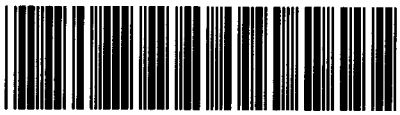

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P.U.C. DOCKET NO. 39504

REMAND OF DOCKET NO. 29526 (APPLICATION OF CENTERPOINT ENERGY HOUSTON ELECTRIC LLC, TEXAS GENCO, LP AND RELIANT ENERGY RETAIL SERVICES, LLC TO DETERMINE STRANDED COSTS AND OTHER BALANCES)	§ § § § § § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

SUPPLEMENTAL AND AMENDED PRELIMINARY ORDER

On March 31, 2004, CenterPoint Energy Houston Electric, LLC, Texas Genco, LP, and Reliant Energy Retail Services, LLC (collectively, applicants) filed jointly an application to determine stranded costs and other true-up balances pursuant to PURA[1] § 39.262 and P.U.C. SUBST. R. 25.263 in Docket No. 29526.[2] The Commission issued an order on rehearing in that docket establishing the final true-up balances as of August 31, 2004 (subject to certain amounts being updated).[3] Appeals were taken on the order on rehearing and it was remanded to the Commission to correct several errors.

The Commission opened this docket on June 15, 2011 to continue its review of the application in light of the judicial remands and issued its preliminary order on August 23. A summary of the procedural history and the issues on remand can be found in that order, which contained the Commission's initial decisions on a threshold legal issue, issues to be addressed, and issues not to be addressed. On August 8, prior to the to the issuance of the preliminary order, parties were requested to brief several issues parties had identified through their pleadings

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[1] Public Utility Regulatory Act, TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2004) (PURA).

[2] *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Services, LLC, and Texas Genco, LP to Determine Stranded Costs and Other True-up Balances Pursuant to PURA § 39.262*, Docket No. 29526 (Dec. 17, 2004).

[3] *Application of CenterPoint Energy Houston Electric, LLC, Reliant Energy Retail Services, LLC, and Texas Genco, LP to Determine Stranded Costs and Other True-up Balances Pursuant to PURA § 39.262*, Docket No. 29526, Order on Rehearing (Dec. 17, 2004), *aff'd in part, rev'd in part CenterPoint Energy Houston Electric, LLC v. Pub. Util. Comm'n*, No. GN5-00139 (Consolidated) (261st Dist. Ct., Travis County, Texas Aug. 26, 2005); *aff'd in part, rev'd in part CenterPoint Energy Houston Electric, LLC v. Gulf Coalition of Cities*, 252 S.W.3d 1 (Tex. App.—Austin 2008), *aff'd in part, rev'd in part sub nom. State v. Pub. Util. Comm'n*, 54 Tex. Sup. Ct. J. 690, 2011 WL 923949 (Tex. Mar. 18, 2011). (Order on Rehearing).

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that implicate legal and policy issues the Commission should address and the parties were notified that the Commission would consider a supplemental or amended preliminary order to address the issues briefed.

Commission Staff; CenterPoint; and the City of Houston and Houston Coalition of Cities, Gulf Coast Coalition of Cities, Houston Council for Health and Education, Office of Public Utility Counsel, Texas Industrial Energy Consumers, and State Agencies and Institutions of Higher Education (collectively, Joint Respondents) filed responses to the order requesting briefing. AEP Texas Central Company (AEP TCC) filed a brief as amicus curiae.

I. SUPPLEMENTAL THRESHOLD LEGAL/POLICY DETERMINATIONS

The following statements of position were reached in consideration of the arguments of the parties.

Issue No. 1 *Whether the Commission has the authority to revisit and change its final order in Docket No. 30706 where it ruled that CenterPoint was entitled to recover the costs of the valuation panel used in Docket No. 29526 to determine a control premium.*

The Commission is a creation of the legislature and has no inherent power; it possesses only that power expressly conferred on it and whatever implied powers that are reasonably necessary to fulfill its express functions and duties.[4] And the Commission may not exercise what is effectively a new power, or a power contradictory to PURA, because it is expedient for administrative purposes.[5] PURA does not give the Commission the authority to reconsider one

[4] *Pub. Util. Comm'n v. City Pub. Serv. Bd.*, 53 S.W.3d 310, 316 (Tex. 2001).

[5] *Id.*

of its orders that has become final.[6] To reopen an administrative proceeding and reconsider an order, a statute must vest an agency with such power.[7]

In Docket No. 30706, the Commission found that CenterPoint was entitled to recover the fee it paid to the control-premium valuation panel.[8] Motions for rehearing for that order were overruled by operation of law, and the order was affirmed by the Texas Supreme Court.[9] The order in Docket No. 30706 is now final and the Commission is without authority to reconsider its previous decision that CenterPoint may recover the cost of the valuation panel from ratepayers. No party has cited to, and the Commission is not aware of, any statutory provision that grants the Commission authority to revisit and change a final order in this type of situation.

Even though they do not assert that the Commission does have such authority, Joint Respondents suggest that "if the Commission decides to reconsider its decision on the treatment of investment tax credits and excess deferred federal income taxes that it should also consider whether the valuation panel's fees should be refunded to ratepayers."[10] The Commission rejects this suggestion because it is without authority to reconsider its determination in Docket No. 30706, and reconsidering the treatment of investment tax credits and excess deferred federal income tax cannot invest it with such authority.

The Commission adds this issue as an issue not to be addressed in this docket.

Issue No. 2 *Does PURA require or prohibit adding the value of debt securities when determining market value using the sale-of-assets method under PURA*

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[6] *Pub. Util. Comm'n of Tex. v. Brazos Elec. Power Coop.*, 723 S.W.2d 171, 173 (Tex. App.—Austin 1987, writ ref'd n.r.e.); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 145 (Tex. App.—Austin 1986, writ ref'd n.r.e.) ("no administrative agency has the power to reconsider its earlier adjudicative orders, based upon a showing of changed circumstances, as a matter of inherent power").

[7] *See Sexton*, 720 S.W.2d at 138.

[8] *Application of CenterPoint Energy Houston Electric, LLC for a Competition to Transition Charge*, Docket No. 30706, Order at 42 (July 14, 2005).

[9] *Texas Indus. Energy Consumers*, 324 S.W. 3d 95,105-07 (Tex. 2010).

[10] Joint Respondents' Joint Response to Order Requesting Briefing at 1 (Aug. 18, 2011) (Joint Respondents' Brief).

§ 39.262(h)(1)? If not required or prohibited, should the Commission consider whether to add the amount of debt to the market value in this docket?

When using the sale-of-assets method, market value is established by the "total net value realized from the sale."[11] The total *net value realized* from a sale is not defined in PURA, but the term is defined by Commission rule as "[a]ll compensation paid by a buyer for generation assets, *including the buyer's assumption of debt*, less any costs of sale such as legal fees, broker fees, and other reasonable transaction cost."[12] The Commission is bound by its own rules.[13] Consequently, the amount of debt assumed by the buyer of Texas Genco must be included in determining market value.

The Commission amends the list of issues to be addressed to include this issue.

Issue No. 3 *Whether the Commission is precluded by the court of appeals' decision from reconsidering the Commission's decision in the order on rehearing on the treatment of EDFIT and ITCs so that it may only consider whether it should provide a remedy in the event that the Internal Revenue Service were to determine such treatment was a normalization violation, and if so, the design of such a remedy?*

In the appeal of the order rehearing, the court of appeals in its opinion remanded the remedy issue, an issue on which it reversed the judgment of the district court and, thus, reversed the order on rehearing. In its judgment, the court remanded the deduction issue, an issue on which it affirmed the district court and, thus, the order on rehearing. For the reasons discussed below, the Commission concludes that it should give effect to the remand language in both the opinion and the judgment of the court of appeals.

The order on rehearing required CenterPoint to deduct from its stranded costs balance the net present value of its income tax credits (ITC) and excess deferred federal income tax

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[11] PURA § 39.262(h)(1).

[12] P.U.C. SUBST. R. 25.263(c)(5) (emphasis added).

[13] *Rodrigues v. Serv. Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999).

(EDFIT).[14] The Commission's decision was predicated on its determination that the applicants had not shown such action would result in a violation of the Internal Revenue Code (although it did note that resolution is "not free from doubt"), and based on rules proposed by the Internal Revenue Service in 2003.[15]

In its appeal, CenterPoint presented two arguments to the court of appeals related to this issue,[16] although they were presented in one point of error.[17] First, "the Commission abused its discretion by making the deductions because the deductions violated certain requirements of the Internal Revenue Service."[18] Second, "the Commission abused its discretion by failing to provide a remedy for the Joint Applicants in the event that the Internal Revenue Service later concludes that there was a tax violation."[19]

On the first issue, the court in its opinion "conclude[d] that the district court properly affirmed the portion of the Commission's order reducing the Joint Applicants' recovery by the current value of the tax benefits."[20] As to the second issue, the court stated that it "reverse[s] the judgment of the district court to the extent that it affirmed the Commission's decision to not provide the Joint Applicants with a remedy, and we remand this proceeding back to the district court for proceedings consistent with this opinion."[21] Later in its opinion, the court stated "in light of the Joint Applicants and the Commission's agreement that we should remand to the Commission the issue of whether the Commission should provide a remedy to account for the

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[14] Order on Rehearing at 85-86.

[15] *Id.* at 83-84.

[16] *CenterPoint Energy Houston Electric, LLC v. Gulf Coalition of Cities*, 252 S.W.3d 1, 41 (Tex. App.—Austin 2008), *aff'd in part, rev'd in part sub nom. State v. Pub. Util. Comm'n*, 54 Tex. Sup. Ct. J. 690, 2011 WL 923949 (Tex. Mar. 18, 2011).

[17] Brief of Appellant CenterPoint at 46-50, No. 03-05-00557-CV (Tex. App.—Austin Dec. 14, 2005).

[18] *Id.*

[19] *Id.*

[20] *CenterPoint v. Gulf Coalition of Cities,* 252 S.W.3d at 44.

[21] *Id.*

possibility that the Internal Revenue Service might later conclude that certain deductions resulted in normalization violations, we remand this issue to the district court with instructions that it remand the issue to the Commission for further proceedings."[22]

The court's judgment, however, states: "It is also ordered that the issue of whether some of the Commission's reductions might result in normalization violations is remanded to the district court with instruction that it remand the issue to the Commission for further proceedings."[23] From this language, it is obvious that the remand in the opinion is different than the remand in the court's judgment. This issue was not appealed further.

Not surprisingly, parties' briefs point to the language favorable to their positions. Commission Staff[24] and Joint Respondents[25] point to the court's language in its opinion and argue that there was a limited remand by the court to consider only whether the Commission should provide CenterPoint a remedy in the event that the Internal Revenue Service were to find a normalization violation. The Commission agrees that the language in the court's opinion unambiguously remands only the remedy issue. CenterPoint, however, points to the language in the judgment and asserts that language "unambiguously remands to the Commission *all questions* concerning the potential normalization violations."[26] The Commission disagrees with CenterPoint because the judgment remands "the issue of whether some of the Commission's deductions might result in a normalization violation."[27] Accordingly, only the deduction of the present value of the ITC and EDFIT accounts—the only deductions that raised normalization issues—was remanded, "not all questions" concerning this issue. No party discussed whether

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[22] 252 S.W.3d at 70.

[23] Judgment Rendered April 17, 2008 at 2, No. 03-05-00557-CV (Tex. App.—Austin Apr. 17, 2008).

[24] Commission Staff's Brief on Threshold Legal and Policy Issues at 15-16 (Aug. 18, 2011) (Commission Staff's Brief).

[25] Joint Respondents' Brief at 4-8.

[26] CenterPoint's Response to Order Requesting Briefing at 14 (Aug. 18, 2011) (emphasis added) (CenterPoint's Brief); *see also* Brief of Amicus Curiae AEP TCC in Response to Commission's Order Requesting Briefing at 6-7 (Aug. 18, 2011).

[27] Judgment Rendered April 17, 2008 at 2, No. 03-05-00557-CV.

there were any legal precepts to resolve this situation: the opinion remands an issue that was reversed and the judgment remands an issue that was affirmed.

To determine the scope of a remand, some courts have stated that one should look not only to the mandate itself, but also to the opinion of the court to help interpret the mandate.[28] But none address a situation such as found here. And none of these courts stated that looking to the opinion was proper only if the mandate (or the underlying judgment) was ambiguous.

Other courts have stated that the same rules of interpretation used for other written instruments should be used in construing court orders and judgments.[29] If the judgment is plain and unambiguous, extrinsic matters may not be considered and the meaning should be determined by the literal meaning of the words used.[30] If the judgment is ambiguous, the entire content of the judgment and the record should be considered.[31] If the language of the judgment is susceptible to more than one interpretation, the one that renders the judgment more reasonable, effective, and conclusive, and that harmonizes it with the facts of the case, should be adopted.[32] But even one of these courts has stated that the opinion of the appellate court is instructive in interpreting any limitations placed on the scope of the remand.[33] Here again, none of these courts were dealing with the situation found here.

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[28] *Hudson v. Wakefield*, 711 S.W.2d 628, 630 (Tex. 1986) (citing to *Wells v. Littlefield*, 62 Tex. 28 (1884)); *Walston v. Walston*, 119 S.W.3d 435, 438 (Tex. App.—Waco 2003, no pet.); *McCalla v. Ski River Development, Inc.*, 239 S.W.3d 374, 379 (Tex. App.—Waco 2007, no pet.).

[29] *Freightliner Corp. v. Motor Vehicle Board*, 255 S.W.3d 356, 363 (Tex. App.—Austin 2008, pet. denied) (citing *Lone Star Cement Corp. v. Fair*, 467 S.W.2d 402, 404-05 (Tex. 1971)).

[30] *Id.* (citing *McLeod v. McLeod*, 723 S.W.2d 777, 779 (Tex. App.—Dallas 1987, no writ)).

[31] *Id.* (citing *Point Lookout West, Inc. v. Whorton*, 742 S.W.2d 277, 278 (Tex. 1987) (per curiam) and *Lone Star Cement*, 467 S.W.2d at 404-05).

[32] *Id.* (citing *State Farm Lloyds, Inc. v. Williams*, 791 S.W.2d 542, 546 (Tex. App.—Dallas 1990, writ. denied)).

[33] *Id.* (citing *Hudson*, 711 S.W.2d at 630).

The Commission concludes that it should give effect to the language in both the court's opinion and its judgment. The Commission "look[s] to the entire content of the judgment and the record"[34] to "harmonize [all of the remanding language] with the facts of the case."

The Commission recognized in the order on rehearing that the normalization law was not clear.[35] After submission, CenterPoint notified the court of a private letter ruling it had received from the Internal Revenue Service. Subsequently, on September 24, 2007, the Commission filed a letter with the court of appeals.[36] In that letter, the Commission discussed the continuing uncertainty in federal tax law and the fact that a private letter ruling issued by the Internal Revenue Service to CenterPoint increased "the cumulative weight on the side of the utility's argument that the Commission's treatment might cause a normalization violation," and noted that it related to issue 3 in Centerpoint's appellate brief. Issue 3 complained about both the deduction to stranded costs and the failure to provide a remedy.[37] That letter then recited that CenterPoint had asked for a remand to allow the Commission to apply the regulation ultimately adopted by the Internal Revenue Service. The Commission then asked that "the Court remand this issue to the Commission to be reconsidered in light of new developments."[38] Nowhere in its letter did the Commission address the remedy component.

The court of appeals, however, characterized the Commission's letter as a request to remand the remedy issue. This characterization is not supported when one looks at the actual language of the Commission's letter and, because the Commission should base its decision on the entire record, not determinative. The Commission concludes that the court of appeals was attempting to grant the Commission's request to reconsider whether the deduction of the ITC and EDFIT amounts would lead to a normalization violation under the current state of the law. But

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[34] *Id.* at 362.

[35] Order on Rehearing at 84.

[36] Letter from Elizabeth R.B. Sterling, Assistant Attorney General, to Jeffry D. Kyle, Clerk of the Court, Third Court of Appeals, at I (Sept. 24, 2007) (Letter).

[37] Brief of Appellant CenterPoint at 46-50, No. 03-05-00557-CV (Tex. App.—Austin Dec. 14, 2005).

[38] Letter at 2.

that does not mean that the literal language of the court's unambiguous language in the opinion can be ignored.

Further, when construing written instruments, where two provisions can be given effect, the provisions should not be construed in a manner that will lead to conflict, and they both should be given effect.[39]

In the order requesting briefing, the Commission requested parties to address the decision in *Freightliner Corp. v. Motor Vehicle Board.*[40] *Freightliner* held that "a court's affirmance in part of an agency decision binds the agency to that part of the decision affirmed and limits the scope of issues the agency considers on remand." The Commission concludes that that decision is not binding where the court's judgment expressly and unambiguously remands an issue that it upheld in its opinion.

The Commission concludes that both the deduction issue and the remedy issue have been remanded to it and it includes both in its issues to be addressed.

Issue No. 4 *Assuming, solely for purposes of answering this question, that the Commission were to change its treatment of EDFIT and ITCs, does the Commission need to re-determine the benefit CenterPoint received from retaining its ADFIT balance? In addition, does the Commission need to re-determine that benefit in light of the Texas Supreme Court's decision on the order on rehearing? If so, is this docket the appropriate place to make those re-determinations?*

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[39] *City of San Antonio v. City of Boerne*, 111 S.W.2d 22, 25 (Tex. 2003) (citations omitted) ("we read the statute as a whole and interpret it to give effect to every part"); *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001) (citations omitted) ("we should not give one provision a meaning out of harmony or inconsistent with other provisions"); *Ogden v. Dickenson State Bank*, 662 S.W.2d 330, 335 (Tex. 1983) (citations omitted) ("In attempting fairly to harmonize the seemingly conflicting provisions, however, the court should favor an interpretation that affords some meaning to each part of the contract"); *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983) (citation omitted) ("the courts should examine and consider the *entire writing* in an effort to harmonize and give effect to *all provisions* of the contract so that none will be rendered meaningless.") (emphasis in the original).

[40] 255 S.W.3d 356 (Tex. App.—Austin 2008, pet. denied).

All of the parties agree that the Commission will need to re-determine CenterPoint's ADFIT balance and the prospective and retrospective benefits provided to CenterPoint as a result of retaining that balance.[41]

The Commission adds this issue to the issues to be addressed in this docket.

The parties differ as to whether the Commission should re-determine the prospective and retrospective benefits to CenterPoint in this proceeding. Commission Staff asserts that this benefit should be addressed in this docket.[42] Joint Respondents state that the benefit can be determined in this docket, or a subsequent docket, but request that it be done in this docket for a speedy resolution.[43] CenterPoint argues that the amount of ADFIT should be determined in this proceeding, but that the calculation of the benefit should be delayed until the subsequent securitization proceeding.[44] CenterPoint points out that the Commission concluded in the order on rehearing that inputs needed to calculate the benefit will not be known until the subsequent proceeding.[45] The Commission agrees that this is still the case. Accordingly, the amount of ADFIT should be determined in this proceeding, but the prospective and retrospective benefits should be determined in a subsequent proceeding.

The Commission adds this issue to the list of issues not to be addressed in this docket.

Issue No. 5 *Is the appropriate interest rate to apply to unrecovered true-up balances (both stranded costs and non-stranded costs) mandated by Commission rules? If so, what are those rates and what is the appropriate time period for each of those rates?*

The Commission's true-up rule governs the procedural and substantive issues related to true-up proceedings to determine the stranded and non-stranded costs that are allowed to be

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[41] CenterPoint's Reply Brief at 32-33; Joint Respondents' Reply Brief at 8-9; Commission Staff's Brief at 18-20.

[42] Commission Staff's Brief at 21.

[43] Joint Respondents' Brief at 9.

[44] CenterPoint's Brief at 33-35.

[45] *Id.*

recovered under PURA.[46] This rule specifies the interest rate to be used to calculate the carrying costs on true-up balances and over what period and to what amounts those carrying costs should apply.[47] The question in this docket is what interest rate should apply to calculate the carrying costs for the amounts, determined in this docket, that should be included in a true-up balance.

As originally enacted, the true-up rule provided that carrying charges "shall be calculated using the utility's cost of capital established in the Unbundled Cost of Service (UCOS) proceeding" and that the carrying charges should be applied to those parts of the true-up balance that had not been securitized as of the date of the Commission's true-up order.[48] A subsequent decision by the Texas Supreme Court held that interest had to be applied starting January 1, 2002 and invalidated the portion of the rule that limited interest to the date of the Commission's true-up order. An amendment in 2006 changed the interest rate to calculate carrying costs to a weighted average of a utility's historical cost of debt and its adjusted marginal cost of debt.[49] The amendment did not change the requirement that carrying costs on the unrecovered true-up balance "shall be calculated from January 1, 2002, until the true-up balance is recovered."[50] CenterPoint argues that the Commission's rule cannot be applied primarily because, it asserts, the rule only applies prospectively.

Joint Respondents asserts that the interest rate mandated by the true-up rule should apply.[51] CenterPoint and Commission Staff agree that the interest rate mandated by this rule must be used to calculate carrying costs after July 31, 2006.[52] But they argue that, for the period from January 1, 2002 to July 31, 2006, former provisions of the true-up rule establish the interest

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[46] P.U.C. SUBST. R. 25.263.

[47] P.U.C. SUBST. R. 25.263(l)(3).

[48] 26 Tex. Reg. 10498 (Dec. 21, 2001) (Former P.U.C. SUBST. R. 25.263(l)(3)).

[49] P.U.C. SUBST. R. 25.263(l)(3)(A)(i).

[50] P.U.C. SUBST. R. §25.263(l)(3). The amendment did change the language of the rule to reflect the Texas Supreme Court's decision.

[51] Joint Respondent's Brief at 9-10.

[52] CenterPoint's Brief at 36-45; Commission Staff's Brief at 23-24.

rate that must be used to calculate carrying costs.[53] For the reasons discussed in this Order, the Commission concludes that it must apply its existing rule to determine carrying costs for the true-up balance amounts determined in this docket.

The Commission's rules are construed "in the same manner as statutes, . . . "to give effect to the agency's intent and follow[] the plain language of the rule."[54] The true-up rule states: "Carrying costs on the unrecovered true-up balance shall be calculated from January 1, 2002, until the true-up balance is fully recovered. Based on the filing described below that is made within 30 days of the effective rate of this rule, carrying costs shall be calculated using an interest rate determined as follows."[55] The rule further states "The establishment of the interest rate used to calculate carrying charges shall be based upon the following," and the rule then describes how the interest rate shall be calculated.[56]

Joint Respondent's assert that the Commission must apply its rules according to their plain language,[57] that the plain language of the rule makes it retroactive, but the rule is not impermissibly retroactive because it does not impair any vested rights.[58] On the other hand, CenterPoint asserts that an agency rule cannot have retroactive application.[59] The one case cited

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[53] CenterPoint's Brief at 36-45; Commission Staff's Brief at 23-24.

[54] *City of Alvin*, 143 S.W.3d 872, 881 (Tex. App—Austin 2004, no pet.) (citing *Rodriquez v. Service Lloyds Ins. Co.*, 997 S.W.2d 248, 254 (Tex. 1999); *City of Dickinson v. Pub. Util. Comm'n*, 284 S.W.2d 449, 452 (Tex. App.—Austin 2009, no pet.)

[55] P.U.C. SUBST. R. 25.263(l)(3).

[56] P.U.C. SUBST. R. 25.263(l)(3)(A).

[57] Joint Respondent's Brief at 10 (citing *Pub. Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201, 207 (Tex. 1991)).

[58] *Id.* at 10-15.

[59] CenterPoint's Brief at 41 (citing *Amarillo Indep. School Dist. v. Meno*, 854 S.W.2d 950, 957, 958 (Tex. App.—Amarillo 1993, writ denied) (citation omitted)).

by CenterPoint does not, however, stand for this proposition. Contrary to CenterPoint's assertion, an administrative rule can have retroactive application.[60]

The fact that the true-up rule calculates carrying costs back to September 1, 2002 does not necessarily make it retroactive. "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law."[61] The *Nzedu* court discussed its decision in *General Dynamics Corp. v. Sharp*[62] where it decided that an amendment to the franchise tax statute was not retroactive where it based the amount of taxes on income in a year prior to the amendment.[63] The court noted that the tax was levied after the effective date of the amendment and concluded that it operated prospectively and not retroactively.[64] The court stated that "there is a distinction between an unconstitutionally retroactive statute and a prospective statute that merely draws upon certain facts or conduct that took place before the statute became law in the process of operating after its effective date."[65] Thus, while the Commission must look back to historical facts to calculate carrying costs, it will make that determination and set a recovery rate after the effective date of the rule.

Even if the true-up rule has retroactive application as Joint Respondents assert,[66] the Commission agrees with Joint Respondents that retroactive application is not impermissible. There are two questions to ask in this regard: First, does PURA authorize the Commission to

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[60] *Liberty Mutual Ins. Co. v. Dept. of Ins.*, 187 S.W.3d 808, 820 (Tex. App.—Austin 2006, pet. denied) (citation omitted). The first question to consider is whether the statute intended to allow the agency to issue a rule with retroactive effect.

[61] *Board of Med. Exam. v. Nzedu*, 228 S.W.3d 264, 271 (Tex. App-Austin 2007, pet. denied) (*quoting Quick v. City of Austin*, 7 S.W.3d 109, 132 (Tex. 1990) (*quoting Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994))).

[62] 919 S.W.2d 861 (Tex. App.—Austin 1996, writ denied).

[63] 228 S.W.2d at 271-72.

[64] *Id.*

[65] *Id.* at 272.

[66] Joint Respondent's Brief at 11-13.

adopt a rule with retroactive effect. And second, whether that retroactive effect is "constitutionally objectionable."[67] The answer to the first question is yes: the Commission is required by PURA to calculate carrying costs back to January 1, 2002,[68] and it must establish an interest rate to make that calculation. As to the second question, retroactive application is not impermissible because the change in interest rate does not impair any vested right. "No one has a vested right in the continuance of present laws in relation to a particular subject.[69] Thus, CenterPoint has no right to the interest rate specified in the former true-up rule. Further, the Commission has not yet determined any additional amounts that should be included in CenterPoint's true-up balance—even though it may have limited discretion under the supreme court's decision in making that determination—or what the amount of carrying cost on that amount should be, nor has it established a rate to recover those amounts. Because it has not yet made these determinations, the Commission cannot not affect any vested rights of CenterPoint by now deciding how much it is entitled to recover.

Notwithstanding the plain language of the true-up rule, CenterPoint argues that it cannot be used to calculate carrying costs from 2002 to 2006. But if this is true, what rule does apply? CenterPoint argues that the interest rate required by a former rule no longer in effect must be used. The Commission notes that the 2006 amendment contained no savings clause to preserve the former provisions. And, after a diligent search, the Commission has found no case that holds that an administrative agency must, or even may, apply a former rule in deciding a matter after remand from the courts; and CenterPoint has not cited any authority for such a proposition. Instead, the Commission concludes that it must apply its rules as they exist at the time of decision.[70] The Commission notes that where the law changes during the pendency of an appeal,

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[67] 187 S.W.3d at 820.

[68] *CenterPoint Energy, Inc. v. Pub. Util. Comm'n,* 143 S.W.2d 81 (Tex. 2004).

[69] 228 S.W.3d at 273.

[70] *Rodrigues v. Serv. Lloyds Ins. Co.,* 997 S.W.2d 248, 254 (Tex. 1999) ("if the Commission does not follow the clear, unambiguous language in its own regulation, we reverse its action as arbitrary and caprious"); *Pub. Util. Comm'n v. Gulf States Util. Co.*, 809 S.W.2d 201 (Tex. 1991).

a court will "apply the law in effect at the time it renders its decision."[71] The Commission recognizes that this rule applicable to the courts during appeal does not speak directly to the issue at hand, but it does provide some support for the Commission's conclusion.

The Commission also notes the inconsistency of CenterPoint's position here with the position it takes on the normalization issues discussed earlier. In asking the court of appeals to remand that issue, CenterPoint wanted the Commission to "apply the regulation ultimately adopted by the IRS."[72] Further, in its brief, CenterPoint makes clear that it wants the Commission to consider new regulations and a private letter ruling issued after the Commission initially decided that matter.[73] CenterPoint asks that the Commission make its decision on that issue using the current law. On the interest rate issue, CenterPoint asserts that the Commission must apply a former rule that was effective at the time the Commission made its initial decision,[74] but no longer has any effect on the issue.

But CenterPoint argues that the plain language of the true-up rule, the Commission's order adopting the rule, Commission precedent, and comments by the courts all show that the rule is to only act prospectively, i.e. that the interest rate mandated by that rule can be used to calculate carrying costs only after July 31, 2006. It also argues that it is entitled to the interest rate under the former rule because it is entitled to the rate in effect at the time of the erroneous judgment and because it is entitled to restitution. It also argues that Joint Respondents have conceded that the old interest rate applies from 2002 to 2006. For the reasons discussed below, the Commission disagrees with all of CenterPoint's contentions.

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[71] *Landgraf v. USI Film Products*, 511 U.S. 244, 264 (1994); *University of Texas Southwestern Medical Center at Dallas v. Estate of Arancibia*, 324 S.W.3d 544, 5487-48 (Tex. 2010); *Blair v. Fletcher*, 849 S.W.2d 344, 345 (Tex. 1993).

[72] Letter from Elizabeth R.B. Sterling, Assistant Attorney General, to Jeffry D. Kyle, Clerk of the Court, Third Court of Appeals, at 2 (Sept. 24, 2007).

[73] CenterPoint's Brief at 14-15.

[74] *Id.* at 37.

CenterPoint states that the plain language of the rule requires prospective application and cites to the requirement that "a utility must amend it CTC tariff 'on a prospective basis.'"[75] CenterPoint asserts that the "only plausible meaning of the phrase is that carrying costs begin to accrue at the lower rate only after the effective date of the rule."[76] The Commission agrees that the rule expressly requires that a CTC tariff be amended on a prospective basis, and properly so. The CTC tariff specifies the CTC—a rate—that can be collected from rate payers. But the Commission disagrees that this provision in any manner limits application of the interest rate to calculate the carrying costs that are recovered by the CTC. Such a reading would conflict with the express requirement that carrying charges "shall be calculated from January 1, 2002 . . . . using an interest rate determined" in P.U.C. Subst. R. 25.263(l)(3)(A)(i).[77] Thus, while the rule limits application of the CTC (rate) prospectively, it expressly provides that the calculation of the amount of carrying costs that can be recovered must look back to September 1, 2002.

Further, as CenterPoint notes, it has "securitized all true-up balances approved by the Commission . . . ."[78] Thus, it has no true-up balance that has not been securitized, and it, therefore no longer has an effective CTC tariff that needs to be amended. As a result of this proceeding, the Commission will have to approve a new CTC tariff for CenterPoint, unless it chooses to securitize the new true-up balance.

CenterPoint asserts that the Commission's order "confirms that the Commission intended for the amendment to operate prospectively only."[79] The Commission disagrees. In its order, the Commission stated: "Subsequent to the effective date of the rule, *changes* to the interest rate

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[75] *Id.* at 39 (citing P.U.C. SUBST. R. 25.263(l)(3).

[76] *Id.*

[77] P.U.C. SUBST. R. §25.263(l)(3). The amendment did change the language of the rule to reflect the Texas Supreme Court's decision.

[78] CenterPoint's Brief at 38; *see also Application of CenterPoint Energy Houston Electric, LLC for a Financing Order*, Docket No. 34448, Financing Order (Sept. 18, 2007).

[79] CenterPoint's Brief at 39.

on [unrecovered] balances will be applied on a prospective basis."[80] This language recognizes that where the Commission had already issued a final and appealable order that determined an interest rate and the carrying charges on the unrecovered amount of the true-up balance, those amounts could only be changed prospectively. But here, the Commission has not even determined the amount of the true-up balance that can be recovered, much less the interest rate and carrying costs for that yet-to-be-determined balance. Where the Commission has determined the true-up balance and the interest rate and carrying costs for that balance, the Commission agrees with CenterPoint that the rule does not allow those amounts to be changed except on a prospective basis. But when determining the interest rate to calculate carrying costs for amounts that the Commission will determine in this docket should be included in the true-up balance, that concern is not applicable and the Commission should apply the plain language of its rule.

CenterPoint next argues that Commission precedent shows that the rule should be applied prospectively.[81] The Commission agrees that in Docket No 32758, AEP TCC's CTC case, the Commission concluded that the interest rate under the true-up rule would not apply until the date of the Commission's final order in that docket. That was the sole interest-rate issue decided there: when should the new interest rate for AEP become effective. As the Commission noted, the true-up rule does not specify a date that the interest rate should change, so it had to determine that date. But that case concerns changing the interest rate, and thus carrying charges, after the Commission had determined AEP's true-up balance and the interest rate and carrying charges that should apply. As discussed above, in that situation, the rule requires the changes to be on a prospective basis. That case did not address what the initial rate and carrying costs on *newly* determined true-up balances should be. Consequently, the Commission did not in that docket reject the arguments the Joint Respondents are now making.

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[80] *Rulemaking Proceeding to Amend Subst. R. §25.263 Relating to True-up Proceedings*, Project No. 32008, Order Adopting Amendments to §25.263 as Approved at the June 29, 2006, Open Meeting at 22 (Jun. 30, 2006); 31 Tex. Reg. 5603, 5608 (2006)).

[81] CenterPoint's Brief at 42.

Next, CenterPoint notes that the "Texas Supreme Court has commented on the prospective-only application of the revised interest rate in [CenterPoint's CTC proceeding]".[82] The issue on appeal in that case was whether the carrying-costs provision of the former true-up rule had been invalidated.[83] The court stated, "Further, as all parties agree, the PUC in 2006 prospectively reset the interest rate on the CTC to reflect changed economic conditions."[84] While the court's comments that the Commission prospectively set the interest rate are true, the court did not address whether such application was appropriate, and it did not address the issue in this case.

But another thing the court said is very relevant:

> [W]e agree with the court of appeals that, as a general proposition, an agency cannot be said to 'err or act arbitrarily or capriciously by complying with the mandate of its own rule,' assuming that the rule is based on a valid delegation of legislative authority and is a reasonable exercise of that authority. Indeed, we have stated that if an agency 'does not follow the clear, unambiguous language of its own regulation, we reverse its action as arbitrary and capricious.'[85]

As noted above, the plain and unambiguous language in the true-up rule requires that carrying costs be calculated from January 1, 2002 using the interest rate calculated under that rule, not a former rule. As stated by the court, the Commission must follow the language of its rule.

Further, the Commission rejects CenterPoint's argument that the Joint Respondents conceded that the 11.075% interest rate applied.[86] That issue, however, was not before the court and they based their argument on an assumed rate. In addition, they expressly stated that they

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[82] CenterPoint's Brief at 42.

[83] *Texas Industrial Energy Consumers v. CenterPoint Energy Houston Electric, LLC*, 324 S.W.3d 95, 101-02 (Tex. 2010).

[84] *Id.* at 104.

[85] *Id.* at 104

[86] CenterPoint's Brief at 43-44.

did not agree that 11.075% was the proper rate. Joint Respondents did not concede this point or waive their right to raise the issue here.

CenterPoint next makes an argument analogizing the interest rate here to judgment interest rates.[87] There is extensive case law on what is the proper interest rate on money judgments. That case law is irrelevant to the interpretation of Commission rules. Next, CenterPoint argues that it is entitled to restitution.[88] It cites to case law addressing the situation where a party has obtained a money judgment and received voluntary payments on that judgment, but on appeal the judgment was reversed or modified. In those cases the court stated that the party had to return the money. Those cases are not applicable to the question of what interest rate is required by a Commission rule. CenterPoint also cites to federal cases that discuss federal law applicable to the Federal Energy Regulatory Commission. Those cases do not address Texas law.

For the reasons discussed above, the Commission concludes that it must apply its true-up rule to calculate carrying costs in this docket and that the plain language of that rule requires the use of the interest rate calculated under that rule back to January 1, 2002.

For the reasons discussed above, the Commission concludes that it must comply with its own rules, and that the plain language of the true-up rule requires that carrying costs on the new true-up balances determined in this docket must be calculated using the interest rate mandated in that rule.

The Commission adds the amount of carrying costs on the true-up balance determined in this docket as an issue to be addressed, and adds an issue not to be addressed to reflect its decision here.

II. SUPPLEMENTAL AND AMENDED ISSUES TO BE ADDRESSED

1. Have the applicants provided a detailed explanation of the actual sales transaction and a description of the items actually sold as required by P.U.C. SUBST. R 25.263(f)(1)(A)? To

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[87] *Id.* at 44.

[88] *Id.* at 44-45.

the extent that the existing record adequately describes and explains the sale, the parties do not need to address this issue beyond providing to the Commission references to the existing record.

2. Have the applicants appropriately calculated the market value of Texas Genco's generation assets using the sale-of-assets valuation method in PURA § 39.262(h)(1) and P.U.C. SUBST. R. 25.263(f)(1)(A)?

   a. Did the applicants properly quantify the total net value realized from the sale of Texas Genco's generation assets?

   b. What was the sales price for the generation assets? To the extent that the existing record adequately establishes the sales price, the parties do not need to address this issue beyond providing to the Commission references to the existing record.

   c. What amount of debt, if any, was assumed by the purchaser of Texas Genco?

   d. What were the reasonable and necessary costs incurred to conduct the sale?

3. Have the applicants appropriately mitigated stranded costs?

   a. Did the applicants pursue commercially reasonable means to reduce their potential stranded costs, including good faith attempts to renegotiate above-cost fuel and purchased-power contracts or the exercise of normal business practices to protect the value of its assets?[89]

   b. Did the applicants use the tools available to an electric utility in PURA Chapter 39, Subchapter F, to mitigate stranded costs?

   c. If the applicants did not appropriately mitigate stranded costs, should any adjustments to net book value be made?

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[89] *See* PURA § 39.252(d).

4. As an alternative to issue 3, is the discussion in the order on rehearing relevant to adequately address the issues identified in issue 3 in relation to a valuation conducted under the sale-of-assets method (recognizing that the decision related to the option granted to Reliant Resources, Inc. should not be addressed as discussed in this Order under the issues not to be addressed)?

5. What amount of actual interest was paid out on excess mitigation credits until the credits were terminated in April 2005?

6. What adjustments need to be made to applicants' ADFIT balance to reflect changes to the true-up balances determined in this docket?

7. What are the reasonable rate-case expenses that have not already been approved by the Commission?

8. Would deducting the present value of the ITC and EDFIT balances from stranded costs violate the normalization requirements in the Internal Revenue Code or the rules of the Internal Revenue Service?

9. What would be the effect if Internal Revenue Service found the treatment of the ITC and EDFIT balances violated normalization requirements?

   a. Could the IRA assess monetary penalties?

   b. What specific tax items would be affected and how would that affect CenterPoint's tax liability? How long would such a treatment last?

   c. How would those changes affect rates? What adjustments would have to be made to rate base and expenses to reflect any changed tax treatment?

   d. What would be the net effect on CenterPoint of any changes in the way taxes would be calculated and the resulting changes to its rates?

10. Could CenterPoint cure a normalization violation after the IRS made a decision? If so, how?

11. Should the Commission deduct the present value of the ITC and EDFIT accounts from the amount of stranded costs to be recovered in this docket? If so, what adjustments, if any, need to be made to those accounts?

12. What is the appropriate amount of carrying costs on the true-up balance determined in this docket?

III. SUPPLEMENTAL ISSUES NOT TO BE ADDRESSED

1. Whether CenterPoint is entitled to recover the cost of the valuation panel from ratepayers.

For the reasons discussed in the answers to threshold issues, the Commission does not have authority to address this issue in this docket.

2. Whether the Commission should determine the prospective and retrospective benefits provided to CenterPoint by retention of its ADFIT balance.

For the reasons discussed in the answers to threshold issues, the determination of these benefits should be conducted in a subsequent proceeding when all necessary inputs will be known.

3. What is the appropriate interest rate to apply to unrecovered true-up balances (both stranded costs and non-stranded costs).

For the reasons discussed in the answers to threshold issues, the interest rate mandated by P.U.C. Subst. R. 25.263(l)(3)(A)(i) must be used to calculate carrying costs.

IV. EFFECT OF PRELIMINARY ORDER

The Commission's discussion and conclusions in this Order regarding threshold legal and policy issues and issues not to be addressed should be considered dispositive of those matters. Questions, if any, regarding threshold legal and policy issues may be certified to the Commission for clarification if the Commission determines that such clarification is necessary. As to all other issues, this Order is preliminary in nature and is entered without prejudice to any party expressing views contrary to this Order at hearing. The Commission, upon is own motion or upon the motion of any party, may deviate from the non-dispositive rulings of this Order when

circumstances dictate that it is reasonable to do so. The Commission will not address whether this Order should be modified except upon its own motion. Furthermore, this Order is not subject to motions for rehearing or reconsideration.

SIGNED AT AUSTIN, TEXAS the 6th day of September, 2011.

PUBLIC UTILITY COMMISSION OF TEXAS

DONNA L. NELSON, CHAIRMAN

KENNETH W. ANDERSON, JR., COMMISSIONER

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