April 8, 2014

Ms. Kasey Feldman-Thomason  
General Law Attorney  
Public Utility Commission of Texas  
P.O. Box 13326  
Austin, Texas 78711

Dear Ms. Feldman-Thomason:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the “Act”), chapter 552 of the Government Code. Your request was assigned ID# 517700.

The Public Utility Commission of Texas (the “commission”) received a request for information pertaining to power plants and generating units that went off line and other sites that had issues contributing to the drop in electricity capacity on a specified date. You state the commission has released some of the requested information. You claim the submitted information is excepted from disclosure under section 552.101 of the Government Code. You also state release of the submitted information may implicate the proprietary interests of third parties. Accordingly, you state, and provide documentation showing, you notified Austin Energy; CPS Energy; Luminant Generation Company, L.L.C. (“Luminant”); NRG Energy Services, L.L.C. (“NRG”); and South Texas Nuclear Project of the request for information and of their right to submit arguments to this office as to why the submitted information should not be released. See Gov’t Code § 552.305(d); see also Open Records Decision No. 542 (1990) (statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in the Act in certain circumstances). You also state, and submit documentation showing, you notified the Electric Reliability Council of Texas (“ERCOT”). See Gov’t Code § 552.304 (interested party may submit comments stating why information should or should not be released). We have received comments from Luminant and ERCOT. We have considered the submitted arguments and reviewed the submitted information.

Initially, we note an interested third party is allowed ten business days after the date of its receipt of the governmental body’s notice under section 552.305(d) to submit its reasons, if
any, as to why information relating to that party should be withheld from public disclosure.  
See id. § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from Austin Energy, CPS Energy, NRG, or South Texas Nuclear Project explaining why their information should not be released. Therefore, we have no basis to conclude Austin Energy, CPS Energy, NRG, or South Texas Nuclear Project have a protected proprietary interest in the submitted information.  See id. § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3. Accordingly, the commission may not withhold any of the information at issue on the basis of any proprietary interest Austin Energy, CPS Energy, NRG, or South Texas Nuclear Project may have in it.

The commission and ERCOT assert portions of the submitted information are confidential under section 552.101 of the Government Code in conjunction with the ERCOT Protocols and Operating Guidelines. We note ERCOT is the independent system operator established by section 39.151 of the Public Utility Regulatory Act, Title II of the Texas Utilities Code.  See Util. Code § 39.151. Under section 39.151, ERCOT is directly responsible and accountable to the commission. See id. § 39.151(d). Pursuant to section 39.151(d) of the Utilities Code, the commission has adopted Substantive Rule 25.362(e)(1)(A), which provides that “[i]nformation submitted to or collected by ERCOT pursuant to requirements of ERCOT rules shall be protected from public disclosure only if it is designated as Protected Information pursuant to ERCOT rules[.]” P.U.C. Subst. R. 25.362(e)(1)(A); see also Util. Code § 39.151(d) (providing that the commission shall adopt and enforce rules related to production and delivery of electricity among all market participants, and may delegate to independent organization responsibilities for establishing or enforcing such rules).

Section 552.101 of the Government Code excepts from required public disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code § 552.101. This section encompasses information protected by other statutes. Section 1.3.1 of the ERCOT Nodal Protocols states that ERCOT or any market participant may not disclose “Protected Information” received from the other to “any other Entity except as specifically permitted in this Section and in these Protocols.” ERCOT Nodal Protocols § 1.3.1. Among other things, “Protected Information” is defined as follows:

Status of Resources, including Outages, limitations, or scheduled or metered Resource data. The Protected Information status of this information shall expire 60 days after the applicable Operating Day[.]

ERCOT Nodal Protocols § 1.3.1.1(c). The commission and ERCOT explain some of the submitted information “identifies specific problems with specific generation resources—specific generating units at specific generation facilities—that had outages or limitations on the operating day in question” and, therefore, this information falls within the definition of Protected Information. The commission and ERCOT also state the Protected
Information status of the information at issue has not expired. Based on these representations and our review of the relevant provisions, we agree the information ERCOT seeks to withhold, which we have marked, consists of Protected Information that must be withheld under section 552.101 in conjunction with the ERCOT Nodal Protocols. However, we find the remaining information does not consist of Protected Information, and it may not be withheld under section 552.101 on the basis of the ERCOT Nodal Protocols.

Luminant raises section 552.104 of the Government Code as an exception to disclosure. This section excepts from disclosure “information that, if released, would give advantage to a competitor or bidder.” Gov’t Code § 552.104. However, section 552.104 is a discretionary exception that protects only the interests of a governmental body, as distinguished from exceptions which are intended to protect the interests of third parties. See Open Records Decision Nos. 592 (1991) (statutory predecessor to section 552.104 designed to protect interests of a governmental body in a competitive situation, and not interests of private parties submitting information to the government), 522 (1989) (discretionary exceptions in general). As the commission does not seek to withhold any information pursuant to section 552.104, no portion of the remaining information may be withheld on this basis.

Section 552.110(b) of the Government Code protects “[c]ommercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained[.]” Gov’t Code § 552.110(b). This exception to disclosure requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. Id.; see also ORD 661 at 5-6 (to prevent disclosure of commercial or financial information, party must show by specific factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm).

Upon review, we find Luminant has failed to demonstrate release of the remaining information would result in substantial damage to Luminant’s competitive position. Accordingly, none of the remaining information at issue may be withheld under section 552.110(b).

In summary, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with the ERCOT Nodal Protocols. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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1 As our ruling on this information is dispositive, we need not address the remaining arguments against disclosure of this information.
This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

Jennifer Luttrall
Assistant Attorney General
Open Records Division

JL/akg

Ref: ID# 517700

Enc. Submitted documents

c: Requestor
(w/o enclosures)

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