

By: Solomons

H.B. No. 2133

Substitute the following for H.B. No. 2133:

By: Cook

C.S.H.B. No. 2133

A BILL TO BE ENTITLED

1 AN ACT

2 relating to the Public Utility Commission of Texas' authority to  
3 disgorge revenue obtained as a result of certain violations;  
4 providing an administrative penalty.

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

6 SECTION 1. The heading to Section 15.023, Utilities Code,  
7 is amended to read as follows:

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

10 SECTION 2. Section 15.023, Utilities Code, is amended by  
11 adding Subsections (e), (f), and (g) to read as follows:

12 (e) For a violation of Section 39.157, the commission shall,  
13 in addition to the assessment of a penalty, order disgorgement of  
14 all excess revenue resulting from the violation. For any other  
15 violation of the statutes, rules, or protocols relating to  
16 wholesale electric markets, the commission may, in addition to the  
17 assessment of a penalty, order disgorgement of all excess revenue  
18 resulting from the violation.

19 (f) The commission and a person may develop and enter into a  
20 voluntary mitigation plan relating to a violation of Section 39.157  
21 or rules adopted by the commission under that section. If the  
22 commission and a person enter into a voluntary mitigation plan,  
23 adherence to the plan constitutes an absolute defense against an  
24 alleged violation with respect to activities covered by the plan.

1        (g) In this subchapter, "excess revenue" means revenue in  
2 excess of revenue that would have occurred absent a violation.

3        SECTION 3. The heading to Section 15.024, Utilities Code,  
4 is amended to read as follows:

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

7        SECTION 4. Section 15.024(f), Utilities Code, is amended to  
8 read as follows:

9        (f) If the person requests a hearing or fails to timely  
10 respond to the notice, the executive director shall set a hearing  
11 and give notice of the hearing to the person. The parties to a  
12 disgorgement proceeding under this subchapter shall be limited to  
13 the person and the commission, including the independent market  
14 monitor. The hearing shall be held by an administrative law judge of  
15 the State Office of Administrative Hearings. The administrative  
16 law judge shall make findings of fact and conclusions of law and  
17 promptly issue to the commission a proposal for a decision about the  
18 occurrence of the violation and the amount of a proposed penalty.  
19 Based on the findings of fact, conclusions of law, and proposal for  
20 a decision, the commission by order may find that a violation has  
21 occurred and impose a penalty or disgorgement order or may find that  
22 no violation occurred.

23        SECTION 5. Section 15.025, Utilities Code, is amended by  
24 adding Subsections (e) and (f) to read as follows:

25        (e) Any excess revenue ordered disgorged under this section  
26 for a violation of the statutes, rules, or protocols relating to  
27 wholesale electric markets shall be returned to the affected

1 wholesale electric market participants to be used to reduce costs  
2 or fees incurred by retail electric customers. The commission  
3 shall adopt rules to prescribe how revenue shall be returned to the  
4 affected wholesale electric market participants under this  
5 subsection.

6 (f) For purposes of this section and Section 15.026, a  
7 reference to a penalty shall be construed to include disgorgement.

8 SECTION 6. Sections 15.026(a) and (b), Utilities Code, are  
9 amended to read as follows:

10 (a) Judicial review of a commission order imposing an  
11 administrative penalty or disgorgement is:

12 (1) instituted by filing a petition as provided by  
13 Subchapter G, Chapter 2001, Government Code; and

14 (2) under the substantial evidence rule.

15 (b) If the court sustains the occurrence of the violation,  
16 the court may uphold or reduce the amount of the penalty or  
17 disgorgement and order the person to pay the full or reduced amount  
18 of the penalty or disgorgement. If the court does not sustain the  
19 occurrence of the violation, the court shall order that no penalty  
20 or disgorgement is owed.

21 SECTION 7. Section 39.157(a), Utilities Code, is amended to  
22 read as follows:

23 (a) The commission shall monitor market power associated  
24 with the generation, transmission, distribution, and sale of  
25 electricity in this state. On a finding that market power abuses or  
26 other violations of this section are occurring, the commission  
27 shall require reasonable mitigation of the market power by ordering

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

25 SECTION 8. The changes in law made by this Act apply only to  
26 a violation that occurs on or after the effective date of this Act.  
27 A violation that occurs before the effective date of this Act is

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1 covered by the law in effect at the time the violation occurred, and  
2 the former law is continued in effect for that purpose.

3 SECTION 9. This Act takes effect September 1, 2011.