

BILL ANALYSIS

C.S.H.B. 1190
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Regulated Industries
Committee Report (Substituted)

BACKGROUND AND PURPOSE

A power generation company is currently limited by statute from owning and controlling more than 20 percent of the installed generation capacity located in, or capable of delivering electricity to, a power region. This provision was intended to limit the ability of a power generation company to exercise market power in the supply of electricity to a power region such as the Electric Reliability Council of Texas (ERCOT). However, the Public Utility Commission of Texas, in their 2007 Scope of Competition Report, has raised concerns that the “own and control” limitation in statute is not broad enough to identify all types of arrangements that could result in market power.

The ability to control the output of a generating plant without owning it is a market power issue in short time horizons and it has become common in the wholesale power market for generation owners to contract with other parties in the market for the output of their generating units. Because power generation companies can contract with each other in this manner, it is quite possible for a power generation company to own and control less than 20 percent of the installed generation capacity, but control more than 20 percent through a combination of ownership and contracting.

Additionally, ownership is also a market power issue. A company that owns a large share of the generation plants in the market is likely to be able to exercise market power over long time horizons. Although the company may by contract relinquish control of some of its plants in the short term, its long-term control of the plants through ownership may dissuade other companies from building and owning plants in competition with the company.

While a statutory change from “own and control” to “owns, controls, or owns and controls in any combination” will certainly limit potential market power, it is not intended to deter investment. Therefore, a reasonable safe harbor for those who own, control, or own and control in any combination in excess of 20 percent within a power region but that still works to mitigate potential market power is necessary. The Independent Market Monitor, the expert who detects and reports market power abuses and is employed by the Public Utility Commission (PUC), is uniquely situated to develop this safe harbor agreement after negotiation with the power generators. Moreover, the ultimate check on the safe harbor agreement is properly placed in the approval of the agreement by the PUC and with the timely disgorgement of any improper revenues acquired by any malfeasance in the market.

RULEMAKING AUTHORITY

Rulemaking authority previously granted to the Public Utility Commission of Texas is modified in SECTION 2 (Section 39.153, Utilities Code) and SECTION 6 (Section 39.157, Utilities Code).

ANALYSIS

SECTION 1. Amends Sections 39.152(a) and (d) and by adding Subsection (a-1), Utilities Code, as follows:

- (a) Requires the Public Utility Commission of Texas (PUC) to certify a power region if, among other certain requirements, no person owns, controls, or owns and controls in any combination more than 20 percent of the installed generation capacity located in or

capable of delivering electricity to a power region, as determined by Section 39.154 (Limitation of Ownership of Installed Capacity).

(a-1) Allows the PUC to certify a power region in which a person owns, controls, or owns and controls in any combination more than 20 percent of the installed generation capacity either located in or capable of delivery to a power region (as determined by Section 39.154) if the person has entered into an agreement with the wholesale electric market monitor as described in Section 39.156 and the PUC has approved the agreement.

(d) Makes conforming changes.

SECTION 2. Amends Section 39.153, Utilities Code, by adding Subsection (a-1) and (a-2) and amending Subsections (e) and (f), as follows:

(a-1) Requires each electric utility subject to this section to sell at auction or otherwise divest additional entitlements, by September 30, 2008, to the utility's Texas jurisdictional installed generation capacity so that a utility does not own, control, or own and control in any combination more than 20 percent of installed generation capacity in ERCOT.

(a-2) The requirement of (a-1) does not apply to an electric utility or power generation company if that utility or company has entered into an agreement with the wholesale electric market monitor to mitigate the potential for market power abuse as described in Section 39.156 and the PUC has approved the agreement.

(e) Requires PUC to adopt additional rules by December 31, 2007, that define the scope of the auctions necessary to comply with Subsection (a-1). Makes a conforming changes.

(f) Authorizes PUC to adopt additional rules that prescribe the procedure for the auction of the entitlements as required by Subsection (a-1), if necessary. Makes conforming changes.

SECTION 3. Amends Sections 39.154(a) and (c) and adds Subsection (a-1), Utilities Code, as follows:

(a) Prohibits a power generation company from owning, controlling, or owning and controlling in any combination more than 20 percent of the installed generation capacity located in, or capable of delivering electricity to a power region.

(a-1) The requirement of (a) does not apply to an electric utility or power generation company if that utility or company has entered into an agreement with the wholesale electric market monitor to mitigate the potential for market power abuse as described in Section 39.156 and the PUC has approved the agreement.

(c) Makes conforming changes.

SECTION 4. Amends Section 39.155(a), Utilities Code, by including that each person, municipally owned utility, electric cooperative, and river authority that controls generation facilities and offers electricity for sale in this state is required to report certain information to PUC.

SECTION 5. Amends Sections 39.156(a), (b), (f) and (g), Utilities Code, as follows:

(a) Redefines "market power mitigation plan" and "plan" to include a proposal to the wholesale electric market monitor to mitigate the potential for market power abuse.

(b) Requires an electric utility or power generation company that owns, controls, or owns and controls in any combination more than 20 percent of the generation capacity located in, or capable of delivering electricity to a power region to either file a market power mitigation plan with PUC by the 90th day after the date the electric utility's or power generation company's generation capacity exceeds the 20 percent limitation prescribed by this subsection, rather than by December 1, 2000, if the utility or company intends to

divest generation capacity or enter into a market power mitigation agreement with the wholesale market power monitor if the utility or company desire to continue to own or control the generation capacity.

(f) Includes market mitigation plans entered into by the wholesale market monitor with those that the PUC must approve, modify or reject within 180 days.

(g) Includes certain additional criteria that PUC is required to consider in reaching its determination under Subsection (f) (regarding approving, modifying or rejecting a market power mitigation plan).

SECTION 6. Amends Section 39.157, Utilities Code, by amending Subsections (a), (b), and (d) and adding Subsection (j), as follows:

(a) Includes requiring refunds or disgorgement of revenues received as a result of market power abuses and requiring generating capacity auctions as methods by which PUC may institute, as required, reasonable mitigation of the market power upon finding that market power abuses or other violations of this section are occurring.

(b) Includes that a person who controls generation facilities is prohibited from owning transmission or distribution facilities in this state, beginning on the date of introduction of customer choice, except under certain exceptions. Makes conforming changes.

(d) Adds to the obligation of the PUC to adopt a rule governing the relationship between an electric utility and its competitive affiliates, that a utility providing electric transmission or distribution services does not act in a manner that in any way suggests or implies that reliability of electric service, or restoration of service to a customer following an outage, is dependent upon a customer receiving service from a competitive affiliate of a utility. Amends the requirement that the PUC must adopt a rule that ensures a utility does not conduct joint advertising or promotional activities with a competitive affiliate by deleting the condition that this must be done in a manner that favors the competitive affiliate. Requires PUC to adopt a rule that ensures a utility does not temporarily assign, for less than three years, rather than one year, employees engaged in transmission or distribution systems operations to a competitive affiliate, and deletes an exception.

(j) Prohibits a competitive affiliate, after January 1, 2008, from using the utility's corporate name, trademark, brand, or logo or any portion of these if PUC determines that such use may be misleading to customers.

SECTION 7. Amends Section 39.407(a), Utilities Code, by revising the direction that the PUC, except as otherwise provided by this subsection, is required to certify that the requirements of Section 39.152(a)(3) (regarding qualifying power regions) are met for electric utilities subject to this subchapter if the total capacity owned, controlled, or owned, controlled, or owned and controlled in any combination by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the constrained geographic region served by each such utility plus the total available transmission capacity capable of delivering firm power and energy to that constrained geographic region. Modifies PUC's authorization to certify that the requirements of Section 39.152(a)(3) are met for electric utilities subject to this subchapter if PUC finds that the total capacity owned, controlled, or owned and controlled in any combination by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the power region and another condition is met.

SECTION 8. Amends Section 39.453(b), Utilities Code, by modifying the requirement that PUC certify that the requirement of Section 39.152(a)(3) is met for an electric utility subject to this subchapter only if PUC finds that the total capacity owned, controlled, or owned and controlled in any combination, rather than owned and controlled, by the electric utility and the utility's affiliates does not exceed 20 percent of the total installed generation capacity within the power region of that utility.

SECTION 9. Repealer: Section 39.153(b) (regarding auctioning the capacity entitlements of electric utilities) and Section 39.154(e) (regarding calculation of generation shares owned and controlled under Sections 39.154 and 39.156), Utilities Code.

SECTION 10. Effective date: Upon passage with necessary vote or September 1, 2007.

EFFECTIVE DATE

This Act takes effect immediately if it receives a vote of two-thirds of each house, otherwise it is effective September 1, 2007.

COMPARISON OF ORIGINAL TO SUBSTITUTE

SECTION 1 of the original amends subsection (a) and (d) of Section 39.152, Utilities Code as follows:

(a) Requires the Public Utility Commission of Texas (PUC) to certify a power region if, among other certain requirements, no person owns or 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 by Section 39.154 (Limitation of Ownership of Installed Capacity).

(d) Makes conforming changes.

SECTION 1 of the substitute amends subsection (a) and (d) of Section 39.152, and adds subparagraph (a-1) of Section 39.152, Utilities Code as follows:

(a) Requires the Public Utility Commission of Texas (PUC) to certify a power region if, among other certain requirements, no person owns, controls, or owns and controls in any combination more than 20 percent of the installed generation capacity located in or capable of delivering electricity to a power region, as determined by Section 39.154 (Limitation of Ownership of Installed Capacity).

(a-1) Allows the PUC to certify a power region in which a person owns, controls, or owns and controls in any combination more than 20 percent of the installed generation capacity either located in or capable of delivery to a power region (as determined by Section 39.154) if the person has entered into an agreement with the wholesale electric market monitor as described in Section 39.156 and the PUC has approved the agreement.

(d) Makes conforming changes.

SECTION 2 of the original amends Section 39.153, Utilities Code, by adding Subsection (a-1) and amending Subsections (e) and (f), as follows:

(a-1) Requires each electric utility subject to this section to sell at auction or otherwise divest additional entitlements, by September 30, 2008, to the utility's Texas jurisdictional installed generation capacity so that a utility does not control more than 20 percent of installed generation capacity in ERCOT or more than 20 percent of installed generation capacity in an ERCOT zonal boundary or a functional boundary recognized by the commission.

(e) Requires PUC to adopt additional rules by December 31, 2007, that define the scope of the auctions necessary to comply with Subsection (a-1). Makes a conforming change.

(f) Authorizes PUC to adopt additional rules that prescribe the procedure for the auction of the entitlements as required by Subsection (a-1), if necessary. Makes conforming changes.

SECTION 2 of the substitute amends Section 39.153, Utilities Code, by adding Subsections (a-1) and (a-2) and amending Subsections (e) and (f), as follows:

(a-1) Requires each electric utility subject to this section to sell at auction or otherwise divest additional entitlements, by September 30, 2008, to the utility's Texas jurisdictional installed generation capacity so that a utility does not own, control, or own and control in any combination more than 20 percent of installed generation capacity in ERCOT.

(a-2) The requirement of (a-1) does not apply to an electric utility or power generation company if that utility or company has entered into an agreement with the wholesale electric market monitor to mitigate the potential for market power abuse as described in Section 39.156 and the PUC has approved the agreement.

(e) Requires PUC to adopt additional rules by December 31, 2007, that define the scope of the auctions necessary to comply with Subsection (a-1). Makes a conforming change.

(f) Authorizes PUC to adopt additional rules that prescribe the procedure for the auction of the entitlements as required by Subsection (a-1), if necessary. Makes conforming changes.

SECTION 3 of the original amends Sections 39.154(a) and (c), Utilities Code, as follows:

(a) Prohibits a power generation company from owning or controlling, or any combination thereof, more than 20 percent of the installed generation capacity located in, or capable of delivering electricity to a power region, zone or functional market recognized by the PUC in the power region.

(c) Makes conforming changes.

SECTION 3 of the substitute amends Sections 39.154(a) and (c) and adds Subsection (a-1), Utilities Code, as follows:

(a) Prohibits a power generation company from owning, controlling, or owning and controlling in any combination more than 20 percent of the installed generation capacity located in, or capable of delivering electricity to a power region.

(a-1) The requirement of (a) does not apply to an electric utility or power generation company if that utility or company has entered into an agreement with the wholesale electric market monitor to mitigate the potential for market power abuse as described in Section 39.156 and the PUC has approved the agreement

(c) Makes conforming changes.

SECTION 4 of the original amends Section 39.155(a), Utilities Code, as follows;

(a) Requires each person, municipally owned utility, electric cooperative, and river authority that owns or controls generation facilities and offers electricity for sale in this state is required to report certain information to PUC.

SECTION 4 of the substitute amends Section 39.155(a), Utilities Code, as follows;

(a) Requires each person, municipally owned utility, electric cooperative, and river authority that owns or controls generation facilities and offers electricity for sale in this state is required to report certain information to PUC.

SECTION 5 of the original amends Sections 39.156(a), (b), and (g), Utilities Code, as follows:

(a) Redefines "market power mitigation plan" and "plan" to include a proposal to reduce ownership or control of installed generation capacity rather than capacity that is owned and controlled. .

(b) Requires an electric utility or power generation company that owns or controls, or any combination thereof, more than 20 percent of the generation capacity located in, or capable of delivering electricity to a power region, zone or functional market recognized

by the commission to file a market power mitigation plan with PUC by the 90th day after the date the electric utility's or power generation company's generation capacity exceeds the 20 percent limitation prescribed by this subsection.

(g) Includes certain additional criteria that PUC is required to consider in reaching its determination under Subsection (f) (regarding approving, modifying or rejecting a market power mitigation plan).

SECTION 5 of the substitute Amends Sections 39.156(a), (b), (f) and (g), Utilities Code, as follows:

(a) Redefines "market power mitigation plan" and "plan" to include a proposal to the wholesale electric market monitor to mitigate the potential for market power abuse.

(b) Requires an electric utility or power generation company that owns, controls, or owns and controls in any combination more than 20 percent of the generation capacity located in, or capable of delivering electricity to a power region to either file a market power mitigation plan with the PUC by the 90th day after the date the electric utility or power generation company's generation capacity exceeds the 20 percent limitation prescribed by this subsection if the utility or company intends to divest generation capacity or enter into a market power mitigation agreement with the wholesale market power monitor if the utility or company desires to continue to own or control the generation capacity.

(f) Includes market mitigation plans entered into by the wholesale market monitor with those that the PUC must approve, modify or reject within 180 days.

(g) Includes certain additional criteria that PUC is required to consider in reaching its determination under Subsection (f) (regarding approving, modifying or rejecting a market power mitigation plan).

SECTION 6 of the original amends Section 39.157, Utilities Code, by amending Subsections (a), (b), and (d) and adding Subsection (j), as follows:

(a) Includes requiring refunds or disgorgement of revenues received as a result of market power abuses as a method by which PUC may institute, as required, reasonable mitigation of market power upon finding that market power abuses or other violations of this section are occurring.

(b) Includes that a person who controls generation facilities is prohibited from owning transmission or distribution facilities in this state, beginning on the date of introduction of customer choice, except under certain exceptions. Makes conforming changes.

(d) Adds to the obligation of the PUC to adopt a rule governing the relationship between an electric utility and its competitive affiliates, as required that, a utility providing electric transmission or distribution services does not act in a manner that in any way suggests or implies that reliability of electric service, or restoration of service to a customer following an outage, is dependent upon a customer receiving service from a competitive affiliate of a utility. Amends the requirement that the PUC must adopt a rule that ensures a utility does not conduct joint advertising or promotional activities with a competitive affiliate by deleting the condition that this must be done in a manner that favors the competitive affiliate. Requires PUC to adopt a rule that ensures a utility does not temporarily assign, for less than three years, rather than one year, employees engaged in transmission or distribution systems operations to a competitive affiliate, and deletes an exception.

(j) Prohibits a competitive affiliate, after January 1, 2008, from using the utility's corporate name, trademark, brand, or logo or any portion of these if PUC determines that such use may be misleading to customers.

SECTION 6 of the substitute amends Section 39.157, Utilities Code, by amending Subsections (a), (b), and (d) and adding Subsection (j), as follows:

(a) Includes requiring refunds or disgorgement of revenues received as a result of market power abuses and requiring generating capacity auctions as methods by which PUC may institute, as required, reasonable mitigation of market power upon finding that market power abuses or other violations of this section are occurring.

(b) Includes that a person who controls generation facilities is prohibited from owning transmission or distribution facilities in this state, beginning on the date of introduction of customer choice, except under certain exceptions. Makes conforming changes.

(d) Adds to the obligation of the PUC to adopt a rule governing the relationship between an electric utility and its competitive affiliates, as required that, a utility providing electric transmission or distribution services does not act in a manner that in any way suggests or implies that reliability of electric service, or restoration of service to a customer following an outage, is dependent upon a customer receiving service from a competitive affiliate of a utility. Amends the requirement that the PUC must adopt a rule that ensures a utility does not conduct joint advertising or promotional activities with a competitive affiliate by deleting the condition that this must be done in a manner that favors the competitive affiliate. Requires PUC to adopt a rule that ensures a utility does not temporarily assign, for less than three years, rather than one year, employees engaged in transmission or distribution systems operations to a competitive affiliate, and deletes an exception.

(j) Prohibits a competitive affiliate, after January 1, 2008, from using the utility's corporate name, trademark, brand, or logo or any portion of these if PUC determines that such use may be misleading to customers.

SECTION 7 of the original amends subsection (a), section 39.158, Utilities Code as follows:

(a) Provides that a person who owns or controls generation facilities is encompassed by the requirements governing certain transactions regulated by this subsection.

The substitute does not contain this provision.

SECTION 8 of the original amends Section 39.407(a), Utilities Code, as follows:

(a) The PUC, except as otherwise provided by this subsection, is required to certify that the requirements of Section 39.152(a)(3) (regarding qualifying power regions) are met for electric utilities subject to this subchapter if the total capacity owned or controlled, or any combination thereof, by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the constrained geographic region served by each such utility plus the total available transmission capacity capable of delivering firm power and energy to that constrained geographic region. Modifies PUC's authorization to certify that the requirements of Section 39.152(a)(3) are met for electric utilities subject to this subchapter if PUC finds that the total capacity owned or controlled, or any combination thereof, by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the power region and another condition is met.

SECTION 7 of the substitute amends Section 39.407(a), Utilities Code, as follows:

(a) The PUC, except as otherwise provided by this subsection, is required to certify that the requirements of Section 39.152(a)(3) (regarding qualifying power regions) are met for electric utilities subject to this subchapter if the total capacity owned, controlled, or owned and controlled in any combination by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the constrained geographic region served by each such utility plus the total available transmission capacity capable of delivering firm power and energy to that constrained geographic region. Modifies PUC's authorization to certify that the requirements of Section 39.152(a)(3) are met for electric utilities subject to this subchapter if PUC finds that the total capacity owned, controlled, or owned and controlled in any combination by each such utility and its affiliates does not exceed 20 percent of the total installed generation capacity within the power region and another condition is met.

SECTION 9 of the original amends Section 39.453(b), Utilities Code, as follows:

(b) Modifies the requirement that PUC certify that the requirement of Section 39.152(a)(3) is met for an electric utility subject to this subchapter only if PUC finds that the total capacity owned or controlled, or any combination thereof, by the electric utility and the utility's affiliates does not exceed 20 percent of the total installed generation capacity within the power region of that utility.

SECTION 8 of the substitute amends Section 39.453(b), Utilities Code, as follows:

(b) Modifies the requirement that PUC certify that the requirement of Section 39.152(a)(3) is met for an electric utility subject to this subchapter only if PUC finds that the total capacity owned, controlled, or owned and controlled in any combination by the electric utility and the utility's affiliates does not exceed 20 percent of the total installed generation capacity within the power region of that utility.

SECTION 10 of the original repeals Section 39.153(b) (regarding auctioning the capacity entitlements of electric utilities) and Section 39.154(e) (regarding calculation of generation shares owned and controlled under Sections 39.154 and 39.156), Utilities Code.

SECTION 9 of the substitute repeals Section 39.153(b) (regarding auctioning the capacity entitlements of electric utilities) and Section 39.154(e) (regarding calculation of generation shares owned and controlled under Sections 39.154 and 39.156), Utilities Code.

SECTION 11 of the original establishes an effective date: Upon passage or September 1, 2007.

SECTION 10 of the substitute establishes an effective date: Upon passage or September 1, 2007.