

A BILL TO BE ENTITLED

AN ACT

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

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

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

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

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

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

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

(d) For a power region outside of ERCOT, a power generation company that is affiliated with an electric utility may elect to demonstrate that it meets the requirements of Subsection (a)(3) by showing that it does not own or ~~[and]~~ control, or any combination thereof, more than 20 percent of the installed capacity in a 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) 20 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. Subsections (a) and (c), Section 39.154,
4 Utilities Code, are amended to read as follows:

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

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

19 SECTION 4. Subsection (a), Section 39.155, Utilities Code,
20 is amended to read as follows:

21 (a) Each person, municipally owned utility, electric
22 cooperative, and river authority that owns or controls generation
23 facilities and offers electricity for sale in this state shall
24 report to the commission its installed generation capacity, the
25 total amount of capacity available for sale to others, the total
26 amount of capacity under contract to others, the total amount of
27 capacity dedicated to its own use, its annual wholesale power sales

1 in the state, its annual retail power sales in the state, and any
2 other information necessary for the commission to assess market
3 power or the development of a competitive retail market in the
4 state. The commission shall by rule prescribe the nature and detail
5 of the reporting requirements and shall administer those reporting
6 requirements in a manner that ensures the confidentiality of
7 competitively sensitive information.

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

10 (a) In this section, "market power mitigation plan" or
11 "plan" means a written proposal by an electric utility or a power
12 generation company for reducing its ownership or ~~and~~ control of
13 installed generation capacity as required by Section 39.154.

14 (b) An electric utility or power generation company owning
15 or ~~and~~ controlling, or any combination thereof, more than 20
16 percent of the generation capacity located in, or capable of
17 delivering electricity to, a power region, zone, or functional
18 market recognized by the commission in the power region shall file a
19 market power mitigation plan with the commission not later than the
20 90th day after the date the electric utility's or power generation
21 company's generation capacity exceeds the 20 percent limitation
22 prescribed by this subsection [~~December 1, 2000~~].

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

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

27 (2) whether on disposition of the generation assets

1 the reasonable value is likely to be received;

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

4 (4) the effect of the plan on current and potential
5 competitors in the generation market; ~~and~~

6 (5) whether the plan is consistent with the public
7 interest;

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

9 (7) the control of generation through the use of
10 contracts between affiliated retail electric providers and
11 independent power producers; and

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

14 SECTION 6. Section 39.157, Utilities Code, is amended by
15 amending Subsections (a), (b), and (d) and adding Subsection (j) to
16 read as follows:

17 (a) The commission shall monitor market power associated
18 with the generation, transmission, distribution, and sale of
19 electricity in this state. On a finding that market power abuses or
20 other violations of this section are occurring, the commission
21 shall require reasonable mitigation of the market power by ordering
22 the construction of additional transmission or distribution
23 facilities, by seeking an injunction or civil penalties as
24 necessary to eliminate or to remedy the market power abuse or
25 violation as authorized by Chapter 15, by requiring refunds or
26 disgorgement of revenues received as a result of market power
27 abuses, by imposing an administrative penalty as authorized by

1 Chapter 15, or by suspending, revoking, or amending a certificate
2 or registration as authorized by Section 39.356. Section 15.024(c)
3 does not apply to an administrative penalty imposed under this
4 section. For purposes of this subchapter, market power abuses are
5 practices by persons possessing market power that are unreasonably
6 discriminatory or tend to unreasonably restrict, impair, or reduce
7 the level of competition, including practices that tie unregulated
8 products or services to regulated products or services or
9 unreasonably discriminate in the provision of regulated services.
10 For purposes of this section, "market power abuses" include
11 predatory pricing, withholding of production, precluding entry,
12 and collusion. A violation of the code of conduct provided by
13 Subsection (d) that materially impairs the ability of a person to
14 compete in a competitive market shall be deemed to be an abuse of
15 market power. The possession of a high market share in a market
16 open to competition may not, of itself, be deemed to be an abuse of
17 market power; however, this sentence shall not affect the
18 application of state and federal antitrust laws.

19 (b) Beginning on the date of introduction of customer
20 choice, a person that owns or controls generation facilities may
21 not own transmission or distribution facilities in this state
22 except for those facilities necessary to interconnect a generation
23 facility with the transmission or distribution network, a facility
24 not dedicated to public use, or a facility otherwise excluded from
25 the definition of "electric utility" under Section 31.002.
26 However, nothing in this chapter shall prohibit a power generation
27 company affiliated with a transmission and distribution utility

1 from owning or controlling generation facilities.

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

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

23 (2) a utility does not:

24 (A) give a competitive affiliate or a competitive
25 affiliate's customers any preferential advantage, access, or
26 treatment regarding services other than corporate support
27 services; or

1 (B) act in a manner that is discriminatory or
2 anticompetitive with respect to a nonaffiliated competitor of a
3 competitive affiliate;

4 (3) a utility providing electric transmission or
5 distribution services:

6 (A) provides those services on nondiscriminatory
7 terms and conditions;

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

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

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

19 (4) a utility does not release any proprietary
20 customer information to a competitive affiliate or any other
21 entity, other than an independent organization as defined by
22 Section 39.151 or a provider of corporate support services for the
23 purposes of providing the services, without obtaining prior
24 verifiable authorization, as determined from the commission, from
25 the customer;

26 (5) a utility does not:

27 (A) communicate with a current or potential

1 customer about products or services offered by a competitive
2 affiliate in a manner that favors a competitive affiliate; or

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

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

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

24 (8) a utility's office space is physically separated
25 from the office space of the utility's competitive affiliates by
26 being located in separate buildings or, if within the same
27 building, by a method such as having the offices on separate floors

1 or with separate access, unless otherwise approved by the
2 commission;

3 (9) a utility and a competitive affiliate:

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

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

21 (10) a utility does not temporarily assign, for less
22 than three years [~~one year~~], employees engaged in transmission or
23 distribution system operations to a competitive affiliate [~~unless~~
24 ~~the employee does not have knowledge of information that is~~
25 ~~intended to be protected under this section~~];

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

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

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

7 (14) assets transferred or services provided between a
8 utility and an affiliate, other than transfers that facilitate
9 unbundling under Section 39.051 or asset valuation under Section
10 39.262, are priced at a level that is fair and reasonable to the
11 customers of the utility and reflects the market value of the assets
12 or services or the utility's fully allocated cost to provide those
13 assets or services;

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

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

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

23 (j) After January 1, 2008, a competitive affiliate may not
24 use the utility's corporate name, trademark, brand, or logo or any
25 portion of the utility's corporate name, trademark, brand, or logo
26 if the commission determines that such use may be misleading to
27 customers.

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

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

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

22 (a) If an electric utility chooses on or after January 1,
23 2007, to participate in customer choice, the commission may not
24 authorize customer choice until the applicable power region has
25 been certified as a qualifying power region under Section
26 39.152(a). Except as otherwise provided by this subsection, the
27 commission shall certify that the requirements of Section

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

1 shall meet the requirements of Sections 37.056(c)(1), (2), and
2 (4)(E). The commission may certify that the requirements of
3 Section 39.152 (a)(3) are met for electric utilities subject to
4 this subchapter if the commission finds that:

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

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

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

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

24 SECTION 10. Subsection (b), Section 39.153, and Subsection
25 (e), Section 39.154, Utilities Code, are repealed.

26 SECTION 11. This Act takes effect immediately if it
27 receives a vote of two-thirds of all the members elected to each

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1 house, as provided by Section 39, Article III, Texas Constitution.
2 If this Act does not receive the vote necessary for immediate
3 effect, this Act takes effect September 1, 2007.