



June 7, 2002

Ms. Susan Durso
General Counsel
Public Utility Commission of Texas
P.O. Box 13326
Austin, Texas 78711

OR2002-3094

Dear Ms. Durso:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 164025.

The Public Utility Commission (the "commission") received seven requests for information relating to the identification and investigation of six companies for overscheduling energy transactions during August 2001. You state that the names of the six companies as well as additional responsive information have been released. You claim that all or portions of nine exhibits, submitted as Exhibits Q through Y, are excepted from disclosure under sections 552.101, 552.103, 552.107, 552.111, and 552.137 of the Government Code. Additionally, you assert that three exhibits, submitted as Exhibits AA, BB, and CC, may contain proprietary information which may be excepted from disclosure under section 552.110. You raise no exception to disclosure on behalf of the commission for these three exhibits nor do you make any arguments regarding the proprietary nature of this information. You have, however, notified the three companies, American Electric Power Service Company ("AEPSC"), Constellation Power Source, Inc. ("Constellation"), and Enron Corporation ("Enron"), of the requests for their information and of their opportunity to submit comments to this office. Gov't Code § 552.305 (permitting third party with proprietary interest to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). You explain that the other three companies whose interests are implicated by the request, Mirant Americas Energy Marketing, Inc., Reliant Energy Services, Inc., and

TXU Electric Company, have consented to the release of their information which has been released. We have considered the exceptions you claim and have reviewed the submitted documents. We have also reviewed the arguments submitted by numerous interested third parties. *See* Gov't Code §§ 552.304, .305 (permitting interested party to submit reasons why requested information should or should not be released).

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. To show that section 552.103(a) is applicable, a governmental body must demonstrate that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information and (2) the information at issue is related to that litigation. *University of Tex. Law Sch. v. Texas Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). Contested cases conducted under the Administrative Procedure Act, chapter 2001 of the Government Code, are considered litigation under section 552.103. Open Records Decision No. 588 at 7 (1991). Section 552.103 requires concrete evidence that litigation may ensue. To demonstrate that litigation is reasonably anticipated, the governmental body must furnish evidence that litigation is realistically contemplated and is more than mere conjecture. Open Records Decision No. 518 at 5 (1989). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 at 4 (1986).

The commission is authorized to investigate and assess penalties for violations of the Public Utility Regulatory Act ("PURA"), Title 2 of the Utilities Code. Util. Code §§ 15.21, .023(a). Assessment proceedings are subject to the Administrative Procedure Act. *Id.* at § 15.024(f). In this instance, you explain that, in the fall of last year, the commission's Market Oversight Division ("MOD") began investigating six companies for alleged overscheduling activities that occurred in August 2001. You have submitted documentation showing that prior to the receipt of the first request, the commission was contemplating enforcement and refund actions against the six companies under investigation. You also state that at the time the commission received the first request for this information, the MOD investigation was still on-going. Based on your representations and our review of the supplemental documentation, we agree that, at the time you received the initial request for information, the commission reasonably anticipated filing enforcement actions against the six companies. We also agree that Exhibits Q through Y are related to the anticipated enforcement actions for purposes of section 552.103(a).

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing parties in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. You acknowledge that some of the information in Exhibits R and W was either communicated to or received from the potential opposing parties. You state that the commission does not

seek to withhold this information under section 552.103(a) and, except for those portions that a third party has claimed to be confidential, this information has been released. You further state that the documents submitted as Exhibits Q, S, T, U, V, X, and Y, as well as the remaining information contained in Exhibits R and W, have not been divulged to opposing parties. Accordingly, we agree that this information may be withheld under section 552.103(a).¹ We note that the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).²

We now turn our attention to the submitted third party information. We note that an interested third party has ten business days after the date of its receipt of the governmental body's notice to submit its reasons, if any, as to why information relating to that party should not be released. See Gov't Code § 552.305(d)(2)(B). As of the date of this ruling, this office has not received any correspondence from Enron. Thus, Enron has not demonstrated that any of the information in Exhibit CC is proprietary. See Gov't Code § 552.110(b) (to prevent disclosure of commercial or financial information, party must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure); Open Records Decision Nos. 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990).

We note, however, that Exhibit CC contains e-mail addresses that may be protected from disclosure under section 552.137 of the Government Code. Section 552.137 requires a governmental body to withhold an e-mail address of a member of the public that is provided for the purpose of communicating electronically with the governmental body, unless the member of the public has affirmatively consented to its release. Consequently, unless the individuals to whom these addresses belong have consented to release, the commission must withhold these e-mail addresses from disclosure. With the exception of information that is protected by section 552.137, the commission must release Exhibit CC.

This office did receive correspondence from AEPSC and Constellation. AEPSC states that while it considers the information in Exhibit AA to be proprietary, in this instance, however, it consents to the release of this information. Accordingly, the commission must release Exhibit AA. Constellation responded that after reviewing the information in Exhibit BB, it consents to the release of all but the name of one of its retail customers. Specifically, Constellation argues that the name of its retail customer is proprietary customer information

¹Although section 552.103(a) authorizes you to withhold this information from disclosure, you may choose to release all or part of the information at issue that is not otherwise confidential by law. See Gov't Code § 552.007; see also Open Records Decision No. 665 at 2 n.5 (2000) (explaining that section 552.103 is discretionary exception to disclosure that governmental body may waive).

²Because we are able to make a determination under section 552.103, we need not address the applicability of your other claimed exceptions for these exhibits.

made confidential by the protocols established by the Electric Reliability Council of Texas ("ERCOT"). Constellation has submitted for our review portions of the ERCOT Protocols.

We note that during the Seventy-sixth legislative session, the Texas Legislature enacted Senate Bill 7 which introduced retail competition and customer choice to Texas. As part of the restructuring of the electric market, ERCOT was established. One of ERCOT's statutory duties was to establish "procedures consistent with PURA and the [commission's] rules relating to the reliability of the regional electrical network[....] These procedures, the ERCOT Protocols, are subject to commission oversight and review." *See* Util. Code § 39.151 (providing for creation and delegation of authority to ERCOT for limited purposes).

Section 552.101 of the Government Code exempts from required public disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.101 encompasses confidentiality statutes. Section 1.3.1 of the ERCOT Protocols states that ERCOT or any market participant may not disclose "protected information" received from the other to "any person, corporation, or any other Entity except as specifically permitted in this Subsection and in these Protocols." Among other things, "protected information" is defined as any "proprietary customer information" that the customer has not authorized for release in a manner approved by the commission. *See* ERCOT Protocols § 1.3.1(4). Proprietary Customer Information is defined as follows:

Any information compiled by a Market Participant on a Customer in the normal course of 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 records, or any other information that a Customer has expressly requested not be disclosed. 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.

See id. § 2: Definitions and Acronyms. Based on your arguments and our review of the relevant provisions, we agree that the name of Constellation's retail customer found in Exhibit BB-4 must be withheld under section 552.101 in conjunction with ERCOT's Protocols. With the exception of this information, Exhibit BB must be released.

In summary, Exhibits Q, S, T, U, V, X, and Y, as well as those portions of Exhibits R and W that have not been divulged to opposing parties, may be withheld under section 552.103(a). Exhibit AA must be released. With the exception of e-mail addresses protected under section 552.137, Exhibit CC must be released. With the exception of the retail customer name found on BB-4, Exhibit BB must be released.

This letter ruling is limited to the particular records 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 records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

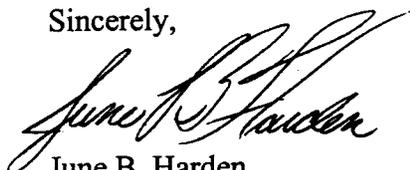
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code

§ 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



June B. Harden
Assistant Attorney General
Open Records Division

JBH/seg

Ref: ID# 164025

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