

By: King of Parker

H.B. No. 1190

Substitute the following for H.B. No. 1190:

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C.S.H.B. No. 1190

A BILL TO BE ENTITLED

AN ACT

1
2 relating to regulation of electric generation capacity ownership in
3 the electric power market.

4 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

5 SECTION 1. Section 39.152, Utilities Code, is amended by
6 amending Subsections (a) and (d) and adding Subsection (a-1) to
7 read as follows:

8 (a) The commission shall certify a power region if:

9 (1) a sufficient number of interconnected utilities in
10 the power region fall under the operational control of an
11 independent organization as described by Section 39.151;

12 (2) the power region has a generally applicable tariff
13 that guarantees open and nondiscriminatory access for all users to
14 transmission and distribution facilities in the power region as
15 provided by Section 39.203; and

16 (3) no person owns, controls, or owns and controls in
17 any combination more than 20 percent of the installed generation
18 capacity located in or capable of delivering electricity to a power
19 region, as determined according to Section 39.154.

20 (a-1) Notwithstanding Subsection (a)(3), the commission may
21 certify a power region in which a person owns, controls, or owns and
22 controls in any combination more than 20 percent of the installed
23 generation capacity located in or capable of delivering electricity
24 to the power region, as determined according to Section 39.154, if:

1 (1) the person has entered into an agreement with the
2 wholesale electric market monitor to mitigate the potential for
3 market power abuse under Section 39.156; and

4 (2) the commission has approved the agreement.

5 (d) For a power region outside of ERCOT, a power generation
6 company that is affiliated with an electric utility may elect to
7 demonstrate that it meets the requirements of Subsection (a)(3) by
8 showing that it does not own, control, or own and control in any
9 combination more than 20 percent of the installed generation
10 capacity in a geographic market that includes the power region,
11 using the guidelines, standards, and methods adopted by the Federal
12 Energy Regulatory Commission.

13 SECTION 2. Section 39.153, Utilities Code, is amended by
14 adding Subsections (a-1) and (a-2) and amending Subsections (e) and
15 (f) to read as follows:

16 (a-1) Not later than September 30, 2008, each electric
17 utility or power generation company subject to this section shall
18 sell at auction or otherwise divest additional entitlements to the
19 utility's or company's Texas jurisdictional installed generation
20 capacity to ensure that a utility or power generation company does
21 not own, control, or own and control in any combination more than 20
22 percent of the installed generation capacity in ERCOT.

23 (a-2) Subsection (a-1) does not apply to an electric utility
24 or power generation company if:

25 (1) the utility or company has entered into an
26 agreement with the wholesale electric market monitor to mitigate
27 the potential for market power abuse under Section 39.156; and

1 (2) the commission has approved the agreement.

2 (e) The commission shall adopt rules by December 31, 2000,
3 that define the scope of the initial capacity entitlements to be
4 auctioned. Not later than December 31, 2007, the commission shall
5 adopt additional rules that define the scope of the auctions
6 necessary to comply with Subsection (a-1). Entitlements may be
7 auctioned in blocks of less than 15 percent. The rules shall state
8 the minimum amount of capacity that can be sold at auction as an
9 entitlement. At a minimum, the rules shall provide that the
10 entitlements:

11 (1) may be sold and purchased in periods of not less
12 than one month nor more than four years;

13 (2) may be resold to any lawful purchaser, except for a
14 retail electric provider affiliated with the electric utility or
15 power generation company that originally auctioned the
16 entitlement;

17 (3) include no possessory interest in the unit from
18 which the power is produced;

19 (4) include no obligations of a possessory owner of an
20 interest in the unit from which the power is produced; and

21 (5) give the purchaser the right to designate the
22 dispatch of the entitlement, subject to planned outages, outages
23 beyond the control of the utility or company operating the unit, and
24 other considerations subject to the oversight of the applicable
25 independent organization.

26 (f) The commission shall adopt rules by December 31, 2000,
27 that prescribe the procedure for the auction of the entitlements as

1 required by Subsection (a). The commission by rule may adopt
2 procedures for the auction of the entitlements under Subsection
3 (a-1) as necessary. The rules shall include:

4 (1) a process for conducting the auction or auctions,
5 including who shall conduct it, how often it shall be conducted, and
6 how winning bidders shall be determined;

7 (2) a process for the electric utility or power
8 generation company to designate which generation units or
9 combination of units are offered for auction;

10 (3) a provision for the utility or company to
11 establish an opening bid price based on the electric utility's or
12 power generation company's expected cost, with the commission
13 prescribing the means for determining the opening bid price, which
14 may not include return on equity; and

15 (4) a provision that allows a bidder to specify the
16 magnitude and term of the entitlement, subject to the conditions
17 established in Subsection (e).

18 SECTION 3. Section 39.154, Utilities Code, is amended by
19 amending Subsections (a) and (c) and adding Subsection (a-1) to
20 read as follows:

21 (a) Beginning on the date of introduction of customer
22 choice, a power generation company may not own, control, or own and
23 control in any combination more than 20 percent of the installed
24 generation capacity located in, or capable of delivering
25 electricity to, a power region.

26 (a-1) Subsection (a) does not apply to a power generation
27 company if:

1 (1) the power generation company has entered into an
2 agreement with the wholesale electric market monitor to mitigate
3 the potential for market power abuse under Section 39.156; and

4 (2) the commission has approved the agreement.

5 (c) In determining the percentage shares of installed
6 generation capacity under this section, the commission shall
7 combine capacity owned or [~~and~~] controlled by a power generation
8 company and any entity that is affiliated with that power
9 generation company within the power region, reduced by the
10 installed generation capacity of those facilities that are made
11 subject to capacity auctions under Sections 39.153(a), (a-1), and
12 (d).

13 SECTION 4. Section 39.155(a), Utilities Code, is amended to
14 read as follows:

15 (a) Each person, municipally owned utility, electric
16 cooperative, and river authority that owns or controls generation
17 facilities and offers electricity for sale in this state shall
18 report to the commission its installed generation capacity, the
19 total amount of capacity available for sale to others, the total
20 amount of capacity under contract to others, the total amount of
21 capacity dedicated to its own use, its annual wholesale power sales
22 in the state, its annual retail power sales in the state, and any
23 other information necessary for the commission to assess market
24 power or the development of a competitive retail market in the
25 state. The commission shall by rule prescribe the nature and detail
26 of the reporting requirements and shall administer those reporting
27 requirements in a manner that ensures the confidentiality of

1 competitively sensitive information.

2 SECTION 5. Sections 39.156(a), (b), (f), and (g), Utilities
3 Code, are amended to read as follows:

4 (a) In this section, "market power mitigation plan" or
5 "plan" means:

6 (1) a written proposal by an electric utility or a
7 power generation company for reducing its ownership or ~~and~~
8 control of installed generation capacity as required by Section
9 39.154; or

10 (2) a proposal to the wholesale electric market
11 monitor to mitigate the potential for market power abuse.

12 (b) An electric utility or power generation company that
13 owns, controls, or owns and controls in any combination ~~owning and~~
14 ~~controlling~~ more than 20 percent of the generation capacity
15 located in, or capable of delivering electricity to, a power
16 region, not later than the 90th day after the date the utility's or
17 company's generation capacity exceeds the 20 percent limitation
18 prescribed by this subsection, shall:

19 (1) file a market power mitigation plan with the
20 commission if the utility or company intends to divest generation
21 capacity; or

22 (2) enter into an agreement to mitigate the potential
23 for market power abuse with the wholesale electric market monitor
24 if the utility or company wants to continue owning or controlling
25 the generation capacity ~~[not later than December 1, 2000]~~.

26 (f) The commission shall approve, modify, or reject a plan
27 within 180 days after the date of a filing under Subsection (b)(1)

1 or after the date the wholesale electric market monitor files with
2 the commission a market power mitigation plan entered into under
3 Subsection (b)(2) [~~(b)~~]. The commission may not modify a plan to
4 require divestiture by the electric utility or the power generation
5 company.

6 (g) In reaching its determination under Subsection (f), the
7 commission shall consider:

8 (1) the degree to which the electric utility's or power
9 generation company's stranded costs, if any, are minimized;

10 (2) whether on disposition of the generation assets
11 the reasonable value is likely to be received;

12 (3) the effect of the plan on the electric utility's or
13 power generation company's federal income taxes;

14 (4) the effect of the plan on current and potential
15 competitors in the generation market; [~~and~~]

16 (5) whether the plan is consistent with the public
17 interest;

18 (6) the control of generation through the use of
19 contracts between affiliated retail electric providers and
20 independent power producers; and

21 (7) the emissions credits owned or controlled in a
22 nonattainment area for national ambient air quality standards.

23 SECTION 6. Section 39.157, Utilities Code, is amended by
24 amending Subsections (a), (b), and (d) and adding Subsection (j) to
25 read as follows:

26 (a) The commission shall monitor market power associated
27 with the generation, transmission, distribution, and sale of

1 electricity in this state. On a finding that market power abuses or
2 other violations of this section are occurring, the commission
3 shall require reasonable mitigation of the market power by ordering
4 the construction of additional transmission or distribution
5 facilities, by seeking an injunction or civil penalties as
6 necessary to eliminate or to remedy the market power abuse or
7 violation as authorized by Chapter 15, by requiring refunds or
8 disgorgement of revenues received as a result of market power
9 abuses, by ordering the auction of entitlements to generating
10 capacity, by imposing an administrative penalty as authorized by
11 Chapter 15, or by suspending, revoking, or amending a certificate
12 or registration as authorized by Section 39.356. Section 15.024(c)
13 does not apply to an administrative penalty imposed under this
14 section. For purposes of this subchapter, market power abuses are
15 practices by persons possessing market power that are unreasonably
16 discriminatory or tend to unreasonably restrict, impair, or reduce
17 the level of competition, including practices that tie unregulated
18 products or services to regulated products or services or
19 unreasonably discriminate in the provision of regulated services.
20 For purposes of this section, "market power abuses" include
21 predatory pricing, withholding of production, precluding entry,
22 and collusion. A violation of the code of conduct provided by
23 Subsection (d) that materially impairs the ability of a person to
24 compete in a competitive market shall be deemed to be an abuse of
25 market power. The possession of a high market share in a market
26 open to competition may not, of itself, be deemed to be an abuse of
27 market power; however, this sentence shall not affect the

1 application of state and federal antitrust laws.

2 (b) Beginning on the date of introduction of customer
3 choice, a person that owns or controls generation facilities may
4 not own transmission or distribution facilities in this state
5 except for those facilities necessary to interconnect a generation
6 facility with the transmission or distribution network, a facility
7 not dedicated to public use, or a facility otherwise excluded from
8 the definition of "electric utility" under Section 31.002.
9 However, nothing in this chapter shall prohibit a power generation
10 company affiliated with a transmission and distribution utility
11 from owning or controlling generation facilities.

12 (d) Not later than January 10, 2000, the commission shall
13 adopt rules and enforcement procedures to govern transactions or
14 activities between a transmission and distribution utility and its
15 competitive affiliates to avoid potential market power abuses and
16 cross-subsidizations between regulated and competitive activities
17 both during the transition to and after the introduction of
18 competition. Nothing in this subsection is intended to affect or
19 modify the obligations or duties relating to any rules or standards
20 of conduct that may apply to a utility or the utility's affiliates
21 under orders or regulations of the Federal Energy Regulatory
22 Commission or the Securities and Exchange Commission. A utility
23 that is subject to statutes or regulations in other states that
24 conflict with a provision of this section may petition the
25 commission for a waiver of the conflicting provision on a showing of
26 good cause. The rules adopted under this section shall ensure that:

27 (1) a utility makes any products and services, other

1 than corporate support services, that it provides to a competitive
2 affiliate available, contemporaneously and in the same manner, to
3 the competitive affiliate's competitors and applies its tariffs,
4 prices, terms, conditions, and discounts for those products and
5 services in the same manner to all similarly situated entities;

6 (2) a utility does not:

7 (A) give a competitive affiliate or a competitive
8 affiliate's customers any preferential advantage, access, or
9 treatment regarding services other than corporate support
10 services; or

11 (B) act in a manner that is discriminatory or
12 anticompetitive with respect to a nonaffiliated competitor of a
13 competitive affiliate;

14 (3) a utility providing electric transmission or
15 distribution services:

16 (A) provides those services on nondiscriminatory
17 terms and conditions;

18 (B) does not establish as a condition for the
19 provision of those services the purchase of other goods or services
20 from the utility or the competitive affiliate; ~~and~~

21 (C) does not provide competitive affiliates
22 preferential access to the utility's transmission and distribution
23 systems or to information about those systems; and

24 (D) does not act in a manner that in any way
25 suggests or implies that reliability of electric service, or
26 restoration of service to a customer following an outage, is
27 dependent on a customer receiving service from a competitive

1 affiliate of a utility;

2 (4) a utility does not release any proprietary
3 customer information to a competitive affiliate or any other
4 entity, other than an independent organization as defined by
5 Section 39.151 or a provider of corporate support services for the
6 purposes of providing the services, without obtaining prior
7 verifiable authorization, as determined from the commission, from
8 the customer;

9 (5) a utility does not:

10 (A) communicate with a current or potential
11 customer about products or services offered by a competitive
12 affiliate in a manner that favors a competitive affiliate; or

13 (B) allow a competitive affiliate, before
14 September 1, 2005, to use the utility's corporate name, trademark,
15 brand, or logo unless the competitive affiliate includes on
16 employee business cards and in its advertisements of specific
17 services to existing or potential residential or small commercial
18 customers locating within the utility's certificated service area a
19 disclaimer that states, "(Name of competitive affiliate) is not the
20 same company as (name of utility) and is not regulated by the Public
21 Utility Commission of Texas, and you do not have to buy (name of
22 competitive affiliate)'s products to continue to receive quality
23 regulated services from (name of utility).";

24 (6) a utility does not conduct joint advertising or
25 promotional activities with a competitive affiliate [~~in a manner~~
26 ~~that favors the competitive affiliate~~];

27 (7) a utility is a separate, independent entity from

1 any competitive affiliates and, except as provided by Subdivisions
2 (8) and (9), does not share employees, facilities, information, or
3 other resources, other than permissible corporate support
4 services, with those competitive affiliates unless the utility can
5 prove to the commission that the sharing will not compromise the
6 public interest;

7 (8) a utility's office space is physically separated
8 from the office space of the utility's competitive affiliates by
9 being located in separate buildings or, if within the same
10 building, by a method such as having the offices on separate floors
11 or with separate access, unless otherwise approved by the
12 commission;

13 (9) a utility and a competitive affiliate:

14 (A) may, to the extent the utility implements
15 adequate safeguards precluding employees of a competitive
16 affiliate from gaining access to information in a manner
17 inconsistent with Subsection (g) or (i), share common officers and
18 directors, property, equipment, offices to the extent consistent
19 with Subdivision (8), credit, investment, or financing
20 arrangements to the extent consistent with Subdivision (17),
21 computer systems, information systems, and corporate support
22 services; and

23 (B) are not required to enter into prior written
24 contracts or competitive solicitations for non-tariffed
25 transactions between the utility and the competitive affiliate,
26 except that the commission by rule may require the utility and the
27 competitive affiliate to enter into prior written contracts or

1 competitive solicitations for certain classes of transactions,
2 other than corporate support services, that have a per unit value of
3 more than \$75,000 or that total more than \$1 million;

4 (10) a utility does not temporarily assign, for less
5 than three years [~~one year~~], employees engaged in transmission or
6 distribution system operations to a competitive affiliate [~~unless~~
7 ~~the employee does not have knowledge of information that is~~
8 ~~intended to be protected under this section~~];

9 (11) a utility does not subsidize the business
10 activities of an affiliate with revenues from a regulated service;

11 (12) a utility and its affiliates fully allocate costs
12 for any shared services, corporate support services, and other
13 items described by Subdivisions (8) and (9);

14 (13) a utility and its affiliates keep separate books
15 of accounts and records and the commission may review records
16 relating to a transaction between a utility and an affiliate;

17 (14) assets transferred or services provided between a
18 utility and an affiliate, other than transfers that facilitate
19 unbundling under Section 39.051 or asset valuation under Section
20 39.262, are priced at a level that is fair and reasonable to the
21 customers of the utility and reflects the market value of the assets
22 or services or the utility's fully allocated cost to provide those
23 assets or services;

24 (15) regulated services that a utility provides on a
25 routine or recurring basis are included in a tariff that is subject
26 to commission approval;

27 (16) each transaction between a utility and a

1 competitive affiliate is conducted at arm's length; and

2 (17) a utility does not allow an affiliate to obtain
3 credit under an arrangement that would include a specific pledge of
4 assets in the rate base of the utility or a pledge of cash
5 reasonably necessary for utility operations.

6 (j) After January 1, 2008, a competitive affiliate may not
7 use the utility's corporate name, trademark, brand, or logo or any
8 portion of the utility's corporate name, trademark, brand, or logo
9 if the commission determines that the use may be misleading to a
10 customer.

11 SECTION 7. Section 39.407(a), Utilities Code, is amended to
12 read as follows:

13 (a) If an electric utility chooses on or after January 1,
14 2007, to participate in customer choice, the commission may not
15 authorize customer choice until the applicable power region has
16 been certified as a qualifying power region under Section
17 39.152(a). Except as otherwise provided by this subsection, the
18 commission shall certify that the requirements of Section
19 39.152(a)(3) are met for electric utilities subject to this
20 subchapter only upon a finding that the total capacity owned,
21 controlled, or owned and controlled in any combination by each such
22 electric utility and its affiliates does not exceed 20 percent of
23 the total installed generation capacity within the constrained
24 geographic region served by each such electric utility plus the
25 total available transmission capacity capable of delivering firm
26 power and energy to that constrained geographic region. Not later
27 than May 1, 2002, each electric utility subject to this subchapter

1 shall submit to the electric utility restructuring legislative
2 oversight committee an analysis of the needed transmission
3 facilities necessary to make the electric utility's service area
4 transmission capability comparable to areas within the ERCOT power
5 region. On or after September 1, 2003, each electric utility
6 subject to this subchapter shall file the utility's plans to
7 develop the utility's transmission interconnections with the
8 utility's power region or other adjacent power regions. The
9 commission shall review the plan and not later than the 180th day
10 after the date the plan is filed, determine the additional
11 transmission facilities necessary to provide access to power and
12 energy that is comparable to the access provided in areas within the
13 ERCOT power region; provided, however, that if a hearing is
14 requested by any party to the proceeding, the 180-day deadline will
15 be extended one day for each day of hearings. The commission shall,
16 as a part of the commission's approval of the plan, approve a rate
17 rider mechanism for the recovery of the incremental costs of those
18 facilities after the facilities are completed and in-service. A
19 finding of need under this subsection shall meet the requirements
20 of Sections 37.056(c)(1), (2), and (4)(E). The commission may
21 certify that the requirements of Section 39.152(a)(3) are met for
22 electric utilities subject to this subchapter if the commission
23 finds that:

24 (1) each such utility has sufficient transmission
25 facilities to provide customers access to power and energy from
26 capacity controlled by suppliers not affiliated with the incumbent
27 utility that is comparable to the access to power and energy from

1 capacity controlled by suppliers not affiliated with the incumbent
2 utilities in areas of the ERCOT power region; and

3 (2) the total capacity owned, controlled, or owned and
4 controlled in any combination by each such electric utility and its
5 affiliates does not exceed 20 percent of the total installed
6 generation capacity within the power region.

7 SECTION 8. Section 39.453(b), Utilities Code, is amended
8 to read as follows:

9 (b) The commission shall certify that the requirement of
10 Section 39.152(a)(3) is met for an electric utility subject to this
11 subchapter only if the commission finds that the total capacity
12 owned, controlled, or owned and controlled in any combination by
13 the electric utility and the utility's affiliates does not exceed
14 20 percent of the total installed generation capacity within the
15 power region of that utility.

16 SECTION 9. Sections 39.153(b) and 39.154(e), Utilities
17 Code, are repealed.

18 SECTION 10. This Act takes effect immediately if it
19 receives a vote of two-thirds of all the members elected to each
20 house, as provided by Section 39, Article III, Texas Constitution.
21 If this Act does not receive the vote necessary for immediate
22 effect, this Act takes effect September 1, 2007.