as follows:

7 (a) A person who owns or controls [~~An owner of~~] electric
8 generation facilities that offers electricity for sale in the state
9 and proposes to merge, consolidate, or otherwise become affiliated
10 with another person who owns or controls [~~owner of~~] electric
11 generation facilities that offers electricity for sale in this
12 state shall obtain the approval of the commission before closing if
13 the electricity offered for sale in the power region by the merged,
14 consolidated, or affiliated entity will exceed one percent of the
15 total electricity for sale in the power region. The approval shall
16 be requested at least 120 days before the date of the proposed
17 closing. The commission shall approve the transaction unless the
18 commission finds that the transaction results in a violation of
19 Section 39.154. If the commission finds that the transaction as
20 proposed would violate Section 39.154, the commission may condition
21 approval of the transaction on adoption of reasonable modifications
22 to the transaction as prescribed by the commission to mitigate
23 potential market power abuses.

24 SECTION 8. Subsection (a), Section 39.407, Utilities Code,
25 is amended to read as follows:

26 (a) If an electric utility chooses on or after January 1,
27 2007, to participate in customer choice, the commission may not

1 authorize customer choice until the applicable power region has
2 been certified as a qualifying power region under Section
3 39.152(a). Except as otherwise provided by this subsection, the
4 commission shall certify that the requirements of Section
5 39.152(a)(3) are met for electric utilities subject to this
6 subchapter only upon a finding that the total capacity owned or
7 ~~[and]~~ controlled, or any combination thereof, by each such electric
8 utility and its affiliates does not exceed 20 percent of the total
9 installed generation capacity within the constrained geographic
10 region served by each such electric utility plus the total
11 available transmission capacity capable of delivering firm power
12 and energy to that constrained geographic region. Not later than
13 May 1, 2002, each electric utility subject to this subchapter shall
14 submit to the electric utility restructuring legislative oversight
15 committee an analysis of the needed transmission facilities
16 necessary to make the electric utility's service area transmission
17 capability comparable to areas within the ERCOT power region. On or
18 after September 1, 2003, each electric utility subject to this
19 subchapter shall file the utility's plans to develop the utility's
20 transmission interconnections with the utility's power region or
21 other adjacent power regions. The commission shall review the plan
22 and not later than the 180th day after the date the plan is filed,
23 determine the additional transmission facilities necessary to
24 provide access to power and energy that is comparable to the access
25 provided in areas within the ERCOT power region; provided, however,
26 that if a hearing is requested by any party to the proceeding, the
27 180-day deadline will be extended one day for each day of hearings.

1 The commission shall, as a part of the commission's approval of the
2 plan, approve a rate rider mechanism for the recovery of the
3 incremental costs of those facilities after the facilities are
4 completed and in-service. A finding of need under this subsection
5 shall meet the requirements of Sections 37.056(c)(1), (2), and
6 (4)(E). The commission may certify that the requirements of
7 Section 39.152(a)(3) are met for electric utilities subject to this
8 subchapter if the commission finds that:

9 (1) each such utility has sufficient transmission
10 facilities to provide customers access to power and energy from
11 capacity controlled by suppliers not affiliated with the incumbent
12 utility that is comparable to the access to power and energy from
13 capacity controlled by suppliers not affiliated with the incumbent
14 utilities in areas of the ERCOT power region; and

15 (2) the total capacity owned or [~~and~~] controlled, or
16 any combination thereof, by each such electric utility and its
17 affiliates does not exceed 20 percent of the total installed
18 generation capacity within the power region.

19 SECTION 9. Subsection (b), Section 39.453, Utilities Code,
20 is amended to read as follows:

21 (b) The commission shall certify that the requirement of
22 Section 39.152(a)(3) is met for an electric utility subject to this
23 subchapter only if the commission finds that the total capacity
24 owned or [~~and~~] controlled, or any combination thereof, by the
25 electric utility and the utility's affiliates does not exceed 20
26 percent of the total installed generation capacity within the power
27 region of that utility.

1 SECTION 10. Subsection (b), Section 39.153, Subsection (e),
2 Section 39.154, and Subsection (d), Section 39.156, Utilities Code,
3 are repealed.

4 SECTION 11. This Act takes effect immediately if it
5 receives a vote of two-thirds of all the members elected to each
6 house, as provided by Section 39, Article III, Texas Constitution.
7 If this Act does not receive the vote necessary for immediate
8 effect, this Act takes effect September 1, 2007.