

SUBJECT: Continuing the Public Utility Commission and OPUC

COMMITTEE: State Affairs — committee substitute recommended

VOTE: 13 ayes — Seidlits, S. Turner, Black, Bosse, Carter, Craddick, Hilbert, Hochberg, B. Hunter, D. Jones, McCall, Ramsay, Wolens

0 nays

1 present, not voting — Danburg

1 absent — Alvarado

WITNESSES: (*On original version*):

For — Robert Reilly, New Electric Wholesalers of Texas; Marianne Carroll, Newtex; Jim Morriss, Texas Electric Cooperatives, Inc.; Tom Standish, Mike Ozymy, Mark Mosely and Kent Caperton, Association of Electric Companies of Texas; Mike Williams

Against — Larry Francis; Nanette Williams; Charles F. Goff; Mark Shilling; Joe D. Gunn; Jim Boyle, International Brotherhood of Electrical Workers; Stephanie Kroger, Texas Industrial Energy Consumers; Mark Leypoldt; Peggy Venable, Texas Citizens for a Sound Economy; Frank D. Griffin, Goose Creek Consolidated Independent School District; Jim Marston; Janee Briesemeister, Consumer's Union; Jay Doegy, City of Arlington; Burl Buchanan; Mary Rhodes

On — Robert W. Gee and Bret J. Slocum, Public Utility Commission; Walter Washington, Office of the Public Utility Counsel; Claire Fulenwider, Texas Chemical Council; Patrick Henry Wood, III

BACKGROUND: In 1975 the 64th Legislature created the Public Utility Commission of Texas (PUC) to regulate public utilities in Texas. The Legislature found that these utilities operated as monopolies and were not subject to normal competitive forces. Regulation was established as a substitute for competition, with the PUC responsible for maintaining rates and services that are fair to both consumers and the utilities. The PUC currently

regulates 10 investor-owned electric utilities (IOUs), 86 electric cooperatives, four river authorities, and 61 local telephone companies. The agency estimates that the utilities it regulated have a combined annual revenue of approximately \$20 billion.

The four basic functions of the PUC are:

- **Certification** — before a regulated utility can operate in the state or construct new facilities, it must obtain a certificate of convenience and necessity (CCN) from the PUC, which certifies that the utility's operation is in the public's best interest.
- **Rate-setting** — the PUC sets rates for all local telephone companies, IOUs and electric cooperatives. Cities have retained original ratemaking authority for electric utilities and cooperatives operating within their boundaries; the PUC reviews these rates on an appellate basis.
- **Monitoring** — the PUC monitors regulated utilities to ensure compliance with statutory requirements and agency policies, rules, orders and service standards.
- **Consumer's advocate** — the PUC helps consumers resolve complaints against regulated utilities.

The PUC consists of three full-time, salaried commissioners who are appointed by the governor. The primary role of the three-member commission is to serve in a quasi-judicial capacity on utility rate cases and other proceedings that have gone through the hearings process.

The Office of Public Utility Counsel (OPUC) was created in 1983 as part of the 68th Legislature's sunset review of the PUC. The office was established to represent residential and small business consumers after concerns had been raised that these ratepayers, who share similar concerns and interests, were not adequately represented in utility rate cases at the PUC. OPUC is overseen by the public utility counsel who is appointed by the governor. OPUC only participates in roughly 6 percent of all rate cases before the PUC, mostly major rate cases, and roughly 11 percent of all non-rate cases before the PUC.

The PUC and OPUC are funded by a gross receipts tax assessed against all regulated utilities. This tax is deposited into the general revenue fund from which appropriations for the PUC and OPUC are drawn. The PUC is authorized to adjust this gross receipts assessment, subject to approval of the Legislature.

The PUC and OPUC were originally scheduled for sunset review during the 73rd Legislature. During that session a number of bills were proposed to revise the PUC and OPUC and electric utility and telecommunications regulation. None passed, however, and the PUC and OPUC sunset review date was extended for two years.

A joint interim committee on the PUC was appointed to study the PUC and OPUC and make recommendations.

DIGEST:

CSHB 3164 would extend the PUC and OPUC until September 1, 2001. The bill would make recommended changes to the administrative section, Title I, of the Public Utilities Regulatory Act (PURA). A majority of these changes involve the application of standard language developed by the Sunset Advisory Commission that is applied to all similar agencies. Among the other major changes included in CSHB 3164 are:

- transferring the administrative hearings division from the PUC to the State Office of Administrative Hearings (SOAH) and establishing a task force on conducting the transfer;
- authorizing the PUC to assess administrative penalties;
- removing the age requirement for PUC commissioners;
- requiring appointed members of the commission to participate in a training program before taking office;
- providing that the executive director is responsible for running the day-to-day operations of the PUC;
- updating and strengthening conflict of interest language including setting a two year "revolving-door" provision for appearing in administrative

hearings or before the PUC (a revolving-door provision prohibits a person who worked at or for an agency to appear before that agency representing another party for a certain length of time);

- allowing persons otherwise ineligible to serve in the PUC or OPUC to do so if they divest ownership interest or control in a regulated utility and inform the attorney general and the agency;
- removing the requirement that the commission audit a utility every 10 years;
- allowing the PUC to promulgate rules regarding the settlement of contested cases before the commission;
- authorizing judges in hearings to impose sanctions, limit discovery, focus parties on contested issues, group parties, except OPUC, with the same interests, and limit parties' time in presenting cases;
- shifting authority from the PUC to the Legislature to adjust the utility gross receipts tax;
- allowing the PUC and OPUC to receive and spend federal funds from grants or other forms of financial assistance and exempting special accounts established for such grants from funds consolidation;
- requiring the PUC to consider whether a proposed utility sale would adversely affect the health and safety of customers or employees, would result in the loss of Texas jobs or a decline in service, whether the utility would be able to recoup its investment and whether the transaction was in the public interest.

The bill would take effect on September 1, 1995. The administrative penalties permitted by the act could only be imposed for violations occurring after the effective date. The settlement process could not apply to an electric utility merger proceeding filed before January 1, 1995, in which a final order had not been issued. The sunset language regarding membership on the commission or post-employment restrictions only apply to a member or employee hired or appointed after the effective date.

SUPPORTERS
SAY:

The administrative changes included in this bill represent a combination of the standard language developed by the Sunset commission now included in the reauthorizations of state agencies and the recommendations of the Joint Interim Committees on the Public Utility Commission. The implementation of these recommendations would help the PUC to run more smoothly, create a greater independence for the hearing examiners and hearing division and allow the process of hearings to be conducted more efficiently.

Transferring hearings division to SOAH. Currently, the physical location of the hearings division at the PUC places hearings examiners and administrative law judges alongside the technical staff who testify in all proceedings at the agency. This situation contributes to a perception that the hearings staff is virtually indistinguishable from the PUC staff as a whole. Transferring the hearings division to SOAH would act to improve the independence, quality and cost effectiveness of PUC hearings. In order to ensure that enough resources and expertise would be transferred from the PUC to SOAH, a task force would be established to oversee the transfer of equipment and personnel.

Conflict of interest provisions. PURA contains specific provisions aimed at prohibiting the appointment of commissioners with direct ties to regulated utilities or their affiliates. CSHB 3164 would strengthen these provisions, based on the recommendations of both the joint interim committee and the Sunset Commission. These new provisions would extend to the general counsel and executive director of the PUC as well as the public counsel. These rules would prohibit such individuals from serving on the board of companies that supply fuel, services or utility-related goods to regulated and unregulated utilities. It would prohibit a person from having an interest in a competitor of a utility as well as in the utility itself. It would also include revolving-door provisions on members and staff of the PUC and OPUC prohibiting them from appearing on behalf of parties for two years. These reforms would strengthen the image of the PUC and OPUC as independent regulatory bodies pursuing policies in the interest of the public.

Adjustment of gross receipts assessment. Originally, the PUC was given the ability to adjust the gross receipts assessment because it was unclear how much money the agency would need for its operations. Experience has shown that the gross receipts assessment is more than sufficient to cover appropriations for both the PUC and OPUC. In fiscal 1993 the assessment generated \$28.6 million while the PUC's expenditures were \$10.7 million and OPUC spent \$1.4 million. Because the primary reason for the PUC to be able to adjust the gross receipts assessment no longer exists, the PUC should not retain control of that power.

Management audits. In 1983 PURA was amended to require the PUC to conduct a management audit of each utility at least once every ten years. The number of audits conducted each year depends on the size of the utilities to be studied, the scope of the audits, and the complexity of the issues to be addressed. While these audits have been helpful and have implemented management improvements, PURA did not provide a separate funding source for these audits, nor did it authorize the PUC to recover costs of the audits from the utilities being audited. As a result, the PUC had not had the budget or staff resources capable of meeting this requirement. By removing the audit requirement and allowing the PUC to conduct management audits only as needed, the quality of such audits and their usefulness to the utilities could be greatly improved.

Administrative penalties. The PUC regulates almost every aspect of a public utility's business activities, from utility rates and quality of service to billing requirements. Many of these regulatory duties require cooperation from the utility. Currently, the PUC has several tools in place for sanctioning utilities that violate statutes, rules and orders, but those enforcement powers are intended for major infractions and are seldom used because of their severity, expense and time-consuming nature. CSHB 3164 would allow the commission to impose an administrative penalty of up to \$5,000 per day for violations. Such penalties may only be imposed after a finding, by a preponderance of the evidence, that a violation has occurred, and the process includes the requisite safeguards to ensure due process. All penalties would be deposited into the general revenue fund. Utilities would be prohibited from recovering administrative penalties from consumers through their rates.

Settlement and hearings procedures. The PUC has two main processes for resolving contested cases, either through the formal hearings process or through informal settlements agreed to by some or all of the parties. The current settlement process occurs outside of the hearing process. By allowing the PUC to establish rules regarding settlement procedures, settlements may be achieved in more efficient way and also include various provisions so that all parties to a contested matter who do not agree to the settlement may still retain full rights to a hearing. Other hearings procedures enacted by CSHB 3164 would streamline the hearings process, providing savings to both utilities and consumers.

OPPONENTS
SAY:

Hearings examiners at the PUC make independent decisions and are not partial to the staff of the PUC simply because they work in the same area. Many of the issues that come before the PUC are of a highly technical nature and would be subject to misinterpretation by a hearings officer who is not an expert in that subject matter. The transfer of the hearings division from the PUC to SOAH would cost at least \$80,000. The question should be whether the state should spend this amount of money only because there is a public perception of impartiality.

This legislation does not address the relationship of the general counsel to the commissioners. The general counsel acts as a advocate of the public interest in proceedings before the commission, but also acts as a corporate counsel for the PUC and the commissioners themselves. These roles should be separated, as was recommended by the joint interim committee.

OTHER
OPPONENTS
SAY:

CSHB 3164 is a scaled-down, noncontroversial version of a bill that should have represented a major change in the regulation of electric utilities. One of the primary issues that should be addressed is the rate-setting treatment of utilities' federal income taxes, the so-called "phantom-tax" issue. Without a change in the way the PUC regulates electric utilities, the administrative provisions included in this legislation will not substantially affect the utility customers of Texas.

NOTES:

The committee substitute removed revisions to Title II of PURA (the regulation of electric utilities). Other changes regarding Title I include:

- adding the provision allowing the PUC to assess administrative penalties;

- adding the language that allows SOAH to charge the PUC an annual fee for conducting administrative hearings, not an hourly one;
- providing for the transfer of the hearings division to begin on September 1, 1995 rather than September 1, 1996; and
- adding the provision allowing the PUC to receive and spend federal grants and other funds.

SB 373 by Armbrister, proposing similar administrative changes to the PUC and OPUC and revising the regulation of electric utilities, was passed to engrossment by the Senate on April 25, but the motion to suspend the regular order and consider the bill on third reading on April 28 failed to receive the necessary two-thirds vote of the members present. The bill remains pending before the Senate.

HB 3159 by Danburg, also proposing administrative changes to the PUC and OPUC and revising the regulation of electric utilities, is pending in the House State Affairs Committee.