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ATTORNEY GENERAL OF TEXAS

January 3, 2022

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

OR2022-00137

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# 919290 (PUC ID No. 2021-02-058).

The Public Utility Commission of Texas (the "commission") received a request for information related to specified types of enforcement actions during a specified time period.¹ We understand you will withhold certain information pursuant to section 552.136(c) of the Government Code.² Although you take no position as to whether the submitted information is excepted under the Act, you state release of the submitted information may implicate the proprietary interests of certain third parties. Accordingly, you state, and provide documentation showing, you notified these third parties of the request for information and of the right to submit arguments to this office as to why the

¹ We note the commission sought and received clarification of the information requested. *See* Gov't Code § 552.222 (providing if request for information is unclear, governmental body may ask requestor to clarify request); *see also City of Dallas v. Abbott*, 304 S.W.3d 380, 387 (Tex. 2010) (holding that when a governmental entity, acting in good faith, requests clarification or narrowing of an unclear or overbroad request for information, the ten-day period to request an attorney general ruling is measured from the date the request is clarified or narrowed).

² Section 552.136(c) of the Government Code authorizes a governmental body to redact, without the necessity of requesting a decision from this office, the information described in section 552.136(b). Gov't Code § 552.136(c); *see also id.* § 552.136(d)-(e) (requestor may appeal governmental body's decision to withhold information under section 552.136(c) to attorney general and governmental body withholding information pursuant to section 552.136(c) must provide certain notice to requestor).

submitted information should not be released.³ *See* Gov't Code §§ 552.304 (interested party may submit comments stating why information should or should not be released), .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). We have considered comments from AEP; the BPUB; Brazos; Calpine; a representative of Direct; Exelon; a representative of Luminant; and TNMP. We have considered the submitted arguments and reviewed the submitted information.⁴

Initially, you state some of the requested information was the subject of previous requests for information, as a result of which this office issued Open Records Letter No. 2021-13431 (2021). We have no indication there has been any change in the law, facts, or circumstances on which the previous ruling was based. Accordingly, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the commission must rely on Open Records Letter No. 2021-13431 as a previous determination and withhold or release the identical information in accordance with that ruling. *See* Open Records Decision No. 673 (2001) (so long as law, facts, and circumstances on which prior ruling was based have not changed, first type of previous determination exists where requested information is precisely same information as was addressed in prior attorney general ruling, ruling is addressed to same governmental body, and ruling concludes that information is or is not excepted from disclosure). However, we will consider the submitted arguments against disclosure of the submitted information that was not at issue in the previous ruling.

Next, 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* Gov't Code § 552.305(d)(2)(B). As of the date of this letter, we have not received comments from any of the remaining third parties explaining why the submitted information should not be released. Therefore, we have no basis to conclude any of the remaining third parties have protected proprietary interests in the submitted information. *See, e.g., id.* § 552.110 (requiring the provision of specific factual evidence demonstrating

³ The commission notified AEP Texas Inc. ("AEP"); Air Liquide, S.A.; Aspen Power, LLC; Barilla Solar, LLC; Brazos Electric Power Cooperative, Inc. ("Brazos"); the Brownsville Public Utilities Board (the "BPUB"); Calpine Corporation ("Calpine"); Cap Rock Energy Corporation; CenterPoint Energy Houston Electric, LLC ("CenterPoint"); the City of Austin ("Austin"); the City of Bartlett; the City of Garland; Constellation Alliance, II, LP; CPS Energy; Direct Energy Services, LLC ("Direct"); EDF Energy Services; EIF Channelview Cogeneration, LLC; El Paso Electric Company; Entergy Texas, Inc.; EnerNOC, Inc.; Exelon Generation Company, LLC ("Exelon"); GDF SUEZ Energy North America, Inc.; Links EP, LLC; Lonestar Generation, LLC; the Lower Colorado River Authority; Luminant; Nextera Energy; Oncor; Optim Energy/Twin Oaks, LP; Power Generation Services, Inc.; Senate Wind, LLC; Southwestern Public Service Company; Texas-New Mexico Power Company ("TNMP"); Topaz Power Management, LP; Trinity Hills Wind Farm, LLC; TTPA, LLC (QTTPAL); and Twin Eagle Resource Management, LLC.

⁴ We note the commission did not comply with section 552.301 of the Government Code in requesting a ruling regarding this information. *See* Gov't Code § 552.301(b), (e). Nevertheless, because the interests of third parties can provide a compelling reason to overcome the presumption of openness, we will consider the submitted arguments for the submitted information. *See id.* §§ 552.007, .302, .352.

the applicability of the exception). Accordingly, the commission may not withhold the submitted information on the basis of any proprietary interest any of the remaining third parties may have in the information.

Next, we note some third parties argue against disclosure of information not submitted to this office for review. This ruling does not address information beyond what the commission has submitted to us for our review. *See id.* § 552.301(e)(1)(D) (governmental body requesting decision from attorney general must submit a copy of specific information requested). Accordingly, this ruling is limited to the information the commission submitted as responsive to the request for information.

Next, we note Brazos, Calpine, Exelon, and Luminant argue some of the information at issue is not responsive to the present request for information. However, we also note the Act requires a governmental body to make a good-faith effort to relate a request to information the governmental body holds or to which it has access. *See* Open Records Decision Nos. 563 at 8 (1990), 561 at 8-9 (1990), 555 at 1-2 (1990), 534 at 2-3 (1989). Because the commission has submitted the information at issue for our review, we find the commission has made a good-faith effort to submit information that is responsive to the request, and we will address the arguments against disclosure of this information.

Section 552.110(b) of the Government Code states “information is [excepted from required disclosure] if it is demonstrated based on specific factual evidence that the information is a trade secret.” *See* Gov’t Code § 552.110(b). Section 552.110(a) defines a trade secret as all forms and types of information if:

- (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret; and
- (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information.

Id. § 552.110(a). Section 552.110(c) of the Government Code states:

[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 is [excepted from required disclosure].

Id. § 552.110(c). Calpine, Centerpoint, Direct, Exelon, Luminant, and TNMP argue some of their information consists of trade secrets subject to section 552.110(b).⁵ Upon review,

⁵ Although Exelon and Luminant cite to former sections 552.110(a) and 552.110(b) of the Government Code in its brief, we understand them to raise current sections 552.110(b) and 552.110(c) based on the substance of their arguments.

we find Centerpoint, Direct, Luminant, and TNMP have demonstrated the information we have marked consists of trade secrets. Therefore, the commission must withhold the information we have marked under section 552.110(b) of the Government Code.⁶ Additionally, Brazos, Calpine, Direct, Exelon, and TNMP argue some of the remaining information consists of commercial or financial information subject to section 552.110(c). Upon review, we find Calpine and Exelon have demonstrated some of the information at issue constitutes commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the commission must withhold the information we have marked under section 552.110(c) of the Government Code.⁷ However, we find the third parties at issue have failed to provide specific factual evidence demonstrating that any portion of the remaining information at issue constitutes trade secrets or commercial or financial information, the release of which would cause substantial competitive harm. Accordingly, the commission may not withhold any of the remaining information at issue under section 552.110 of the Government Code.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” *Id.* § 552.101. This section encompasses information protected by other statutes, such as section 418.181 of the Government Code, which was added to chapter 418 of the Government Code as part of the Texas Homeland Security Act. Section 418.181 provides,

Those documents or portions of documents in the possession of a governmental entity are confidential if they identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism.

Id. § 418.181. The fact information may generally be related to a governmental body’s security concerns or to a security system does not make the information *per se* confidential under section 418.181. *See* Open Records Decision No. 649 at 3 (1996) (language of confidentiality provision controls scope of its protection). Furthermore, the mere recitation by a governmental body of a statute’s key terms is not sufficient to demonstrate the applicability of a claimed provision. As with any confidentiality provision, a governmental body asserting section 418.181 must adequately explain how the responsive information falls within the scope of the statute. *See* Gov’t Code § 552.301(e)(1)(A) (governmental body must explain how claimed exception to disclosure applies).

Some third parties, including AEP, argue some of the remaining information is confidential under section 418.181 of the Government Code. AEP states the information at issue relates to details of the State of Texas’s electrical grid. AEP argues, and we agree, the electrical grid is critical infrastructure for purposes of section 418.181. *See generally id.* § 421.001(2) (defining “critical infrastructure” to include “all public or private assets, systems, and functions vital to the security, governance, public health and safety, economy, or morale of

⁶ As our ruling is dispositive, we need not address the remaining arguments against disclosure of this information.

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the state or the nation”). AEP states release of the information at issue would reveal vulnerabilities of specific components of the electrical grid. Based on these representations and our review of the information at issue, we find AEP has demonstrated the release of some of the information at issue would identify the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Thus, the commission must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code. However, we find no third party has demonstrated the remaining information at issue identifies the technical details of particular vulnerabilities of critical infrastructure to an act of terrorism. Consequently, the commission may not withhold any of the remaining information at issue under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code.

Calpine, Direct, and Exelon assert some of the remaining information is 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 also encompasses information protected by the ERCOT Nodal Protocols. Section 1.3.1.1 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 § 1.3.1.1. Among other things, “Protected Information” is defined as follows:

(h) Raw and Adjusted Metered Load (AML) data (demand and energy) identifiable to:

...

(ii) A specific Customer or Electric Service Identifier (ESI ID);

...

(m) Resource-specific costs, design and engineering data, including such data submitted in connection with a verifiable cost appeal;

...

(p) Current Operating Plans (COPs). The Protected Information status of this information shall expire 60 days after the applicable Operating Day;

(q) Any information that is designated as Protected Information in writing by Disclosing Party at the time the information is provided to Receiving Party except for information that is expressly designated not to be Protected Information by Section 1.3.1.2 or that, pursuant to Section 1.3.1.4, is no longer confidential;

(r) Any information compiled by a Market Participant on a Customer that in the normal course of a Market Participant's business that makes possible the identification of any individual Customer by matching such information with the Customer's name, address, account number, type of classification service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing record, or any other information that a Customer has expressly requested not be disclosed ("Proprietary Customer Information") unless the Customer has authorized the release for public disclosure of that information in a manner approved by the [commission]. Information that is redacted or organized in such a way as to make it impossible to identify the Customer to whom the information relates does not constitute Proprietary Customer Information;

...

(t) [Qualified Scheduling Entity ("QSE")], Transmission Service Provider (TSP), and Distribution Service Provider (DSP) backup plans collected by ERCOT under the Protocols or Other Binding Documents;

...

(z) Non-public financial information provided by a Counter-Party to ERCOT pursuant to meeting its credit qualification requirements as well as the QSE's form of credit support;

(aa) ESI ID, identity of Retail Electric Provider (REP), and MWh consumption associated with transmission-level Customers that wish to have their Load excluded from the Renewable Portfolio Standard (RPS) calculation consistent with Section 14.5.3, End-Use Customers, and subsection (j) of P.U.C. SUBST. R. 25.173, Goal for Renewable Energy;

(bb) Generation Resource emergency operations plans and weatherization plans;

(cc) Information provided by a Counter-Party under Section 16.16.3, Verification of Risk Management Framework;

(dd) Any data related to Load response capabilities that are self-arranged by the [Load Serving Entity (“LSE”)] or pursuant to a bilateral agreement between a specific LSE and its Customers, other than data either related to any service procured by ERCOT or non-LSE-specific aggregated data. Such data includes pricing, dispatch instructions, and other proprietary information of the Load response product[.]

...

(ff) Any documents or data submitted to ERCOT in connection with an Alternative Dispute Resolution (ADR) proceeding. The Protected Information status of this information shall expire upon ERCOT’s issuance of a Market Notice indicating the disposition of the ADR proceeding pursuant to paragraph (1) of Section 20.9, Resolution of Alternative Dispute Resolution Proceedings and Notification to Market Participants, except to the extent the information continues to qualify as Protected Information pursuant to another paragraph of this Section 1.3.1.1;

ERCOT Nodal Protocols § 1.3.1.1(1)(h), (m), (p)-(r), (t), (z)-(dd), (ff). For purposes of the ERCOT Nodal Protocols, “Operating Day” means the day during which energy flows. *See id.* § 2.1. Upon review, we find the remaining information at issue relates to Operating Days that were more than 60 days ago or otherwise does not consist of Protected Information as defined by the ERCOT Nodal Protocols. Therefore, we find this information does not consist of Protected Information, and the commission may not withhold any of the remaining information under section 552.101 on the basis of the ERCOT Nodal Protocols.

Brazos and Exelon inform us some of the remaining information at issue was submitted to the commission pursuant to the procedures of section 22.71(d) of title 16 of the Texas Administrative Code. We note that section 22.71 does not expressly make information confidential; instead, it provides the procedures for how information submitted to the commission should be designated and labeled by parties and how the commission should maintain that information internally. *See* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality must be express, and confidentiality requirement will not be implied from statutory structure), 478 at 2 (1987) (statutory confidentiality requires express language making certain information confidential or stating that information shall not be released to the public); *see also Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 677 (Tex. 1976) (governmental agency may not bring information within scope of statutory predecessor to section 552.101 by promulgation of rule; to imply such authority merely from general rule-making powers would be to allow agency to circumvent very purpose of the Act). Neither Brazos nor Exelon has cited to any specific law, and we are not aware of any, that makes the information at issue confidential under section 552.101; therefore, the commission may not withhold the information at issue under section 552.101.

Centerpoint and TNMP also assert portions of the remaining information are protected by section 25.272(g)(1) of title 16 of the Texas Administrative Code, which provides for the protection of proprietary customer information of a utility in certain circumstances. *See* 16 T.A.C. § 25.272(g)(1). Section 25.272(c)(5) of title 16 of the Texas Administrative Code defines “proprietary customer information” in part as

[a]ny information compiled by an electric utility on a customer in the normal course of providing electric service that makes possible the identification of any individual customer by matching such information with the customer’s name, address, account number, type or classification of service, historical electricity usage, expected patterns of use, types of facilities used in providing service, individual contract terms and conditions, price, current charges, billing records, or any other information that the customer has expressly requested not be disclosed.

Id. § 25.272(c)(5). However, we note section 25.272(c)(5) further provides “[i]nformation that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.” *Id.* Upon review, we find neither Centerpoint nor TNMP have demonstrated its remaining information makes it possible to identify any customer to which the information relates. Therefore, the commission may not withhold any of the remaining information under section 552.101 of the Government Code on the basis of section 25.272(g)(1) of title 16 of the Texas Administrative Code.

TNMP further asserts portions of its remaining information are protected by section 25.472(b)(1) of title 16 of the Texas Administrative Code, which provides for the protection of proprietary customer information of a utility, as defined in section 25.272(c)(5) of title 16 of the Texas Administrative Code, in certain circumstances. *See id.* § 25.472(b)(1). For purposes of this provision, section 25.272(c)(5) of title 16 of the Texas Administrative Code defines “proprietary customer information” as noted above. *See id.* § 25.272(c)(5). However, as previously noted, section 25.272(c)(5) further provides “[i]nformation that is redacted or organized in such a way as to make it impossible to identify the customer to whom the information relates does not constitute proprietary customer information.” *Id.* Upon review, we find TNMP has not demonstrated any portion of its remaining information makes it possible to identify any customer to which the information relates. Therefore, the commission may not withhold any of TNMP’s remaining information under section 552.101 of the Government Code on the basis of section 25.472(b)(1) of title 16 of the Texas Administrative Code.

Calpine also raises section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. Section 552.111 is a discretionary exception to public disclosure that protects a governmental body’s interests, as distinguished from exceptions that are intended to protect the interests of third parties. *See* Open Records Decision Nos. 592 (1991), 522 (1989) (discretionary exceptions in general). Therefore, because the commission has not raised section 552.111, none of the remaining information may be withheld under this exception.

Calpine also raises section 552.117(a)(1) of the Government Code for some of the remaining information. Section 552.117(a)(1) of the Government Code excepts from disclosure the home address and telephone number, emergency contact information, social security number, and family member information of a current or former employee or official of a governmental body who requests this information be kept confidential under section 552.024 of the Government Code. *See* Gov't Code § 552.117(a)(1). Upon review, we find Calpine has failed to demonstrate the applicability of section 552.117(a)(1) of the Government Code to the remaining information at issue. Therefore, the commission may not withhold any portion of the remaining information at issue under section 552.117(a)(1) of the Government Code.

Section 552.133 of the Government Code excepts from disclosure a public power utility's information that is "reasonably related to a competitive matter." *Id.* § 552.133(b). Section 552.133 provides, in relevant part, the following:

(a) In this section, "public power utility" means an entity providing electric or gas utility services that is subject to the provisions of this chapter.

(a-1) For purposes of this section, "competitive matter" means a utility-related matter that is related to the public power utility's competitive activity, including commercial information, and would, if disclosed, give advantage to competitors or prospective competitors. The term:

(1) means a matter that is reasonably related to the following categories of information:

...

(D) risk management information, contracts, and strategies, including fuel hedging and storage[.]

Id. § 552.133(a)-(a-1)(1)(D). We note section 552.133(a-1)(2) provides fifteen categories of information that are not competitive matters. *See id.* § 552.133(a-1)(2). The BPUB states it is a public power entity for purposes of section 552.133. The BPUB asserts the information they indicated pertains to the public electric utility's competitive activity specifically identified by section 552.133(a-1)(1). Further, they state the information at issue is not among the fifteen categories of information expressly excluded from the definition of "competitive matter" by section 552.133(a-1)(2). *See id.* Based upon these representations and our review, we find the information at issue relates to a competitive matter as defined by section 552.133(a-1). *See id.* § 552.133(a-1). Accordingly, we conclude the commission must withhold the information we have marked under section 552.133 of the Government Code.⁸

⁸ As our ruling is dispositive, we need not address the remaining argument against disclosure of this information.

We understand you will withhold the e-mail addresses you have marked under section 552.137 of the Government Code pursuant to Open Records Decision No. 684 (2009).⁹ Direct further argues some of the remaining information is confidential under section 552.137. Section 552.137 of the Government Code provides, “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body is confidential and not subject to disclosure under [the Act],” unless the owner of the e-mail address has affirmatively consented to its release or the e-mail address is specifically excluded by section (c). *Id.* § 552.137(a)-(c). Section 552.137 is not applicable to an institutional e-mail address, an Internet website address, the general e-mail address of a business, an e-mail address of a person who has a contractual relationship with a governmental body, an e-mail address maintained by a governmental entity for one of its officials or employees, or a personal e-mail address belonging to a city employee or official used to conduct official government business. *See id.* § 552.137(c); *Austin Bulldog v. Leffingwell*, 490 S.W.3d 240 (Tex. App.—Austin 2016, no pet.) (holding personal e-mail addresses of government officials used to conduct official government business are not e-mail addresses of “members of the public” for purposes of Gov’t Code § 552.137(a)). Accordingly, to the extent the e-mail addresses within the remaining information belong to members of the public and are not excluded by section 552.137(c) of the Government Code, the commission must withhold such e-mail addresses under section 552.137 of the Government Code, unless the individuals to whom the e-mail addresses belong affirmatively consent to their release. *See* Gov’t Code § 552.137(b). However, to the extent an e-mail address within the remaining information is excluded by section 552.137(c) or belongs to a governmental employee or official, the commission may not withhold that e-mail address under section 552.137 of the Government Code.

In summary, to the extent the requested information is identical to the information previously requested and ruled upon by this office, we conclude the commission must rely on Open Records Letter No. 2021-13431 as a previous determination and withhold or release the identical information in accordance with that ruling. The commission must: (1) withhold the information we have marked under section 552.110(b) of the Government Code; (2) withhold the information we have marked under section 552.110(c) of the Government Code; (3) withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 418.181 of the Government Code; (4) withhold the information we have marked under section 552.133 of the Government Code; (5) withhold the e-mail addresses within the remaining information under section 552.137 of the Government Code, to the extent the e-mail addresses at issue belong to members of the public, are not excluded by section 552.137(c) of the Government Code, and the individuals to whom the e-mail addresses belong do not affirmatively consent to their release.

⁹ Open Records Decision No. 684 is a previous determination to all governmental bodies authorizing them to withhold certain information, including an e-mail address of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

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.

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 <https://www.texasattorneygeneral.gov/open-government/members-public/what-expect-after-ruling-issued> or call the OAG's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Public Information Act may be directed to the Cost Rules Administrator of the OAG, toll free, at (888) 672-6787.

Sincerely,

Tim Neal
Assistant Attorney General
Open Records Division

TN/eb

Ref: ID# 919290

Enc. Submitted documents

c: Requestor
(w/o enclosures)

7 Third Parties
(w/o enclosures)