Interim Report

to the 84th Legislature

House Committee on
State Affairs

December 2014

HOUSE COMMITTEE ON STATE AFFAIRS
TEXAS HOUSE OF REPRESENTATIVES
INTERIM REPORT 2014

A REPORT TO THE
HOUSE OF REPRESENTATIVES
84TH TEXAS LEGISLATURE

BYRON COOK
CHAIRMAN

COMMITTEE CLERK
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Committee On
State Affairs

December 30, 2014

Byron Cook
Chairman

P.O. Box 2910
Austin, Texas 78768-2910

The Honorable Joe Straus
Speaker, Texas House of Representatives
Members of the Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

Dear Mr. Speaker and Fellow Members:

The Committee on State Affairs of the 83rd Legislature hereby submits its interim report including recommendations and drafted legislation for consideration by the 84th Legislature.

Respectfully submitted,

Byron Cook, Chairman

Helen Giddings, Vice-Chair

Tom Craddick

Jessica Farrar

John Frullo

Charlie Geren

Patricia Harless

Harvey Hilderbran

Dan Huberty

Jose Menendez

Rene Oliveira

John Smithee

Sylvester Turner

Helen Giddings
Vice-Chair

Members: Tom Craddick, Jessica Farrar, John Frullo, Charlie Geren, Patricia Harless, Harvey Hilderbran, Dan Huberty, Jose Menendez, Rene Oliveira, John Smithee, and Sylvester Turner

TABLE OF CONTENTS

INTRODUCTION

On January 31, 2013, Texas House Speaker Joe Straus appointed 13 members to the House Committee on State Affairs (the Committee): Byron Cook, Chairman; Helen Giddings, Vice-Chair; Tom Craddick; Jessica Farrar; John Frullo; Charlie Geren; Patricia Harless; Harvey Hilderbran; Dan Huberty; Jose Menendez; Rene Oliveira; John Smithee; Sylvester Turner.[1]

Under House Rule 3, Section 34, the Committee has jurisdiction over all matters pertaining to:

1) questions and matters of state policy;
2) the administration of state government;
3) the organization, operation, powers, regulation and management of state departments, agencies and institutions;
4) the operation and regulation of public lands and state buildings;
5) the duties and conduct of officers and employees of the state government;
6) the operation of state government and its agencies and departments; all of above except where jurisdiction is specifically granted to some other standing committee;
7) access of the state agencies to scientific and technological information;
8) the regulation and deregulation of electric utilities and the electric industry;
9) the regulation and deregulation of telecommunications utilities and the telecommunications industry;
10) electric utility regulation as it relates to energy production and consumption;
11) pipelines, pipeline companies, and all others operating as common carriers in the state;
12) the regulation and deregulation of other industries jurisdiction of which is not specifically assigned to another committee under these rules; and
13) the following state agencies: the Council of State Governments, the National Conference of State Legislatures, the Office of the Governor, the Texas Facilities Commission, the Department of Information Resources, the Inaugural Endowment Fund Committee, the Sunset Advisory Commission, the Public Utility Commission of Texas and the Office of Public Utility Counsel.[2]

On January 31, 2014, Speaker Straus released interim charges, which list specific topics for the Committee to study prior to the start of the 84th Legislative Session.[3] Several public hearings were held throughout the interim to give experts the opportunity to provide the Committee with information related to the charges.

The first interim hearing, on Charge # 2 Title 15 of the Election Code was held on May 1, 2014. Eight invited witnesses with experience related to campaign finance provided balanced testimony regarding disclosure requirements for 501(c)(4) non-profits and proposed a number of ideas for ensuring that the campaign finance system in Texas is transparent to voters.

On September 4, 2014, the Committee held its second interim hearing to address the following interim charges: Charge # 1 focusing on resource adequacy in Texas' electricity market, Charge # 4 examining the HealthSelect contract at the Employees Retirement System of Texas and Charge # 5 addressing non-citizens driving without proper documentation.

On November 19, 2014, the Committee held its third and final interim hearing, as a follow-up to charge # 4, to analyze the State Auditor's Office Report, No. 15-007, an Audit Report on the HealthSelect Contract at the Employees Retirement System of Texas.

The three interim hearings can be found at the following links:

May 1, 2014: http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=8306

September 4, 2014: http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=9067

November 19, 2014: http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=9347

Having completed its study on the interim charges assigned by Speaker Straus, the Committee has adopted the following report.

INTERIM CHARGES

Charge # 1 Study the methods state agencies use for planning for investment in future infrastructure. Specifically, review how agencies determine what investments in infrastructure will be necessary to meet the state's demands and facilitate continued economic expansion. Review how agencies determine the costs and benefits associated with future infrastructure investment to ensure that the citizens of the state are receiving the best value and what other factors agencies use to make investment decisions.

Charge # 2 Study Title 15 of the Election Code, which regulates political funds and campaigns, including requirements for financial reports by campaigns, candidates, officeholders, and political committees. Specifically, study what types of groups are exempt from reporting requirements in the Election Code and make recommendations on how to make the political process more transparent.

Charge # 3 Study the different financial assurance options used by state agencies to ensure compliance with environmental clean-up or remediation costs. Determine whether the methods utilized by state agencies are appropriate to ensure sufficient funds will be available when called upon.

Charge # 4 Review state agency contracting with businesses seeking to provide goods and services to the state. Study the procedures agencies use to determine the costs versus benefits when evaluating proposals. Determine whether additional disclosure and reporting requirements are necessary to ensure transparency and accountability and to promote ethical business practices.

Charge # 5 Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature. In conducting this oversight, the committee should:

a. consider any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;

b. identify issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;

c. determine whether an agency is operating in a transparent and efficient manner; and

d. identify opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

RESOURCE ADEQUACY UPDATE

Interim Charge # 1: Study the methods state agencies use for planning for investment in future infrastructure. Specifically, review how agencies determine what investments in infrastructure will be necessary to meet the state's demands and facilitate continued economic expansion. Review how agencies determine the costs and benefits associated with future infrastructure investment to ensure that the citizens of the state are receiving the best value and what other factors agencies use to make investment decisions.

Since the time the above charge was first issued, a number of select committees were appointed to address investment in future infrastructure -- in the areas including water and transportation, therefore, the House Committee on State Affairs chose to focus on resource adequacy and electric reliability for now and the future. The Committee requested an update from the Public Utility Commission of Texas (PUCT) and Electric Reliability Council of Texas (ERCOT).

Public Hearing

The House Committee on State Affairs held a public hearing on September 4, 2014, at 10:30 a.m. in Austin, Texas in the John H. Reagan Building, Room 140, to address the above interim charge. The Committee heard testimony from the following invited witnesses:

Witnesses are listed in alphabetical order

- Kenneth W. Anderson, Jr., *Commissioner, Public Utility Commission of Texas*
- Bill Magness, *Vice President, General Counsel, and Corporate Secretary, Electric Reliability Council of Texas*
- Brandy Marty, *Commissioner, Public Utility Commission of Texas*
- Donna Nelson, *Chairman, Public Utility Commission of Texas*

Introduction

There are three chief components of electric industry infrastructure: electric generation, transmission and distribution. While maintaining a successful, reliable electric market in Texas depends on investment in all three, the focus of the interim charge was on generation and transmission.

According to median projections of the Texas State Data Center, Texas could add 11 million more residents by 2040.[4] Additionally, over the past 10 years, Texas has continually exceeded the national average in GDP growth, adding jobs even during times of national recession.[5] Meeting the needs of new residents and businesses requires new investment in generation and transmission. Given the state's continued population growth, without enough energy and its timely delivery to meet demand, residents could face the possibility of rolling outages or experience other reliability events.

Background

Generation Resource Adequacy

The commitment to new generation appears strong. According to the PUCT, twenty-two facilities, totaling 8,324 MW of generation, have been issued permits by the Texas Commission on Environmental Quality (TCEQ). Of these, 10 facilities, totaling 4,912 MW, have also received greenhouse gas permits. Another 18 facilities totaling 8,723 MW have applied for TCEQ permits.[6]

ERCOT is the Regional Transmission Operator that serves about 90 percent of the state's electric load.[7] One of ERCOT's functions is to study the amount of electricity available in the wholesale market and to project the amount of load and demand that will be needed using a wide array of resources, such as premise-level data and weather forecasts.

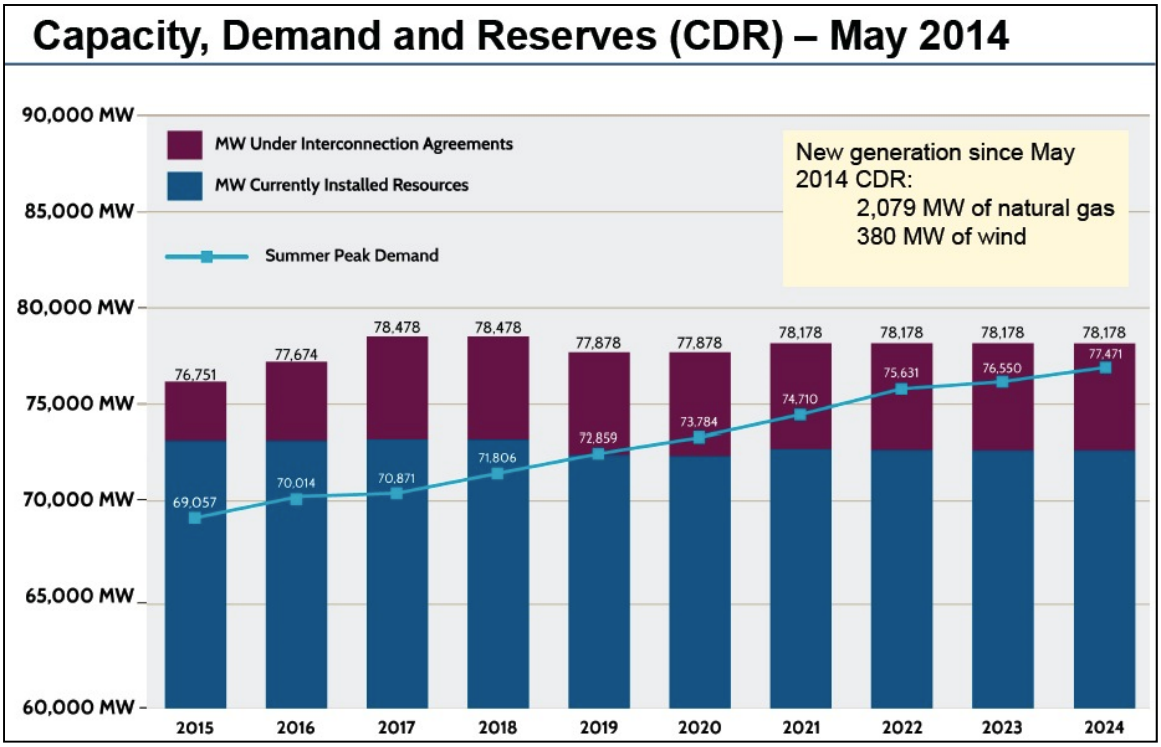
Once ERCOT settles on those numbers, it determines the forecasted reserve margin, which is the amount of capacity divided by the projected peak demand (the highest amount of power expected to be required at a given instant, typically in the afternoon when most air conditioning would be in use). In order to maintain a system in which consumers could see one outage every ten years, ERCOT aims to reach a reserve margin of 13.75 percent, which allows for continued reliable operation when the weather is inclement or if power plants are forced offline for mechanical reasons.

The 2011 ERCOT Capacity, Demand and Reserves (CDR) report included predictions that the reserve margin would fall below that target by 2013. However, many stakeholders suggested that ERCOT's load forecasting model was inaccurate, projecting too much load growth when compared with historical years.

In 2013 and 2014, ERCOT revised its load forecasting model and some new gas generation was added, resulting in a CDR that showed generation reliability is not expected to be a concern in the immediate future.[8] [9] [10]

Commissioner Anderson testified at the September 4th hearing that ERCOT had sufficient generation capacity for the next three years. (It is difficult to project past three years since that is about the amount of time it takes to site, build and connect a natural gas generating plant).[11]

Using the revised methodology in 2014, ERCOT noted that it tracks recent years' experience more closely than the previous model.[12] Additionally, ERCOT has recently revised the way wind is assessed in the CDR, based on historical information. In the previous CDR, ERCOT counted 8.7 percent of wind's nameplate capacity in its projections, due to the resource's intermittent nature. Under the new methodology, that percentage will increase for West Texas wind and significantly increase for Coastal wind. This will further improve the outlook for resource adequacy.[13]



Source: ERCOT presentation to the House Committee on State Affairs, September 4, 2014

On December 1, 2014, ERCOT released another CDR.[14] Based on current information, ERCOT's planning reserve margins are expected to exceed 15 percent through 2018.[15] The new CDR shows a reserve margin of 15.7 percent in summer 2015, based on peak demand of 69,057 MW, including 2,343 MW that participate in various demand response programs, and more than 77,000 MW of anticipated generation capacity.[16]

The Committee will continue to closely monitor this issue and **expects that these adjustments will indeed result in a more accurate forecast for resource adequacy. Failure to accurately forecast our load could result in profound consequences for the state.**

Regulatory Factors Affecting Resource Adequacy

The United States Environmental Protection Agency (EPA) recently released draft rule 111(d), designed to reduce emissions of greenhouse gases (GHGs) nationwide. Under the rule, each state must develop a plan to reduce GHG emissions, to a target set by the EPA. States may use a combination of emission reduction technologies, including increased energy efficiency programs and renewable development. The EPA assessed each state's potential based on their activity as of 2012.[17]

The EPA draft rule 111(d) is the biggest issue affecting the continued operation of coal-fired power nationwide.[18] Coal-fired generation accounts for 37 percent of ERCOT's power and 34 percent statewide.[19] [20] This creates pressure for an electricity market in ERCOT that is based on

economic efficiency. The PUCT estimates that Texas will be required to account for 18 percent to 25 percent of national CO2 reduction under the proposed rule.[21] Also, because 2012 is used as a baseline for determining state-by-state requirements, the rule does not give credit to states that have already reduced emissions through more efficient power generation and renewable investment.

Chairman Donna Nelson noted in her testimony before the Committee that the proposed EPA rule mandates a 42 percent reduction in emissions for Texas and a 52 percent reduction in coal generation.[22] Thus, EPA draft rule 111(d) would likely significantly reduce the coal-fired generation in use in Texas today, requiring additional investment.[23] Furthermore, Chairman Nelson states that, "The proposed greenhouse gas rule disproportionately affects Texas. Texas has 11 percent of the country's electric generation, yet the EPA requires Texas to contribute almost 18 percent of the emissions reductions in this proposed rule**. The EPA has Texas reducing more than 27 other states combined**." [24]

Regarding the EPA Cross-State Air Pollution Rule (CSAPR): the rule was invalidated in August 2012; however, the U.S. Supreme Court granted a rehearing request, and oral arguments were heard on December 2013 and the ruling was in EPA's favor earlier this year. Most recently, on October 23, 2014, the U.S. Court of Appeals for the D.C. Circuit ordered that EPA's motion to lift the stay of CSAPR be granted.

EPA's Mercury and Air Toxic Standards (MATS) sets hazardous air pollutant emission standards for mercury and other gases. MATS requires compliance by April 16, 2015. It remains unclear how much of Texas' coal-fired power plants will be affected, but the impact is expected to be far less than the greenhouse gas rule, were it implemented in its draft form.[25]

In May 2014, the EPA released its final rules governing requirements for cooling water intake structures used by electric generating facilities. The rule is known as 316(b), named for the appropriate section of the Clean Water Act. The new rule is designed to reduce the impact of cooling water intake structures on fish and other aquatic life forms. Under 316(b), electric generators have multiple options for meeting the rule's requirements. Smaller facilities have seven technology options prescribed by the rule, while larger plants may work with local permitting authorities to mitigate effects on wildlife. This rule is relatively flexible, and should allow generators to achieve the goals of the rule without facing shutdown.[26]

Weather Factors Affecting Resource Adequacy

While the situation is far less dire than recent years, Texas remains largely in a state of drought. Fossil-fuel generating plants require access to water for cooling (though very little of the water is consumed; it is recycled for subsequent cooling), and most are cooled through man-made reservoirs built by the generating company. In 2011, 98 percent of the state was in moderate or worse drought, according to the National Drought Mitigation Center.[27] As of 2014, about 49 percent of the state remains in moderate or worse drought.[28]

Transmission Adequacy

ERCOT and the PUCT continue to focus on the need for transmission infrastructure upgrades to meet growing demand in the state.[29] Because ERCOT is located entirely in the State of Texas, ERCOT is largely outside regulation by the Federal Energy Regulatory Commission (FERC) -- the PUCT has complete oversight over ERCOT.

The areas outside ERCOT include: El Paso Electric Company (part of the Western Electricity Coordinating Council), Entergy Texas (part of the Midcontinent Independent System Operator), American Electric Power, Southwestern Electric Power Company and Xcel Energy (all a part of the Southwest Power Pool). The PUCT participates in multi-jurisdictional meetings with these entities, as well as regulators from adjacent states, to ensure transmission adequacy for these regions.[30] [31]

ERCOT identifies and analyzes existing and potential constraints in the transmission system that poses reliability concerns. Eagle Ford Shale activities have created the need for transmission system improvements in South Texas. Due to transmission constraints, ERCOT was forced to implement rolling outages on October 8, 2014, highlighting the need for continued investment.[32]

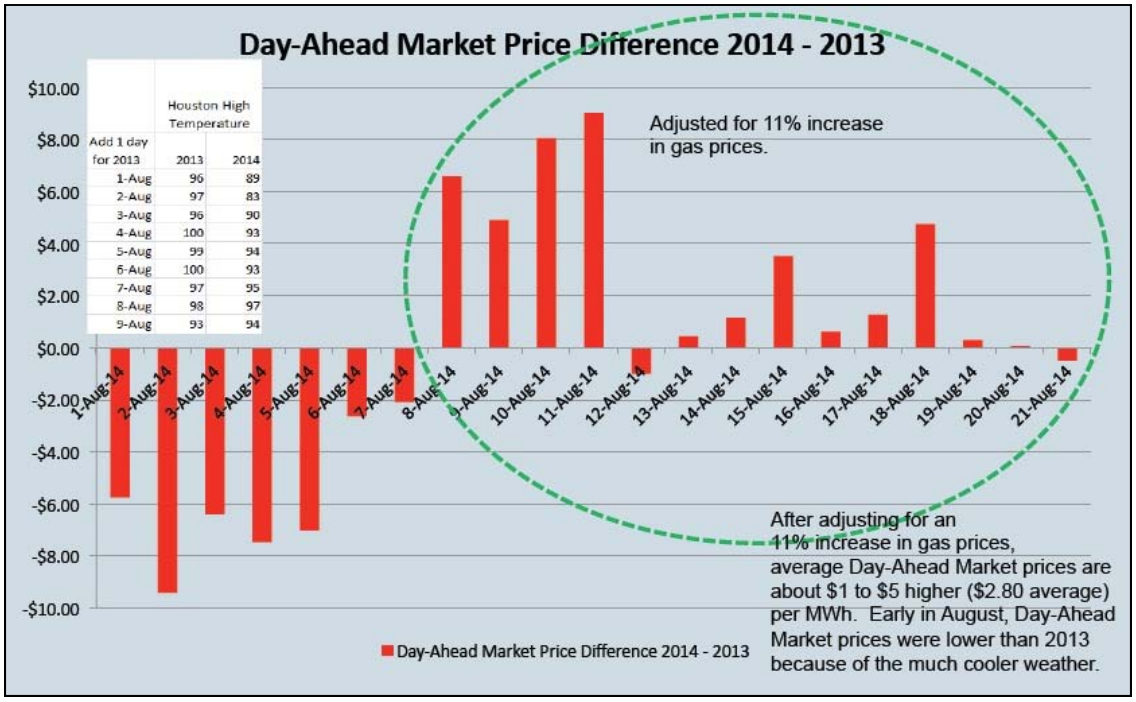
Regulatory Initiatives to Improve Generation Resource Adequacy

The PUCT and ERCOT made several changes to address the need for generators to increase their revenue in the wholesale market. Promoting revenue through more accurate pricing in the wholesale market is the central basis for bringing new power plants online.[33]

ERCOT increased its system-wide offer cap (SWOC) in the nodal energy market from $5,000/MWH in 2013 to $7,000/MWH in 2014.[34] The SWOC will increase to $9,000/MWH in 2015.[35] This mechanism is designed to better reflect the true value of electricity during times of scarcity, while ensuring some control in the market to maintain affordable prices for retail electric providers (REPs) who need to purchase that power for end-use customers.[36]

ERCOT also recently added an Operating Reserve Demand Curve (ORDC), designed to improve price signals in the wholesale market. The ORDC is in its early stages, and the PUCT and ERCOT are monitoring its effect on market clearing prices. It is hoped that the ORDC will help provide more accurate prices during times of scarcity, which, in turn, will create additional incentives for electric generators to invest in the ERCOT power market.[37]

The graph below compares August 2014 ERCOT day-ahead market prices with those of 2013, with an adjustment for the difference in natural gas prices. As shown, day-ahead prices were higher for generators, suggesting some positive impact of the rule changes.[38]



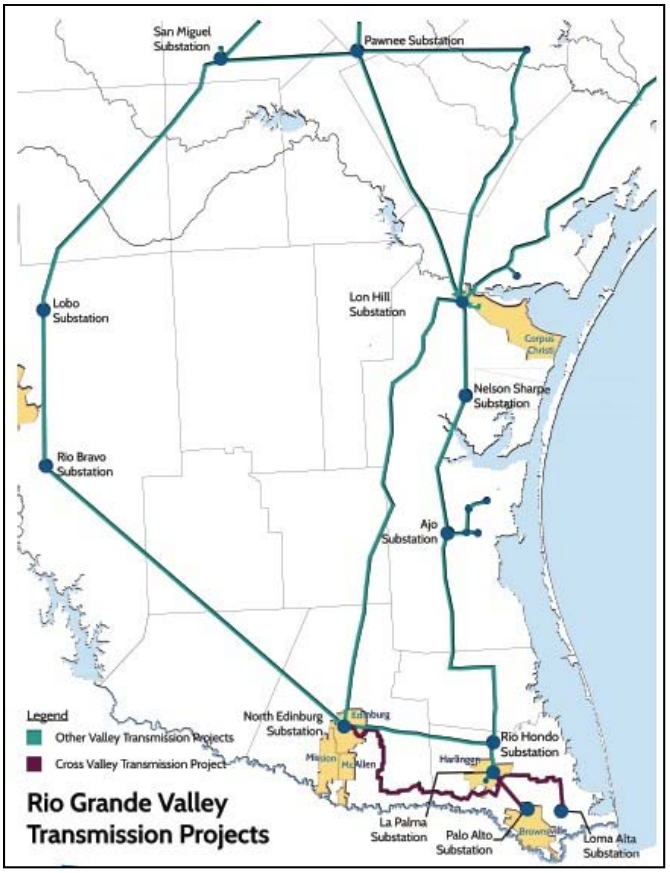
Source: PUCT Commissioner Anderson's presentation to the House Committee on State Affairs, September 4, 2014

Regulatory Initiatives to Improve Transmission Adequacy

The PUCT recently approved the Lower Rio Grande Valley project to upgrade and increase capacity of facilities in the Valley. As shown, the project will connect Corpus Christi, Laredo, Hidalgo County and the Brownsville Ship Channel. The ERCOT regional planning group continues to evaluate the need for additional improvements.[39]

Transmission and distribution utilities, ERCOT and the PUCT are working closely with state and federal agencies to identify critical infrastructure within the ERCOT system, as well as taking the steps necessary to improve the security of power lines, substations and other necessary equipment. Working groups nationwide include: the US Cyber Emergency Response Team, the National Electric Sector Cyber Security Organization, the Department of Homeland Security, the US Nuclear Regulatory Commission and the North American Electric Reliability Council.[40] [41] [42] [43] [44]

Sub-synchronous oscillation (SSO) is caused by long transmission lines, as well as some connected equipment. It is a variance in frequency, and aligning frequencies can create increased stress on components of the grid. In the worst cases, SSO can cause power line components to fail and damage generating plants. The PUCT is evaluating the potential for SSO damage system-wide, and potential system modifications may be required. The PUCT has an open project to determine how to address SSOs, who will implement SSO improvements and how those costs should be allocated.[45]



Source: ERCOT presentation to the House Committee on State Affairs, September 4, 2014

The agency has also opened up a project related to ratemaking for transmission and distribution utilities in ERCOT. The project is designed to improve cash flow and reduce regulatory burden for utilities, allowing for more regular investment in transmission and distribution infrastructure.[46]

Recommendations

Generation resource adequacy is vital to Texas' healthy economy; therefore it is critical that the state continue to utilize a diverse portfolio of power generation. While current electricity supplies appear to be sufficient for the next few years, regulators must persist in overseeing market structure to ensure we continue to build and maintain reliable generation infrastructure. To increase transparency and bolster confidence, ERCOT should report biannually to the PUCT and to the respective legislative committees as to the accuracy of its load forecasting model.

TITLE 15 OF THE ELECTION CODE

Interim Charge # 2: Study Title 15 of the Election Code, which regulates political funds and campaigns, including requirements for financial reports by campaigns, candidates, officeholders, and political committees. Specifically, study what types of groups are exempt from reporting requirements in the Election Code and make recommendations on how to make the political process more transparent.

Public Hearing

The House Committee on State Affairs held a public hearing on May 1, 2014, at 10:00 a.m. in Austin, Texas in the John H. Reagan Building, Room 140, to address the above interim charge. The Committee heard testimony from eight invited witnesses with experience related to campaign finance. The following invited individuals testified:

Witnesses are listed in alphabetical order

- Steve Bresnen, *Bresnen Associates*
- Jim Clancy, *Chairman, Texas Ethics Commission*
- James Dunnigan, *Member, Utah House of Representatives*
  Chairman, Special Investigative Committee
- Chris Gober, *Gober Hilgers PLLC*
- Fred Lewis, *President, Texans Together & Campaign Finance Advisor*
- Joe Pojman, *Executive Director, Texas Alliance for Life*
- Russell Withers, *General Counsel and Policy Analyst,*
  Texas Conservative Coalition Research Institute
- Kyleen Wright, *President, Texans for Life Coalition*

Introduction

Funds used to pay for election campaigns that are not disclosed to voters are commonly referred to as "dark money." Texas voters have a right to know who is influencing elections, and transparency of campaign contributions is a crucial first step in restoring public confidence to our campaign finance system. In 2010, the United States Supreme Court in its *Citizens United v. Federal Elections Commission,* decision gave free reign to corporations and labor unions to make unlimited "independent expenditures" in elections. Some, including corporations, labor unions and individuals -- have discovered that by obtaining tax-exempt status under Internal Revenue Code (IRC) section 501(c)(4), independent political expenditures can be made without having to disclose the names of the persons or entities who funded them. This created an attractive option for some people to anonymously spend money to influence elections. **However, it is extremely important to note that an often-overlooked part of *Citizens United* is the fact that the Court did NOT change campaign disclosure laws. In fact, eight of the nine Supreme Court Justices voted to give their full support in upholding existing campaign disclosure laws.**

The next section of this report provides detail of the damaging impact that anonymous campaign contributions have on elections and recommendations on how to make the campaign finance system more transparent to Texas voters. **When the public cannot determine who or what organization is behind a political message, it allows for potential corruption of our free democratic process. Voters can better measure the authenticity and accuracy of political messages when they know who is behind the message.**

Background

The Texas Ethics Commission (TEC) is responsible for administering and enforcing Title 15 of the Election Code, which regulates political funds and campaigns, including requirements for financial reports by campaigns, candidates, officeholders and political committees. The TEC was established in November 1991, after a new provision, Article III, Section 24a was added to the Texas Constitution. This constitutional provision was created to replace the Secretary of State with the TEC as the agency administering lobbyist regulation statutes, campaign finance and other ethics laws.[47]

During the 83rd Legislative Session, the Texas Legislature passed Senate Bill (SB) 346, which required a person or group of persons that does not meet the definition of a political committee, and spends more than $25,000 in a calendar year on political expenditures, to disclose to the TEC the identity of donors whose contributions exceeded $1,000 in a reporting period.[48] According to the House Research Organization Bill Analysis of SB 346, supporters of the bill said, "SB 346 would close a loophole in existing political contribution reporting requirements and ensure that all entities spending money to influence elections were treated the same." [49] SB 346 passed the Senate on a vote of 23 to 6, and the House 95 to 52.[50] [51] The bill was vetoed by Governor Rick Perry on May 25, 2013.[52]

Title 15 of the Election Code

Title 15 of the Election Code §251.001(12) defines a "political committee" as a group of persons that has a principal purpose accepting political contributions or making political expenditures.[53] Election Code §254.261(a) defines a "direct expenditure filer" as, "A person not acting concert with another person who makes one or more direct campaign expenditures in an election from the person's own property shall comply with this chapter as if the person were the campaign treasurer of a general-purpose committee that does not file monthly reports under §254.155." [54]

Notably, both political committees and direct expenditure filers are required to report political *expenditures*.[55] However, the TEC has not required political committees to report political contributions, which leaves direct expenditure filers the ability to keep their contributors anonymous.[56] Additionally, an entity's status as for-profit or non-profit does not have an effect on its standing as a political committee under Texas law and does not affect its duty to comply with Texas campaign finance laws. Moreover, Texas has no restrictions on contribution limits.[57]

Since the *Citizens United* decision, Texas has experienced a dramatic increase in the amount of direct campaign expenditures. Testimony by then-TEC Chair Clancy indicated that direct

campaign expenditures were on the rise and direct expenditure reports filed with the TEC underscore his testimony.[58] The following table shows the number of direct expenditure reports filed with the TEC during the past three election years: [59]

Year	Number of Direct Campaign Expenditure Reports
2010	28
2012	64
2014	95

The definitions in Title 15 on the difference between political committees and direct expenditure filers, or what constitutes political expenditures and/or contributions, are often unclear or misinterpreted by filers. This could be a possible explanation for the recent increase in direct campaign expenditures.

Political committees are required to maintain a record of all information used to prepare reports of political expenditures and contributions for a minimum of two years after the deadline for the submission of the report.[60] They must keep a record of the names, addresses of donors, and in some cases the principal occupation of the donor, as well as the date each contribution was received.[61] A letter dated May 15, 2014, signed by 11 members of the House Committee on State Affairs, stated that the TEC has the **clear authority under current law to require the disclosure of donors and their contributions, if those contributions are used to make direct campaign expenditures** as defined in §254.261, Election Code.[62]

In taking steps under the authority already afforded to the TEC, at its August 21, 2014, meeting, the Commission voted to propose rules that were written to help clarify current rules.[63] The proposed rules included, clearly defining "a principal purpose" and setting a standard whereby "A group has a principal purpose accepting political contributions if the proportion of the political contributions to the total contributions to the group is more than 25 percent within a calendar year."[64] The Commission also proposed a clarification for Commission Rule §22.6(b) whereby "acting in concert" is clearly defined and some criteria for evidence of acting in concert are laid out.[65] On October 29, 2014, the Commission unanimously adopted those two proposed rules that clearly define "a principal purpose" and "acting in concert," which should prevent filers from deciding their own interpretations.[66] [67]

Some critics have said that in light of the governor's veto of SB 346 the Commission's adoption of the two proposed rules was tantamount to acting like a legislature. However, it is **critically important to note** that Justice Paul Green of the Texas Supreme Court in its 2009 *Entergy Gulf States, Inc. v. John Summers* opinion states, **"Just as we decline to consider failed attempts to pass legislation, we likewise decline consideration of lawmakers' post-hoc statements as to what a statute means; explanations produced, after the fact, by individual legislators are not statutory history and can provide little guidance as to what the legislature collectively intended."** [68]

In an opinion editorial titled, *"Dark Money" rule a win for transparency in Texas,* TEC Commissioner Chase Untermeyer wrote, "We're not a legislature, but we're charged with interpreting and enforcing existing law to help clarify the disclosure process. This we did by ruling that a group is a "political committee" under the Texas Election Code if more than 25 percent of its spending is directed toward the support or opposition of candidates and referenda. Under the same law, political committees must disclose their contributors and their expenditures…By setting the floor at more than 25 percent of spending, we in effect said that a group may have three principal purposes and that if politics is one of those, the group must register and report as a political committee." [69]

The Committee heard testimony at the May 1, 2014, hearing that SB 346 83(R) created an entirely new statutory category of filers and established reporting thresholds and recordkeeping requirements for the new filers, whereas, implementing §254.261, Election Code, would use existing reporting thresholds and would not require additional recordkeeping.[70] (In addition, §22.352, Business Organizations Code, already requires non-profit corporations to maintain complete financial records.) [71]

The disclosure required by the language of §254.261, Election Code, is <u>not</u> limited to expenditures; however, currently, that is all that is being reported. In a letter dated May 27, 2014, to then-TEC Chair Clancy, Chairman Byron Cook states that, *"The legislature revised that law [§254.261, Election Code], to apply it's reporting requirements to* ***all legal entities****, if they make direct campaign expenditures. Prior to that statutory change, it only applied to individuals -- therefore, now businesses and non-profits are required to report. For example, if a person makes direct campaign expenditures without receiving contributions, the person would report $0 in contributions. But, if the person uses contributions to* ***influence elections****, they are required to report those contributions like everyone else, whether they are an individual, a corporation or any kind of non-profit."* [72] In §571.001(3), Government Code, the legislature directed the TEC to construe the laws under its jurisdiction in favor of full disclosure.[73]

At the May 1, 2014, hearing, it was apparent that the TEC investigates alleged violations of the Election Code upon receiving sworn complaints.[74] However, enforcing Title 15 has become problematic because of the ambiguity of the phrase "a principal purpose". Notably, the TEC's publication entitled, *Campaign Finance Guide for Political Committees* states, "A group becomes a political committee by its actions, not by filing an appointment of a campaign treasurer." [75] For example, while an organization may originate with a principal purpose of education, its principal purpose may eventually develop into political campaigning. Deducing when the principal purpose has shifted has proven difficult without a predetermined standard in place.

<u>501(c)(4) Social Welfare Organizations</u>

According to the Internal Revenue Service (IRS) **501(c)(4) non-profits are, "To be operated <u>exclusively to promote social welfare</u>, an organization must operate primarily to further the common good and general welfare of the people of the community."**[76] The IRS defines this tax-exemption as: *"To be tax-exempt as a social welfare organization described in Internal*

Revenue Code (IRC) section 501(c)(4), an organization must not be organized for profit and must be operated exclusively to promote social welfare…the promotion of social welfare does not include direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office. However, a section 501(c)(4) social welfare organization may engage in some political activities, so long as that is not its primary activity."[77]

Although, the IRS notes that seeking to influence legislation germane to the organization's **programs through lobbying is a permissible means of attaining social welfare purposes, it cannot be the organization's primary purpose.** [78] In summary, this means two things: (1) campaign activity cannot be the organization's primary activity and (2) a group that primarily benefits private partisan interests may jeopardize its 501(c)(4) status.[79] Furthermore, "…a section 501(c)(4) organization that engages in lobbying may be required to either provide notice to its members regarding the percentage of dues paid that are applicable to lobbying activities or pay a proxy tax." [80]

Currently, under Federal Law, social welfare organizations are required to file information returns on Form 990.[81] This form is a public document and requires the organization to disclose donors who contributed $5,000 or more.[82] However, the information regarding donors is only accessed by the IRS and not included in the public disclosure portion of the document (see §§ 6104, 6103, Treas. Reg. 1.6104(b)-1(b), prohibiting disclosure of donor information on Form 990).[83]

The *Citizens United v. FEC* ruling should not be misinterpreted to have held that 501(c)(4) organizations have a constitutional right to anonymously influence elections. Additionally, the May 1, 2014, testimony, from a number of experts, revealed that since the *NAACP v. Alabama* case, the U.S. Supreme Court, in numerous cases including *Citizens United* and *McCutcheon,* has repeatedly held disclosure requirements to be constitutional.

In fact the Court noted that, **"independent groups…running election-related advertisements 'while hiding behind dubious and misleading names' and that 'the public has an interest in knowing who is speaking about a candidate just before an election…'since they help citizens "make informed choices in the political marketplace."** [84] Supreme Court Justice Anthony Kennedy, who authored the 5-4 majority opinion in *Citizens United*, also wrote, "Transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages." [85]

Additionally, *Citizens United* referenced "independent campaign expenditures," which is the equivalent to Texas' use of "direct campaign expenditures." *Citizens United* plainly upheld disclosure of contributors who fund independent expenditures of a non-profit, remarking, "That statement must identify the person making the expenditure, the amount of the expenditure, the election to which the communication was directed, and the names of the certain contributors." [86] In a recent campaign finance Supreme Court decision, Chief Justice John Roberts, stated, "*Finally, disclosure of contributions minimizes the potential for abuse of the campaign finance system. Disclosure requirements are in part 'justified based on a governmental interest in providing information to the electorate about the sources of election-related spending.' They*

may also deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. Disclosure requirements burden speech but--unlike the aggregate limits--they do not impose a ceiling on speech. For that reason, disclosure often represents a less restrictive alternative to flat bans on certain types or quantities of speech." [87]

Thousands of individuals, businesses, and non-profits comply with federal, state and local election laws each year and over a majority of the House Committee on State Affairs concurred that it is unfair to allow others to use a different set of requirements.

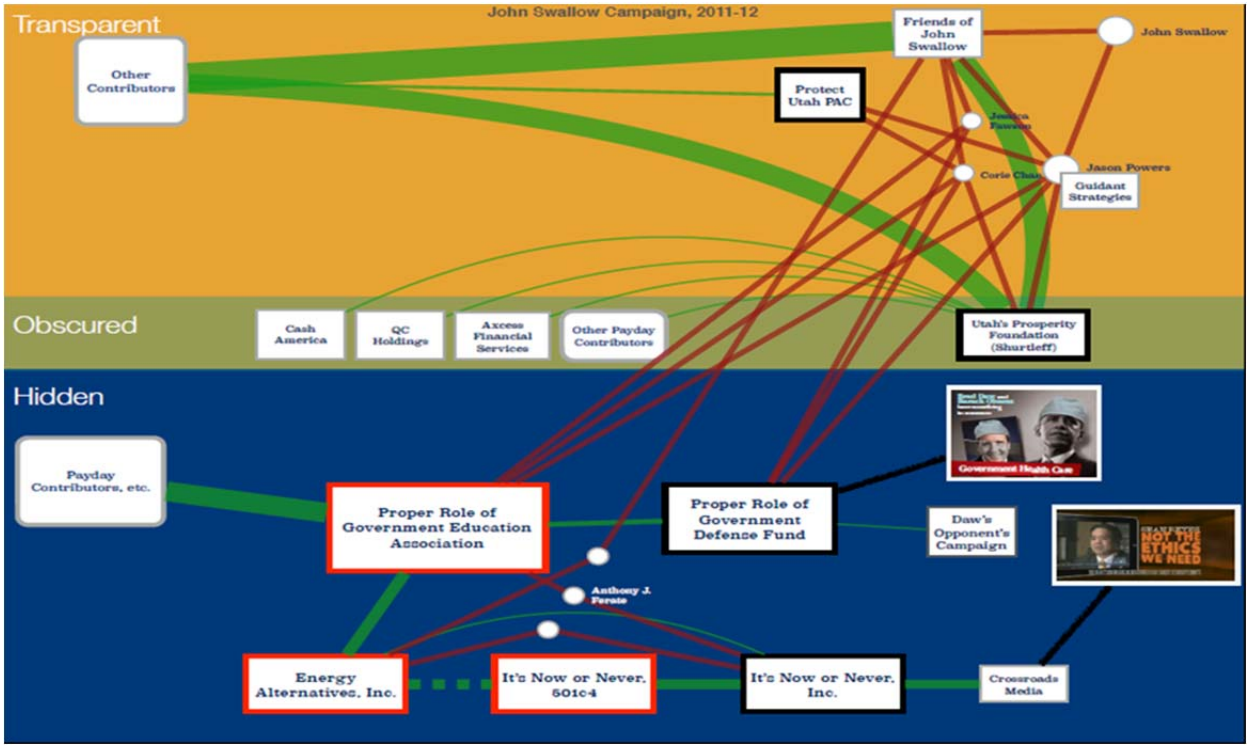
The State of Utah

In reviewing how other states address the issue of campaign finance, it became clear that Utah, like Texas, had very few laws regarding disclosure of campaign contributions. **A recent scandal in Utah, which cost the state eight months and more than four million dollars, provides great insight into the level of corruption and sophistication that anonymous contributors utilize to abuse the campaign finance system.**

The Utah House of Representatives established a Special Investigative Committee on July 3, 2013, to investigate and report on allegations of misconduct by then-Attorney General (AG) John E. Swallow.[88] The committee was chaired by State Representative James A. Dunnigan, (R)-Taylorsville. Eager to learn from a conservative state with similar campaign finance laws, the House Committee on State Affairs invited Dunnigan to provide testimony at its May 1, 2014, hearing. His testimony focused on the investigation that he led into the use of highly complex 501(c)(4) non-profits to disguise campaign contributions.

Dunnigan's testimony disclosed that the Special Investigative Committee exposed that when Utah's sitting AG, Mark Shurtleff, decided not to run for a fourth term, his then-chief deputy, John Swallow, laid plans to run as his successor.[89] [90] Swallow, assisted by Shurtleff, exploited a web of vaguely named 501(c)(4) non-profit organizations in several states to mask hundreds of thousands of dollars in campaign contributions used to attack his opponent and other members of the Utah Legislature. [91] Figure 1 below, provided by Chairman Dunnigan shows the complex design and ability of organizations and individuals to keep contributions anonymous.[92] Many of the non-profit organizations created by the Swallow campaign, had misleading names, including the *Proper Role of Government Education Association* and *It's Now or Never, Inc.* [93] The largest contributions were funneled through the newly created non-profits, with *The Proper Role of Government Education* collecting $452,000 during Mr. Swallow's campaign.[94] A memo on one $5,000 check described it as a "campaign contribution," which underscores the explicit political nature of the non-profit groups.[95]

Figure 1



Amid the growing scrutiny of potential corruption, Swallow was forced to resign in November 2013, not even holding the office for a year. In July 2014, both former AGs Swallow and Shurtleff were arrested and charged with a combined 23 counts, including receiving or soliciting bribes, accepting gifts and tampering with witnesses and evidence, which could land each in prison for 30 years. [96]

Following the scandal investigation, the Utah Legislature passed several bills enacting stricter campaign finance laws. One of those bills was House Bill 394, sponsored by Chairman Dunnigan, which, among other things, allows individuals to opt-out if they do not want their contributions to organizations used for political purposes.[97] HB 394 was signed by the governor of Utah on March 13, 2014, with an immediate effective date. [98]

Conclusion

Some contributions to entities that are actively seeking to influence elections in Texas are not subject to disclosure, while others are required by law to be disclosed. The integrity of our elections depends on the ability of the public being fully informed and having the right to know who is spending money to influence elections. Then-TEC Chair Clancy remarked at the October 29, 2014, TEC meeting, **"…in Texas, where there are no limitations on contributions and no limitation on expenditures, disclosure is the only protection the public has."** [99]

In a recent 5th Circuit Court of Appeals decision *Catholic League v. Texas Ethics Commission*, stated, "Unlike contribution and expenditure limits, the government may further defend disclosure regulations based on a governmental interest in providing the electorate with information about the sources of election-related spending...the need for an effective and comprehensive disclosure system is especially valuable after *Citizens United*…the court is not blind to the fact that Texas's disclosure scheme, given Texas's near-total aversion to spending limits, plays a relatively more important role in preventing corruption or its appearance." [100]

Transparency is an essential principle of free and competitive markets and is equally vital in a system of free and competitive elections. Money raised and spent to influence voting decisions and election results should be subject to public scrutiny. All groups functioning as political committees, with a principal purpose of accepting political contributions or making political expenditures, should be held to the same standard of disclosure requirements. The lack of transparency and accountability in the campaign finance system fortifies public mistrust in government. **If we fail to act, we leave the opportunity for a growing number of entities to anonymously manipulate and control our elections, which undermines the democratic process.** In order to make the most informed decision in casting their ballot, Texas voters have a right to place political messages in context.

Recommendations

The ability to give and spend anonymously through highly sophisticated means, often by obtaining 501(c)(4) status, corrupts the free democratic process for everyone. It is fundamentally vital that the legislature increase the transparency of our campaign finance system and protect the integrity of our elections, while providing for laws that meet constitutional scrutiny. In order to remedy the current loophole found in existing political contribution reporting requirements, lawmakers should pass legislation that will ensure that all entities spending substantial funds to influence elections have the same reporting standard. Additionally, like the State of Utah, the Texas Legislature should give individuals who donate to non-profit groups the ability to expressly opt-out of having their donations used for political purposes. To bolster and possibly further clarify the actions taken by the TEC on October 29, 2014, the legislature should consider defining in statute, the phrase "a principal purpose" and "acting in concert". Finally, the legislature could enact statutes requiring the disclosure of the identity of persons funding direct campaign expenditures made by a person that does not meet the definition of a political committee.

FINANCIAL ASSURANCE OPTIONS

Interim Charge # 3: Study the different financial assurance options used by state agencies to ensure compliance with environmental clean-up or remediation costs. Determine whether the methods utilized by state agencies are appropriate to ensure sufficient funds will be available when called upon.

Introduction

At the request of the House Committee on State Affairs, the Texas Commission on Environmental Quality (TCEQ) and the Railroad Commission of Texas (RRC) composed reports on the methodology and utilization of each agency's financial assurance options. **These reports are the exact format and language received by the Committee.**

The next section of this report will provide an Executive Summary of the TCEQ report and the full RRC report. These agency reports do not contain any recommendations for the legislature.

The full TCEQ report on financial assurances can be found at the following link:
http://www.tceq.state.tx.us/assets/public/comm_exec/pubs/ctf/014.pdf

Texas Commission on Environmental Quality

Background

Financial Assurance (FA) is a term used to describe financial mechanisms/instruments1 that assure funds are available for the completion of closure, post-closure or corrective action activities should a facility permittee be unable or unwilling to perform such activities as required by their license, permit or registration.

The TCEQ oversees approximately $12.1 billion in FA potentially available for environmental clean-up and remediation provided for approximately 14,000 facilities. FA is a requirement for 18 different regulatory programs managed by the TCEQ. Approximately 9 percent of the $12.1 billion in total FA overseen by the TCEQ is maintained as part of federally delegated programs from either the United States Environmental Protection Agency (EPA) or the United States Nuclear Regulatory Commission (NRC). For 10 of those programs, the delegating agency sets the minimum standards for the types of FA mechanisms, which the TCEQ uses to operate its FA program. Eight smaller, state-authorized FA programs use slightly different standards which are set out either in rule or statute. Unless specific instruction is set out by state statute for these state-authorized programs or programmatic requirements direct otherwise, the TCEQ generally follows the federally established FA requirements.

1 The term "mechanism" has the same meaning as "instrument," and due to its common usage in regulation and statute, mechanism will be the primary term used in this report.

Table 1 Financial Assurance Authorization and Delegation

EPA	NRC	Texas
Industrial Hazardous Waste (IHW)	Low-level Radioactive Waste Disposal	Recycling
Underground Injection Control (UIC)	Radioactive By-Product Material Disposal	Class B Sewage Sludge Land Application
Municipal Solid Waste (MSW)	Radioactive Alternative Methods of Disposal (Burial)	Petroleum Contaminated Soil Remediation
Underground Storage Tanks (UST)	Uranium Mining	Water Utilities
Used Oil	Radioactive Substances Processing and Storage	Scrap Tire Recycling
		Medical Waste Transporters
		Quarries in the John Graves Scenic Riverway
		Brine Pits

Permittees for most programs can choose from among six FA mechanisms. For most programs, FA is provided by the permittee prior to acceptance/management of waste at the facility. FA costs estimates for closure and post-closure are based on how the waste is managed.

The TCEQ is seldom required to collect under a FA mechanism because most permittees address their environmental obligations without the need for regulatory intervention or do not have releases of contaminants which need to be addressed. For example, not all underground storage tanks leak although financial assurance is required to address the potential for a release. However, when an FA mechanism is required to address a permittee's environmental obligations, the FA has generally been sufficient to address the required activities.

In those instances when FA has been inadequate, there are two primary reasons why FA could be insufficient for closing a facility. The first reason could be that the cost estimates associated with the facility are inadequate or non-existent. This usually occurs when a licensed entity is out of compliance, or in the event of a release or contamination. The second reason for FA insufficiency may occur in the event of a FA mechanism failure, where the agency is unable to draw upon FA funding to address issues at the site. Although most FA mechanisms pay when demanded, the TCEQ has encountered problems attempting to collect closure/post-closure insurance and pay-in trust mechanisms. The TCEQ recognizes, however, that changes in authorized mechanisms allowed or to the terms of operation would likely come at a cost to regulated entities.

Additionally, when the need for corrective action occurs, programs that do not require FA for potential corrective action are at a higher risk for insufficient financial assurance. Consistent with federal rules from delegating agencies, no FA for potential corrective action is required in advance for most programs due to the wide ranging possible cost estimates as well as the potential cost to the facility permittee of carrying the FA mechanism. Instead, FA for corrective action is not required until a release has occurred, been investigated, characterized, a remedy method is selected, and the required FA amount is calculated. The financial viability of the responsible entity at that time determines whether adequate FA for corrective action is provided.

Railroad Commission of Texas

Background

The Railroad Commission of Texas is the state agency with primary regulatory jurisdiction over the oil and natural gas industries, pipeline transporters, natural gas and hazardous liquid pipeline industry, natural gas utilities, the LPG/LNG/CNG industries, and coal and uranium surface mining operations. As such, the Commission has statutory responsibilities under state and federal laws for regulation and enforcement of the state's energy industries, including oversight of environmental cleanup or remediation compliance should such action become necessary.

The Commission's oversight includes the prevention and abatement of surface and subsurface water pollution and environmental cleanup or remediation compliance should such action become necessary at oil and gas sites, and with respect to surface mining, to evaluate applications and issue permits, enforce regulations, and assure that mining sites are reclaimed in accordance with the applicable laws, rules, and permits. The Commission has statutory authority to require financial assurance in four general areas:

1) Surface Mining sites, to include:
    a) Coal Mining, which require that all coal mining permits maintain financial assurance in the form of bonding for the entire length of the permit. Accepted types of financial assurance include: surety bonds, collateral bonds, escrow account bonds (a form of collateral bond), self-bonds and combined surety/escrow bonds. Twenty-nine coal mining permits are actively bonded at present.
    b) Uranium Mining, though currently, no active uranium mining or reclamation is taking place in Texas. The Commission accepts the following types of bonds for uranium mining: self-bonds, surety bonds, or collateral bonds.
2) Oil and Gas wells;
3) Oil and Gas commercial waste management facilities; and
4) Oil and gas activities other than wells or waste management facilities.

For oil and gas operators, of any type, the primary source of financial assurance is put forth as part of the P-5 Organization Report. Pursuant to Texas Natural Resources Code §91.142(f)(1), individuals or organizations are not permitted to conduct oil and gas operations in Texas without an active P-5 on file with the Commission.

All commercial oil and gas waste management facilities require financial assurance pursuant to Texas Natural Resources Code 91.109 and 16 TAC Sec. 3.78(l). This includes collecting pits at commercial injection well sites, reclamation plants that use on-site waste storage or disposal that requires a permit under 16 TAC Sec. 3.8, and commercial oil and gas waste recycling, disposal, separation, and land treatment facilities. The financial assurance must be a bond or letter of credit on the form approved by the Commission.

Financial Assurance Instruments by Industry

Surface Coal Mining Current Financial Assurance (as of 7/1/14)			
Company	Type of Financial Assurance	Amount of Financial Assurance	Number of Sites
Alcoa, Inc.	Collateral Bond	$27,250,000	1 site
Dos Republicas	Collateral Bonds	$10,478,632	2 sites
Farco Mining, Inc.	Surety Bonds	$5,826,105	3 sites
Texas Westmoreland Coal Company	Self-Bond with Third-Party Guarantee	$76,000,000	2 sites
	Surety Bond	$31,500,000	
The Sabine Mining Company	Self-Bonds with Third-Party Guarantee	$115,000,000	2 sites
Marshall Mine, LLC	Surety Bonds	$20,200,000	2 sites
San Miguel Electric Cooperative, Inc.	Self-Bonds with Third-Party Guarantee	$100,000,000	2 sites
TMPA	Collateral Bond	$18,400,000	2 sites
	Escrow-Account Bond	$350,000	
	Self-Bond	$13,500,000	
Luminant Mining Company, LLC	Collateral Blanket Bonds	$1,100,000,000	13 sites
Walnut Creek Mining	Surety Bond	$43,198,583	1 site

Oil and Gas Waste Management Current Financial Assurance (as of 5/31/14)		
Type of Facility	Total Amount of Financial Assurance	Number of Sites
Collecting pits at commercial injection wells	$14,024,153.90	113
Commercial Solids Recycling, Disposal, Separation and Land Treatment Facilities	$30,598,030.53	58
Reclamation Plants that use on- site waste storage or disposal that require a permit under 16 TAC Sec. 3.8	$2,542,147.22	33

Oil and Gas Wells Current Financial Assurance (as of 6/28/14)		
Type of Facility	Total Amount of Financial Assurance	Number of Wells
Well operated by operators current with Commission required P-5.	$343,425,803	410,936
Under Texas law, an operator may meet the financial security requirement by the posting of a bond, letter of credit, or cash deposit.		

Financial Security as applied to P-5 Organization Report requirements was initially adopted under SB 1103 (72nd Legislative Session) and included several options other than the posting of a bond or letter of credit. Under SB 310 (77th Legislative Session) the "unbonded" options were eliminated, leaving the requirement to post a bond, letter of credit, or cash deposit in specified amounts.

P-5 financial security for non-well operations is required under Texas Natural Resources Code Section 91.109. As originally implemented under SB 1103, the requirement was $25,000 if the operator had any activities other than the operation of wells. Under HB 942 (78th Legislative Session), certain activities were exempted from the requirement to post financial security. NOTE: the $25,000 required with the P-5 filing is in addition to any closure cost bonding required by the Technical Permitting section of the Railroad Commission.

Financial security for well operations is calculated under two methods:

> Blanket: a three-tier structure requiring $25,000 for 1 to 10 wells; $50,000 for 11–99 wells, and $250,000 for 100 or more wells. This option is available to all operators. The bonding amounts were set by SB 1103.
> Individual Well: $2.00 per foot of well depth for all wells operated. This option is unavailable to operators who have no-well operations. This level was set under SB 1103.

In addition to the base bonding, Commission rules require the operator of wells in state waters to post an additional $100,000 per non-producing offshore well and $60,000 per non-producing bay well. Note that an operator's financial security requirement is the maximum of the well requirement and the non-well requirement; the two aren't additive. In addition to the well and site specific financial assurance instruments available to the Commission, the Oil and Gas Regulation and Cleanup Fund (OGRC) is available to address those environmental situations that occurred prior to the implementation of financial assurance requirements. The OGRC is funded by fee revenue from industry. Should it become necessary, OGRC funds are also available for sites with abatement, environmental cleanup, or remediation requirements in excess of their site specific financial assurance. If OGRC funds are used, the Commission is authorized to, and does, pursue appropriate legal action for reimbursement from the responsible operator.

Outstanding Liabilities

There are no outstanding liabilities related to surface mining sites.

From fiscal year 1992 to June 2014, the Commission has plugged more than 30,100 orphaned wells statewide, according to a prioritization plan that plugged those abandoned wells that pose a high risk to the environment first. The RRC identifies abandoned wells that pose a high risk of water contamination, employs periodic testing of those high risk wells, and gives priority to plugging high risk wells with compromised casings. As of June 30, 2014,

Commission records reflect a total orphan well population of 9,364 wells. Based on average per-well plugging costs in each Commission district for land wells, an estimated cost of $500,000 to plug each bay well, and an estimated cost of $1,000,000 to plug each offshore well, the estimated plugging cost for the total orphan well population is $268,037,487. (Excluding operators that have been delinquent for less than 12 months, the orphan well population consists of 6,459 wells, with an estimated plugging cost of $208,412,450.)

As of June 28, 2014, Commission well records include 1,367 wells predating the 1991 adoption of financial security requirements where no financial security, of any type, was posted. Commission records further show 2,252 wells where the only financial security posted was of an "unbonded" type prior to 2004. These wells are also included in the number of wells counted in the preceding paragraph. Using the average per-well costs in each RRC district observed in the state-managed plugging program, the estimated cost to plug these 3,619 wells is $75,890,992. Two of the wells in this population are identified as "Bay Wells." The estimated plugging cost of each Bay Well is approximately $500,000. Senate Bill 1103 (72nd Legislative Session), which implemented financial assurance, also authorized the Commission to use the Oil Field Cleanup Fund, now the Oil and Gas Regulation and Cleanup Fund, to plug abandoned wells and cleanup leases, pits and other oil field sites when the responsible operators have failed to do so. The Fund is supported entirely by fees, penalties and other payments collected from the oil and gas industry.

The Commission's rule, 16 TAC 3.78(l) includes safeguards intended to protect the state when facilities began operations prior to the introduction of financial assurance requirements. Under 78(l), commercial oil and gas waste management operators must submit a closure cost estimate performed by an engineer, based on the maximum amount necessary to close the facility under the terms of the permit, and approved by the Commission. Under the permit, the operator shall not receive waste until after the approved bond or letter of credit is on file with the Commission. Rule 78 does not specifically require the operator to update its closure cost estimate if conditions change at the facility, but because the estimate is based on the maximum amount to close under the terms of the permit, and presumes the operator is abiding by the terms of the permit, it is expected the operator will seek to amend the permit to account for anticipated changed conditions, at which time the closure cost estimate would be amended to account for new conditions under new permit terms.

Statutory Requirements

Various statutes determine the level of financial assurance required for either mining or oil and gas activities. While there is a statutory framework for financial assurance related to uranium mining found in Texas Natural Resources Code Ch. 131.201–131.204, there is not presently any uranium mining in Texas.

Coal Mining Statutes:

TEX. NAT. RES. CODE Ch. 134.121 - 134.126.	Summary of statutory requirements:
§134.121. PERFORMANCE BOND REQUIREMENT	After a surface coal mining and reclamation permit application has been approved, but before the permit is issued, the applicant shall file with the Commission a performance bond payable to the state and conditioned on the faithful performance of the requirements of statutory requirements and the permit. The bond will cover the area of land in the permit area on which the applicant will begin and conduct surface coal mining and reclamation operations during the initial term of the permit. The permit holder will provide an additional bond or bonds to cover a succeeding increment of surface coal mining and reclamation operations conducted in the permit area at the time the increment begins.
§134.122. AMOUNT OF BOND	The Commission determines the amount of the bond required for each bonded area to reflect the probable difficulty of the reclamation, considering factors including: (A) topography; (B) geology of the site; (C) hydrology; and (D) revegetation potential; and be sufficient to assure completion of the reclamation plan if the Commission has to perform the work in the event of forfeiture. The bond for the entire area under one permit may not be less than $10,000.
§134.123. BOND WITHOUT SURETY	The Commission may accept the bond of an applicant without separate surety if the applicant demonstrates to the satisfaction of the Commission the existence of a suitable and continuous operation sufficient for authorization to self-insure or bond the amount.
§134.124. ALTERNATIVE TO BONDING PROGRAM	Instead of establishing a bonding program under this subchapter, the Commission may approve an alternative system that will achieve the purposes of the bonding program.
§134.125. EXTENT OF LIABILITY UNDER BOND	Liability under the bond shall be for the duration of the surface coal mining and reclamation operation and of the applicant's responsibility for revegetation.
§134.126. SECURITY FOR BOND	The applicant and a corporate surety licensed to do business in the state will execute the bond unless the applicant elects to deposit security that equals or exceeds the amount of the bond required for the bonded area for the performance of the applicant's obligations under the bond: (1) cash; (2) negotiable bonds of the United States government or the state; or (3) negotiable certificates of deposit of a bank organized or transacting business in the United States.

Oil and Gas Operations Statutes, with specific requirements for Oil and Gas Waste Management:

TEX. NAT. RES. CODE Ch. 91	Summary of statutory requirements:
§ 91.103. PERSONS REQUIRED TO EXECUTE BOND, LETTER OF CREDIT, OR CASH DEPOSIT	Requires any person, including any firm, partnership, joint stock association, corporation, or other organization, required to file an organization report to execute and file with the Commission a bond, letter of credit, or cash deposit.
§ 91.104. BONDS, LETTERS OF CREDIT, CASH DEPOSITS, AND WELL-SPECIFIC PLUGGING INSURANCE POLICIES	Well-specific plugging insurance policies must: (1) be approved by the Texas Department of Insurance; (2) name this state as the owner and contingent beneficiary of the policy; (3) name a primary beneficiary who agrees to plug the specified well bore; (4) be fully prepaid and cannot be canceled or surrendered; (5) provide that the policy continues in effect until the specified well bore has been plugged; (6) provide that benefits will be paid when, but not before, the specified well bore has been plugged in accordance with Commission rules in effect at the time of plugging; and (7) provide benefits that equal the greatest of: (A) an amount equal to $2 for each foot of well depth, as determined in the manner specified by the Commission, for the specified well; (B)if the specified well is a bay well and regardless of whether the well is producing oil or gas, the amount required under Commission rules for a bay well that is not producing oil or gas; (C)if the specified well is an offshore well and regardless of whether the well is producing oil or gas, the amount required under Commission rules for an offshore well that is not producing oil or gas; or (D) the payment otherwise due under the policy for plugging the well bore.
§ 91.1041. INDIVIDUAL BOND	A person required to file a bond, letter of credit, or cash deposit who operates one or more wells may file a bond in an amount equal to $2 for each foot of well depth for each well.*
§ 91.1042. BLANKET BOND	(a) A person required to file a bond, letter of credit, or cash deposit under Section 91.103 may file a blanket bond to cover all wells for which a bond, letter of credit, or cash deposit is required as follows: (1) a person who operates 10 or fewer wells shall file a $25,000 blanket bond; (2) a person who operates more than 10 but fewer than 100 wells shall file a $50,000 blanket bond; and (3) a person who operates 100 or more wells shall file a $250,000 blanket bond.*
§ 91.105. BOND CONDITIONS	Each bond shall be conditioned that the operator will

	plug and abandon all wells and control, abate, and clean up pollution associated with an operator's oil and gas activities covered under the bond in accordance with the law of the state and the permits, rules, and orders of the Commission.
§ 91.106. EXECUTION OF BOND	Each bond shall be executed by a corporate surety authorized to do business in this state and shall be renewed and be continued in effect until the conditions have been met or release is authorized by the Commission.
§ 91.107. NEW BOND, LETTER OF CREDIT, OR CASH DEPOSIT	If an active or inactive well is transferred, sold, or assigned by its operator, the Commission shall require the party acquiring the well to file a new bond, letter of credit, or cash deposit.
§ 91.108. DEPOSIT AND USE OF FUNDS	Proceeds from bonds and other financial security required pursuant to this chapter and benefits under well-specific plugging insurance policies that are paid to the state as contingent beneficiary of the policies shall be deposited in the oil and gas regulation and cleanup fund and may be used only for actual well plugging and surface remediation.
§ 91.109. FINANCIAL SECURITY FOR PERSONS INVOLVED IN ACTIVITIES OTHER THAN OPERATION OF WELLS	A person applying for or acting under a Commission permit to store, handle, treat, reclaim, or dispose of oil and gas waste may be required by the Commission to maintain a performance bond or other form of financial security conditioned that the permittee will operate and close the storage, handling, treatment, reclamation, or disposal site in accordance with state law, Commission rules, and the permit to operate the site. However, this section **does not authorize** the Commission to require a bond or other form of financial security for saltwater disposal pits, emergency saltwater storage pits (including blow-down pits), collecting pits, or skimming pits **provided that such pits are used in conjunction with the operation of an individual oil or gas lease**.**
§ 91.1091. REFUND	The Commission shall refund the proceeds from a bond, letter of credit, or cash deposit required under this subchapter if: (1) the conditions that caused the proceeds to be collected are corrected; (2) all administrative, civil, and criminal penalties relating to those conditions are paid; and (3) the Commission has been reimbursed for all costs and expenses incurred by the Commission in relation to those conditions.

*The Commission by rule shall set the amount of the bond for an operator of one or more bay or offshore wells at a reasonable amount that exceeds the amount equal to $2 for each foot of well depth for each well. 16 TAC §3.78 (a) (11) (H) ii-iii) sets the financial assurance amount at $60,000 per bay well and $100,000 per offshore well.

**For oil and gas activities other than the operation of a well, a bond, letter of credit, or cash deposit in an amount not to exceed $25,000 is required from gatherers, gas plants, pipelines, reclamation plants, refineries, reserve pit cleaners, commercial salt water disposal skimmers,

and transporters. Financial assurance is not required from the following types of operators:

a. local distribution company;
b. gas marketer;
c. crude oil nominator;
d. first purchaser;
e. well servicing company;
f. survey company;
g. salt water hauler;
h. gas nominator;
i. gas purchaser; or
j. well plugger

A person who engages in more than one activity or operation, including well operation, for which a bond, letter of credit, or cash deposit is required does not have to file a separate bond, letter of credit, or cash deposit for each activity or operation in which the person is engaged. That person must only provide financial assurance in the greatest amount required among all of the activities or operations in which that person engages.

PROCUREMENT
HealthSelect Contract at Employees Retirement System of Texas

<u>Interim Charge # 4:</u> Review state agency contracting with businesses seeking to provide goods and services to the state. Study the procedures agencies use to determine the costs versus benefits when evaluating proposals. Determine whether additional disclosure and reporting requirements are necessary to ensure transparency and accountability and to promote ethical business practices.

Public Hearing

The House Committee on State Affairs held a public hearing on September 4, 2014, at 10:30 a.m. in Austin, Texas in the John H. Reagan Building, Room 140, to address the above interim charge. The following invited individuals testified:

<u>Witnesses are listed in alphabetical order</u>

- Ann Bishop, *Executive Director, Employees Retirement System of Texas*
- Robert Kukla, *Director of Benefit Contracts, Employees Retirement System of Texas*
- Tom Quirk, *Chief Executive Officer, UnitedHealthCare Operations in Texas & Oklahoma*

Introduction

On June 1, 2011, the Employees Retirement System of Texas (ERS) issued a Request for Proposal (RFP) for the HealthSelect of Texas third-party administrator contract, which would cover an initial four year period from September 1, 2012, through August 31, 2016.[101] Since September 1, 2005, the HealthSelect contract had been held by Blue Cross Blue Shield of Texas (BCBSTX).[102] The requested services included in the contract were administrative services, claims processing, network management and utilization management.[103] RFP responses from potential contractors were due on or before July 27, 2011. By the deadline, ERS received two responses to the RFP, one from BCBSTX and another from United HealthCare Services, Inc. (UnitedHealthcare).

According to ERS, the proposals by BCBSTX and UnitedHealthcare were evaluated on the basis of compliance and adherence to the RFP. Minimum requirements for the potential contractors included the following: having the appropriate licensing, good standing with the state, demonstrating experience with large organizations, having a provider network capable of servicing Group Benefits Program participants and meeting the net worth and liquidity requirements.[104] On February 21, 2012, the ERS Board of Trustees awarded UnitedHealthcare the HealthSelect contract with a begin date of September 1, 2012.[105]

Background

In 2012, Speaker Joe Straus issued a procurement interim charge and the Committee held a

public hearing to address the charge on September 27, 2012.[106] The Committee heard from a number of invited witnesses representing a myriad of state agencies, including ERS, regarding procurement and state contracting practices. Because the new contract start date began on September 1, 2012, no historical data was available to review, therefore, the testimony primarily focused on the bidding process.

Having been issued the procurement interim charge again, in 2014, the Committee held a second hearing on September 4, 2014, with a focus on the HealthSelect contract.[107] In preparation for the hearing, the Committee requested data, for comparison purposes, from the previous vendor BCBSTX, the current vendor, UnitedHealthcare and ERS. The Committee was interested to learn if the current vendor had met the commitments made in 2012.

Testimony at the September 4, 2014, hearing revealed some disturbing facts and increased the Committee's concerns regarding the new contract and the decision the ERS board had made, which includes the following:

- Charges subject to Balanced Billing increased from $125M to $161M. *(Increased member liability).*

- Eligible Charges for Out of Network Providers increased from $78M to $329M. *(Due to a Plan Design with lower Out of Network member benefits, members pay a significantly higher percent of Out of Network charges than Eligible In Network charges).*

- After seeing year over year In Network Provider's Discount increase, a reduction was observed in first year UHC data. *(In Network provider discount down 1 percent, this equates to $42M additional cost to the Plan).*[108]

In a memorandum written to ERS Board of Trustees dated September 26, 2014, Chairman Cook stated, "Perhaps one of the most disturbing realities that were revealed during the hearing was through the ERS Executive Director, Ann Bishop's testimony. Ms. Bishop stated several times that the data the Committee was furnished by BCBSTX and by UnitedHealthcare was not the same data that ERS had. It is disconcerting that the numbers we were given by the providers would not be the same as the numbers maintained by ERS." [109]

In the memorandum, Cook continued, "In order to ensure that the state and the approximately 440,000 participants are receiving the best possible medical program (provider access and pricing), I would highly recommend that the board call for an **independent audit** review of all claims data incurred during BCBSTX's final year (FY2012) and UHC's initial year (FY2013). Moreover, I strongly believe it is essential that this audit be directed by an **independent subject matter expert**. Because the ERS board has a fiduciary responsibility to this state, an independent audit would also offer the members of the board the information necessary to have a clear understanding about their decision that affects so many lives. An independent audit should present the necessary information to give the board a level of comfort that the provider choice was the right decision, or if the contract should be re-evaluated and possibly be rebid." [110]

ERS Board of Trustees Chair Brian Ragland responded to Chairman Cook's memorandum with a letter stating, in part, "An independent audit of the claims paid during the first year of the UnitedHealthcare administrative contract (FY13) has recently been completed by the audit firm Mountjoy Chilton Medley LLP, and an audit of the second contract year (FY14) will begin in January 2015." [111]

On November 7, 2014, the Texas State Auditor's Office (SAO) released its Audit Report, a compliance audit, on the HealthSelect contract at ERS.[112] After reviewing the Report and meeting with both ERS and the SAO, it became apparent that a public hearing was essential to ensure transparency and accountability for a contract that affects about 440,000 individuals in the State of Texas.

The Committee held a public hearing on November 19, 2014, at 2:00 p.m. in Austin, Texas in the Texas State Capitol Building, Room E2.014, regarding the Audit Report on the HealthSelect contract at ERS, SAO Report No. 15-007. The following invited individuals testified:

Witnesses are listed in alphabetical order

- Kristin Alexander, *Project Manager, State Auditor's Office*
- Ann Bishop, *Executive Director, Employees Retirement System of Texas*
- Cesar Saldivar, *Audit Manager, State Auditor's Office*

The SAO Audit Report revealed that ERS did NOT always ensure that compliance with state and ERS criteria for contracts was used. SAO's Overall Conclusion of Report No. 15-007 is laid out below and the link to the full SAO Report can be found here: http://www.sao.state.tx.us/reports/report.aspx?reportnumber=15-007 [113]

Overall Conclusion, SAO Report No.15-007

The Employees Retirement System (System) established processes to plan, procure, and form the HealthSelect of Texas third-party administrator (HealthSelect) contract it awarded to United Healthcare Services, Inc. in February 2012. However, those processes did not always ensure compliance with state and System criteria for contracts. The System had weaknesses and inconsistencies in its processes for planning and procuring the HealthSelect contract, including not defining "best value." As a result, it is not possible to determine whether the System selected the contractor that provided the best value to the State.

The System generally managed and monitored the HealthSelect contract to help ensure that the contractor performed according to the terms of the contract. However, until July 2014, the System did not have a process to reconcile its daily reimbursement payments to detailed health care claims, and it should improve the timeliness of its monitoring activities.

The HealthSelect contract with United Healthcare Services, Inc. is valid through the end of fiscal year 2016. The System estimates that administrative fees for the contract term will be $204.8 million. System health care claims payments under the contract for fiscal year 2013 exceeded $1.5 billion.

Planning. *The System established a process for planning and procuring the HealthSelect contract. However, that process did not involve the System's Purchasing Department, and the System did not assign staff who met state training and certification requirements to the planning and procuring of the HealthSelect contract. Additionally, that process did not ensure that the System prepared and maintained all required planning documentation and that the request for proposals (RFP) complied with statutory requirements and System policies.*

Procurement. *The System's process for evaluating the HealthSelect contractor proposals did not include many of the required or suggested elements in the State of Texas Contract Management Guide and did not always follow established System policy. The evaluation process the System established did not:*

- Result in a scoring tool with criteria that consistently related to the RFP provided to respondents.

- Provide guidelines to ensure that evaluators were consistent in how they scored the proposals.

- Verify the mathematical accuracy of the evaluation documentation.

- Include a methodology for handling additional evaluation factors not anticipated during planning.

Contract Formation*. The HealthSelect contract does not contain all essential contract clauses required by statute and the State of Texas Contract Management Guide. While the Office of the Attorney General (Office) reviewed the preliminary HealthSelect contract that the System included in its RFP, the System did not request that the Office review the final HealthSelect contract prior to the signing of the contract. Additionally, the System did not consistently document management approval of contract amendments in accordance with its policies.*

Contract Oversight*. The System monitored payments to United Healthcare Services, Inc. for administrative fees and established a process to determine whether health care management incentive payments are required. However, the System did not have a process to reconcile its daily reimbursement payments to detailed health care claims. The System performs contract monitoring to ensure that United Healthcare Services, Inc. is providing services in accordance with contract terms; however, the System should strengthen those processes to help ensure that its monitoring is comprehensive and performed in a timely manner.*

Auditors communicated other, less significant issues related to the HealthSelect contract procurement separately in writing to the System.[114]

SAO Report No. 15-007 Discussion

Ms. Bishop testified at the November 19, 2014, hearing that ERS was not happy with the SAO Audit Report and that mistakes were made in the planning and procurement of the HealthSelect contract.[115] Specifically, Ms. Bishop stated, "Am I happy with the audit? No. Were mistakes made? Absolutely mistakes were made. Those mistakes have been corrected and appropriate personnel changes have occurred and we continuously improve."[116]

At the November 19th hearing, Ms. Bishop's testimony reiterated that ERS conducted an internal audit in 2013 that identified some of the same weaknesses and inconsistencies as the SAO Audit Report.[117] In response to this, Chairman Cook questioned Ms. Bishop as to why ERS failed to bring its internal audit findings to the attention of the Committee sooner.[118] Ms. Bishop apologized, stating that ERS should have brought its concerns to the Committee earlier.[119]

The SAO testified that ERS failed to define "best value," therefore making it impossible to determine whether ERS selected the contractor that provided the best value to the state.[120] Government Code §2155.074 requires that the agency shall determine best value.[121] Section §2155.074 (a) states, "For a purchase of goods and services under this chapter, each state agency, including the commission, shall purchase goods and services that provide the best value for the state." [122] Additionally, Government Code §2155.146 (b) specifically relates to ERS declaring: "(b) The Employees Retirement System of Texas shall acquire goods or services by any procurement method approved by the board of trustees of the retirement system that provides the best value to the retirement system. The retirement system shall consider the best value standards enumerated in Section 2155.074, as added by Chapter 1206, Acts of the 75th Legislature, Regular Session, 1997."[123]

SAO determined that the Office of the Attorney General (OAG) reviewed the preliminary HealthSelect contract that ERS included in its RFP; however, ERS did not request that the OAG review the final HealthSelect contract prior to the signing of the contract.[124] Government Code §811.009 requires that the OAG review contracts that value $250 million or more and relate to medical or health care services, coverage or benefits before the agency enters into that contract.[125] The Audit Report underscores the severity of not sending the contract to the OAG for final review by stating, "**Not submitting the final contract to the Office for review creates a risk that the HealthSelect contract may not comply with all statutory and other requirements."** [126]

SAO testimony exposed that ERS did not involve their Purchasing Department, nor did ERS assign staff, which met state training and certification qualifications in the planning and procuring of the HealthSelect contract.[127] Ms. Bishop testified at the November 19, 2014, hearing that she disagreed with the SAO's assessment of involving the Purchasing Department, because they were not subject matter experts and the individuals in the Benefits Contracts Division were subject matter experts.[128] However, the Audit Report notes that, "None of the Benefits Contracts Division employees who planned and procured the HealthSelect contract had a certified Texas procurement manager certification." [129] The *State of Texas Procurement Manual* states that the certified Texas procurement manager certification is required for

individuals to make competitive purchases for amounts exceeding $100,000. [130] Furthermore, the SAO Audit showed that ERS failed to assign a certified Texas contract manager, under Government Code §2262.053 and the *State of Texas Procurement Manual*, to monitor the HealthSelect contract.[131] [132] The individual assigned to monitor the contract had not taken any of the state's contract manager training courses.[133]

At the November 19th hearing, Representative Dan Huberty asked Ms. Bishop if ERS had imposed any fines or penalties for nonperformance on behalf of UnitedHealthcare.[134] Ms. Bishop responded by stating that ERS had imposed a $970,000 fine on UnitedHealthcare for not providing data to ERS in a timely manner.[135]

Conclusion

The SAO Audit Report revealed many weaknesses and inconsistencies in planning, procuring and ensuring compliance with state and ERS criteria for contracts, including ERS's failure to define "best value."

Because the HealthSelect contract impacts approximately 440,000 Texas lives, including all state employees and all state elected officials, it is critical that ERS operate above reproach in planning and procuring potential contracts.

Sunset Advisory Commission Review -- ERS

While preparing for the hearing on the procurement charge, in 2012, it was discovered that in 1993, the section of the Government Code requiring ERS to be reviewed by the Sunset Advisory Commission was repealed -- **without language explaining the reason for removal.** It is crucial that a Sunset Advisory Commission review of ERS, a highly important agency, is conducted on a regular basis. **After 21 years, a thorough assessment is long overdue to ensure that ERS is operating effectively and efficiently -- and for that reason the legislature assured that ERS will be up for Sunset review in the 2016-2017 review cycle.** It is important to note that as a constitutionally created agency, ERS is not subject to abolishment under the Texas Sunset Act; however, it **should** be reviewed on a consistent basis.

Recommendations

ERS should quickly address the problems laid out in SAO Report No. 15-007, including improving the timeliness of its monitoring activities and strengthening processes, whereby reconciling daily reimbursement payments to detailed health care claims is done comprehensively and timely. All state agencies, including ERS, should directly follow the guidelines set-forth by the legislature in the *State of Texas Contract Management Guide* to avoid costly mistakes and minimize potential doubts. Finally, by rebidding the present HealthSelect contract, ERS could alleviate some of the uncertainty and concerns that exist regarding the contract.

CONDITIONAL DRIVING PERMIT

Interim Charge # 5: Conduct legislative oversight and monitoring of the agencies and programs under the committee's jurisdiction and the implementation of relevant legislation passed by the 83rd Legislature. In conducting this oversight, the committee should:

a. considers any reforms to state agencies to make them more responsive to Texas taxpayers and citizens;

b. identifies issues regarding the agency or its governance that may be appropriate to investigate, improve, remedy, or eliminate;

c. determine whether an agency is operating in a transparent and efficient manner; and

d. identifies opportunities to streamline programs and services while maintaining the mission of the agency and its programs.

Public Hearing

The House Committee on State Affairs held a public hearing on September 4, 2014, at 10:30 a.m. in Austin, Texas in the John H. Reagan Building, Room 140, to address the above interim charge. The Committee heard testimony from seven invited witnesses with experience that included law enforcement, immigration and vehicle insurance. The following invited individuals testified:

Witnesses are listed in alphabetical order

- Charles Foster, *Chairman, FosterQuan, LLP*
- Paul B. Harrison, *President, Alinsco Insurance Company*
- Faye Kolly, *Senior Attorney, De Mott McChesney Curtright & Armendariz LLP*
- Jeremiah Kuntz, Director, *Vehicle Title and Registration Division, Texas Department of Motor Vehicles*
- Steven McCraw, *Director, Texas Department of Public Safety*
- Joe Peters, *Assistant Director of Driver License Division, Texas Department of Public Safety*
- Mark Worman, *Manager, Personal and Commercial Lines Form Filings Program, Texas Department of Insurance*

Introduction

The *Real ID Act* passed by Congress in 2005, requires states to, among other things, create tamper-proof driver's licenses and require proof of lawful presence from license applicants.[i] In order to comply with the Federal *Real ID Act,* the 82nd Texas Legislature approved changes in the law governing how to obtain or renew a driver's license in Texas. These new changes included a requirement that all applicants for a Texas Driver's License (TDL) be able to show proof of lawful presence in the United States. This legislative change made it impossible **for anyone to obtain or even renew a TDL**, without proof of lawful presence. This change in the law did not include a provision for an alternative driver authorization document**. Now, countless**

individuals, <u>some who previously had a TDL for many years</u>, have no ability to obtain or renew one – yet these individuals are likely still driving.

Background

Testimony at the September 4, 2014, hearing revealed that there are an estimated two million residents in the State of Texas, who cannot prove lawful presence and cannot obtain or renew a TDL. However, to function in their everyday lives, most are still operating motor vehicles -- without a driver's license, and often, without automobile insurance or other proof of financial responsibility, as required by law. Individuals who have insurance carry the weight of those who do not. According to the Texas Insurance Checking Office, the chart below shows incurred losses of the uninsured, underinsured and hit-and-run claims.

Annual Aggregate Experience - Uninsured/Underinsured Coverage Premiums and Losses (Voluntary Market)		
Accident Year*	Earned Premium	**Incurred Losses****
2012	$ 1,134,616,520	**$ 576,977,477**
2011	$ 1,124,903,806	**$ 567,518,629**
2010	$ 1,093,693,595	**$ 581,205,669**

**** Accident year provides premiums collected during that year, regardless of when the losses were paid.***

***** Incurred losses are as of March 2013. Losses incurred may be a result of an uninsured motorist, underinsured motorist, or hit-and-run.***

The below graphs, provided by the Texas Department of Insurance, indicate the percent of registered vehicles that were not matched to auto insurance from 2009- to mid-2014. TexasSure Vehicle Insurance Verification (TexasSure) is the financial responsibility verification program created as a result of Senate Bill 1670 passed by the 79th Texas Legislature, which added Texas Transportation Code, Subchapter N requiring the implementing agencies to establish a program for verification of whether owners of motor vehicles have established financial responsibility.[136]

Figure 1

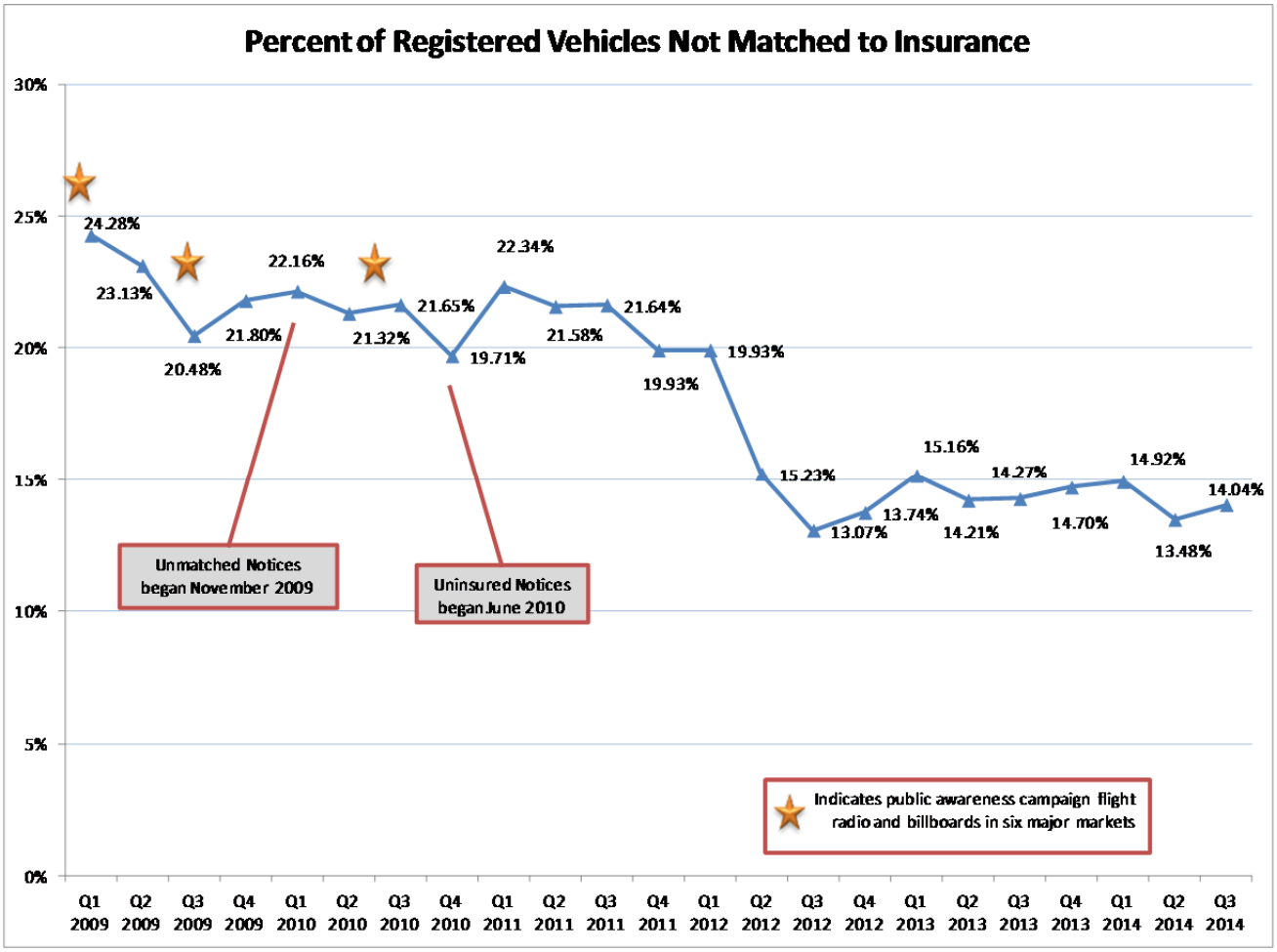


Figure 2

Matching and Query System	
4.9M	Average number of monthly queries
99.5%+	Reported insurance policies matched to a registered vehicle
24.28%	Texas unmatched vehicles, December 2008
14.04%	Texas unmatched vehicles, June 2014

Figure 3

Uninsured Customer Notices (as of June 2014)	
4.7M	Uninsured Notices Mailed
7.1%	Undeliverable
17.0%	Responses Received (for letters delivered)

On a weekly basis, TexasSure matches the Texas Department of Motor Vehicles (TxDMV) database of registered vehicles to insurance companies' full book of personal auto business and self-insureds reported by the Texas Department of Public Safety (DPS).[137] Reporting of commercial policies is optional. The system is used by all county Tax Assessors-Collectors, DPS Texas Highway Patrol, and is available to all Texas local law enforcement agencies. TexasSure incorporates customer notices and a call center to collect responses. A maximum of 25,000 notices are sent weekly, **however, there is no enforcement authority connected to the notices**. Figure 3, on the previous page, shows that, as of June 2014, Texas has 14.04 percent of vehicles that are registered and are not matched to automobile insurance. **Currently, individuals who receive a notice and still do not purchase auto insurance are not penalized unless they encounter law enforcement.**

TDL -- Common Misconceptions v. FACTS

Misconception: Many people believe that a TDL is required for purposes including: to vote, board a plane, jury duty or cash a check.

- ✓ **FACT:** Although a TDL **may** be used in the above instances for identification purposes the **only reason an individual is required to possess a valid TDL is to legally operate a motor vehicle.**

Misconception: A TDL is needed to register a motor vehicle for the first time.

- ✓ **FACT:** Although a TDL may be used to initially register a motor vehicle, testimony at the September 4th hearing confirmed that many other forms of identification are acceptable under Texas Administrative Code 217.22 (b)(4)(E) and are as follows:

    - Driver's license or state identification certificate issued by a state or territory of the United States
    - United States or foreign passport
    - United State military identification card
    - North Atlantic Treaty Organization identification or identification issued under a Status of Forces agreement
    - United States Department of Homeland Security, United States Citizenship and Immigration Services or United States Department of State identification document[138]

Misconception: A TDL is required to purchase automobile insurance.

- ✓ **FACT:** There is **no** Texas law that prohibits an insurance agent from writing an auto insurance policy if an individual does not have a TDL. In fact, currently, there are approximately 35 Non Standard Auto (NSA) insurance writers in the state of Texas.[139] Nonstandard is a term used to classify an insurance policy sold to an individual whose risk factors make it difficult or impossible to obtain insurance at standard or preferred rates. Almost half of the 35 NSA companies offer a rate for an applicant without a valid Texas or United States driver's license.[140] In a letter, dated October 3, 2014, to Chairman Cook, Paul

Harrison, who testified at the Committee hearing, notes that a six month quote for a common Texas risk for state mandatory liability only coverage is $258 vs. $309 for the nonstandard average, which represents a 20 percent difference.[141] Therefore, someone who purchases a NSA insurance policy will pay a higher rate than that of a standard policy.

The State of Utah

In preparation for the hearing, the Committee learned that Utah created a Driving Privilege Card (DPC) that brought them into compliance with the *Real ID Act*, while addressing the issue of unlicensed and uninsured motorists. On March 8, 2005, the governor of Utah signed into law, effective immediately, Senate Bill (SB) 227. SB 227, authored by Republican State Senator Curtis Bramble, established a one year DPC for those individuals who could not prove lawful presence.[142] Under SB 227, applicants without a Social Security number must prove Utah residency for six months and provide a tax identification number**. The DPC is expressly prohibited from being used for any identification purposes by a government entity.** [143] The graph below depicts the number of DPC's issued by the state of Utah from 2006-2008.

Year	# of Driving Privilege Cards Issued
2006	25,000
2007	34,000
2008	43,000

Utah finds that the average number of cards issued are 33,000 per year since its inception in 2005.[144] [145]

Additionally, in January 2006, the Utah Office of the Legislative Auditor General, directed by Senator Bramble, conducted a sample study matching DPC's to vehicle insurance. The study sampled 2,500 DPC's and it showed that 1,876 were electronically matched to insurance policies.[146] **Roughly 75 percent of individuals who met the criteria and applied for DPC's in the state of Utah subsequently purchased auto insurance in order to be in full compliance with the law -- bringing Utah's uninsured motorist rate to 5.38 percent.** [147] [148]

Conditional Driving Permit (CDP)

A proposed solution, that maintains compliance with the *Real ID Act*, and addresses those who cannot prove lawful presence, is the creation of a Conditional Driver's Permit (CDP). A CDP will provide law enforcement a record of the unlawfully and lawfully present immigrants who cannot get their status otherwise verified through the Systematic Alien Verification for Entitlements Program system, or even U.S. Citizens who otherwise do not have immediate proof of citizenship.

This CDP would require a driving test to ensure that state laws are better understood and that those individuals applying and receiving a CDP could read English road signs. Also, a CDP could be used to allow individuals to register their vehicles -- if the legislature added it to the list of acceptable documents. The CDP **would not resemble a driver's license and would not be**

used for other identification purposes.

The proposed CDP could have the following requirements:

- $150 dollar initial and renewal
- Full criminal background check
- Complete electronic set of fingerprints
- Pass English written and driving tests
- Provide proof of financial responsibility/auto insurance for the duration of the permit

Testimony before the Committee on September 4, 2014, revealed that, "A driver's permit will not give such individuals any other substantive rights or privileges that they do not already have." [149] A CDP would only be used for the purposes of operating a motor-vehicle.

The risks of driving without a driver's license are high. Transportation Code §521.025 outlines the penalties for driving without a license in the state of Texas. The penalties are as follows:

(1) A person who violates this section commits an offense. An offense under this subsection is a misdemeanor punishable by a fine of not to exceed $200, except that:
(2) for a second conviction within one year after the date of the first conviction, the offense is a misdemeanor punishable by a fine of not less than $25 or more than $200;
(3) for a third or subsequent conviction within one year after the date of the second conviction the offense is a misdemeanor punishable by:
    (A) a fine of not less than $25 or more than $500
    (B) Confinement in the county jail for not less than 72 hours or more than six months; or
(4) if it is shown on the trail of the offense that at the time of the offense the person was operating the motor vehicle in violation of Section 601.191 and caused or was at fault in a motor vehicle accident that resulted in serious bodily injury to or the death of another person, an offense under this section is a Class A misdemeanor.[150]

Most individuals who cannot prove lawful presence will probably continue to drive. Because the CDP is comprehensive and extensive, individuals who spend the time and money to relinquish their information to receive a CDP are highly likely to be further incentivized to fully comply with the law by purchasing automobile insurance or other financial responsibility.

Conclusion

Those individuals who cannot prove lawful presence are likely to remain in the United States indefinitely in one status or another -- <u>and continue to drive</u>. Below are the results of a poll conducted by Wilson Perkins Allen (WPA) Opinion Research on behalf of Texans for Sensible Immigration Policy that shows wide, bipartisan support for the issuance of a CDP.

Respondents were screened to ensure that they were neither a member of the news media nor a public relations company. WPA selected a random sample of likely voters from the Texas voter file using Registration Based Sampling (RBS). The sample for this survey was stratified based on gender, age, ethnicity and geography. This methodology allows WPA to minimize post-survey "weighting," which can reduce the reliability of survey results.

Respondents were contacted via a live telephone operator for an interview on August 26-28, 2014. The study has a sample size of 1,005 likely voters in Texas with a margin of error of ±3.1 percent in 95 out of 100 cases.

The following question was posed to 1,005 likely voters in Texas:

"Would you support or oppose legislation that requires all undocumented immigrants to apply for a driving permit, pay a $150 fee, provide finger print and photo identification, pass a criminal background check, and buy liability insurance?"

	Partisan Breakdown	Total Support (72%)	Total Oppose (23%)
Republican	**39%**	**77%**	**20%**
Independent	**31 %**	**71%**	**23%**
Democratic	**24%**	**67%**	**27%**

What are the incentives for individuals to obtain a CDP?

Individuals who cannot prove lawful presence would have the opportunity to obtain the legal means to drive by submitting to the comprehensive requirements of the CDP. A CDP might prevent them from the possibility of getting a citation for driving without a license or permit, if stopped by law enforcement. Since the 2011 statute was changed**, individuals who previously had a TDL for a number of years cannot renew it.** A CDP would allow individuals to commute to school, work, church and other activities without the fear of being penalized.

What are the incentives for the State of Texas to create a statute offering a CDP?

A CDP would provide law enforcement with a way to have a record of many of these individuals who cannot prove lawful presence, which they currently do not have. Because a CDP would require a driving test to ensure state laws are better known and that those receiving a CDP could read English road signs, all Texas motorists will be safer. Because individuals would have to submit to a number of conditions before receiving a CDP, which is not easy, they are much more likely to take the time, money and effort to obtain and maintain the auto insurance required to possess a valid CDP. Because of this, a CDP should help to decrease the uninsured motorist rate in Texas, which is 14.04 percent. The issuance of a CDP would likely increase the overall public safety of all Texans.

Recommendations

The 2011 statutory change regarding proof of lawful presence created a detrimental unintended consequence that puts Texas citizens at great risk. The law did not provide for an alternative driver authorization document – even for those individuals who already had or still have an unexpired TDL. An increasing number of individuals are, or soon will be, operating motor vehicles without a valid license or permit and most likely without insurance. Failure to address this issue tolerates a growing number of individuals who will probably continue the irresponsible behavior of driving without a license – because lawmakers offered no alternative provision. The legislature could remedy this by enacting legislation that creates a conditional driving permit, which remains compliant with the *Real ID Act*, while allowing individuals who cannot prove lawful presence to obtain the legal means to operate a motor vehicle. Additionally, the legislature should reassess the TexasSure program, and create a robust enforcement mechanism to bolster the likelihood that individuals will insure their vehicles after registration. This is a conservative, commonsense approach to protecting Texas citizens, making roadways safer and giving law enforcement the ability to gather vital information on undocumented individuals.

APPENDIX A -- DISSENTING LETTER

HOUSE OF REPRESENTATIVES

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COMMITTEES:

JUDICIARY & CIVIL JURISPRUDENCE
VICE-CHAIR

STATE AFFAIRS

December 15, 2014

Representative Byron Cook, Chair
House Committee on State Affairs
PO Box 2910
Austin, Texas 78768-2910

Dear Chairman Cook:

I have signed on in support of the interim committee report, but would like to comment on the discussion of EPA draft rule 111(d) included in the resource adequacy discussion.

The EPA's proposed greenhouse gas regulations are an important step forward for Texas, and the nation as a whole. Texas has made investments in energy efficiency and has been a leader in expanding wind and solar power. Still, climate change will continue to impact public health and safety through extreme weather events, such as severe hurricanes, increased flooding, extreme temperatures, prolonged droughts, and more frequent wildfires. Urgent action on climate change is critical to protect future generations from further harm.

I appreciate the opportunity to collaborate on this report. Thank you for your leadership as Chair of the House Committee on State Affairs.

Respectfully,

Jessica Farrar
State Representative, District 148

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