

BILL ANALYSIS

C.S.S.B. 483
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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 (PUC), 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 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 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 Section 39.152, Utilities Code, by amending Subsections (a) and (d) and by adding Subsection (a-1), 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 to mitigate the potential for market power abuse under Section 39.156 and the PUC has approved the agreement.

(d) Conforms subsection (d) to changes made in subsections (a)(3) and (a-1) and clarifies that, for a power region outside ERCOT, a power generation company that is affiliated with an electric utility may not own, control, or own and control in any combination more than 20 percent of the installed generation capacity in a geographic market that includes the power region, using the guidelines, standards, and methods adopted by the Federal Energy Regulatory Commission.

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 or power generation company subject to Section 39.153 to sell at auction or otherwise divest additional entitlements, by September 30, 2008, to the utility's or company's Texas jurisdictional installed generation capacity to ensure that a utility or power generation company does not own, control, or own and control in any combination more than 20 percent of the installed generation capacity in ERCOT.

(a-2) Provides that Subsection (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 under 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 conforming changes.

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

SECTION 3. Amends Section 39.154, Utilities Code, by amending Subsections (a) and (c) and adding Subsection (a-1), 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) Provides that Subsection (a) does not apply to a power generation company if that company has entered into an agreement with the wholesale electric market monitor to mitigate the potential for market power abuse under Section 39.156 and the PUC has approved the agreement.

(c) Includes in the calculation of percentage shares of installed generation capacity, that capacity owned or controlled, rather than owned and controlled, by a power generation company and any entity that is affiliated with that power generation company within the power region, reduced by the installed generation capacity of those facilities that are made subject to capacity auctions under Sections 39.153(a), (a-1), and (d).

SECTION 4. Amends Section 39.155(a), Utilities Code, to require that each person, municipally owned utility, electric cooperative, and river authority that controls generation facilities and offers electricity for sale in this state 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" or "plan" to mean a written proposal by an electric utility or a power generation company for reducing its ownership or control of installed generation capacity or 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 if the utility or company intends to divest generation capacity, or to enter into an agreement with the wholesale market power monitor to mitigate the potential for market power abuse if the utility or company desires to continue to own or control the generation capacity. Requires the utility or company to file the plan or enter into the agreement not later than the 90th day after the date the utility's or company's generation capacity exceeds the 20 percent limitation. Makes conforming changes.

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

(g) Includes certain additional criteria (the control of generation through the use of contracts between affiliated retail electric providers and independent power producers; and the emissions credits owned or controlled in a nonattainment area for national ambient air quality standards) 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) On finding that market power abuse or other violations of this section are occurring, the commission shall require reasonable mitigation of the market power by requiring refunds or disgorgement of revenues received as a result of market power abuses, by ordering the auction of entitlements to generating capacity, or by using one of the other remedies laid out in this section.

(b) Includes that a person who owns or 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. However, nothing in this chapter shall prohibit a power generation company affiliated with a transmission and distribution utility from owning or controlling generation facilities.

(d) Adds to the obligation of the PUC to adopt a rule governing the relationship between a transmission and distribution utility and its competitive affiliates, so that the utility 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. Requires the PUC to adopt a rule prohibiting the utility from conducting joint advertising or promotional activities with a competitive affiliate by deleting the provision that allowed those activities in certain circumstances. Requires the 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 that 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, rather than owned and controlled, 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: Repeals Section 39.153(b) and Section 39.154(e), 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 subsection (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) Conforms subsection (d) to changes made in subsections (a)(3) and (a-1) and clarifies that, for a power region outside ERCOT, a power generation company that is affiliated with an electric utility may not own, control, or own and control in any combination more than 20 percent of the installed generation capacity in a geographic market that includes the power region, using the guidelines, standards, and methods adopted by the Federal Energy Regulatory Commission.

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 section 39.153 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 25 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 conforming changes.

(f) Authorizes PUC to adopt additional rules that prescribe the procedures 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 or power generation company subject to this section to sell at auction or otherwise divest additional entitlements, by September 30, 2008, to the utility's or the company's Texas jurisdictional installed generation capacity so that a utility or company 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) and adding Subsection (f), 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 ERCOT, or 25 percent of the installed generation capacity in a power region, zone or functional market recognized by the PUC in the power region.

(c) Makes conforming changes.

(f) Excludes from the percentage market shares of installed generation capacity owned or controlled by a power generation company under this section or Section 39.156 any capacity generated from integrated gasification combined cycle or other similar clean coal technologies.

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 a power generation company if that 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) Includes in the calculation of percentage shares of installed generation capacity, that capacity owned or controlled, rather than owned and controlled, by a power generation company and any entity that is affiliated with that power generation company within the power region, reduced by the installed generation capacity of those facilities that are made subject to capacity auctions under Sections 39.153(a), (a-1), and (d).

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 controls generation facilities and offers electricity for sale in this state to report certain information to PUC.

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

(a) Redefines "market power mitigation plan" or "plan" to include a proposal to reduce ownership or control of installed generation capacity.

(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 ERCOT, or 25 percent of the installed generation capacity in a power region, zone or functional market recognized by the commission in the power region 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. Makes conforming changes.

(f) Allows the commission the authority to modify a plan to require divestiture by the electric utility or the power generation company.

(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 (the control of generation through the use of contracts between affiliated retail electric providers and independent power producers; and the emissions credits owned or controlled in a nonattainment area for national ambient air quality standards) 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, to the extent feasible, 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 have occurred or are presently occurring. In lieu of seeking a civil penalty, the PUC may require a person found to have engaged in market power abuse to pay equivalent funds to an existing emergency bill payment assistance program operated by local assistance agencies that are supported by the Texas Department of Housing and Community Affairs.

If the market monitor issues a report under Section 39.1515 indicating that market power abuses or other violations have occurred or are occurring, the executive director shall promptly approve or reject the findings of the market monitor and pursue all appropriate administrative remedies. After finding that market power abuse has occurred and assessing all administrative remedies the PUC shall refer the matter to the Attorney General for further action, including imposition of civil penalties, criminal prosecution under Section 15.030, or coordinating and assisting in local criminal prosecution.

(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 a transmission and distribution utility and its competitive affiliates, so that the utility 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. Requires PUC to adopt a rule prohibiting the utility from conducting joint advertising or promotional activities with a competitive affiliate by deleting the provision that allowed that activity in certain circumstances. 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) On finding that market power abuse or other violations of this section are occurring, the commission shall require reasonable mitigation of the market power by requiring refunds or disgorgement of revenues received as a result of market power abuses, by ordering the auction of entitlements to generating capacity, or by using one of the other remedies laid out in this section.

(b) Includes that a person who owns or 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. However, nothing in this chapter shall prohibit a power generation company affiliated with a transmission and distribution utility from owning or controlling generation facilities.

(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 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, rather than owned and controlled, 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 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, rather than owned and controlled, 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 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, 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 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 9 of the substitute repeals Section 39.153(b), and Section 39.154(e), Utilities Code.

SECTION 10 of the original repeals Section 39.153(b), Section 39.154(e), and Section 39.156(d), Utilities Code.

SECTION 10 of the substitute establishes an effective date: Upon passage, or, if the Act does not receive the necessary vote, September 1, 2007.

SECTION 11 of the original establishes an effective date: Upon passage, or, if the Act does not receive the necessary vote, September 1, 2007.