Consumers Union
Southwest Regional Office
1300 Guadalupe, Suite 100
Austin, Texas 78701
www.consumerunion.org

May 29, 2002

Ms. Isabelle Flores
Legal Division
ERCOT
7620 Metro Center
Austin, Texas 78744

VIA Email: iflores@ercot.com

RE: PRR327

Dear Ms. Flores and PRS Members,

Consumers Union[1] submits the following comment letter in an effort to ensure public accountability in the newly deregulated energy market. In general, we believe neither ERCOT nor the Commission have the authority to define any information as "Protected Information." Instead, the Commission must rely on the process for protecting third party information set out in the Public Information Act (PIA) and must conduct its affairs in accordance with the Act's presumption that all information is public.

Proposed 1.3.1.1 Items considered Protected Information; Current 1.3.3 Protecting Disclosures to Governmental Authorities

We urge ERCOT and the Public Utility Commission to exercise caution when defining "Protected Information," because neither the PUC nor ERCOT can promise confidentiality not authorized by statute. New proposed 1.3.1.1 appears to do just this.

The Public Information Act presumes that information is public if it is "collected, assembled, or maintained" by a governmental body or where the body has a right of access. Information can be

[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the state of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of Consumer Reports, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, Consumer Reports, with approximately 4.6 million paid circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial, and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

protected through the standard Attorney General review process, and it must then fall under one of the exceptions to the Public Information Act or it must be confidential by some other statute. Other statutory authority to close records typically includes federal or other Texas law, but cannot include regulations promulgated by an agency unless those regulations have explicit statutory authority.

Consumers Union believes the statutory authority in the Public Utility Regulatory Act (PURA) is insufficient to sustain the proposed ERCOT protocols and the corresponding "Confidentiality Agreement" between ERCOT and the PUC. The Agreement purports to prevent the PUC from disclosing information defined as "Protected Information" by ERCOT. [ERCOT-PUC Protected Information Confidentiality Agreement, July 31, 2001] Section 1.3.3 of the current protocols requires ERCOT to obtain a Confidentiality agreement from any governmental body to which it is required to pass information.

But the Attorney General prohibits agencies from contracting to close records not explicitly made confidential by law.

> By providing that all information a governmental body collects, assembles, or maintains is public unless expressly excepted from disclosure, the Act prevents a governmental body from making an enforceable promise to keep information confidential unless the governmental body is authorized to do so. Thus, a governmental body may rely on its promise of confidentiality to withhold information from disclosure only if the governmental body has specific statutory authority to make such a promise. Unless a governmental body is explicitly authorized to make an enforceable promise to keep information confidential, it may not make such a promise in a contract or a settlement agreement. In addition, a governmental body may not pass an ordinance or rule purporting to make certain information confidential unless the governmental body is statutorily authorized to do so.
>
> --*Office of the Attorney General, 2002 Public Information Handbook, p. 69.*

Govt. Code 552.101 excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. To fall within Govt. Code §552.101, a statute must explicitly require confidentiality; a confidentiality requirement will not be inferred from the statutory structure. [Open Records Decision No. 465 at 4-5 (1987)]

The PUC states that its authority to promulgate rules related to confidentiality, and therefore to sign a confidentiality agreement, is found in PURA §39.155(a) and §39.151(d).

PURA §39.151(d) fails the test because it merely establishes the Commission's right to oversee the general activities of ERCOT "relating to the reliability of the regional electrical network and accounting for the production and delivery of electricity." This section authorizes no confidentiality of information whatsoever.

PURA §39.155(a) authorizes the Commission to "administer" its reporting requirements "in a manner that ensures the confidentiality of competitively sensitive information." PURA does not define "competitively sensitive information," nor does it authorize the PUC to create a definition. If the Legislature had intended to create a new and different exception to disclosure for a new class of information called "competitively sensitive information" it would have done so—just as

the same Legislature made special exception for a new class of municipal electric utility information related to a "competitive matter." [Govt. Code §552.133, including definitions, local authority, and Attorney General oversight]

Instead, the language in PURA assumes on its face that the PUC's primary role is to execute "reporting requirements" (companies "shall" report) related to generation capacity, wholesale and retail power sales, and "any other information necessary for the Commission to assess market power..." While the authority to determine mandatory reporting is clear, the authority to keep information confidential is merely procedural. The PUC must "administer" the mandatory reporting "in a manner" designed to protect third party interests. We believe the best procedure for protecting these interests is the existing Attorney General procedure guided by existing law.

The Public Information Act already incorporates a well-understood set of definitions and a process to protect competitively sensitive information that effectively balances the needs of industry with public accountability. The Act clearly defines "trade secret" and "commercial or financial information" and provides procedural tools (including notice, timeframes for filing comments, guidelines readily available on the internet) to ensure that any third party and any member of the public with an interest in access can participate in a decision to close records. The recent dispute over Balancing Energy Neutrality Adjustment (BENA) information [OR 164025] illustrates the usefulness of the Attorney General as an arbiter of any dispute over third party information. The Attorney General reviews the facts, but also acts as the defender of the principles of openness set out in the Preamble to the Public Information Act.

Because the Attorney General is unable to resolve disputes of fact related to information, and must rely on the statements of the third party or facts discernible from the documents, he will generally accept a claim of confidentiality "when a prima facie case is made that the information in question constitutes a trade secret and no argument is made that rebuts that assertion as a matter of law." [Open Records Decision No. 552 at 5 (1990)] Thus, the current standard is not weighted overly in favor of openness. Frequently, the public is not sufficiently aware of the specific information in question (it is, of course, confidential until the Attorney General makes a determination) to be able to effectively counter the prima facia case made by a company representative. On the other hand, the existing Attorney General process *effectively* weeds out efforts by third parties to protect information where there is no "factual evidence" of "substantial competitive harm" in disclosure.

Consumers Union recommends that the ERCOT protocols avoid any promise to protect specific information that is not clearly protected by statute, and instead incorporate the existing Attorney General process for making a Govt. Code §552.110 determination. Specifically:

- Delete Section 1.3.1.1 in its entirety;
- Delete Section 1.3.3 in its entirety;
- Amend 1.3.2 Procedures for Protected Information to add a new (5) stating, "Information obtained by ERCOT from any Disclosing Party may be subject to release under the Public Information Act, Texas Govt. Code §552. If a member of the public requests information from the Public Utility Commission or information to which the Commission has a right of access, the Public Utility Commission will notify the Disclosing Party, and the Disclosing

> Party will have the right to assert confidentiality claims at outlined at Texas Govt. Code §552.305."

There is no indication in PURA that oversight over the development of the new electricity market should be anything but public. The recent dispute over BENA information highlights the strong public interest in the ability of our fledgling oversight system to prevent electricity market manipulation during the hottest summer months. Company managers who might endure the spotlight of public exposure if they inappropriately manipulate markets will be more likely to hesitate before making decisions that harm the public interest in the future.

Proposed 1.3.1.2 Continuation of Protection after Disclosure for Limited Purposes

ERCOT promises to keep company information confidential "in all other circumstances not encompassed by these Protocols." We question ERCOT's ability to make such a promise. ERCOT is either a governmental body itself or it is a non-governmental body holding records on behalf of a governmental body (the PUC). In either case, it cannot promise to protect information if the PUC *has a right of access to it*. [Govt. Code §552.002(a)(2)] The PUC has a right of access to any information it determines it needs to fulfill its mandate to assess market power (PURA §39.155) or oversee ERCOT itself (PURA §39.151). Therefore, the promise set out at 1.3.1.2 is overly broad. We suggest instead that the ERCOT protocols here reference the PUC's right of access to information required to fulfill its statutory mandates, and also reference the Attorney General process for asserting third party claims of confidentiality.

Proposed 1.3.1.3 Expiration of Confidentiality and Proposed 1.3.7 Commission Declassification

Consumers Union supports minimum guidelines establishing that certain information is clearly public after 90 days (1.3.1.3) or after notice and opportunity for hearing (1.3.7). While the Public Utility Commission (and therefore ERCOT) has no statutory authority to make specific information confidential, we believe the agency has the flexibility to create reports that will be clearly public. All information held by a governmental body or to which it has a right of access is presumed public. Further, information described at Govt. Code §552.022 is public by law unless another law specifically makes it confidential. No law makes the proposed 90-day old information confidential.

The Public Utility Commission and ERCOT can propose to regularly post a market report with its underlying data to the public on its web site and through its data warehouse. This report (presumably posted monthly for data that is more than 90 days old) would be a public record under Govt. Code §552.022(a)(1). The administrative rulemaking process, with its public comment period and published response to comments, allows third parties who object to the release of 90-day old market data to provide evidence that these reports would cause "substantial competitive harm." The Commission, in the administrative rule process, can make a finding of fact that disclosure of specific information will not cause substantial competitive harm. Such a finding will not affect the Commission's ability to regulate because reporting requirements are mandatory under PURA. Companies will report in order to compete. Disclosure will create a level playing field for new competitors as well as the established utilities.

We do not believe companies will be harmed by the release of this information, and the benefit to the public is clear. Information which will be presumed public after 90 days includes information about power outages at specific generating units (which relates to customer service) and the final settlement among companies when over-scheduling occurs (some of the data that indicates whether companies manipulated load during high use periods). This information no longer provides other companies a competitive edge because prices and costs fluctuate rapidly. Information from three months ago does not provide competitors an edge today. Further, if the same information is available about every market participant, then all may compete fairly and the market will better regulate itself. Unfair manipulation thrives on secrecy. None of the information that ERCOT suggests should be reported after 90 days would reveal specific customer information or information about specific customer usage (which is confidential by statute).

Conclusion

Neither ERCOT nor the Public Utility Commission can promise to keep information confidential without express statutory authority. The existing process set out in the Public Information Act for protecting trade secret or "commercial and financial information" is appropriate for the electric utility market. Certain information can and should be released as part of the regular market oversight rules of the Commission. Third parties who wish to assert that the specific information proposed for release would cause "substantial competitive harm" will be able to do so in this rulemaking process. But, we believe that release of the proposed information will not harm any market participant, but will only make the emerging, more competitive electric market serve consumers better.

Kathy Mitchell
Research Manager
Consumers Union
Southwest Regional Office