

SUBJECT: Continuing the PUC and Office of Public Utility Counsel

COMMITTEE: Regulated Industries — committee substitute recommended

VOTE: 7 ayes — P. King, Hunter, Baxter, R. Cook, Crabb, Hartnett, Turner
0 nays

WITNESSES: For — Travis Brown, Public Citizen; Brad Denton, Texas Telephone Association; John Fainter, Association of Electric Companies of Texas Inc.; Bryan Gonterman, SBC Texas; Michael Jewell, Direct Energy, CPL Retail Energy, WTU Retail Energy, and Alliance for Retail Markets (*Registered, but did not testify*: Steve Banta, Verizon Communications; Jose Camacho, Valor Telecom; Thomas Ratliff, Western Wireless; Ben Watson, Sprint; Mike Williams, Texas Electric Cooperatives)

Against — (*Registered, but did not testify*: Geoffrey Gay, Cities Aggregation Power Project, Inc. and South Texas Aggregation Project, Inc.)

On — Carol Biedrzycki, Texas Ratepayers Organization to Save Energy; Phillip Oldham, Texas Coalition for Competitive Electricity; Paul Hudson, Public Utility Commission

BACKGROUND: Created in 1975, the Public Utility Commission of Texas (PUC) serves to ensure that Texas consumers have access to high-quality, competitive telecommunications and electric utility services. Although created to regulate the rates and services of utility monopolies, the commission now focuses primarily on oversight of those markets through rulemaking and enforcement. The PUC is governed by three full-time commissioners who represent the public and are appointed by the governor to serve six-year terms.

Created in 1983, the Office of Public Utility Counsel (OPUC) represents the interests of residential and small commercial consumers to help ensure just and reasonable rates for electric and telephone services. The agency appears in contested rate cases, participates in PUC rulemaking proceedings, advocates on behalf of Texas consumers at the federal level,

intervenes in court cases, and represents consumers as a voting member of the ERCOT board of directors.

The Electric Reliability Council of Texas (ERCOT) is one of 10 regional reliability councils in North America and the Independent System Operator for the ERCOT area. ERCOT is responsible for facilitating wholesale electricity transactions among power generators and retailers, ensuring customer information is provided to retailers, maintaining the reliability of the transmission network, and ensuring open access to the network.

DIGEST:

Public Utility Commission

CSHB 1779 would continue the PUC for six years until September 1, 2011. The bill would add two commissioners appointed by the governor, creating a five-member governing body.

Definitions. The bill would add the term "provider" – meaning service or network provider – to several areas of the statute. The bill would define "service" as basic local telecommunications service, interexchange telecommunications service, local exchange telephone service, electrical transmission service, and a service provided by an electric or telecommunications utility. The bill would exclude from the definition of "affiliate" a broker, dealer, bank, insurance company, investment adviser, or investment company. The definition also would exclude an employee benefit plan, pension fund, endowment fund, or other entity that held between 5 and 15 percent of the voting securities of a public utility, provided that the fund did not acquire the utility for the purpose or with the effect of influencing the utility.

Representation. A person representing an entity in a contested proceeding would have to be a licensed attorney. The commission could make an exception to this requirement.

Commission eligibility. To serve on the PUC, a person could not currently own stocks or bonds of \$10,000 or more in a utility, provider, or affiliate upon appointment. (Under current law, a person cannot have owned such stock in the two years prior to appointment.) The bill would delete a provision preventing a person from serving on the commission if that person or the person's spouse held a 10 percent interest in an entity affected by a PUC decision in a manner other than by the setting of rates.

The bill instead would prohibit a person from serving if that person or the person's spouse had a 10 percent interest in a "utility, provider, affiliate, or direct competitor."

Reporting of transactions. Provisions requiring a utility to report buying or selling a plant or merging with another utility would not apply to a provider holding a certificate of operating authority on August 31, 2005, or an incumbent local exchange carrier. Transactions that were reported to a federal agency, another state, or another agency also could go unreported.

Administrative penalties. Under the bill, the PUC could impose a \$10,000 penalty for each violation of statute, rule, or order. A violation would not be a separate violation for each day it occurred but would count as only one violation. The PUC would establish a classification system for violations under which a penalty could exceed \$10,000 only if it were in the highest class of violations.

The bill would institute a statute of limitations under which the commission could not initiate the process of assessing an administrative penalty later than two years after the date on which the violation occurred or the date on which the commission knew that the violation occurred.

If the PUC executive director contended that a violation occurred, he or she would have to issue a report stating the facts on which the contention was based, including whether service to an end-user was the basis for the contention. An alleged violator would have 60 days, instead of the current 20, by which to accept or contest the executive director's contention. A contested hearing would be conducted by the PUC or by the State Office of Administrative Hearings. Action for civil damages could be brought against a violator, but could not be brought if the PUC had acted to address the conduct as a market power violation or as a violation of ERCOT rules. A disgorgement or refund would have to be paid to ERCOT for distribution according to the PUC.

Assessment on utilities and providers. The assessment on utilities and providers to help fund the administration of Public Utilities Regulatory Act (PURA) could not exceed one-sixth of 1 percent of the gross receipts from services over which the PUC had jurisdiction, including interconnection service.

Securitization. The bill would specify that securitization financing should be used by utilities to recover regulatory assets, amounts determined under a true-up proceeding, and any amounts recovered under a competition transition charge.

Review of reporting requirements. After the bill's effective date, the PUC would review and report on its statutory and administrative reporting requirements for telecommunications providers. The report would include actions taken by the commission to amend rules after the review and recommendations for legislation necessary to change statutory reporting requirements.

Across the board recommendations. The bill would add standard sunset provisions governing conflicts of interest, grounds for removing a board member, division of responsibilities, negotiating of rulemaking, technology, and complaint procedures.

Office of Public Utility Counsel

CSHB 1779 would continue OPUC for six years, until September 1, 2011.

Representation. The bill would specify that OPUC could represent residential consumers as a class in any proceeding in which the counselor determined consumers needed representation. OPUC could represent consumers individually or as a class in a judicial proceeding and could represent residential and small commercial consumers as a group or class in any federal bankruptcy case in which the counselor determined consumers to be in need of representation.

Management audit. The bill would require the state auditor in coordination with the Legislative Budget Board to evaluate OPUC's performance measures. The audit would include an estimate of consumer savings attributable to OPUC participation in proceedings. The report would be sent to the governor, the lieutenant governor, and the speaker of the House by August 1, 2006.

Annual report. OPUC would have to submit an annual report on its activities to the House Appropriations Committee, Senate Finance Committee, other legislative committees with jurisdiction over OPUC, and the Sunset Advisory Commission. The report would include:

- the types of activities conducted by the office and the time spent on those activities;
- the number of hours billed for representing residential and small commercial consumers;
- the type of work performed by each staff position; and
- OPUC's rate of success in representing consumers.

Stakeholder meeting. OPUC would conduct an annual hearing to give the public a chance to comment on the office's priorities, functions, and effectiveness. This meeting would not be subject to state open meetings laws, but notice would have to be filed in the Texas Register.

Across the board recommendations. The bill would add standard sunset provisions governing conflicts of interest, grounds for removing a board member, division of responsibilities, negotiation of rulemaking, technology, and complaint procedures.

Other provisions

Repealed. The bill would repeal sections governing:

- liberal construction of Public Utilities Regulatory Act (PURA) ;
- recovery of attorney fees by a utility for a case brought in bad faith;
- civil penalties against utilities, pay phone providers, and affiliates;
- third-degree felony offenses;
- complaints regarding RV park owners; and
- consumer protections.

Effective date. The bill would take effect September 1, 2005. Changes related to attorney's fees, civil penalties, felony offenses, eligibility requirements of the OPUC chief executive and PUC commissioners, and administrative penalties would apply only after the effective date of the bill.

**SUPPORTERS
SAY:**

Continuing the PUC. By continuing the PUC for six years, CSHB 1779 would retain this important regulatory agency. Allowing the commission to go through the sunset process again in six years is a necessary requirement for an agency governing the telecommunications and electric industries. Both of these industries involve rapidly changing technologies and regulatory requirements, and it would be appropriate to review the

agency again in six years to ensure that the PUC's regulatory practices appropriately track changes in these industries.

Increasing the PUC governing body from three to five commissioners would improve representation and administration on the commission. Currently, any time two commissioners meet, that meeting is subject to open government provisions that require the meeting to be public and posted to allow for public involvement. This is an impractical arrangement which impedes the efficiency of the commission's deliberation and decision-making process.

Continuing OPUC. OPUC serves an important function by representing Texas consumers in PUC rulemakings, rate cases, ERCOT protocols and other procedures, and CSHB 1779 would improve the agency's service to this constituency. The bill would improve accountability at the agency by requiring an annual report by the agency to the Legislature and an audit of the agency's performance measures. In addition, the bill would institute an annual stakeholder meeting to solicit input on the agency's mission and activities from the public that it represents. Finally, by continuing OPUC for six years, the bill would allow the Legislature time to evaluate the agency's role as competition in the electric and telecommunications market expands.

Administrative penalties. By doubling the maximum penalty the PUC could administer from \$5,000 to \$10,000, this bill would strengthen the commission's enforcement authority over violations of PURA. A two-year statute of limitations on violations of PURA is necessary to provide utilities and providers with a measure of regulatory certainty in their dealings with the commission and consumers. The bill would allow the PUC to initiate the process of assessing a penalty up to two years after the commission had determined a violation had occurred, an appropriate expectation of action on the part of the commission.

OPPONENTS
SAY:

Continuing the PUC. The PUC has worked very well as a three-member commission, and there is not a compelling reason to increase the number of commissioners to five. Consumers and regulated entities currently can be sure that all deliberations and decisions made by the commissioners will open to public scrutiny. Small public interest organizations representing consumers could see their influence decline, as they might find their attention and limited resources stretched among five commissioners rather than three. Adding two additional commissioners

and their support staff would cost the state almost \$1.2 million per biennium, and this money could be applied to more pressing needs elsewhere in the state budget.

Continuing OPUC. While OPUC served an important purpose in the days of rate regulation, changes in the electric and telecommunications markets have rendered this agency superfluous. For this reason, OPUC should be eliminated. The number of PUC rate cases has declined substantially since the late 1990s, reflecting the increased importance of competition in the electric and telecommunications markets in Texas. The Attorney General's Office easily could absorb the duties of representing consumers in the few rate cases that still occur, and the PUC itself adequately could consider consumer interests in its rulemaking process without the need of adversarial and independent legal representation.

Administrative penalties. Because administrative penalties no longer would be calculated on a per day, per violation basis, CSHB 1779 would weaken the PUC's authority to punish entities that violate the law. If a utility or provider perpetrated a single type of violation that lasted several days, that entity would be fined only once, rather than being punished for each day a violation occurred. The longer an entity committed a violation, the more cost-effective that violation would become. Rather than weakening administrative penalties, the bill should include the sunset staff recommendation that the maximum administrative penalty be increased to \$25,000 per day, per violation.

It can take months, if not years, for the PUC to determine whether an action by a regulated entity constitutes a violation. A two-year statute of limitations could deter the PUC from thoroughly proceeding with investigations to determine whether a violation occurred.

OTHER
OPPONENTS
SAY:

Given the technological innovations and regulatory changes that have occurred since the PUC was established in 1975, the Legislature should seriously consider whether a stand-alone agency is needed to oversee the electric and telecommunications markets in Texas. Consumer protection and most other essential functions could be handled by the attorney general and relevant federal agencies. The state embarked upon a path toward full and open competition in utility markets in the 1990s, and this stand-alone agency that oversees and regulates these industries is a relic from an outmoded regulatory framework. In this era of intermodal

telecommunications competition and retail electric choice, the PUC's functions simply are no longer necessary.

NOTES:

In the bill as filed, the PUC could have imposed a \$25,000 penalty for each violation of a statute, rule, or order. The bill as filed included power generation companies and retail electric providers in the definition of "provider."

The committee substitute removed the definition of affiliate to exclude brokers, dealers, banks, insurance companies, investment advisers, investment companies, and individuals holding a limited financial interest in a utility. The committee substitute also added provisions excluding ILECs from transaction disclosure requirements as well as provisions governing civil damages, repayment of disgorged amounts, and securitization of stranded costs.

According to the fiscal note, adding two PUC commissioners and their support staff would result in a decrease of \$1.8 million in general revenue in fiscal 2006-07.

On May 3, the Senate passed SB 408 and SB 409 by Nelson, which would continue the PUC and OPUC, respectively, until January 1, 2011. SB 408 was reported favorably, as substituted, by the House Regulated Industries Committee on May 9.