



**COPY**

April 18, 2002

The Honorable Steve Wolens  
Chair, Committee on State Affairs  
Texas House of Representatives  
P.O. Box 2910  
Austin, Texas 78768-2910

Dear Representative Wolens:

This letter is to acknowledge your correspondence of April 10, 2002, requesting the opinion of the Attorney General on matters relating to the Public Information Act (the "PIA") and the Public Utility Commission of Texas (the "PUC") (OAG ID No. 164254). You have asked the following questions of law:

1. Are the names of market participants identified in the PUC MO BENA study as consistently engaging in over scheduling practices subject to public disclosure under Texas Government Code §552.101 or any other section?
2. The PUC has identified certain conduct as being indicative manipulative behavior. Such conduct is quantified in Exhibit C, Attachments C and D, and reflects:
  - a. actual load served,
  - b. load imbalance quantity,
  - c. load imbalance payments, and
  - d. percentage of over or under scheduling.

Is the conduct specified above in 2 a-d subject to disclosure under Texas Government Code §§552.101, 552.104, 552.110 or any other section?

Please note that the question above does not seek the basis for establishing a conclusion whether market manipulation occurred but rather asks for the conduct the PUC identified in the MOD study which may form the basis for further analysis.

POST OFFICE BOX 12548, AUSTIN, TEXAS 78711-2548  
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The Honorable Steve Wolens  
April 18, 2002  
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3. Are QSE schedules in the ERCOT wholesale market from past operating days subject to public disclosure?
4. Is the percentage of scheduled load over actual load for each of the QSEs identified in the PUC investigation subject to public disclosure?
5. Given that some of the information presented for your review, such as the market clearing price of energy paid for load imbalance and the identities of certain market participants seems so firmly planted in the public domain, can an electricity market participant be sanctioned for filing groundless and frivolous claims of confidentiality solely to impede public disclosure of said information and, if so, under what section of the law?

On April 4, 2002, the PUC submitted a request for an opinion relating to the PIA concerning five pending open records requests received by the PUC (OAG ID No. 164025). These open records requests are for information relating to the identification and investigation of six companies for over scheduling energy transactions during August 2001. The five requestors have been provided with some information responsive to their requests by the PUC. In addition, the PUC has raised exceptions for disclosure on its own behalf and on behalf of third parties whose interests might be involved under §552.305 of the PIA. Under §552.306 of the PIA, the Office of Attorney General has a 45-day deadline of June 7, 2002 and a 55-day deadline of June 21, 2002, to issue a decision to the PUC in this matter.

A decision to be issued by the Open Records Division to the PUC in ID No. 164025 will resolve to issues 1 to 4 that you have raised in your April 10, 2002 letter. For this reason, you will be copied on that decision when it is issued to the PUC. Issue 5 has been assigned to the Opinions Committee for response. You will be receiving formal notification from the Committee regarding the opinion process and deadlines. If you have any questions or comments regarding this matter, please do not hesitate to contact me at the number listed below.

Sincerely,



Howard G. Baldwin, Jr.  
First Assistant Attorney General

HGB:nf

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# COMMITTEE ON STATE AFFAIRS

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Steven Wolens  
Chairman

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APR 22 2002

OPINION COMMITTEE

April 10, 2002

FILE # ML-4 2573-02 Sylvester Turner  
I.D. # 42573 Vice Chairman

CERTIFIED MAIL

The Honorable John Comyn  
Attorney General  
209 W. 14th Street  
P.O. Box 12548  
Austin, Texas 78711-2548

Dear General Comyn:

HAND DELIVER

RQ-0536-JC

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APR 10 2002  
OPEN RECORDS DIVISION

FILE # OR-164254-02  
I.D. # 164254

Pursuant to Texas Government Code §402.042(7), I am requesting an opinion of the Attorney General on the application and interpretation of Texas Government Code §§552.101, 552.104, 552.110, and other applicable sections relating to the identification of certain parties and their conduct in wholesale electricity markets in Texas.

## I.

### FACTS

By way of background, let me report to you the following:

1. On 02/19/02, I requested the Public Utility Commission of Texas (PUC) investigate whether there had been possible manipulation of the recently restructured wholesale electricity market within the Electric Reliability Council of Texas (ERCOT).
2. On 03/06/02, the PUC responded to my letter. A two-page letter from Commissioners Klein and Perlman (a copy of which is enclosed as Exhibit A) discussed a PUC Market Oversight Division (MOD) study into possible manipulative behavior by certain market participants who received large payments from ERCOT through the Balancing Energy Neutrality Adjustment (BENA), a credit on the market participant's invoice for decreasing electricity generation during periods of congestion on the transmission system. In this instance, market participants committed to deliver more electricity to the bulk power grid than was necessary and were then paid to not actually produce or deliver it. Included in the 03/06/02 PUC letter to me was a three-page memorandum from MOD

#### Members:

Leo Alvarado, Jr. • Kevin Bailey • Kim Brimer • David Counts • Tom Craddick • Debra Danburg  
Paul Hilbert • Bob Hunter • Delwin Jones • John Longoria • Kenny Marchant • Brian McCall • Tommy Merritt

director Parviz Adib (a copy of which is enclosed as Exhibit A-1) which intentionally did not name the six electric market participants (qualified scheduling entities, or QSEs) identified in the MOD study as possibly manipulating the wholesale market. A single page attachment to the PUC's 03/06/02 response by PUC general counsel Susan Durso (a copy of which is enclosed as Exhibit A-2) stated that "certain persons" asserted that their identities and market actions were confidential under Chapter 552 of the Texas Government Code, specifically, §552.101, concerning information that is confidential by law, §552.104, concerning competitively sensitive information, and §552.110, concerning trade secrets.

3. On 03/15/02 I wrote to the PUC (a copy of which is enclosed as Exhibit B). In that letter, I requested:
  - a. the names of those specific people representing the market participants who asserted confidentiality of their identities and market behavior,
  - b. the names of those market participants (QSEs) who claimed their identity was confidential, and
  - c. the specific conduct that each market participant (QSE) engaged in that might be the basis for allegations of improper behavior, including:
    1. the number of days in August 2001 that each identified QSE overscheduled load,
    2. the percentage of scheduled load over actual load,
    3. the percentage of scheduled load over actual load on consecutive days, and
    4. the payments made to each company as a result of overscheduling.
4. On 03/25/02, the PUC responded to my inquiry (a copy of which is enclosed as Exhibit C). The commission indicated it could not publicly release the names of the specific market participants identified in the MOD study so long as those market participants' claims of confidentiality remain unresolved, although PUC staff and ERCOT staff both determined the identities of the market participants cited in the MOD study and other information related to the BENA payments are not confidential under the ERCOT Protocols.

In a letter dated 02/27/02 to PUC staff attorney Terri Eaton (a copy of which is enclosed as Exhibit C-1), ERCOT corporate counsel Ralph Weston concludes that the data in question is not confidential with the following reasoning:

Of the data you mention, only adjusted meter load and scheduled load are provided by the QSE. The other data are calculated based on adjusted meter load, scheduled load, and market clearing prices. Market clearing prices, to the extent they does [sic] not lead to disclosure of bids or pricing information identifiable to a specific QSE, are not Protected Information.

To the best of our knowledge, no QSE has designated in writing at the time such information was furnished that such information should be treated as Protected Information. Finally, ERCOT has not designated such information as Protected Information under the ERCOT-PUCT Protected Information Confidentiality Agreement.

ERCOT affirmed this position in an electronic mail from ERCOT client relations manager Ted Hailu (a copy of which is enclosed as Exhibit C-2) to all QSEs and senior ERCOT staff on 02/28/02, informing market participants of the pending disclosure of the information in question.

The PUCT, as part of its investigation, has asked if ERCOT concurs with their conclusion that the following information for each QSE is not included in Protected Information as defined in the Protocols:

1. Adjusted Metered Load (MW)
2. Load Imbalance Quantity (MW)
3. Load Imbalance Amount (\$)
4. Percent Over/Under Scheduled

After reviewing the Protocols, ERCOT has informed the PUCT that it agrees the above information does not fit within the defined classes of Protected Information.

The PUC provided the information I requested under Texas Government Code §552.008. In doing so, the PUC maintained the confidentiality claims of one or more market participants who may have engaged in improper behavior to the detriment of Texas retail electricity customers. The PUC's 03/25/02 response contains the following materials, all of which are enclosed:

- a. Attachment A provides non-confidential information on the MOD study of overscheduling and a summary of MOD's conclusions. This attachment includes the identities of five market participants identified in the MOD BENA study who volunteered to make their identities known. Four of those five market participants also did not object to the release of their QSE's BENA data. That data for those QSEs contains:
1. the number of days the QSE overscheduled energy in each ERCOT zone,
  2. the average percentage of overscheduling, and
  3. the total load imbalance (BENA) payments each QSE received from ERCOT.

Therefore, Attachment A does not include the name of the one market participant who continues to assert the confidentiality of its identity, nor does it contain the scheduling and payment information for the two market participants who continue to assert the confidentiality of their BENA data.

- b. Attachment B provides alleged confidential information. It reflects overscheduling of two QSEs with an extraordinarily high percentage of scheduled load over actual load. Specifically, it includes the average percentage of overscheduling for the month of August 2001 by ERCOT zone and the total load imbalance (BENA) payments received by each of the two QSEs. One of the QSEs named is a market participant who continues to assert the confidentiality of its identity. Both QSEs identified in Attachment B assert the confidentiality of the overscheduling and payment information provided in Attachment B.
- c. Attachment C provides alleged confidential information. It is a summary of load imbalance information for the six QSEs that received more than \$1 million in load imbalance (BENA) settlements during August 2001. This attachment identifies actual load, scheduled load, percentage difference, and settlement payments for each identified QSE by ERCOT zone.
- d. Attachment D provides alleged confidential information. It contains a daily breakdown of the load imbalance information summarized in Attachment C for the six QSEs that received more than \$1 million in load imbalance (BENA) settlements during August 2001. This attachment identifies the daily actual load, scheduled load, percentage difference, and settlement payments for each identified

QSE by ERCOT zone.

- e. Included are two non-confidential petitions, one filed by American Electric Power and one filed on behalf of one or more anonymous market participants by the Austin law firm of Carroll & Gross. The petitions seek to preserve the confidentiality of information relating to scheduling of loads and the petitioners' identities as companies on which the MOD focused its study. PUC staff responses to both petitions are also included. Both the petitions and the staff responses are a matter of public record in PUC Dockets 25533 and 25534.
- f. Finally, included are 18 letters exchanged between PUC staff, ERCOT staff, and representatives of the six identified market participants relating to the asserted confidentiality of BENA information. This correspondence appears to be attorney-client information, the confidentiality of which I do not contest.

## II.

### LAW AND ARGUMENT

- 1. Although Chapter 552 of the Texas Government Code, commonly known as the Open Records Act, does contain certain categories of information excepted from public disclosure, I am not convinced the information asserted to be confidential by some market participants and provided to me by the PUC is covered by the exceptions. Specifically, I do not find anything in §§ 552.101, 552.104, or 552.110 to suggest that a corporate identity constitutes a trade secret or commercially sensitive information in this instance. The QSEs identified in the MOD BENA study are registered with ERCOT and subject to the market oversight jurisdiction of the PUC.
- 2. Furthermore, I fail to understand how past scheduling practices of certain market participants could be considered proprietary commercial information for the following reasons:
  - a. Daily schedules submitted more than eight months ago cannot be considered reliable indicators of a particular QSE's market share in any given ERCOT zone because customer switching continually adjusts that market share over time.
  - b. Many QSEs schedule power for more than one market participant, further obscuring any market share data that might be gleaned from scheduling data.

- c. The QSE scheduling data in question does not reveal from whom energy is purchased or whom it is intended to serve. Thus, the data does not reveal any contractual or pricing information between the QSE, the generator from whom the energy is purchased, the retailer for whom the schedule is submitted to ERCOT, or the quantity or class of customer(s) served.
- d. The percentage of scheduled load over actual load is precisely not indicative of any commercially sensitive information but rather may be indicative of whether a particular market participant is conducting wholesale electricity business in good faith within Texas.
- e. The market clearing price of energy paid to each of these QSEs for load imbalance is clearly posted in the public market information section of the ERCOT web site at the following internet address:

<http://www.ercot.com/ercotPublicWeb/PublicMarketInformation/MCP/MarketClearingPrices.htm>

### III.

#### QUESTIONS

Therefore, I request your determination on the following points of law:

1. Are the names of market participants identified in the PUC MOD BENA study as consistently engaging in overscheduling practices subject to public disclosure under Texas Government Code §552.101 or any other section?
2. The PUC has identified certain conduct as being indicative of manipulative behavior. Such conduct is quantified in Exhibit C, Attachments C and D, and reflects:
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Please note that the question above does not seek the basis for establishing a conclusion whether market manipulation occurred but rather asks for the conduct the PUC identified in the MOD study which may form the basis for further analysis.

3. Are QSE schedules in the ERCOT wholesale market from past operating days subject to public disclosure?
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5. Given that some of the information presented for your review, such as the market clearing price of energy paid for load imbalance and the identities of certain market participants seems so firmly planted in the public domain, can an electricity market participant be sanctioned for filing groundless and frivolous claims of confidentiality solely to impede public disclosure of said information and, if so, under what section of the law?

#### IV.

#### CONCLUSION

Consumer confidence in deregulated energy markets has been shaken by the intense electricity price spikes seen in California and by the collapse of Enron. As Texas continues its own transition to a competitive electricity market, I believe it is important for the people of Texas to know whether there is market manipulation and if so:

1. which corporate entities may have acted irresponsibly,
2. what those actions may have entailed,
3. how retail electricity customers have been impacted, and
4. what steps the state has taken to prevent possible manipulations of the ERCOT wholesale electricity market in the future.

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I firmly believe the long-term health of our restructured electricity market depends on a measure of transparency in certain business practices and not the opacity presented by some electric companies' narrow interpretation of Chapter 552 of the Texas Government Code. I would appreciate your immediate attention to this matter related to public disclosure in our electricity markets.

With kind regards,

**Original Signed By**  
**STEVEN D. WOLENS**  
Steven D. Wolens

SDW/mb

Enclosure