

BILL ANALYSIS

Senate Research Center

H.B. 2133
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Natural Resources
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Engrossed

AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The Public Utility Commission of Texas (PUC) has the authority to impose administrative penalties for abuse of wholesale electricity market power to protect retail electric customers. However, there is concern that PUC does not have the authority to order the return of ill-gotten gains received from manipulating the market to the affected market participants. Interested parties note that legislation is needed to clarify PUC's authority to disgorge inappropriately received revenues resulting from violations of the wholesale electricity market statutes, rules, or protocols, and to draw a clear distinction between disgorgement and an administrative penalty. H.B. 2133 seeks to address these matters relating to PUC's authority to disgorge revenue obtained as a result of certain violations and to provide for an administrative penalty.

H.B. 2133 amends current law relating to the Public Utility Commission of Texas' authority to disgorge revenue obtained as a result of certain violations and provides an administrative penalty.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the Public Utility Commission of Texas in SECTION 5 (Section 15.025, Utilities Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends the heading to Section 15.023, Utilities Code, to read as follows:

Sec. 15.023. ADMINISTRATIVE PENALTY, DISGORGEMENT ORDER, OR MITIGATION PLAN.

SECTION 2. Amends Section 15.023, Utilities Code, by adding Subsections (e), (f), and (g), as follows:

(e) Requires the Public Utility Commission of Texas (PUC), for a violation of Section 39.157 (Commission Authority to Address Market Power), to, in addition to the assessment of a penalty, order disgorgement of all excess revenue resulting from the violation. Authorizes PUC, for any other violation of the statutes, rules, or protocols relating to wholesale electric markets, to, in addition to the assessment of a penalty, order disgorgement of all excess revenue resulting from the violation.

(f) Authorizes PUC and a person to develop and enter into a voluntary mitigation plan relating to a violation of Section 39.157 or rules adopted by PUC under that section. Provides that if PUC and a person enter into a voluntary mitigation plan, adherence to the plan constitutes an absolute defense against an alleged violation with respect to activities covered by the plan.

(g) Defines "excess revenue."

SECTION 3. Amends the heading to Section 15.024, Utilities Code, to read as follows:

Sec. 15.024. ADMINISTRATIVE PENALTY ASSESSMENT OR DISGORGEMENT ORDER PROCEDURE.

SECTION 4. Amends Section 15.024(f), Utilities Code, as follows:

(f) Requires the executive director of PUC, if a person requests a hearing or fails to timely respond to the notice, to set a hearing and give notice of the hearing to the person. Requires the parties to a proceeding under this subchapter to be limited to the person and PUC, including the independent market monitor. Requires that the hearing be held by an administrative law judge of the State Office of Administrative Hearings (SOAH). Requires the administrative law judge to make findings of fact and conclusions of law and promptly issue to PUC a proposal for a decision about the occurrence of the violation and the amount of a proposed penalty. Authorizes PUC by order, based on the findings of fact, conclusions of law, and proposal for a decision, to find that a violation has occurred and impose a penalty or disgorgement order or to find that no violation occurred.

SECTION 5. Amends Section 15.025, Utilities Code, by adding Subsections (e) and (f), as follows:

(e) Requires that any excess revenue ordered disgorged under this section for a violation of the statutes, rules, or protocols relating to wholesale electric markets be returned to the affected wholesale electric market participants to be used to reduce costs or fees incurred by retail electric customers. Requires PUC adopt rules to prescribe how revenue is required to be returned to the affected wholesale electric market participants under this subsection.

(f) Requires that a reference to a penalty, for purposes of this section and Section 15.026, be construed to include disgorgement.

SECTION 6. Amends Sections 15.026(a) and (b), Utilities Code, as follows:

(a) Provides that judicial review of a PUC order imposing an administrative penalty or disgorgement is:

(1) instituted by filing a petition as provided by Subchapter G (Contested Cases: Judicial Review), Chapter 2001 (Administrative Procedure), Government Code; and

(2) under the substantial evidence rule.

(b) Authorizes a court, if the court sustains the occurrence of the violation, to uphold or reduce the amount of the penalty or disgorgement and order the person to pay the full or reduced amount of the penalty or disgorgement. Requires the court, if the court does not sustain the occurrence of the violation, to order that no penalty or disgorgement is owed.

SECTION 7. Amends Section 39.157(a), Utilities Code, as follows:

(a) Requires PUC to monitor market power associated with the generation, transmission, distribution, and sale of electricity in this state. Requires PUC, on a finding that market power abuses or other violations of this section are occurring, to require reasonable mitigation of the market power by ordering the construction of additional transmission or distribution facilities, by seeking an injunction or civil penalties as necessary to eliminate or to remedy the market power abuse or violation as authorized by Chapter 15 (Judicial Review, Enforcement, and Penalties), by imposing an administrative penalty as authorized by Chapter 15, by ordering the disgorgement of excess revenue as authorized by Chapter 15, or by suspending, revoking, or amending a certificate or registration as authorized by Section 39.356 (Revocation of Certification). Section 15.024(c) (relating to penalties assessed to violators) does not apply to an administrative penalty imposed under this section. Provides that, for purposes of this subchapter, market power abuses

are practices by persons possessing market power that are unreasonably discriminatory or tend to unreasonably restrict, impair, or reduce the level of competition, including practices that tie unregulated products or services to regulated products or services or unreasonably discriminate in the provision of regulated services. Provides that, for purposes of this section, "market power abuses" include predatory pricing, withholding of production, precluding entry, and collusion. Requires that a violation of the code of conduct provided by Subsection (d) (relating to enforcement procedures to govern transactions between transmission and distribution) that materially impairs the ability of a person to compete in a competitive market be deemed to be an abuse of market power. Provides that the possession of a high market share in a market open to competition may not, of itself, be deemed to be an abuse of market power; however, this sentence shall not affect the application of state and federal antitrust laws.

SECTION 8. Makes application of this Act prospective.

SECTION 9. Effective date: September 1, 2011.