

I agree with the Court's disposition of the direct appeals in these cases in all respects but one, which is the Court's conclusion that the Commission was authorized by section 39.307 of the PURA to adopt a non-standard trueup. Accordingly, I respectfully dissent in part from the Court's judgment.

I recognize that a mechanism for dealing with what the parties describe as "cascading load loss" may be critical to the marketability of transition bonds and therefore to the viability of securitization financing. However, I am constrained to conclude that the PURA ties the Commission's hands. Neither section 39.253 nor section 39.307 gives the Commission discretion to reallocate transition charges among customer classes in a manner that is different from the allocation required by section 39.253.

In somewhat simplified terms, the non-standard trueup provides that if in a given year, the predicted load within a class is projected to decrease by more than ten percent of what the load for that class was for the twelve months ended April 30, 1999, then the amount of transition charges attributable to the projected lost load are reallocated among all customer classes. In short, customers in some classes pay more transition charges than the allocation mechanism prescribed in section 39.253 permits, while others pay less than that allocation mechanism would require. To see why that is so, the mechanics of section 39.253 must be understood.

Section 39.303(c) of the PURA says that transition charges "shall be *collected* and *allocated* among customers" in the manner prescribed by section 39.201.¹ Section 39.201(j) in turn says that section 39.253 governs.² The allocation of stranded costs under section 39.253, which expressly includes

¹ TEX. UTIL. CODE § 39.303(c) (emphasis added).

² *Id.* § 39.201(j).

regulatory assets,³ has two basic components. One is determined by applying the same methodology used to allocate costs of the underlying assets in the electric utility's most recent commission order addressing rate design.⁴ The other is the energy consumption of the respective classes⁵ "based on the relevant class characteristics as of May 1, 1999, adjusted for normal weather conditions."⁶

CPL has eight classes of customers among which transition charges are allocated. They include the residential class, commercial classes, firm industrial customers, non-firm industrial customers, and others. Section 39.253 allocates transition charges to the residential class differently than to the other classes.⁷ Section 39.253 also requires that non-firm industrial customers are to be treated differently from other classes of customers.⁸ Non-firm industrial customers are allocated a larger share of transition charges. Their allocation is increased by fifty percent of what it would otherwise be applying allocation demand factors, so that their allocation is 150percent.⁹

Although the Court correctly concludes that there is some ambiguity in section 39.253 about how allocations are to be made among classes of customers, it is nevertheless clear that section 39.253 requires a financing order to establish a *fixed* percentage for each class that determines how much of the transition

³ *Id.* § 39.253(h) ("For purposes of this section, 'stranded costs' includes regulatory assets.").

⁴ *Id.* § 39.253(c)-(e).

⁵ *Id.* § 39.253(c).

⁶ *Id.* § 39.253(g).

⁷ *Id.* § 39.253(c).

⁸ *Id.* § 39.253(d).

⁹ *Id.*

charges are to be allocated to each class based on *historical* data. Section 39.253 does not allow subsequent adjustment of the allocation to take into account growth or, conversely, load loss within each class during the life of the transition bonds, much less projected load loss.

The Commission applied the methodology used in CPL’s last rate design case to the consumption data in that case to arrive at allocation factors, that is percentages, for each class of customers. The Court correctly says that the Commission could have chosen to apply the same rate design methodology to more recent, but nonetheless historical, data.¹⁰ Section 39.253 is not crystal clear in that regard. But the Commission has now construed section 39.253 to require application of the latest rate design methodology to the consumption data that was part of the same rate case in which the rate design methodology was established. The Court agrees with that construction.¹¹ Application of the rate design methodology to historical consumption data results in a fixed percentage, also known as a demand allocation factor. That percentage is applied to the transition charges and results in an allocation to each class of a dollar amount of transition charges for which it is liable. There is no mechanism in section 39.253 for reallocating some or all of one class’s responsibility to another class. To the contrary, section 39.253(i) says that “no customer or customer class may avoid the obligation to pay the amount of stranded costs allocated to that customer class,” with certain exceptions not relevant here.¹²

¹⁰ ___S.W.3d at ___.

¹¹ *Id.* at ___.

¹² TEX. UTIL. CODE § 39.253(i).

When transition charges that would otherwise be allocated to a customer class under section 39.253 are reallocated to another class, the class whose transition charges are reallocated has “avoid[ed] the obligation to pay the amount of stranded costs allocated to that customer class.”¹³

This can be seen from the examples given by the Court. The Court assumes that \$100 million in annual transition charges must be allocated among four classes of customers based on each class’s historical usage. Applying the allocation factors assumed by the Court, each class is assigned the obligation to pay a dollar amount:

	Residential	Commercial	Industrial	Other
(1) Allocation of total annual transition charges (assumed, based on historical usage)	40%	20%	10%	30%
(2) Annual dollar allocation (multiply \$100 MM by line 1)	\$40 MM	\$20 MM	\$10 MM	\$30 MM

In the Court’s example, a load loss of 16 MM units is forecasted in the industrial class, which is more than a ten percent decrease in that class’s load as of the year ended April 30, 1999. That load loss would trigger the non-standard trueup, and each class’s responsibility to pay its assigned dollar amount is reallocated. Under the Court’s example, \$3 million in transition charges that would otherwise be borne by the industrial class is reallocated across all classes:

¹³ *Id.*

	Residential	Commercial	Industrial	Other
(1) Allocation of total annual transition charges (assumed, based on historical usage)	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) Resulting allocation factor after reallocation of annual transition charges	41.2%	20.6%	7.3%	30.9%

It is readily apparent that allocation factors for each class have in reality been changed. The residential class no longer bears the percentage of responsibility assigned to it by the methodology set forth in section 39.253. Its obligation is a higher percentage. Likewise, the industrial class is no longer required to shoulder 150percent of the transition charges allocated to it. But its obligation is something less than section 39.253(d) requires. And more importantly, under the Court’s decision, there is nothing to prevent the Commission from more drastically altering the allocation factors in a non-standard trueup.

I agree with the Office of Public Utility Counsel and the Texas Retailers Association that the non-standard trueup contravenes requirements in section 39.253 that are not ambiguous. I agree with those parties that the Commission may not take actions that are in excess of or inconsistent with express statutory

provisions. The Third Court of Appeals “restated the familiar principles” in *Southwestern Bell Telephone Co. v. Public Utility Commission*:

“[A]n agency can adopt only such rules as are authorized by and consistent with its statutory authority.” *Railroad Comm'n v. Lone Star Gas Co.*, 844 S.W.2d 679, 685 (Tex. 1992) (quoting *State Bd. of Ins. v. Deffebach*, 631 S.W.2d 794, 798 (Tex. App. – Austin 1982, writ ref'd n.r.e.)). In this connection, it is well settled that an agency rule may not impose additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions.¹⁴

The Commission and those who side with it rely on section 39.307 for authority to adopt non-standard trueups. That provision of the PURA says that a financing order must include an adjustment mechanism “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.*”¹⁵ But the only circumstance under which the standard trueup would result in insufficient collections to cover debt service and other costs in connection with transition bonds would be if all customers in a class were lost. Theoretically, at least, as long as one customer remained in a given class, that customer would be obligated to pay all transition charges allocated to that class.¹⁶ The non-standard trueup is not designed to remedy the default of a class

¹⁴ 888 S.W.2d 921, 926 (Tex. App. – Austin 1994, writ denied) (quoting *R.R. Comm'n v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 481 (Tex. App. – Austin 1994, writ denied)).

¹⁵ TEX. UTIL. CODE § 39.307 (emphasis added).

¹⁶ Such a situation might result in challenges to the validity or constitutionality of the true-up provision, but there is no such challenge in this case.

of customers in paying its allocated share of transition charges. The non-standard trueup is designed to more equitably spread transition charges when projected load loss within a class is just ten percent.

The Commission knows how to design a provision that would protect transition bondholders from the complete loss of customers in a class. It did so in the financing order at issue in *TXU Electric Co. v. Public Utility Commission*.¹⁷ TXU's financing order says: "Should any of the Regulatory Asset Recovery Classes cease to have any customers, the [allocation factors] will be adjusted proportionately such that the sum of the [allocation factors] equals 100.0000%." The Commission nevertheless included a non-standard true-up provision in TXU's financing order identical to the one in CPL's financing order. This underscores that non-standard true-up provisions do not and are not designed 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,"¹⁸ which is the Court's touchstone for sanctioning non-standard trueups. A non-standard trueup is designed to try to forestall a death spiral, but it is not until the death spiral has occurred and no customers are left in a class that debt service is impaired. A non-standard trueup does not cure that impairment. Under a non-standard trueup, transition charges are still allocated to all classes, even if there are no customers in one or more of those classes to pay the charges.

My fundamental problem with the Court's holding is that it reads section 39.253 out of the PURA without express language in section 39.307 that can be used to do that. The Court has construed section 39.307 to allow the Commission to allocate transition charges in any manner that it chooses, as long as the

¹⁷ __S.W.3d__ (Tex. 2001).

¹⁸ TEX. UTIL. CODE § 39.307.

Commission deems that necessary to ensure payment of the transition bonds. To give but one example, the Commission could decide not to afford residential customers the protections that section 39.253 provides by choosing to allocate transition costs in a manner entirely different from the one set forth by the Legislature. I recognize that the Commission did not take such a drastic step in CPL's financing order. But once the moorings of section 39.253 are cut by giving the Commission authority under section 39.307 to allocate transition costs in any manner that it deems necessary, section 39.253 becomes a dead letter.

The general directive that section 39.307 gives to the Commission to "ensure the expected recovery of amounts" to retire transition bonds cannot override the more specific directives in other sections of the PURA about how transition charges are to be allocated among classes of customers. This Court's decision in *State v. Jackson*¹⁹ is instructive. In that case, a statute authorized the Game and Fish Commission to close certain waters from all forms of netting and seining, except for minnow seines, whenever the Game and Fish Commission deemed that was best for protection of fish life. In another statute, the Legislature expressly said that it was lawful to use nets of a certain size in Galveston and Trinity Bays. Thereafter, the Game and Fish Commission issued a proclamation prohibiting all seines or nets for fishing in Galveston and Trinity Bays. This Court held that when the Legislature acts with specificity, an administrative agency cannot nullify that action under a more general grant of regulatory authority:

When the Legislature acts with respect to a particular matter, the administrative agency may not so act with respect to the matter as to nullify the Legislature's action even though the matter be within the agency's general regulatory field.

¹⁹ 376 S.W.2d 341 (Tex. 1964).

There is little case law announcing the rule last stated, no doubt because it is self-evident.²⁰

In the case before the Court today, section 39.307 is a general grant of regulatory authority. It cannot nullify the specific directive in section 39.253 about how transition charges are to be allocated among customer classes.

I recognize that the Commission found itself in a dilemma. Section 39.253 allocates transition charges in such a way that load loss leading to a death spiral is not unlikely. In *Jackson*, this Court recognized a similar dilemma: “The State puts its position in these words: ‘The need for administrative closing of the bays increases when and as the Legislature increases the area of legal netting.’”²¹ We nevertheless were required to conclude, “Let it be so; the problem is one for legislative, not judicial solution.”²² This Court recognized that we must give effect to the plain meaning of a statute, even if to do so may effectuate a plan that is impracticable:

“The problem of statutory construction is to ascertain the intent of the Legislature. When we abandon the plain meaning of words, statutory construction rests upon insecure and obscure foundations at best. It should perhaps be reiterated that Courts have no concern with the wisdom of legislative acts, but it is our plain duty to give effect to the stated purpose or plan of the Legislature, although to us it may seem ill advised or impracticable.”²³

²⁰ *Id.* at 344-45.

²¹ *Id.* at 346.

²² *Id.*

²³ *Id.* (quoting *State Bd. of Ins. v. Betts*, 315 S.W.2d 279, 281 (Tex. 1958)).

I would hold that the Commission did not have the statutory authority to include a non-standard trueup in CPL's financing order. Accordingly, I respectfully dissent.

Priscilla R. Owen
Justice

OPINION DELIVERED: June 6, 2001