

We join fully in the Court’s judgment affirming the district court and in JUSTICE OWEN’s concurring opinion. This is the opinion of the Court regarding the validity of the “non-standard true-up” included in the Public Utility Commission’s financing order for Central Power and Light Company.

Under chapter 39 of the Public Utility Regulatory Act,¹ the Public Utility Commission may issue a financing order authorizing an electric utility to use securitization financing by issuing transition bonds secured by or paid from transition charges.² Transition charges are allocated among and collected from the retail electricity customers in the utility’s geographical certificated service area as it existed on May 1, 1999.³ The allocation is by customer class (*e.g.*, residential, commercial, industrial, etc.), and the rate per unit of service is affected by the energy consumption of the class.⁴ Because consumption varies over time, the unit rate must be adjusted periodically so that the total transition charge revenue is neither more nor less than the amount necessary to discharge the transition bond obligations and related financing costs. Section 39.307 refers to this adjustment as a “true-up” and provides:

A financing order shall include a mechanism requiring that transition charges be reviewed and adjusted at least annually, within 45 days of the anniversary date of the issuance of the transition bonds, to correct any overcollections or undercollections of the preceding 12 months and to ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the transition bonds.⁵

¹ TEX. UTIL. CODE §§ 39.001-.909 [hereinafter PURA].

² PURA §§ 39.301; 39.302(2), (6)-(8); 39.303; 39.304.

³ *Id.* §§ 39.201(j), 39.252(b), 39.253(c)-(i), 39.303(c).

⁴ *Id.*

⁵ *Id.* § 39.307.

The Commission determined that the true-up for CPL should not only adjust the transition charge rate for each class based on changes in consumption within the class — what the Commission called a “standard true-up” — but should also adjust the allocation of transition charges among the classes if any class’s consumption is forecast to drop more than ten percent below its consumption for the year ending April 30, 1999 — termed by the Commission a “non-standard true-up”. The Office of Public Utility Counsel and others contend that this non-standard true-up is not authorized by section 39.307, is contrary to PURA’s purposes, and is not supported by the evidence. Before we consider OPC’s arguments, we must explain the allocation of transition charges in more detail.

Section 39.303(c) states that “[t]ransition charges shall be collected and allocated among customers in the same manner as competition transition charges under Section 39.201.”⁶ Section 39.201(j) states that “[a]ny competition transition charge shall be allocated among retail customer classes according to Section 39.253.”⁷ Section 39.253 prescribes the allocation of stranded costs, including regulatory assets, among a utility’s classes of customers. The parties agree that transition charges must also be allocated in the manner section 39.253 prescribes. Section 39.253 provides in pertinent part:

(c) The allocation to the residential class shall be determined by allocating to all customer classes 50 percent of the stranded costs in accordance with the methodology used to allocate the costs of the underlying assets in the electric utility's most recent commission order addressing rate design and allocating the remainder of the stranded costs on the basis of the energy consumption of the classes.

⁶ *Id.* § 39.303(c).

⁷ *Id.* § 39.201(j).

(d) After the allocation to the residential class required by Subsection (c) has been calculated, the remaining stranded costs shall be allocated to the remaining customer classes in accordance with the methodology used to allocate the costs of the underlying assets in the electric utility's most recent commission order addressing rate design. Non-firm industrial customers shall be allocated stranded costs equal to 150 percent of the amount allocated to that class.

(e) After the allocation to the residential class required by Subsection (c) and the allocation to the nonfirm industrial class required by Subsection (d) have been calculated, the remaining stranded costs shall be allocated to the remaining customer classes in accordance with the methodology used to allocate the costs of the underlying assets in the electric utility's most recent commission order addressing rate design.

(f) Notwithstanding any other provision of this section, to the extent that the total retail stranded costs, including regulatory assets, of investor-owned utilities exceed \$5 billion on a statewide basis, any stranded costs in excess of \$5 billion shall be allocated among retail customer classes in accordance with the methodology used to allocate the costs of the underlying assets in the electric utility's most recent commission order addressing rate design.

(g) The energy consumption of the customer classes used in Subsections (a)(2) and (c) shall be based on the relevant class characteristics as of May 1, 1999, adjusted for normal weather conditions.

(h) For purposes of this section, "stranded costs" includes regulatory assets.

(i) Except as provided by Section 39.262(k), no customer or customer class may avoid the obligation to pay the amount of stranded costs allocated to that customer class.

Thus, transition charges are to be allocated among a utility's classes of customers based in part on the utility's most recent Commission order addressing rate design and in part on the classes' characteristic, weather-adjusted energy consumption as of May 1, 1999. CPL has eight customer classes. The Commission calculated each class's transition charge allocation factor as follows:

Residential	37.0664%
Commercial & Small Ind. – Energy	21.5756%
Commercial & Small Ind. – Demand	26.9570%
Large Industrial – Firm	4.4891%
Large Industrial – Non-firm	5.5190%
Standby – Firm	1.4227%
Standby – Non-firm	0.3844%
Municipal & Cotton Gin	2.5858%
 Total	 100.0000%

To derive each class’s transition charge rate per unit of service, CPL’s financing order requires the transition bonds servicer to determine the total revenue needed to meet obligations for the upcoming year, multiply that amount by the percentage factors above to get each class’s dollar allocation, and then divide that allocation by the class’s usage forecast for the year in terms of billing units (*e.g.*, kilowatt-hours for residential customers and kilowatts for demand customers), to arrive at a per-unit transition charge rate to bill the customer. Thus, usage and rate are inversely related. If usage increases, the unit rate decreases, and vice versa. If actual usage during the year varies from the forecast so that a class is charged more or less than its allocation, the class rate for the following year is adjusted up or down to compensate for the overpayment or underpayment the prior year. This adjustment is the standard true-up, and it is not challenged in this case.

Transition charges are nonbypassable; that is, they must be paid by every consumer of electricity in the utility’s service area whether the consumer buys electricity from the utility or not.⁸ Two exceptions are for customers using co-generation facilities operational by September 1, 2001, and customers using

⁸ Id. §§ 39.302(7), 39.306; *see id.* § 39.252.

on-site generators with a rated capacity not more than ten megawatts.⁹ Typically, these are industrial customers. If such customers avoid transition charges by one of these exceptions, or simply by relocating outside the utility's service area, the decrease in consumption in their class will result in an increase in the class rate, thereby prompting other customers in the class to look for a way out. Each departure of a customer from the class increases the transition charge burden on those remaining, encouraging further departures. In the Commission's words, this "cascading load loss" could reach a "death spiral" so that transition charge rates become prohibitive, driving all customers from the class. If the class's transition charge allocation is not shifted to the remaining classes or funded by some other means, the total transition charge revenue will be insufficient to meet transition bond obligations. No one disputes that the possibility of such an eventuality is very real and would adversely affect transition bond ratings by financial markets and impair their marketability. In this case, the Commission determined that a non-standard true-up should be used to reallocate transition charges among CPL's customer classes whenever a class's annual consumption is forecast to be less than ninety percent of its consumption for the year ending April 30, 1999.

It is undisputed that consumption by CPL's industrial customers has already dropped more than ten percent since April 30, 1999. Texas Industrial Energy Consumers, a party to this case, states that CPL has fewer than twenty-five customers in each of its two industrial classes, so that a loss of only a few customers could significantly increase the transition charge rate paid by the others. By contrast, residential consumption in CPL's service area is increasing. A witness for the Commission staff testified that most

⁹ *Id.* §§ 39.253(i), 39.262(k).

other states had used a procedure like the non-standard true-up to avoid cascading load loss in a class of customers. Analyzing the revenues projected to be needed to service CPL's transition bonds, he concluded that "if any class experiences a decrease in [usage] in excess of 4%-7% (assuming no over- or under-collection) that class will see a higher transition charge in the prospective period than in the previous period, and thus may be at risk for a cascading load loss scenario." He recommended that a non-standard true-up be used and that it be triggered when a class's projected consumption decreased more than ten percent below consumption for the year ended April 30, 1999. A witness for CPL testified in favor of a more fluid reallocation each year, but after prompting by the Commission for the parties to resolve as many differences as possible, CPL agreed to the non-standard true-up proposed by the Commission staff.

To illustrate the operation of the non-standard true-up, OPC offers the following example. Suppose a utility must allocate \$100 million in annual transition charges among four classes of customers. Assuming allocation percentages and class usage, the rates for each class are calculated as follows:

	Residential	Commercial	Industrial	Other
(1) Allocation of total annual transition charges (assumed)	40%	20%	10%	30%
(2) Annual dollar allocation (multiply \$100 MM by line 1)	\$40 MM	\$20 MM	\$10 MM	\$30 MM
(3) Annual unit usage (assumed)	700 MM	260 MM	23 MM	500 MM
(4) Rate per unit (divide line 2 by line 3)	5.7¢	7.7¢	43.5¢	6.0¢

If forecast industrial usage drops to 16 MM units, and consumption by all the other classes remains the same, industrial customers will provide only \$7 million in transition charges at a 43.5¢ rate, leaving a \$3 million deficit. If that \$3 million is reallocated to the four classes using the non-standard true-up prescribed in CPL's financing order, the rates for each class would be calculated as follows:

	Residential	Commercial	Industrial	Other
(1) Allocation of total annual transition charges (assumed)	40%	20%	10%	30%
(2) Dollar allocation of deficit (multiply \$3 MM by line 1)	\$1.2 MM	\$600 K	\$300 K	\$900 K
(3) Dollar allocation of balance	\$40 MM	\$20 MM	\$7 MM	\$30 MM
(4) Total after reallocation	\$41.2 MM	\$20.6 MM	\$7.3 MM	\$30.9 MM
(5) Annual unit usage	700 MM	260 MM	16 MM	500 MM
(6) Rate per unit (divide line 4 by line 5)	5.9¢	7.9¢	45.6¢	6.2¢

If industrial class customers had borne the entire rate increase due to their reduced consumption, their rate would have increased to 62.5¢ and the other three rates would have stayed the same. One will notice in this illustration, although OPC does not point it out, that the non-standard true-up increases the rate for industrial customers by 4.8%, while increasing the rates for the other three classes only about 2.5% to 3.5%. Without the non-standard true-up, rates for these three classes would remain the same while the industrial class rate increased 43.7%. Moreover, as the Commission points out, there is no basis for an assumption that consumption in the non-industrial classes will not increase. An increase in their total consumption by slightly over three percent would make up the \$3 million deficit in annual transition charges caused by the reduction in industrial class consumption, leaving rates unchanged after a non-standard true-up. A greater increase in consumption in those classes would result in rate reductions, although those reductions would be larger without a non-standard true-up.

With this understanding of the non-standard true-up, we return to OPC's arguments. First, OPC argues that however reasonable and beneficial the non-standard true-up might appear, it simply is not authorized by the PURA. Section 39.253 requires a fixed allocation based on historical data and does not contemplate reallocations among classes based on future changes in consumption of electricity. To read section 39.307 to allow for adjustments in section 39.253 allocations among classes, OPC contends, would violate the clear provision of section 39.253(i) that with the exceptions we have already noted, "no customer or customer class may avoid the obligation to pay the amount of stranded costs allocated to that customer class." Rather, OPC argues, section 39.307 permits only intra-class rate adjustments required by inaccurate forecasts of usage and does not allow for adjustments in the allocations made under section

39.253. OPC points to the language in section 39.307 that true-up adjustments are “to correct any overcollections or undercollections of the preceding 12 months”.

We agree with the Commission and CPL, however, that OPC's argument ignores broader language in section 39.307 requiring adjustments “to ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the transition bonds.” A significant shrinkage of CPL's industrial classes would unquestionably threaten the collection of “amounts sufficient to timely provide all payments of debt service”. OPC does not dispute this fact, nor does it argue that we should simply invalidate the non-standard true-up procedure in the financing order and leave no means to address the problem. Rather, OPC urges us to remand the case to the Commission to find a different solution. But the requirement of section 39.307 that adjustments be made to protect the discharge of transition bond obligations does not limit the means available to the Commission. The non-standard true-up does not permit classes to avoid allocated charges, as prohibited by section 39.253(i); the procedure merely allows minimal adjustments to ensure the payment of transition bonds — which benefits all of the classes.

OPC argues that reading section 39.307 to allow a non-standard true-up makes section 39.253 a dead letter, allowing the Commission to make whatever allocations it may choose. We disagree. Section 39.307 does not convey such broad discretion, and the Commission makes no claim for such authority. Rather, as the Commission itself recognized in CPL's financing order, transition charge allocations among customer classes must start with section 39.253, and that allocation must remain undisturbed unless and until its structure threatens the recovery of sufficient revenue to pay the transition bonds and other costs.

Any load loss for a class will not trigger a non-standard true-up; the loss must be at least ten percent of the consumption in the year ending April 30, 1999. Section 39.307 allows only minor and essential adjustments in class allocations.

OPC argues that the non-standard true-up will raise residential rates, making it more difficult for non-incumbent retailers to compete and thereby defeating the purpose of chapter 39 deregulation. But as its own illustration shows, the impact of a non-standard true-up on residential rates may well be minuscule. Somewhat inconsistently, OPC argues that a non-standard true-up is unnecessary because the threat of industrial load loss to CPL is not great. Of course, if that turns out to be correct, the non-standard true-up may not be much used or have much effect. In any event, we are not persuaded that the Commission's order jeopardizes retail competition in residential electricity markets simply because it adopts a procedure used successfully in other states to protect transition bonds.

OPC argues that even if the PURA authorized the Commission to adopt some type of non-standard true-up procedure, the evidence in this proceeding did not support the Commission's decision in CPL's financing order to trigger the non-standard true-up procedure whenever forecast consumption in one class falls below ninety percent of consumption for the year ending April 30, 1999. OPC argues that the ten percent figure was arbitrarily chosen, but as we have noted, the record contains testimony by a Commission staff witness that a class with a decrease in usage of four to seven percent "may be at risk for a cascading load loss scenario." We have not been cited to any evidence that the ten percent figure was too low. OPC's argument that the record does not support measuring the ten percent reduction against the year ending April 30, 1999, instead of the year immediately preceding the true-up, has more force. OPC

contends that the Commission did not fully consider that because CPL's industrial load loss since April 30, 1999, already exceeds ten percent, the non-standard true-up will be triggered to determine the first rates, and if industrial usage does not increase, may be triggered every year afterward, thereby becoming the *standard* true-up. As explained more fully in Part XI of JUSTICE OWEN's concurring opinion, we are troubled that the Commission's haste in this proceeding may have resulted in an incomplete consideration of the complex and critical issues presented. With respect to the ten percent trigger, however, OPC argued its position to the Commission fully, explaining in detail the possible effects of the trigger, just as it has here. While the evidence supporting the Commission's decision is slight, we cannot say in this case that the decision was arbitrary.

Finally, OPC argues that the Commission did not fully consider alternatives to the non-standard true-up. With respect to one alternative advanced by OPC's witness — a non-standard true-up among three "super-classes", combining CPL's eight customer classes — was fully presented and discussed in the record. The only other alternative that OPC has advanced here is that customers in a class likely to have decreased usage should be required to pay increased transition charges in advance to provide a fund for bond payments later. But if increased rates due to decreased usage will drive customers from a class, we fail to see why increased rates due to *anticipated* decreased usage will not have the same effect. We find no support for this alternative in the record. OPC has not suggested an alternative solution that is consistent with its construction of section 39.307.

JUSTICE OWEN's dissenting opinion makes three additional arguments which we address briefly. First, she notes that there can be no default on transition bond payments until a class has been completely

vacated, leaving no one to pay its share of the transition charges. If the Commission's concern were really "to ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the transition bonds" as authorized by section 39.307, the Commission need not have provided for any adjustments to class allocations until one class was vacant. However, we do not agree that the Commission was required to do nothing until the predicted exodus from the industrial class was complete, thereby impairing, *at present*, the marketability of the transition bonds. Moreover, if the non-standard true-up prevents the complete vacancy of the industrial class, the other classes will benefit because industrial customers will remain to pay a portion of the transition charges.

Second, JUSTICE OWEN argues that section 39.307 is a general provision and therefore cannot be used to "nullify" section 39.253. We disagree that the non-standard true-up "nullifies" the allocations prescribed by section 39.253. At most, the adjustments are slight, and some adjustments are almost certainly unavoidable if bond obligations are to be met. In our view, JUSTICE OWEN would deprive section 39.307 of its express purpose of protecting the means of satisfying bond obligations.

Lastly, unlike OPC, who argues for a remand so that the Commission can devise an alternate solution, JUSTICE OWEN argues that the dilemma facing the Commission and parties in this case is simply inescapable without legislative solution. We recognize that we cannot alter a statute's plain meaning merely to make it more workable, but as we have explained, we believe our reading of section 39.307 is faithful both to its language and to PURA's purposes.

Accordingly, we conclude that the non-standard true-up procedure in CPL's financing order does not violate the PURA.

Nathan L. Hecht
Justice

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