

Emergency Cease and Desist Authority HB 1600

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Findings

- Emergency cease and desist authority would decrease competition and reduces reliability in the Texas electricity market.
- Eliminate the provision in HB 1600 that authorizes the PUC to issue emergency cease and desist orders to electric industry participants.
- Do not amend HB 1600 to increase the PUC's administrative penalty authority.

The Texas Sunset Advisory Commission's Staff Report on the Public Utility Commission of Texas (PUC) made the claim last year that, "PUC Lacks Regulatory Tools Needed to Provide Effective Oversight and Prevent Harm to the Public."¹

From there, the Staff Report recommended:

- In limited circumstances, authorize PUC to issue emergency cease-and-desist orders to electric industry participants.
- Increase PUC's administrative penalty authority to \$100,000 per violation per day for electric industry participants' violations of ERCOT's reliability protocols or PUC's wholesale reliability rules.²

The Sunset Commission rejected the recommendation to increase the PUC's administrative penalties, but accepted the recommendation on emergency cease and desist authority. As a result, HB 1600, which is up on the floor of the Texas House of Representatives on Wednesday, March 20, contains a provision granting the PUC the authority to issue emergency cease and desist orders to electric industry participants.

HB 1600 would add a new Subchapter D to Chap. 15 of the Public Utilities Code. It gives the PUC the authority to issue a cease and desist order on its own authority without going to district court. The PUC could also issue a cease and desist order without providing notice to the company or without providing the company an opportunity for a hearing. Only if "practicable" would a company have an opportunity for notice or a hearing.

HB 1600 provides the PUC broad discretion in deciding to issue a cease and desist order, using the following criteria:

- A. poses a threat to continuous and adequate electric service;
- B. is hazardous;
- C. creates an immediate danger to the public safety; or
- D. is causing or can be reasonably expected to cause an immediate injury to a customer of electric services and that the injury is incapable of being repaired or rectified by monetary compensation.³

Both the emergency cease and desist authority and the broad discretion contained in HB 1600 are completely unjustified given the facts. There is a complete lack of evidence provided in the Staff Report of any substantive violations or problems in the Texas electricity market to justify this increased intervention in the market. This provision in HB 1600 is particularly worrisome at a time when the primary challenge facing state policymakers is maintaining reliability in the face of government intervention in the Texas electricity market.

HB 1600's provision to grant the PUC cease and desist authority stands in sharp contrast to the findings of Potomac Economics, the Independent Market Monitor for the ERCOT Wholesale Market, which reports:

continued

Overall pricing outcomes from the nodal real-time market have met expectations for improved efficiency. ... The nodal market has also enabled the higher utilization of transmission facilities... Three areas where the nodal market implementation led to unanticipated outcomes were identified and quickly resolved in 2011. ... In summary, we find that the ERCOT nodal wholesale market performed competitively in 2011.⁴

The report of the Market Monitor highlights the fact that there is no evidence of problems in the market to justify the cease and desist provision in HB 1600.

It is important to note that the PUC already has cease and desist authority. Under current law, the PUC must “issue a notice to the alleged violator and provide an opportunity for a hearing before issuing a cease-and-desist order.” What HB 1600 would grant is *emergency* cease and desist authority, allowing the PUC to skip the notice and hearing if they are not practicable.

One might conclude that there is a need for emergency cease and desist authority if the PUC was actively using its current cease and desist authority. However, the Staff Report notes that the PUC has only used its current cease and desist authority *once* since FY 2007.

HB 1600 grants the PUC emergency cease and desist authority without evidence of problems in the market place. It would allow the PUC to stop a business from engaging in a commercial activity without providing any evidence of a violation and without the business being able to defend itself until it has lost a significant amount of money.

Existing PUC Authority to Stop Potentially Harmful Activity

Voluntary Cease and Desist Order: “[B]efore a lawsuit is filed, [an] agency or the Attorney General [may] send the offending party a Cease and Desist Order. The purpose of the Cease and Desist Order is to obtain voluntary compliance with the law and to formally advise the individual that further legal action will be taken by the agency unless the individual complies with the agency’s order or rules.” Source: Texas Administrative Law 2010 Handbook.

Administrative Cease and Desist Order: “To stop an action, PUC first must issue a notice to the alleged violator and provide an opportunity for a hearing before issuing a cease-and-desist order.” Source: Texas Sunset Commission Staff Report

Temporary Restraining Order/Injunction: Sec. 15.021, Utilities Code. Action To Enjoin Or Require Compliance. (a) The attorney general, on the request of the commission, shall apply in the name of the commission for a court order under Subsection (b) if the commission determines that a public utility or other person is:

- (1) engaging in or about to engage in an act that violates this title or an order or rule of the commission entered or adopted under this title; or
- (2) failing to comply with the requirements of this title or a rule or order of the commission.

(b) A court, in an action under this section, may:

- (1) prohibit the commencement or continuation of an act that violates this title or an order or rule of the commission entered or adopted under this title; or
- (2) require compliance with a provision of this title or an order or rule of the commission.

Disgorgement of all excess revenue resulting from the violation: Sec. 15.023, Utilities Code. ADMINISTRATIVE PENALTY, DISGORGEMENT ORDER, OR MITIGATION PLAN. (e) For a violation of Section 39.157, the commission shall, in addition to the assessment of a penalty, order disgorgement of all excess revenue resulting from the violation. For any other violation of the statutes, rules, or protocols relating to wholesale electric markets, the commission may, in addition to the assessment of a penalty, order disgorgement of all excess revenue resulting from the violation.

Administrative Fines of \$25,000 per violation per day: Sec. 15.023, Utilities Code. ADMINISTRATIVE PENALTY, DISGORGEMENT ORDER, OR MITIGATION PLAN. (a) The commission may impose an administrative penalty against a person regulated under this title who violates this title or a rule or order adopted under this title. (b) The penalty for a violation may be in an amount not to exceed \$25,000. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

Civil Fines of \$5,000 per violation: Sec. 15.028, Utilities Code. CIVIL PENALTY AGAINST PUBLIC UTILITY, PAY TELEPHONE SERVICE PROVIDER, OR AFFILIATE. (a) A public utility, customer-owned pay telephone service provider under Section 55.178, or affiliate is subject to a civil penalty if the utility, provider, or affiliate knowingly violates this title, fails to perform a duty imposed on it, or fails or refuses to obey an order, rule, direction, or requirement of the commission or a decree or judgment of a court. (b) A civil penalty under this section shall be in an amount of not less than \$1,000 and not more than \$5,000 for each violation.

Third Degree Felony Criminal Penalty: Sec. 15.030, Utilities Code. OFFENSE. (a) A person commits an offense if the person wilfully and knowingly violates this title. (b) This section does not apply to an offense described by Section 55.138. (c) An offense under this section is a felony of the third degree.

Contempt of Court: Sec. 15.022, Utilities Code. CONTEMPT. The commission may file a court action for contempt against a person who: (1) fails to comply with a lawful order of the commission; (2) fails to comply with a subpoena or subpoena duces tecum; or (3) refuses to testify about a matter on which the person may be lawfully interrogated.

The Sunset Staff Report did try to overcome the lack of evidence for its recommendations by pointing to the February 2, 2011 extreme cold weather event which led to a series rolling blackouts in the state:

The failure to live up to the terms of such an agreement can be serious, as seen on February 2, 2011, when extreme cold weather and an inadequate response by several market participants contributed to an energy emergency alert at ERCOT, resulting in rolling blackouts statewide to avert what could have been a major disaster had the entire grid failed.⁵

While of course it is important for market participants to “live up to the terms” of their commitments, the Staff report attempts to paint the February 2 event as one in which there were questionable actions by market participants where higher fines either might have led to a different outcome or would have been appropriately levied against some of the participants.

However, once again the Staff Report’s findings contrast with the Independent Market Monitor, as well as by the actions taken by the PUC after the event. The Independent Market Monitor found:

Although a wide range of actions were undertaken by generation resource owners in preparation for the extreme weather conditions, it is clear from the unprecedented loss of generation capacity on the morning of February 2nd that many of these preparatory efforts were unsuccessful. This experience will serve to produce lessons learned and specific areas for improvement in the areas of generation resource weatherization and coordinated extreme weather planning. Overall, although the scope and magnitude of the generating unit outages on February 2nd was absolutely unprecedented, we do not find any evidence that indicates that any of the outages were the result of physical withholding.

Another measure to provide additional insight related to this finding is the relative profitability of market participants during these events and how it correlates with unit outages. Although an assessment of profitability in isolation is insufficient to draw conclusions related to market manipulation or market power, increased profitability is the primary motive associated with resource withholding strategies. Hence, a negative correlation between resource outages and profitability would provide increased confidence in the finding that the outages were not the result of market manipulation strategies or market power abuses.⁶

The Independent Market monitor concluded, “These wholesale market pricing outcomes were consistent with the ERCOT energy-only market design.” In other words, even though unprecedented cold weather stressed the system in ways that were completely unanticipated, the system worked as planned, and the events of February 2 are unlikely ever to be repeated. If they ever are, it will be the “lessons learned and specific areas for improvement in the areas of generation resource weatherization” that will keep Texas from again experiencing rolling blackouts, not increases in fines recommended by the Staff Report.

Neither will the Staff Report’s recommendation of granting the PUC emergency cease and desist authority have any beneficial effects on the electricity market or the public. Here again, the Staff Report provides no evidence of any problems that its recommendation is designed to solve. Instead, it offers conjecture:

A regulatory agency should be able to stop unlicensed or harmful activity immediately. PUC’s current authority relating to electric industry participants does not meet this standard. To stop an action, PUC first must issue a notice to the alleged violator and provide an opportunity for a hearing before issuing a cease-and-desist order. By then the harm may have been done.⁷

What harm may have been actually done it does not state.

The PUC should not be granted emergency cease and desist authority. Its existing authority is sufficient to handle any problems that might crop up in the market. ★

Electric Companies Regulated by PUC	
Type of Company	Number
Integrated Investor-Owned Utilities	4
Transmission and Distribution Utilities (TDUs)	6
Transmission Service Providers (TSPs)	4
Retail Electric Providers (REPs)	116
Power Generation Companies (PGCs)	211
Electric Cooperatives	75
Municipal Utilities	77
Power Aggregators	247
Power Marketers	221

Source: Texas Sunset Advisory Commission

Endnotes

- ¹ Texas Sunset Advisory Commission, *Staff Report with Committee Decisions on the Public Utility Commission of Texas* (Jan. 2013) 13.
- ² *Ibid.*, 16.
- ³ HB 1600, 83rd Texas Legislature, House Committee Report (2013).
- ⁴ Potomac Economics, 2011 State of the Market Report for the ERCOT Wholesale Electricity Markets, Independent Market Monitor for the ERCOT Wholesale Market (July 2012) xxviii ff.
- ⁵ Sunset Commission, Staff Report, 13.
- ⁶ Potomac Economics, 2011 State of the Market Report, 21-22.
- ⁷ Sunset Commission, Staff Report, 15.

