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HOUSE RESEARCH ORGANIZATION

daily floor report

Wednesday, March 20, 2013
83rd Legislature, Number 37
The House convenes at 10 a.m.

HB 1600 by Cook, the Public Utility Commission Sunset bill, has been set on the Major State Calendar for second reading consideration today and is analyzed starting on page 1.

The House will consider a Congratulatory and Memorial Calendar today.

The following House committees had public hearings scheduled for 8 a.m.: Agriculture and Livestock in Room E1.010; Public Health in Room E2.012; and Special Purpose Districts in Room E2.014.

The House Urban Affairs Committee has a public hearing scheduled for 10:30 a.m. or on adjournment in Room E2.016.

The following House committees have public hearings scheduled for 2 p.m. or on adjournment: Corrections in Room E.2010; Culture, Recreation, and Tourism in Room E2.026; Energy Resources in JHR 120; Higher Education in Room E1.014; and State Affairs in JHR 140.



Bill Callegari
Chairman
83(R) – 37

SUBJECT: Continuing PUC and transferring certain authority from TCEQ

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 11 ayes — Cook, Craddick, Farrar, Frullo, Geren, Harless, Huberty, Menéndez, Oliveira, Smithee, Sylvester Turner

0 nays

2 absent — Giddings, Hilderbran

WITNESSES: For — John W. Fainter Jr., Association of Electric Companies of Texas, Inc.; Phillip Oldham, Texas Association of Manufacturers; David Power, Public Citizen; Cyrus Reed, Sierra Club, Lone Star Chapter; (*Registered, but did not testify*: David Frederick, TAMER; Lindsey Hughes, Texas Competitive Power Advocates; Brett Kerr, Calpine Corporation; Catherine Webking, TEAM - Texas Energy Association for Marketers; Kate Zerrenner, Environmental Defense Fund; Mark Zion, Texas Public Power Association)

Against — None

On — Brian Lloyd, Donna Nelson, PUC of Texas; Bill Peacock, Texas Public Policy Foundation; Karl Spock, Sunset Advisory Commission; (*Registered, but did not testify*: Linda Brookins, Todd Galiga, and Doug Holcomb, TCEQ; Trip Doggett, ERCOT; Sheri Givens, Office of Public Utility Counsel)

BACKGROUND: The Public Utility Commission of Texas (PUC) was established in 1975 to oversee the operations of electric, water, and telecommunications utilities. In 1986, the Legislature transferred responsibility for water utility regulation to the Texas Water Commission, now the Texas Commission on Environmental Quality (TCEQ).

Initially, the PUC regulated rates and services of monopoly utilities in the absence of competition. Since the 1980s, telecommunications and electric utilities have become largely deregulated due to changes in technology and state and federal law. The PUC's role has changed from regulating

monopolies to overseeing regulated activities and the operation of free markets in the restructured telecommunication and electric utility sectors.

The PUC is headed by three commissioners appointed by the governor with the advice and consent of the Senate. They serve six-year, staggered terms. An executive director oversees agency operations and a staff of about 170.

In fiscal 2011, the PUC spent about \$83.8 million according to the Sunset Advisory Commission, including about \$13.2 million on operations and \$70.6 million from the System Benefit Fund to pay for a 10 percent discount provided by electric companies to low-income electricity customers from May through September. At the beginning of fiscal 2013, the balance of the System Benefit Fund was \$766.7 million.

The PUC last underwent a complete Sunset review in 2010, but the 82nd Legislature did not enact the Sunset bill (SB 661 by Nichols) during the 2011 session. Instead, the Legislature enacted SB 652 by Hegar, which continued the agency for two years and charged the Sunset Advisory Commission with conducting a special purpose review of the PUC. The Sunset commission has since reexamined its recommendations from 2010 in light of actions taken by PUC in response to the initial Sunset findings and other legislation enacted in 2011.

The PUC authorization will expire on September 1, 2013, unless it is continued.

DIGEST:

HB1600 would continue the Public Utility Commission until September 1, 2023. The bill would:

- allow the PUC to issue emergency cease-and-desist orders;
- require the PUC to provide additional oversight of the Electric Reliability Council of Texas (ERCOT) and its system administration fee;
- transfer regulation of water and wastewater rates from TCEQ to the PUC and require the PUC to examine and compare the rate-setting processes to those used in the electric and telecommunications industries;
- move public interest advocacy for water utility rate matters from TCEQ's Office of Public Interest Counsel to the Office of Public Utility Counsel (OPUC);

- require the PUC to establish a mechanism for the renewal of certificates for the competitive local exchange carriers;
- prohibit a former PUC commissioner from serving on the ERCOT board for two years after leaving office; and
- eliminate certain statutorily required reports.

Cease-and-desist orders. HB 1600 would require the PUC to adopt rules for issuing cease-and-desist orders, which the agency could issue, with or without a hearing, if it determined that an action by an electric utility or related entity:

- posed a threat to continuous and adequate electric service;
- was hazardous;
- created an immediate danger to the public safety; or
- was causing or could be expected to cause an immediate injury to an electric customer that could not be repaired or rectified by monetary compensation.

If the PUC conducted a hearing, it would have to provide notice at least 10 days before the hearing date. The notice would have to include a statement of charges and an order to cease and desist the activities.

If the PUC issued an order without a hearing, the affected entity could, within 30 days of receiving the order, request a hearing to affirm, modify, or set aside the order. The hearing would have to take place within 10 days of the PUC receiving the request or on a date agreeable to both parties. The PUC could hold the hearing itself or delegate this authority to the State Office of Administrative Hearings.

A cease-and-desist order would remain in force until stayed by the PUC. The PUC commissioners could delegate the authority to issue a cease-and-desist order to the agency's executive director.

ERCOT oversight. HB 1600 would require ERCOT to submit for PUC's review and approval, including possible modification:

- ERCOT's annual budget;
- proposals for financing or refinancing of debt; and
- proposed performance measures for use in PUC's evaluation of ERCOT during the budget review process.

The PUC, after approving ERCOT's budget, would set the range for the system administration fee, which is assessed to wholesale electricity buyers and sellers to fund ERCOT's operations. The PUC would ensure that the revenue raised by the fee closely matched ERCOT's expenditures and did not create a surplus or deficit at the end of ERCOT's fiscal year.

PUC approval of the ERCOT budget or a proceeding to set the annual system administration fee would not be a contested case under Government Code, ch. 2001 (Administrative Procedure).

The bill would require the PUC to prepare an annual report on ERCOT's performance for submission to the lieutenant governor, the speaker of the House, and Senate and House standing committees with jurisdiction over electric utility issues.

Transfer water and wastewater rate regulation. Starting September 1, 2014, HB 1600 would transfer from TCEQ to the PUC responsibility for ratemaking and other economic regulation, such as the issuance of a certificate of convenience and necessity, for water and wastewater. The agencies would be required to adopt jointly a memorandum of understanding (MOU) guiding the transfer by August 1, 2014, and rules to implement HB 1600 by February 1, 2015.

TCEQ would continue regulating water and sewer utilities to ensure safe drinking water and environmental protection. TCEQ and the PUC would establish a transition team to facilitate the agencies' cooperation in meeting federal drinking water standards, maintaining adequate water supplies, meeting established design criteria for wastewater treatment plants, demonstrating the economic feasibility of regionalization, and serving economically distressed communities.

Any of TCEQ's rules, forms, policies, and procedures related to water and wastewater authority would remain in effect until it was replaced or amended by the PUC.

The bill would require the PUC to conduct and report to the 84th Legislature a comparative analysis of its ratemaking authority for electric utilities and telecommunications companies with its new authority for water and wastewater utilities to identify potential for standardization of procedures.

OPUC participation in water and wastewater economic matters. HB 1600 would transfer the powers, duties, functions, programs and activities of TCEQ's Office of Public Interest Counsel to the OPUC on September 1, 2014, including any related contracts and obligations, property and records, and funds. The bill would allow for the transfer to the OPUC of any TCEQ personnel whose primary functions involved the economic regulation of water and sewer service. It would require TCEQ and OPUC to develop an MOU regarding the transfer by August 1, 2014, and TCEQ to adopt rules to implement the transfer by February 1, 2015.

HB 1600 would require OPUC to represent the interests of residential and small commercial consumers regarding water and wastewater rates and services. Under the bill, OPUC would:

- assess the effect of utility rate changes and other regulatory actions on residential consumers in Texas;
- advocate a position determined to be most advantageous to a substantial number of residential consumers;
- be entitled to the same access as a party, other than PUC staff, to records gathered by the PUC; and
- be entitled to discovery of any nonprivileged matter that was relevant to the subject matter of a proceeding or petition before PUC.

OPUC could:

- appear or intervene on behalf of a residential consumer or small business consumer;
- initiate or intervene in a judicial proceeding that involved an action taken by an administrative agency in certain circumstances;
- represent an individual residential or small commercial consumer with respect to the consumer's disputed complaint concerning retail services that were unresolved before the PUC; and
- recommend legislation that it determined would serve the interests of residential and small commercial consumers.

The bill would not limit the PUC's authority to represent residential or small commercial consumers nor preclude the appearance of other parties on their behalf.

HB 1600 also would require the PUC and the OPUC to include in their legislative appropriations requests for fiscal 2016-17 a report on staffing changes related to the transfer of water and sewer programs.

Telecommunications provisions. HB 1600 would require the PUC to develop rules as soon as practicable for competitive local exchange carriers (CLECs) to renew, on a one-time or regular basis, certificates of operating authority and service provider certificates of operating authority.

Eliminating reports. HB 1600 would eliminate the requirement for the PUC to publish a report promoting consumer awareness of changes in the telecommunications market. It also would eliminate the requirement for a PUC-generated report to the Electric Utility Restructuring Legislative Oversight Committee.

The bill would take effect September 1, 2013.

SUPPORTERS
SAY:

HB 1600 would continue longstanding efforts to help the PUC direct the ongoing transition from traditional regulation of monopoly utilities to the market-oriented environment that now prevails in both the electric and telecommunications industries. While specific enhancements to PUC's authority, such as ERCOT oversight, are needed, the agency is doing an effective job.

Cease-and-desist orders. In granting the ability to issue emergency cease-and-desist orders, the bill would give PUC the power it needs to stop electric providers and others from taking actions that could threaten the state's electric supply or harm individuals or businesses. The ability to issue cease-and-desist orders without going to court would be critically important, for example, when quick action was needed by the PUC to prevent rolling blackouts while the state's electric grid was operating near capacity.

Nothing in HB 1600 would give the PUC authority to disconnect utility customers. In fact, cease-and-desist orders are designed to protect consumers. For example, during a summer disconnect moratorium, the PUC could use cease-and-desist orders to stop utilities from illegally suspending service to individuals, which especially would benefit the state's most vulnerable customers, including the elderly and those in poor health.

Cease-and-desist authority is not a new concept in state government. The PUC should have the same emergency cease-and-desist authority to address harmful activities that is available to other regulatory agencies,

including the Department of Insurance, the Department of Licensing and Regulation, and the Securities Board. HB 1600 would guard against government overreach by giving entities subject to cease-and-desist orders the right to seek redress before the PUC.

HB 1600's cease-and-desist authority would protect the public interest, negating the need for an increase in fines above \$25,000 for electric industry participants violating ERCOT reliability protocols or the PUC's wholesale reliability rules. The PUC would not need emergency cease-and-desist authority to address cases of alleged fraud because such issues are best addressed under current law in civil court.

Granting cease-and-desist authority to the PUC would not create a market environment in Texas hostile to development of electrical generation capacity. Cease-and-desist authority has little to do with markets and market capacity. Its aim would be to prevent bad actors from harming the state's electric grid and consumers in times of emergencies and to stop violations of PUC rules for economic gain.

ERCOT oversight. The bill would give the PUC greater oversight authority over ERCOT's budget, debt financing, and fees. It would make the powerful non-profit organization more accountable to ratepayers, the public, and the Legislature by requiring ERCOT to develop PUC-approved performance measures, which would curb the agency's ability to pass the cost for expensive and wasteful projects to the state's electric customers. The bill also would benefit consumers by making the revenue collected by ERCOT under the system administration fee effectively equal to ERCOT's expenditures. This requirement would prevent ERCOT from generating surpluses at consumers' expense by raising fees, thus helping protect consumers from higher electric bills.

HB 1600 would provide clear legislative direction and resolve many of the questions about the PUC's ERCOT oversight authority. Although current law gives the PUC significant authority over ERCOT, the PUC has not always fully embraced it. In recent years, the PUC has increased its oversight of ERCOT, and HB 1600 would ensure that the agency did not back away from its responsibilities in this area.

Transfer of water and wastewater rate regulation. HB 1600 would not change existing state policy with respect to the economic regulation of water utilities. It merely would change the location of rate setting and

other economic regulation from TCEQ to the PUC. The bill appropriately would place the PUC, rather than TCEQ, in charge of water and sewer rate regulation. The PUC originally regulated water and sewer rates, and the agency historically has regulated rates and services of electric and telecommunications companies in areas where competition was weak or nonexistent.

HB 1600 would define clearly the PUC's role in regulating rates and economic matters and TCEQ's role in regulating drinking water safety and environmental protection, allowing the agencies to coordinate their efforts to best perform these functions. TCEQ's main focus is environmental protection, and water utility economic regulation is a small and often overlooked part of the agency's charge that should be transferred to the PUC.

In transferring from TCEQ's Office of Public Interest Counsel to OPUC the responsibility for representing the interests of residential and small businesses in rate cases before the PUC, HB 1600 would place this charge with the most experienced agency. Unlike TCEQ's office, which advocates according to a legal standard of what is in the best public interest, OPUC advocates on behalf of specific classes of ratepayers, consumers, and small commercial enterprises. This more specific charge would ensure that the interests of these classes of ratepayers were not diluted.

Telecommunications. HB 1600 would implement a Sunset recommendation requiring CLECs to renew their certificates with the PUC. This simple registration process would provide the PUC an up-to-date list of the entities it regulates and would not impose a burden on the regulatory community.

Eliminating reports. The two reports that would be eliminated by HB 1600 are redundant or no longer necessary. Utilities Code, sec. 17.003 already requires the PUC to inform consumers about changes in the telecommunications market, and the Electric Utility Restructuring Legislative Oversight Committee was abolished in 2011.

PUC governance. Significant changes to agency management structure, leadership, and authority would be costly, disruptive, and unlikely to yield positive results in the long term. Electing PUC commissioners, as some

have proposed, could result in unqualified officials overseeing significant portions of the Texas economy.

OPPONENTS
SAY:

Cease-and-desist orders. By allowing the PUC to issue cease-and-desist orders with or without a hearing, HB 1600 inappropriately would give a potentially dangerous tool to the agency to attack problems that should be solved by the marketplace or, as a last resort, the courts. Giving the PUC cease-and-desist authority would be a clear case of regulatory overreach and would have a chilling effect on the marketplace. It could create regulatory uncertainty and reduce the willingness of utilities to invest in Texas, thus depriving the state of much-needed generation capacity. There has been only one case in the last five years requiring a cease-and-desist order, and that was obtained through a court.

ERCOT oversight. Current law gives broad oversight authority over ERCOT to the PUC, and the additional authority granted by HB 1600 would be unnecessary and duplicative. For example Utilities Code, sec. 39.151(d), grants the PUC “...complete authority to oversee and investigate [ERCOT’s] finances, budget, and operations as necessary to ensure the organization’s accountability and ensure that the organization adequately performs [its] functions and duties.” The PUC has adopted rules related to budgets and debts under current law and could adopt additional rules, if necessary, under existing statutes without further legislative action.

Transfer of water and wastewater rate regulation. Moving water utility regulation to the PUC would not result in cost savings, better governance, or relief to ratepayers. Rate setting in water utility matters is highly prescriptive, with many issues — including cost recovery — stipulated in state law. Moving to the PUC the economic regulation of the state’s 3,970 retail water utilities, many of which are substantially smaller than the large telecommunications and electric utilities, would not address consumer concerns about water rates.

Because the economic aspects of regulation cannot clearly be separated from the environmental aspects, HB 1600 could complicate regulating water and sewage service in the state by splitting the functions between the PUC and TCEQ. In addition, the transfer of water and wastewater economic regulation could be inefficient and costly. The assets, personnel and budget transferred from TCEQ to the PUC and OPUC would be insufficient given the level of review that rate cases undergo at the PUC.

For example, OPUC would need additional staff beyond those being transferred to provide the level of representation in water utility cases that it provides to electric and telecommunications customers.

PUC governance. The PUC, as it is currently composed, is ineffective in protecting the interests of most ratepayers. While large utilities and businesses can afford lobbyists to ensure that their positions are heard by the PUC, the concerns of the average ratepayer have little sway at the agency. To remedy this situation, the PUC should be headed by elected officials who would be more responsive to the needs of the general public.

OTHER
OPPONENTS
SAY:

HB 1600 would protect industry at the expense of consumers experiencing market abuse and fraud. The bill should include fraud as one of the allowable circumstances under which the PUC could issue a cease-and-desist order. Also, the bill should raise the fine for violating ERCOT's reliability protocols or the PUC's wholesale reliability rules from \$25,000 to \$100,000. A \$25,000 fine is insignificant to large utilities and sends a message that they can conduct business as usual without fear of a substantial penalty. Both provisions were included in the PUC Sunset bill from the 82nd Legislature (SB 661), but do not appear in HB 1600.

NOTES:

According to the Legislative Budget Board, HB 1600 would have no significant fiscal impact, based on the assumption that all TCEQ resources associated with the economic regulation of water and wastewater would be transferred to the PUC.

The companion bill, SB 206 by Nichols, was referred to the Senate Business and Commerce Committee on February 25.

A related bill, HB 1307 by Geren et al., would transfer from TCEQ to the PUC water and wastewater economic regulation and would modify the rate setting procedures. It has been referred to the House Natural Resources Committee.

Another related bill, HB 1963 by Sylvester Turner, would replace the appointed PUC board with one elected commissioner. It has been referred to the House State Affairs Committee.