

SUBJECT: PUC's authority to disgorge revenue resulting from certain violations

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 9 ayes — Cook, Menendez, Frullo, Gallego, Geren, Huberty, Smithee, Solomons, Turner

1 nay — Craddick

1 present, not voting — Hilderbran

2 absent — Harless, Oliveira

WITNESSES: For — Jay Doegey, Texas Coalition for Affordable Power (TCAP) and Oncor Cities Steering Committee; Phillip Oldham, Texas Association of Manufacturers; Tom “Smitty” Smith, Public Citizen; (*Registered, but did not testify*: Shanna Igo, Texas Municipal League; Michael Peterson, AT&T)

Against — Bill Peacock, Texas Public Policy Foundation

On — Marianne Carroll, Texas Competitive Power Advocates; Stephen Davis, Alliance for Retail Markets (ARM); John W. Fainter, Jr., Association of Electric Companies of Texas, Inc.; Dan Jones, Potomac Economics; Barry Smitherman, Public Utility Commission of Texas

BACKGROUND: Under current law, the Public Utility Commission (PUC) has the authority to levy administrative penalties in instances of market manipulation. The current administrative penalty limit is \$25,000 per violation per day. Since 2007, the PUC has levied \$32 million in penalties. Of that amount, \$15 million was a settlement in one instance of alleged market power abuse. Penalties collected by the PUC go to the General Revenue Fund.

DIGEST: Under CSHB 2133, for a violation of market power abuse under the Utilities Code, the Public Utility Commission (PUC) would be required, in addition to assessing a penalty, to order disgorgement of all revenue in excess of revenue that would have occurred absent a violation.

For any other violation of statutes, rules, or protocols relating to wholesale electric markets, the PUC would be authorized to order disgorgement of all excess revenue resulting from the violation, in addition to the penalty.

Any excess revenue ordered disgorged would be returned to the affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. The PUC would be required to adopt rules to prescribe how revenue would be returned.

The PUC and an alleged violator could develop and enter into a voluntary mitigation plan relating to a violation. Adherence to the plan would constitute an absolute defense against an alleged violation with respect to activities covered by the plan.

The bill would require that parties to a disgorgement proceeding be limited to the alleged violator and the PUC, including the independent market monitor.

The bill would take effect September 1, 2011, and would apply only to violations occurring on or after that date.

**SUPPORTERS  
SAY:**

A basic premise in law is that if a person is caught stealing or defrauding people of their money, law enforcement officials recover the funds and penalize the criminal with a jail sentence or fine. Although the deregulation of Texas' electricity market has resulted in expanded investment to meet the state's growing demand for electricity, as well as providing consumer choice in the retail market, the Public Utility Commission (PUC) does not have all the tools necessary to ensure that all market participants are operating within the law designed to achieve a fair marketplace. Currently, the PUC has the ability only to assess a penalty in instances of market violations. CSHB 2133 would grant PUC the authority not only to assess a penalty, but also to get the excess revenue gained from the violation back to the retail electric companies or consumers who paid it.

The PUC, as with any other regulatory and enforcement agency, must be empowered to deal with fraud and violations of the law. CSHB 2133 would authorize the PUC to recover inappropriately received revenue resulting from violations of wholesale electricity statutes, rules, and protocols. It would make it clear that market power abuse would not be

tolerated. Under CSHB 2133, violators would have to return all ill-gotten revenue and be subject to appropriate administrative fines.

While some believe the penalties associated with a violation are deterrent enough to prevent market abuse and could add up to a significant amount of money, the economic value of any ill-gotten gains could be greater than even the harshest assessed penalties. Not only should violators pay the penalty, but any ill-gotten gains should go back into the hands of the consumers who paid them to effectively deter market abuse.

OPPONENTS  
SAY:

The PUC already has considerable authority to assess penalties, with some administrative penalties being as high as \$25,000 per violation per day. These penalties are enough of a deterrent to prevent market abuse. With instances of penalties reaching more than \$200 million, administrative penalties are nothing to take lightly. Disgorgement should not be required in addition to administrative penalties.

HB 2133 is a solution in search of a problem. Market manipulation has happened on a historically limited basis, with only one alleged instance in nine years of competition. Further, a market monitor is continuously monitoring the market to detect manipulation and serve as a deterrent. CSHB 2133 could create an incentive for people seeking damages and liability.

CSHB 2133 would go against the premise that electricity services and prices should be determined by customer choices and the normal forces of competition. Disgorgement is based on the premise that somebody thinks a company charged too much for electricity. However, price controls have been eliminated in Texas. It is not illegal to exercise market power. It is only illegal if a company engages in certain other practices, such as predatory pricing, withholding of production, precluding entry into the market, and collusion. These market abuses are determined by prices being too high, especially in a time of shortage. If the PUC determined the rates were too high or too much profit was made, a company could be charged with market abuse. Disgorgement effectively would re-impose price controls and cause significant harm to Texas consumers and the Texas economy. It could disrupt the market and create regulatory uncertainty because the electric companies would never know what prices were acceptable.

If a market participant were thought to have engaged in market abuse, it should be handled in the courts to preserve the market.

OTHER  
OPPONENTS  
SAY:

Determining the proper amount for disgorgement would likely become a subject of dispute. It would be better if it were handled through the attorney general's power to take civil action through civil court than handled through the PUC.

CSHB 2133 would limit the parties to a disgorgement proceeding for market power abuse, but it would not limit the parties to a proceeding for a voluntary mitigation plan. Not limiting the parties for voluntary mitigation plans could be a disincentive to companies that were working to be proactive because it could open up that process to third-party intervenors. The bill should limit both types of proceedings.

NOTES:

According to the fiscal note, the duties and responsibilities of implementing CSHB 2133 could be accomplished by utilizing existing resources at the PUC, with no significant fiscal impact to the state.

The committee substitute differs from the bill as filed in several ways, including:

- adding a provision not in the bill as filed that would limit parties to a disgorgement proceeding to the alleged violator and the PUC, including the independent market monitor;
- referring to disgorgement of excess revenue rather than disgorgement of revenues;
- providing for a voluntary mitigation plan; and
- omitting the deadline for the PUC to adopt rules for how excess revenue would be returned.