KEN PAXTON
ATTORNEY GENERAL OF TEXAS

September 29, 2017

Ms. Kasey Feldman-Thomason
General Counsel
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711-3326

OR2017-20479A

Dear Ms. Feldman-Thomason:

This office issued Open Records Letter No. 2017-20479 (2017) to Public Utility Commission of Texas (the "commission") on September 7, 2017. We have examined this ruling and determined we will correct it. *See generally* Gov't Code § 552.011 (providing that Office of Attorney General may issue decision to maintain uniformity in application, operation, and interpretation of Public Information Act (the "Act"), chapter 552 of the Government Code). Consequently, this decision serves as the correct ruling and is a substitute for the decision issued on September 7, 2017. Your request was assigned ID# 684288.

The commission received a request for certain information pertaining to household enrollments for system benefit fund discounts by retail electric providers during a defined time period. Although you take no position with respect to the submitted information, you state release of this information may implicate the proprietary interests of multiple third parties, including Conservice, LLC ("Conservice"); Entergy Texas, Inc. ("ET"); Solix, Inc.; TriEagle Energy L.P. ("TriEagle"); TXU Energy Retail Company LLC ("TXU"); and Value Based Brands LLC f/k/a 4Change Energy Company LLC ("VBB").[1] Accordingly, you state you notified the third parties of the request for information and of their right to submit arguments to this office as to why the information at issue should not be released. *See id.* § 552.305(d); *see also* Open Records Decision No. 542 (1990) (statutory predecessor to

[1]We note the commission did not comply with section 552.301 of the Government Code in requesting this decision. *See* Gov't Code § 552.301(e). Nevertheless, because the interest of a third party can provide a compelling reason to overcome the presumption of openness, we will consider third party interests for the submitted information. *See id.* §§ 552.007, .302, .352.

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). We have received comments from Conservice, ET, TriEagle, TXU, and VBB. We have considered the submitted arguments and reviewed the submitted representative sample of information.[2]

Initially, we note the requestor excluded company names from the present request. Therefore, this information is not responsive to the instant request. This ruling does not address the public availability of any information that is not responsive to the request and the commission is not required to release such information in response to this request. Further, TXU and VBB contend the remaining information is not responsive to the present request for information because it does not pertain to the time period specified by the requestor. A governmental body must make a good-faith effort to relate a request to information that is within its possession or control. *See* Open Records Decision No. 561 at 8-9 (1990). In this instance, the commission has reviewed its records and determined the documents at issue are responsive to the present request. Thus, we find the commission has made a good-faith effort to relate the request to information within its possession or control on the date the commission received the request. Accordingly, we will determine whether the commission must release this information to the requestor under the Act.

Next, we note ET and Conservice argue against release of information that was not submitted by the commission. This ruling does not address information that was not submitted by the commission and is limited to the information the commission has submitted as responsive for our review.[3] *See* Gov't Code § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit copy of specific information requested).

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 the remaining third parties explaining why their information should not be released. Therefore, we have no basis to conclude these third parties 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

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[2]We assume the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

[3]As we are able to make this determination, we need not address the remaining arguments against disclosure submitted by ET and Conservice.

commission may not withhold the responsive information on the basis of any proprietary interests the remaining third parties may have in it.

Section 552.104(a) of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). A private third party may invoke this exception. *Boeing Co. v. Paxton*, 466 S.W.3d 831 (Tex. 2015). The "test under section 552.104 is whether knowing another bidder's [or competitor's information] would be an advantage, not whether it would be a decisive advantage." *Id.* at 841. TXU and VBB state they have competitors. In addition, they state release of the information at issue would provide their competitors with an advantage. After review of the information at issue and consideration of the arguments, we find TXU and VBB have established the release of the information at issue would give advantage to a competitor or bidder. Thus, we conclude the commission may withhold the information we have marked under section 552.104(a) of the Government Code.[4] However, upon review, we find Tri-Eagle has failed to demonstrate release of the information at issue would give an advantage to a competitor or bidder. Consequently, the commission may not withhold the information at issue under section 552.104(a).

Tri-Eagle also claims some of its information is subject to section 552.110(b) of the Government Code. Section 552.110(b) 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. Upon review, we find Tri-Eagle has not made the specific factual or evidentiary showing required by section 552.110(b) that release of the information at issue would cause the company substantial competitive harm. *See* Open Records Decision No. 319 at 3 (1982) (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, qualifications and experience, and pricing). Therefore, we conclude the commission may not withhold the information at issue under section 552.110(b).

In summary, the commission may withhold the information we have marked under section 552.104(a) of the Government Code. The commission must release the remaining responsive information.

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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[4]As our ruling 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,

Cole Hutchison
Assistant Attorney General
Open Records Division

CH/sb

Ref: ID# 684288

Enc. Submitted documents

c: Requestor
(w/o enclosures)

6 Third Parties
(w/o enclosures)