



September 3, 2020

The Honorable Ken Paxton
Office of the Attorney General
Open Records Division
P.O. Box 12548
Austin, Texas 78711-2548

Re: Public Utility Commission of Texas PIA Request ID #2020-07-023

Dear General Paxton:

I recently made this public information request to the Public Utility Commission of Texas (PUC):

I request any and all documents, spreadsheets, emails, memos, attachments, etc., whether in electronic or paper form, that the PUC, including its commissioners, divisions, and staff, might have related to the 2020 cost of the ORDC and/or the RDPA. This would include any related correspondence from the ERCOT Market Monitor at Potomac Economics.

Summary of PUC and Potomac Economics Response

The PUC admits that it has information that is responsive to my request but claims that “some of the information responsive to [my] request is exempted from disclosure under Government Code §552.111.” Specifically, the PUC is claiming the “work product privilege” for material or communications prepared, developed, or made “in anticipation of litigation or for trial.” Thus, they have withheld the responsive information.

Apparently, some of the responsive information is contained in the “daily and monthly reports” the PUC receives from Potomac Economics. Potomac has weighed in on this matter claiming that the “trade secret” “exception to disclosure” “codified in Texas Government Code § 552.110” “applies to” some of the information contained in its “ERCOT Daily Snapshot.” In particular, Potomac claims the “specific part of the ‘ERCOT Daily Snapshot’ reports covered by the exception is the ‘Gas Prices’ data.”

Of course, I am at a disadvantage here because I cannot see the documents or information in question or the information they contain. But it is clear from reading their letters that neither the PUC or Potomac claim that the specific responsive information “related to the 2020 cost of the ORDC and/or the RDPA” is covered by either the “work product privilege” or the “trade secret” exception.

Nature of the Information Requested

In 2013, the commissioners of the PUC directed ERCOT to implement what is known as the Operating Reserve Demand Curve (ORDC). The ORDC went into effect in 2014. In 2019 and again in 2020, ERCOT increased or expanded the use of the ORDC at the direction of PUC commissioners—this time without a vote. The purpose of the ORDC is to increase the wholesale price of electricity. In other words, the PUC ordered the implementation of the ORDC so that consumers would pay more for electricity in order to increase the profits of Texas electric generators.

It has become obvious over time that few policymakers in Texas want the public to know how much extra they are paying for electricity because of the ORDC. The best I can tell, the number has never been published. There is data published after the fact that can be used to estimate the cost. In the case of 2019, I used this data to estimate that the ORDC increased wholesale electricity prices by \$3.6 billion. One can imagine why this information is difficult to find. Just imagine the fuss Texans might make if they knew their governor, Lt. governor, and legislators allowed an obscure state agency to impose a \$3.6 billion electricity tax on them without so much as a vote.

I was made aware over a year ago that the PUC had information that might allow for a more or less real time calculation of the costs imposed on Texas consumers by the ORDC. Since the ORDC typically kicks in only during the hottest months of the summer during periods of scarcity, I believed there might be value in presenting these costs to the public at this time because “the people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know” (Sec. 552.001, Government Code). Thus, I recently made my request.

No one in this case has claimed that the information I requested meets any of the exceptions listed in Chapter 552 of the Texas Government Code. Specifically, the PUC does not claim that the information responsive to my request is covered by the “work product privilege” exemption. Neither does Potomac claim that the responsive information is covered by the “trade secret” exception. *Instead, they appear to claim that the documents containing the responsive information may also contain other information that is covered by applicable exceptions.* Subsequently, the PUC appears to be claiming that no portion of documents containing information covered by exceptions, including portions containing responsive information but no excepted information, may be released to the public.

Work Product

Regarding the work product exception alleged by PUC, my reading of Texas Rule of Civil Procedure 192.5, is that the documents must be prepared in anticipation of litigation. As I demonstrate above, the ORDC information is NOT prepared in anticipation of litigation but is prepared so that the PUC can keep track of the effects of the ORDC on the market, including the increase in wholesale electricity prices. In fact, the ORDC data is likely *not* the data that “supports the PUC in its enforcement obligations” and for which the PUC is claiming the work product exemption. It is unclear how information relating to the distribution of a subsidy mandated by the PUC and distributed in accordance to ORDC protocols would be used for enforcement purposes.

Yet even if there might be some nexus between the responsive information and the PUC’s “enforcement obligations,” the information would not be included under the work product exception. The PUC is in fact arguing that if data could possibly be used in litigation, then it should be protected by work product. They argue, “The PUC uses this information to evaluate whether enforcement actions (contested cases under the Administrative Procedures Act) are necessary and it could be used in any litigation that ensued.” That statement surely does not prove that the Potomac Economics’ Daily Snapshot is prepared for litigation, only that it *could be used in litigation*. All data compiled and used at PUC could be used in litigation for myriad purposes and under PUC’s theory any data they collect is protected if they can think of a way that the data could be used in litigation. Unfortunately for the PUC, the work product privilege does not provide a blanket shield to releasing any data that might be used in litigation. The OAG should deny this request or, at a minimum inquire more as to how and why the PUC uses the ORDC information.

Trade Secrets

Potomac Economic fails to show that the ERCOT Daily Snapshot is a trade secret. Potomac Economic only proves that the database and algorithm maintained by Argus Media, Inc., is a trade secret. Based on my reading of *Boeing v. Paxton*, 466 S.W.3d 831, 842 (Tex. 2015), Potomac Economic has shown no proof that the ERCOT Daily Snapshot is protected by trade secret privilege. Potomac Economic has made an argument to withhold the disclosure of Argus Media Inc.’s database and algorithm, but has failed to show any evidence that **conclusory data** (i.e. gas price estimates), sold on the open market by Argus Media to customers, is a trade secret. Furthermore, Potomac Economic has failed to show how the ERCOT Daily Snapshot is a trade secret, in and of itself. And it has not claimed that the responsive information has any relation to Argus Media Inc.’s database and algorithm. The OAG should deny this request, or at a minimum, inquire as to how the ERCOT Daily Snapshot is a

trade secret, because Potomac Economic has not shown any proof that it is, and whether Potomac is claiming that the responsive information itself is protected by trade secret privilege.

Further Arguments – Hidden Tax Protected as “Work Product” or “Trade Secret”

I am not an attorney and am unaware of most case law on this matter. But the position of the PUC in this matter seems to me to be in sharp contrast to both the spirit and the letter of Chapter 552.

Sec. 552.001 requires that the “provisions of this chapter shall be liberally construed to implement this policy” in part because “[t]he people insist on remaining informed so that they may retain control over the instruments they have created.” It is unclear how hiding from the public information showing the billions of dollars added to the electricity costs of Texas consumers through the ORDC at the direction of public officials (in this case, PUC commissioners) in order to increase the profits of generators with multibillion dollar market caps can be construed as meeting this requirement.

Furthermore, it is important to note that Chapter 552 of the Texas Government Code pertains to public information, not public documents. In Sec. 552.002, public information is defined as “that is written, produced, collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business” by or for a governmental body. While to be accessible the information must be recorded on some type of media, it is not the media that is the subject of Chapter 552, but the information itself. Thus, the public and, in this case, I have the right to access responsive information, even if it is included in a document that might contain information excepted from disclosure. Yet the PUC appears to be claiming that because some information in a document might be protected, then no part of the document can be released to the public

One can imagine several ways in which the PUC could provide me with the responsive information without revealing any information that might be covered by the exceptions claimed—if those claims are valid. For instance, the PUC could provide me only with copies of the pages containing the responsive information. These could be provided electronically in pdf form or in hard copy. Additionally, the PUC could provide the complete documents containing the responsive information by redacting the information that might be covered by the exceptions claimed. Or the PUC could provide spreadsheets with any information that might be covered by the exceptions claimed removed.

Please remember “it is the policy of this state that each person is entitled ... to complete information about the affairs of government and the official acts of public officials and employees.” What could be more responsive to this policy than information in the possession of the PUC and collected by a state contractor paid with public money that explains to the public the costs of decisions made and policies adopted by public officials of the state of Texas?

For these reasons, I respectfully request that you issue an opinion informing the PUC that the information I have requested is not covered by any exceptions and therefore should be released under Chapter 552 of the Texas Government Code.

If you need anymore information, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'WJ Peacock III', with a horizontal line underneath the name.

William Peacock III
Policy Director