

UTILITIES CODE

TITLE 2. PUBLIC UTILITY REGULATORY ACT

SUBTITLE B. ELECTRIC UTILITIES

CHAPTER 40. COMPETITION FOR MUNICIPALLY OWNED UTILITIES AND RIVER
AUTHORITIES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 40.001. APPLICABLE LAW. (a) Notwithstanding any other provision of law, except Sections 39.155, 39.157(e), 39.203, and 39.904, this chapter governs the transition to and the establishment of a fully competitive electric power industry for municipally owned utilities. With respect to the regulation of municipally owned utilities, this chapter controls over any other provision of this title, except for sections in which the term "municipally owned utility" is specifically used.

(b) Except as specifically provided in this subsection, Chapter 39 does not apply to a river authority operating a steam generating plant on or before January 1, 1999, or a corporation authorized by Chapter 152, Water Code, or Section 32.053. A river authority operating a steam generating plant on or before January 1, 1999, is subject to Sections 39.051(a)-(c), 39.108, 39.1516, 39.155, 39.157(e), and 39.203.

(c) For purposes of Section 39.051, hydroelectric assets may not be deemed to be generating assets, and the transfer of generating assets to a corporation authorized by Chapter 152, Water Code, satisfies the requirements of Section 39.051.

(d) Accommodation shall be made in the code of conduct established under Section 39.157(e) for the provisions of Chapter 152, Water Code, and the commission may not prohibit a river authority and any related corporation from sharing officers, directors, employees, equipment, and facilities or from providing goods or services to each other at cost without the need for a competitive bid.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 8.401, eff. Sept. 1, 2001.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 467 (H.B. 4170), Sec. 16.004, eff. September 1, 2019.

Acts 2019, 86th Leg., R.S., Ch. 610 (S.B. 936), Sec. 8, eff. September 1, 2019.

Sec. 40.002. DEFINITION. For purposes of this chapter, "body vested with the power to manage and operate a municipally owned utility" means a body created in accordance with Section 1502.070, Government Code, or Subchapter G, Chapter 552, Local Government Code, or by municipal charter.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 8.402, eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 3.77(29), eff. April 1, 2009.

Sec. 40.003. SECURITIZATION. (a) Municipally owned utilities and river authorities may adopt and use securitization provisions having the effect of the provisions provided by Subchapter G, Chapter 39, to recover through appropriate charges their stranded costs, at a recovery level deemed appropriate by the municipally owned utility or river authority up to 100 percent, under rules and procedures that shall be established:

(1) in the case of a municipally owned utility, by the municipal governing body or a body vested with the power to manage and operate the municipally owned utility, including procedures providing for rate orders of the governing body having the effect of financing orders, providing for a separate nonbypassable charge approved by the governing body, in the nature of a transition charge, to be collected from all retail electric customers of the municipally owned utility, identified as of a date determined by the governing body, to fund the recovery of the stranded costs of the municipally owned utility and of all reasonable related expenses, as determined by the governing body, and providing for the issuance of bonds, having a term and other characteristics as

determined by the governing body, as necessary to recover the amount deemed appropriate by the governing body through securitization financing; and

(2) in the case of a river authority, by the commission.

(b) In order to implement securitization financing under the rules and procedures established by and for a municipally owned utility under Subsection (a)(1), municipalities are expressly authorized and empowered to issue bonds, notes, or other obligations, including refunding bonds, payable from and secured by a lien on and pledge of the revenues collected under an order of the governing body of the municipality, and the bonds shall be issued, without an election or any requirement of giving notice of intent to issue the bonds, by ordinance adopted by the governing body of the municipality, in the form and manner and sold on a negotiated basis or on receipt of bids and on the terms and conditions as shall be determined by the governing body of the municipality.

(c) Bonds issued under the authority conferred by Subsections (a)(1) and (2) and Subsection (b) may be issued in the form and manner, with or without credit enhancement or liquidity enhancement and using the procedures as provided in Chapter 1201, Government Code, or other laws applicable to the issuance of bonds, including Subchapters A-C, Chapter 1207, Government Code, and Chapter 1371, Government Code, as if those laws were fully restated in this section and made a part of this section for all purposes, and a municipality or river authority shall have the right and authority to use those other laws, notwithstanding any applicable restrictions contained in those laws, to the extent convenient or necessary to carry out any power or authority, express or implied, granted under this section, in the issuance of bonds by a municipality or river authority in connection with securitization financing. This section is wholly sufficient authority for the issuance of bonds, notes, or other obligations, including refunding bonds, and the performance of the other authorized acts and procedures, without reference to any other laws or any restrictions or limitations contained in those laws. To the extent of any conflict or inconsistency between the provisions of this

authorization and any provisions of any other law or home-rule charter, the authorization and power to issue bonds conferred on municipalities or river authorities under this section shall prevail and control.

(d) The rules and procedures for securitization established by the commission under Subsection (a)(2) shall include procedures for the recovery of qualified costs under the terms of a financing order adopted by the governing body of the river authority.

(e) The rules and procedures for securitization established by the commission under Subsection (a)(2) shall include rules and procedures for the issuance of transition bonds. Findings made by the governing body of a river authority in a financing order issued under the rules and procedures described in this subsection shall be conclusive, and any transition charge incorporated in the rate order to recover the principal, interest, and all reasonable expenses associated with any transition bonds shall constitute property rights, as described in Subchapter G, Chapter 39, and otherwise conform in all material respects to the transition charges provided by Subchapter G, Chapter 39.

(f) The rules and procedures established under this section shall be consistent with other law applicable to municipally owned utilities and river authorities and with the terms of any resolutions, orders, charter provisions, or ordinances authorizing outstanding bonds or other indebtedness of the municipalities or river authorities.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.
Amended by Acts 2001, 77th Leg., ch. 1420, Sec. 8.403, eff. Sept. 1, 2001.

Sec. 40.004. JURISDICTION OF COMMISSION. Except as specifically otherwise provided in this chapter, the commission has jurisdiction over municipally owned utilities only for the following purposes:

(1) to regulate wholesale transmission rates and service, including terms of access, to the extent provided by Subchapter A, Chapter 35;

(2) to regulate certification of retail service areas

to the extent provided by Chapter 37;

(3) to regulate rates on appeal under Subchapters D and E, Chapter 33, subject to Section 40.051(c);

(4) to establish a code of conduct as provided by Section 39.157(e) applicable to anticompetitive activities and to affiliate activities limited to structurally unbundled affiliates of municipally owned utilities, subject to Section 40.054;

(5) to establish terms and conditions for open access to transmission and distribution facilities for municipally owned utilities providing customer choice, as provided by Section 39.203;

(6) to administer the renewable energy credits program under Section 39.904(b) and the natural gas energy credits program under Section 39.9044(b);

(7) to require reports of municipally owned utility operations only to the extent necessary to:

(A) enable the commission to determine the aggregate load and energy requirements of the state and the resources available to serve that load; or

(B) enable the commission to determine information relating to market power as provided by Section 39.155; and

(8) to evaluate and monitor the cybersecurity preparedness of a municipally owned utility described by Section 39.1516(a)(3) or (4).

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Amended by:

Acts 2019, 86th Leg., R.S., Ch. 467 (H.B. 4170), Sec. 16.005, eff. September 1, 2019.

Acts 2019, 86th Leg., R.S., Ch. 610 (S.B. 936), Sec. 9, eff. September 1, 2019.

SUBCHAPTER B. MUNICIPALLY OWNED UTILITY CHOICE

Sec. 40.051. GOVERNING BODY DECISION. (a) The municipal governing body or a body vested with the power to manage and operate a municipally owned utility has the discretion to decide when or if the municipally owned utility will provide customer choice.

(b) Municipally owned utilities may choose to participate in customer choice at any time on or after January 1, 2002, by adoption of an appropriate resolution of the municipal governing body or a body vested with power to manage and operate the municipally owned utility. The decision to participate in customer choice by the adoption of a resolution is irrevocable.

(c) After a decision to offer customer choice has been made, Subchapters D and E, Chapter 33, do not apply to any action taken under this chapter.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.052. UTILITY NOT OFFERING CUSTOMER CHOICE. (a) A municipally owned utility that has not chosen to participate in customer choice may not offer electric energy at unregulated prices directly to retail customers outside its certificated retail service area.

(b) A municipally owned utility under Subsection (a) retains the right to offer and provide a full range of customer service and pricing programs to the customers within its certificated area and to purchase and sell electric energy at wholesale without geographic restriction.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.053. RETAIL CUSTOMER'S RIGHT OF CHOICE. (a) If a municipally owned utility chooses to participate in customer choice, after that choice all retail customers served by the municipally owned utility within the certificated retail service area of the municipally owned utility shall have the right of customer choice consistent with the provisions of this chapter, and the municipally owned utility shall provide open access for retail service.

(b) Notwithstanding Section 39.107, the metering function may not be deemed a competitive service for customers of the municipally owned utility within that service area and may, at the option of the municipally owned utility, continue to be offered by the municipally owned utility as sole provider.

(c) On its initiation of customer choice, a municipally

owned utility shall designate itself or another entity as the provider of last resort for customers within the municipally owned utility's certificated service area as that area existed on the date of the utility's initiation of customer choice. The municipally owned utility shall fulfill the role of default provider of last resort in the event no other entity is available to act in that capacity.

(d) If a customer is unable to obtain service from a retail electric provider, on request by the customer, the provider of last resort shall offer the customer the standard retail service package for the appropriate customer class, with no interruption of service, at a fixed, nondiscountable rate that is at least sufficient to cover the reasonable costs of providing that service, as approved by the governing body of the municipally owned utility that has the authority to set rates.

(e) The governing body of a municipally owned utility may establish the procedures and criteria for designating the provider of last resort and may redesignate the provider of last resort according to a schedule it considers appropriate.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.054. SERVICE OUTSIDE AREA. (a) A municipally owned utility participating in customer choice shall have the right to offer electric energy and related services at unregulated prices directly to retail customers who have customer choice without regard to geographic location.

(b) In providing service under Subsection (a) to retail customers outside its certificated retail service area as that area exists on the date of adoption of customer choice, a municipally owned utility is subject to the commission's rules establishing a code of conduct regulating anticompetitive practices.

(c) For municipally owned utilities participating in customer choice, the commission shall have jurisdiction to establish terms and conditions, but not rates, for access by other retail electric providers to the municipally owned utility's distribution facilities.

(d) Accommodation shall be made in the commission's terms

and conditions for access and in the code of conduct for specific legal requirements imposed by state or federal law applicable to municipally owned utilities.

(e) The commission does not have jurisdiction to require unbundling of services or functions of, or to regulate the recovery of stranded investment of, a municipally owned utility or, except as provided by this section, jurisdiction with respect to the rates, terms, and conditions of service for retail customers of a municipally owned utility within the utility's certificated service area.

(f) A municipally owned utility shall maintain separate books and records of its operations from those of the operations of any affiliate.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.055. JURISDICTION OF MUNICIPAL GOVERNING BODY. (a) The municipal governing body or a body vested with the power to manage and operate a municipally owned utility has exclusive jurisdiction to:

(1) set all terms of access, conditions, and rates applicable to services provided by the municipally owned utility, subject to Sections 40.054 and 40.056, including nondiscriminatory and comparable rates for distribution but excluding wholesale transmission rates, terms of access, and conditions for wholesale transmission service set by the commission under this subtitle, provided that the rates for distribution access established by the municipal governing body shall be comparable to the distribution access rates that apply to the municipally owned utility and the municipally owned utility's affiliates;

(2) determine whether to unbundle any energy-related activities and, if the municipally owned utility chooses to unbundle, whether to do so structurally or functionally;

(3) reasonably determine the amount of the municipally owned utility's stranded investment;

(4) establish nondiscriminatory transition charges reasonably designed to recover the stranded investment over an appropriate period of time, provided that recovery of retail

stranded costs shall be from all existing or future retail customers, including the facilities, premises, and loads of those retail customers, within the utility's geographical certificated service area as it existed on May 1, 1999;

(5) determine the extent to which the municipally owned utility will provide various customer services at the distribution level, including other services that the municipally owned utility is legally authorized to provide, or will accept the services from other providers;

(6) manage and operate the municipality's electric utility systems, including exercise of control over resource acquisition and any related expansion programs;

(7) establish and enforce service quality and reliability standards and consumer safeguards designed to protect retail electric customers, including safeguards that will accomplish the objectives of Sections 39.101(a) and (b), consistent with this chapter;

(8) determine whether a base rate reduction is appropriate for the municipally owned utility;

(9) determine any other utility matters that the municipal governing body or body vested with power to manage and operate the municipally owned utility believes should be included;

(10) make any other decisions affecting the municipally owned utility's participation in customer choice that are not inconsistent with this chapter; and

(11) determine the extent to which the municipally owned utility offers energy efficiency programs and how the programs are administered by the utility, except as provided by Section 39.9051(e).

(b) In multiply certificated areas, a retail customer, including a retail customer of an electric cooperative or a municipally owned utility, may not avoid stranded cost recovery charges by switching to another electric utility, electric cooperative, or municipally owned utility.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 939 (H.B. 3693), Sec. 27, eff.

September 1, 2007.

Sec. 40.056. ANTICOMPETITIVE ACTIONS. (a) If, on complaint by a retail electric provider, the commission finds that a municipal rule, action, or order relating to customer choice is anticompetitive or does not provide other retail electric providers with nondiscriminatory terms and conditions of access to distribution facilities or customers within the municipally owned utility's certificated retail service area that are comparable to the municipally owned utility's and its affiliates' terms and conditions of access to distribution facilities or customers, the commission shall notify the municipally owned utility.

(b) The municipally owned utility shall have three months to cure the anticompetitive or noncompliant behavior described in Subsection (a), following opportunity for hearing on the complaint. If the rule, action, or order is not fully remedied within that time, the commission may prohibit the municipally owned utility or affiliate from providing retail service outside its certificated retail service area until the rule, action, or order is remedied.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.057. BILLING. (a) A municipally owned utility that opts for customer choice may continue to bill directly electric customers located in its certificated retail service area, as that area exists on the date of adoption of customer choice, for all transmission and distribution services. The municipally owned utility may also bill directly for generation services and customer services provided by the municipally owned utility to those customers.

(b) A municipally owned utility that opts for customer choice may not adopt anticompetitive billing practices that would discourage customers in its service area from choosing a retail electric provider.

(c) A customer that is being provided wires service by a municipally owned utility at distribution or transmission voltage and that is served by a retail electric provider for retail service has the option of being billed directly by each service provider or

to receive a single bill for distribution, transmission, and generation services from the municipally owned utility.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.058. TARIFFS FOR OPEN ACCESS. A municipally owned utility that owns or operates transmission and distribution facilities shall file with the commission tariffs implementing the open access rules established by the commission under Section 39.203 and shall file with the commission the rates for open access on distribution facilities as set by the municipal regulatory authority, before the 90th day preceding the date the utility offers customer choice. The commission does not have authority to determine the rates for distribution access service for a municipally owned utility.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.059. MUNICIPAL POWER AGENCY; RECOVERY OF STRANDED COSTS. (a) In this section, "member city" means a municipality that participated in the creation of a municipal power agency formed under Chapter 163 by the adoption of a concurrent resolution by the municipality on or before August 1, 1975.

(b) After a member city adopts a resolution choosing to participate in customer choice under Section 40.051(b), a member city may include stranded costs described in Subsection (c) in its distribution costs and may recover those costs through a nonbypassable charge. The nonbypassable charge shall be as determined by the member city's governing body and may be spread over 16 years.

(c) The stranded costs that may be recovered under this section are those costs that were determined by the commission and stated in the commission's April 1998 Report to the Texas Senate Interim Committee on Electric Utility Restructuring entitled "Potentially Strandable Investment (ECOM) Report: 1998 Update" and specifically stated in the report at Appendix A (ECOM Estimates Including the Effects of Transition Plans) under the commission base case benchmark base market price for the year 2002.

(d) The stranded cost amounts described in this section may

not be included in the generation costs used in setting rates by the member city's governing body.

(e) The provisions of this section are cumulative of all other provisions of this chapter, and nothing in this section shall be construed to limit or restrict the application of any provision of this chapter to the member cities.

(f) The municipal power agency shall extinguish the agency's indebtedness by sale of the electric facility to one or more purchasers, by way of a sale through the issuance of taxable or tax-exempt debt to the member cities, or by any other method. The agency shall set as an objective the extinguishment of the agency's debt by September 1, 2000. In the event this objective is not met, the agency shall provide detailed reasons to the electric utility restructuring legislative oversight committee by November 1, 2000, why the agency was not able to meet this objective.

(g) The municipal power agency or its successor in interest may, at its option, use the rate of return method for calculating its transmission cost of service. If the rate of return method is used, the return component for the transmission cost of service revenue requirement shall be sufficient to meet the transmission function's pro rata share of levelized debt service and debt service coverage ratio (1.50) and other annual debt obligations; provided, however, that the total levelized debt service may not exceed the total debt service under the current payment schedule. Any additional revenue generated by the methodology described in this subsection shall be applied to reduce the agency's outstanding indebtedness.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.060. NO POWER TO AMEND CERTIFICATES. Nothing in this chapter empowers a municipal governing body or a body vested with the power to manage and operate a municipally owned utility to issue, amend, or rescind a certificate of public convenience and necessity granted by the commission. This subsection does not affect the ability of a municipal governing body or a body vested with the power to manage and operate the municipally owned utility to pass a resolution under Section [40.051\(b\)](#).

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

SUBCHAPTER C. RIGHTS NOT AFFECTED

Sec. 40.101. INTERFERENCE WITH CONTRACT. (a) This subtitle may not interfere with or abrogate the rights or obligations of parties, including a retail or wholesale customer, to a contract with a municipally owned utility or river authority.

(b) This subtitle may not interfere with or abrogate the rights or obligations of a party under a contract or agreement concerning certificated utility service areas.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.102. ACCESS TO WHOLESALE MARKET. Nothing in this subtitle shall limit the access of municipally owned utilities to the wholesale electric market.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.103. PROTECTION OF BONDHOLDERS. Nothing in this subtitle or any rule adopted under this subtitle shall impair contracts, covenants, or obligations between this state, river authorities, municipalities, and the bondholders of revenue bonds issued by the river authorities or municipalities.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.

Sec. 40.104. TAX-EXEMPT STATUS. Nothing in this subtitle may impair the tax-exempt status of municipalities, electric cooperatives, or river authorities, nor shall anything in this subtitle compel any municipality, electric cooperative, or river authority to use its facilities in a manner that violates any contractual provisions, bond covenants, or other restrictions applicable to facilities financed by tax-exempt debt. Notwithstanding any other provision of law, the decision to participate in customer choice by the adoption of a resolution in accordance with Section 40.051(b) is irrevocable.

Added by Acts 1999, 76th Leg., ch. 405, Sec. 39, eff. Sept. 1, 1999.