

1-1 By: Solomons (Senate Sponsor - Fraser) H.B. No. 2133  
1-2 (In the Senate - Received from the House April 28, 2011;  
1-3 May 3, 2011, read first time and referred to Committee on Natural  
1-4 Resources; May 18, 2011, reported favorably by the following vote:  
1-5 Yeas 8, Nays 0; May 18, 2011, sent to printer.)

1-6 A BILL TO BE ENTITLED  
1-7 AN ACT

1-8 relating to the Public Utility Commission of Texas' authority to  
1-9 disgorge revenue obtained as a result of certain violations;  
1-10 providing an administrative penalty.

1-11 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-12 SECTION 1. The heading to Section 15.023, Utilities Code,  
1-13 is amended to read as follows:

1-14 Sec. 15.023. ADMINISTRATIVE PENALTY, DISGORGEMENT ORDER,  
1-15 OR MITIGATION PLAN.

1-16 SECTION 2. Section 15.023, Utilities Code, is amended by  
1-17 adding Subsections (e), (f), and (g) to read as follows:

1-18 (e) For a violation of Section 39.157, the commission shall,  
1-19 in addition to the assessment of a penalty, order disgorgement of  
1-20 all excess revenue resulting from the violation. For any other  
1-21 violation of the statutes, rules, or protocols relating to  
1-22 wholesale electric markets, the commission may, in addition to the  
1-23 assessment of a penalty, order disgorgement of all excess revenue  
1-24 resulting from the violation.

1-25 (f) The commission and a person may develop and enter into a  
1-26 voluntary mitigation plan relating to a violation of Section 39.157  
1-27 or rules adopted by the commission under that section. If the  
1-28 commission and a person enter into a voluntary mitigation plan,  
1-29 adherence to the plan constitutes an absolute defense against an  
1-30 alleged violation with respect to activities covered by the plan.

1-31 (g) In this subchapter, "excess revenue" means revenue in  
1-32 excess of revenue that would have occurred absent a violation.

1-33 SECTION 3. The heading to Section 15.024, Utilities Code,  
1-34 is amended to read as follows:

1-35 Sec. 15.024. ADMINISTRATIVE PENALTY ASSESSMENT OR  
1-36 DISGORGEMENT ORDER PROCEDURE.

1-37 SECTION 4. Section 15.024(f), Utilities Code, is amended to  
1-38 read as follows:

1-39 (f) If the person requests a hearing or fails to timely  
1-40 respond to the notice, the executive director shall set a hearing  
1-41 and give notice of the hearing to the person. The parties to a  
1-42 proceeding under this subchapter shall be limited to the person and  
1-43 the commission, including the independent market monitor. The  
1-44 hearing shall be held by an administrative law judge of the State  
1-45 Office of Administrative Hearings. The administrative law judge  
1-46 shall make findings of fact and conclusions of law and promptly  
1-47 issue to the commission a proposal for a decision about the  
1-48 occurrence of the violation and the amount of a proposed penalty.  
1-49 Based on the findings of fact, conclusions of law, and proposal for  
1-50 a decision, the commission by order may find that a violation has  
1-51 occurred and impose a penalty or disgorgement order or may find that  
1-52 no violation occurred.

1-53 SECTION 5. Section 15.025, Utilities Code, is amended by  
1-54 adding Subsections (e) and (f) to read as follows:

1-55 (e) Any excess revenue ordered disgorged under this section  
1-56 for a violation of the statutes, rules, or protocols relating to  
1-57 wholesale electric markets shall be returned to the affected  
1-58 wholesale electric market participants to be used to reduce costs  
1-59 or fees incurred by retail electric customers. The commission  
1-60 shall adopt rules to prescribe how revenue shall be returned to the  
1-61 affected wholesale electric market participants under this  
1-62 subsection.

1-63 (f) For purposes of this section and Section 15.026, a  
1-64 reference to a penalty shall be construed to include disgorgement.

2-1 SECTION 6. Sections 15.026(a) and (b), Utilities Code, are  
2-2 amended to read as follows:

2-3 (a) Judicial review of a commission order imposing an  
2-4 administrative penalty or disgorgement is:

2-5 (1) instituted by filing a petition as provided by  
2-6 Subchapter G, Chapter 2001, Government Code; and

2-7 (2) under the substantial evidence rule.

2-8 (b) If the court sustains the occurrence of the violation,  
2-9 the court may uphold or reduce the amount of the penalty or  
2-10 disgorgement and order the person to pay the full or reduced amount  
2-11 of the penalty or disgorgement. If the court does not sustain the  
2-12 occurrence of the violation, the court shall order that no penalty  
2-13 or disgorgement is owed.

2-14 SECTION 7. Section 39.157(a), Utilities Code, is amended to  
2-15 read as follows:

2-16 (a) The commission shall monitor market power associated  
2-17 with the generation, transmission, distribution, and sale of  
2-18 electricity in this state. On a finding that market power abuses or  
2-19 other violations of this section are occurring, the commission  
2-20 shall require reasonable mitigation of the market power by ordering  
2-21 the construction of additional transmission or distribution  
2-22 facilities, by seeking an injunction or civil penalties as  
2-23 necessary to eliminate or to remedy the market power abuse or  
2-24 violation as authorized by Chapter 15, by imposing an  
2-25 administrative penalty as authorized by Chapter 15, by ordering the  
2-26 disgorgement of excess revenue as authorized by Chapter 15, or by  
2-27 suspending, revoking, or amending a certificate or registration as  
2-28 authorized by Section 39.356. Section 15.024(c) does not apply to  
2-29 an administrative penalty imposed under this section. For purposes  
2-30 of this subchapter, market power abuses are practices by persons  
2-31 possessing market power that are unreasonably discriminatory or  
2-32 tend to unreasonably restrict, impair, or reduce the level of  
2-33 competition, including practices that tie unregulated products or  
2-34 services to regulated products or services or unreasonably  
2-35 discriminate in the provision of regulated services. For purposes  
2-36 of this section, "market power abuses" include predatory pricing,  
2-37 withholding of production, precluding entry, and collusion. A  
2-38 violation of the code of conduct provided by Subsection (d) that  
2-39 materially impairs the ability of a person to compete in a  
2-40 competitive market shall be deemed to be an abuse of market power.  
2-41 The possession of a high market share in a market open to  
2-42 competition may not, of itself, be deemed to be an abuse of market  
2-43 power; however, this sentence shall not affect the application of  
2-44 state and federal antitrust laws.

2-45 SECTION 8. The changes in law made by this Act apply only to  
2-46 a violation that occurs on or after the effective date of this Act.  
2-47 A violation that occurs before the effective date of this Act is  
2-48 covered by the law in effect at the time the violation occurred, and  
2-49 the former law is continued in effect for that purpose.

2-50 SECTION 9. This Act takes effect September 1, 2011.

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