



Control Number: 29298



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Dung Tran
VP & Principal Financial Officer
Commercial & Risk Management

November 13, 2006

Docket Clerk
Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711-3326

Re: PUC Project No. 29298
2006 3Q Quarterly Wholesale Electricity Transaction Report

Dear Docket Clerk:

Enclosed is the Quarterly Wholesale Electricity Transaction Report for the third quarter of 2006 for TXU Generation Company LP and TXU Portfolio Management Company LP (collectively referred to herein as "TXU Wholesale").

Contact information for TXU Wholesale is as follows:

Ms. Elizabeth Howland
Regulatory Affairs
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Pursuant to Procedural Rule 22.71(d) and Substantive Rule 25.93, TXU Wholesale is filing a copy of the full report electronically via the Commission's ETR software and is submitting two copies of the full report via standard-format compact disk. This full report contains confidential information and should be treated confidentially in accordance with Substantive Rule 25.93(g). In addition, pursuant to Procedural Rule 22.71(d) and Substantive Rule 25.93, TXU Wholesale is filing two public copies of the report, from which confidential information has been redacted, via standard-format compact disk, and two hard copies of the contact information required by Substantive Rule 25.93(d)(2)(A).

Confidentiality

The following information (the "Protected Information")¹ contained in the TXU Wholesale's report is confidential, competitively sensitive, proprietary, trade secret, protected commercial and financial information and is redacted from the public report:

Contract Data: Counterparty (Column 3), Counterparty ID (Column 4), Affiliate (Column 5) and Termination Date (Columns 10 and 11).

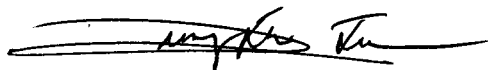
Transaction Data: Counterparty (Column 3), Counterparty ID (Column 4), Quantity (Column 18), Price (Column 19) and Total Charge (Column 22).

As required by Substantive Rule 25.93(g)(4), a statement of the specific reasons why the information listed above is confidential information subject to protection from public disclosure, and the legal authority in support of such treatment, is attached to this letter as Attachment A. TXU Wholesale reserves the right to provide further factual information and legal authority to support the confidentiality of the Protected Information should it become necessary in connection with a Texas Public Information Act request pursuant to Substantive Rule 25.93(g)(2) or a contested case hearing pursuant to Substantive Rule 25.93(g)(3).

Substantive Rule 25.93(g)(2) provides that if the Commission receives a request from the public for the Protected Information, then it "shall make a good faith effort to provide notice of the request to the affected reporting entity within three business days of receipt of the request." TXU Wholesale specifically requests that notice of any request for the Protected Information be provided to all of the contacts listed above in this letter.

Please contact me should you have any questions concerning this report.

Sincerely,



Dung Tran
VP & Principal Financial Officer
Commercial & Risk Management

¹ The data element names listed below match those used in the Commission's template for the Quarterly Wholesale Electricity Transaction Reports (Version 4) that was created in Project No. 28288.

ATTACHMENT A

**CONFIDENTIALITY STATEMENT IN SUPPORT OF PROTECTING FROM PUBLIC DISCLOSURE
CERTAIN INFORMATION INCLUDED IN TXU WHOLESALE'S QUARTERLY WHOLESALE ELECTRICITY
TRANSACTION REPORT**

I. INTRODUCTION

The following information contained in TXU Wholesale's Quarterly Wholesale Electricity Transaction Report¹ is confidential, protected information that qualifies for exception from public disclosure under the Texas Public Information Act (TPIA) (hereinafter referred to as the "Protected Information"):

Contract Data: Counterparty (Column 3), Counterparty ID (Column 4), Affiliate (Column 5) and Termination Date (Columns 10 and 11).

Transaction Data: Counterparty (Column 3), Counterparty ID (Column 4), Quantity (Column 18), Price (Column 19) and Total Charge (Column 22).

The Protected Information is competitively sensitive, trade secret, commercial and financial information that is confidential by law. The Public Utility Regulatory Act (PURA) and the TPIA protect such information from public disclosure.^{2,3}

In general, the TPIA provides that information filed with the Commission (or any other public agency) is to be made available to the public.⁴ Confidential and proprietary information such as the Protected Information, however, is expressly protected from public disclosure under two exceptions to the TPIA.⁵ Section 552.101 of the TPIA grants a general exception for information deemed confidential by constitutional law, statutory provision, or judicial decision.⁶ Because PURA specifically provides that information related to wholesale power sales reported pursuant to Section 39.155(a), such as the Protected Information, must be treated in a manner that ensures its confidentiality, Section 552.101 of the TPIA protects such information from public disclosure. Furthermore, another provision of the TPIA, Section 552.110, provides an exception from public disclosure for trade secrets and other "[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" The Protected Information is trade secret information and is commercial and financial information, disclosure to the public of which would cause substantial harm to TXU Wholesale, and, accordingly, Section 552.110 of the TPIA protects such information from public disclosure.

¹ The data element names listed below match those used in the Commission's preliminary template for the Quarterly Wholesale Electricity Transaction Reports (Version 4) that was created in Project No. 28288.

² See PURA §§ 39.001(b)(4), 39.155(a); TPIA §§ 552.101, 552.110.

³ TXU Wholesale understands that FERC does not recognize the confidentiality of information concerning FERC-jurisdictional transactions filed pursuant to FERC reporting rules that are similar to Substantive Rule 25.93. However, as discussed in detail in Comments filed by TXU Power in the rulemaking proceeding that resulted in adoption of Substantive Rule 25.93 (Project No. 26188), FERC's rationale is not applicable to the PUCT and transactions occurring in ERCOT. In short, FERC generally asserts that confidentiality is not allowed because the Federal Power Act requires the information to be publicly reported. In contrast, while PURA allows the Commission to require the reporting of transactional information, the Texas statute requires that the PUCT maintain the confidentiality of competitively sensitive information.

⁴ TPIA § 552.021.

⁵ TPIA §§ 552.101, 552.110.

⁶ TPIA § 552.101.

The exceptions to public disclosure of third-party information contained in Sections 552.101 and 552.110 of the TPIA are mandatory.⁷ Accordingly, the Commission does not have the discretion under the TPIA to release third-party information that is protected by Sections 552.101 and 552.110.⁸ Furthermore, the unauthorized release of confidential information is prohibited by law as a misdemeanor criminal offense and considered to be official misconduct.⁹

II. THE PROTECTED INFORMATION IS “COMPETITIVELY SENSITIVE INFORMATION”

Established case law describes “competitively sensitive information” as information that is not publicly known and that, if released to an entity’s competitors, would confer on those competitors a competitive advantage that would be detrimental to the entity’s market position or that would negatively affect its ability to bargain freely in the marketplace.¹⁰ In the context of this proceeding, the identifiers in the Quarterly Wholesale Electricity Transaction Report for “Counterparty,” “Counterparty ID,” and “Affiliate” all reveal the identity of TXU Wholesale’s customers. The identifiers for “Termination Date,” “Quantity,” “Price,” and “Total Charge” all reveal transaction-specific terms and pricing of TXU Wholesale’s wholesale electricity sales. Thus, if disclosed, the information contained in the Protected Information (i.e., customer identifying information and transaction-specific terms and pricing information) would reveal the market position and competitive strategies of TXU Wholesale and cannot be reasonably considered anything but “competitively sensitive information.”

TXU Wholesale’s competitors in the wholesale electricity market, as well as wholesale electricity customers, would be in an unfairly advantageous competitive position vis-à-vis the electric market if they had access to the Protected Information. Such data constitutes the core of TXU Wholesale’s proprietary and competitively sensitive information concerning the wholesale competitive electric market and, as discussed in more detail below with regard to protection of trade secrets and confidential commercial and financial information, the information can safely be presumed to be unknown to TXU Wholesale’s competitors and is closely guarded by the Companies. If the Protected Information was disclosed to the public, competitors could gain insight as to how the Companies price certain types of customer loads and how they procure supplies to meet specific contractual obligations. Disclosure of the Protected Information would thus give competitors and wholesale customers an unfair competitive advantage over TXU Wholesale in future negotiations, bidding and sales and purchase transactions. Accordingly,

⁷ Tex. Att’y Gen ORD-665 at 2, note 5 (2000) (“Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third-parties.” *Id.*).

⁸ *Id.*

⁹ TPIA § 552.352.

¹⁰ See, e.g., *General Portland, Inc. v. LaFarge Coppee S.A.*, No. CA-3-81-1060-D, 1981 WL 1408, at *10 (N.D. Tex. Aug. 28, 1981) (explaining that “competitively sensitive” information includes data that could “allow a competitor to gain a competitive advantage . . . and thereby destroy” the market position of the entity to whom the information relates); *Burlington N.R.R. v. Southwestern Elec. Power Co.*, 905 S.W.2d 683, 685 (Tex. App.—Texarkana 1995, no writ) (explaining that “competitively sensitive” contract term includes a term that, if revealed to competitors or customers, would negatively affect the ability to bargain freely in the marketplace); *State v. Mid-America Dairymen, Inc.*, No. 9710120, 1997 WL 669970, at *5 (Tex. Dist. Ct. Sept. 3, 1997) (explaining that “competitively sensitive information” means information that is not public and could be used by a competitor or a supplier to make production, pricing or marketing decisions, including, but not limited to, information relating to costs, capacity, distribution, marketing, supply, market territories, customer relationships, the terms of dealing with any particular customer, and current and future margins or prices, including discounts, slotting allowances, bids or price lists).

TXU Wholesale could experience a loss in sales and/or revenues as a direct result of the public disclosure of the Protected Information.

In addition, it is important to note that with regard to wholesale sales to the retail electric provider (“REP”) wholesale customers of TXU Wholesale, the Protected Information is the core of their proprietary and competitively sensitive information concerning the *retail* electric market. If competitors and customers of a REP were to know the price that such REP paid for electricity (i.e., the REP’s cost), then the competitive position of that REP would be harmed and its ability to bargain freely in the marketplace would be unfairly compromised.

One need only look to antitrust regulation to understand the dangers of publicly disclosing to competitors information such as customer information, pricing, quantities and detailed terms and conditions that can reveal the position of market participants. An important function of the United States Department of Justice (“DoJ”) in administering antitrust laws is to review mergers to ensure that they will not harm consumers. A federal court has stated that the ultimate issue in connection with a DoJ merger review is determining “whether the challenged acquisition is likely to hurt consumers, as by making it easier for the firms in a market to collude, expressly or tacitly, and *thereby force price above or farther above the competitive level.*”¹¹ Thus, a key consideration for antitrust regulators in the context of merger approval is examining the ability of competitors to harm consumers by colluding. In that vein, the DoJ will look for certain conditions that will facilitate coordinated activity, such as: (1) conditions enabling competitors to reach agreement on concerted actions, and (2) conditions facilitating the competitors’ detection and punishment of deviations from the agreed-upon course of conduct.¹² One of the key factors facilitating anticompetitive agreements among competitors is the *availability of information regarding rivals and the market.*¹³ In turn, a key factor facilitating competitor detection and punishment of deviations from agreed behavior is the *availability of information regarding specific transactions, prices, and output levels.*¹⁴

Thus, public availability of information regarding competitors’ pricing and market behaviors often triggers a DoJ challenge to a merger because such public disclosure *can actually harm consumers by facilitating collusion.* This is especially true when the transparency involves current, on-going positions of market participants, rather than merely historical data concerning completed contracts and transactions after a sufficient lag period.

Further, the Federal Trade Commission recently expressed concern about rapid public disclosure of competitively sensitive information in the following comments to the Federal Energy Regulatory Commission (FERC) regarding information disclosure in conjunction with FERC’s market behavior rules:

¹¹ *Hospital Corp. of America v. Federal Trade Comm’n*, 807 F.2d 1381, 1386 (7th Cir. 1986) (emphasis added).

¹² U.S. Dept. of Justice, *Horizontal Merger Guidelines* §§ 2.1, 2.11, 2.12 (April 8, 1997); William J. Kolansky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, *Coordinated Effects in Merger Review; From Dead Frenchmen to Beautiful Minds and Mavericks*, Address Before the American Bar Ass’n Section of Antitrust Law (April 24, 2002) (available at <http://www.usdoj.gov/atr/public/speeches/11050.htm>) (hereinafter, “*Merger Review*”).

¹³ *Merger Review*.

¹⁴ *Merger Review*.

Another potential concern is that rapid disclosure of price and quantity information to these public entities by all market participants will result in rapid public disclosure of the price and quantity involved in a high proportion of all individual transactions. Such rapid, inclusive disclosure in a market may facilitate monitoring of a collusive agreement and make collusion more likely in that market.

We encourage FERC to avoid any requirement that would tend to result in rapid disclosure of individual transaction data that could facilitate monitoring compliance with a collusive agreement among suppliers.¹⁵

In sum, the Protected Information is competitively sensitive, proprietary information that is closely guarded within the Companies and that, if publicly disclosed, would confer on competitors and wholesale customers an unfair competitive advantage that would be detrimental to TXU Wholesale's market position and that would negatively affect the Companies' ability to bargain freely in the marketplace.

III. SPECIFIC LEGAL PROTECTIONS AFFORDED TO THE PROTECTED INFORMATION

A. The Protected Information is confidential by law and thus exempt from disclosure pursuant to TPIA § 552.101(a).

Section 552.101(a) of the TPIA prohibits the release of "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."¹⁶ In analyzing whether a statute confers confidentiality such that it can be incorporated by Section 552.101(a) of the TPIA, the language of the relevant statute controls the scope of the protections.¹⁷ To fall within the provisions of Section 552.101(a), a statute must explicitly require confidentiality; confidentiality will not be inferred from the statutory structure.¹⁸ Section 39.155(a) of PURA explicitly provides that competitively sensitive information related to competitive electricity sales, such as the Protected Information, is confidential by law.

PURA unambiguously establishes that it is in the public interest of the State of Texas to ensure the integrity of the competitive process through the protection of competitively sensitive information:

The Legislature finds that it is in the public interest to . . . protect the competitive process in a manner that ensures the confidentiality of competitively sensitive information during the transition to a competitive market and after the commencement of customer choice.¹⁹

In order to enable the public interest to be fulfilled, the Texas Legislature also included several explicit directives in PURA mandating that the PUCT maintain the confidentiality of certain types of information related to the sale of electricity. First, when the Legislature granted the PUCT the authority to require reporting of wholesale power sales, which provides the primary authority for Substantive Rule 25.93, it directed the Commission to "by rule prescribe

¹⁵ *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, FERC Docket Nos. EL01-118-000 and EL01-118-001, Comment of the Federal Trade Commission at 17-18 nn. 42, 43 (Aug. 28, 2003).

¹⁶ TPIA § 552.101(a).

¹⁷ See Tex. Att'y Gen. ORD-478 at 2 (1987).

¹⁸ See Tex. Att'y Gen. ORD-465 at 4-5 (1987).

¹⁹ PURA § 39.001(b)(4) (emphasis added).

the nature and detail of the reporting requirements and . . . administer those reporting requirements in a manner that ensures the confidentiality of competitively sensitive information.”²⁰ Second, the PUCT is required to use information provided by retail electric providers (REPs) for the purpose of acquiring a REP certification “in a manner that ensures the confidentiality of competitively sensitive information.”²¹ Third, the Legislature mandated that the PUCT protect customer consumption and credit information.²²

Thus, the Legislature explicitly directed that in order to protect the competitive process, competitively sensitive information is to remain confidential during the transition to customer choice and thereafter. Ensuring the confidentiality of competitively sensitive information requires that such information not be disclosed to those in a position to make competitive use of that information.

In Attorney General Opinion No. JC-0424 (2001), the Texas Attorney General stated that while PURA Section 39.001 is an introductory provision providing a legislative policy intent, PURA Section 39.155(a) is a specific confidentiality provision that requires the Commission to maintain the confidentiality of information collected thereunder:

*Section 39.001 is a multi-part, introductory provision declaring the legislature’s policy and purpose with respect to restructuring the electric utility industry. Its finding about confidentiality does not make any specific information confidential; rather, the finding explains the purpose of specific confidentiality provisions that follow in chapter 39 of the Utilities Code and that require the Public Utility Commission . . . to keep confidential information collected for certain purposes. For example, section 39.155 of the Utility Code requires the PUC to collect information on utilities’ generating capacity and sales in order to assess their market power. It specifically provides that the PUC “shall by rule prescribe the nature and detail of the reporting requirements and shall administer those reporting requirements in a manner that ensures the confidentiality of competitively sensitive information.”*²³

Furthermore, in a 2002 Open Records Letter Ruling, the Attorney General specifically considered the explicit directives of Sections 17.004(a)(6) and 39.101(a)(2) of PURA to confer confidentiality for the purpose of Section 552.101(a) of the TPIA.²⁴ In that Open Records Letter Ruling 2002-5755, the Attorney General found that third-parties did not meet their burden of showing how the disclosure of certain customer information would violate the confidentiality requirements of Sections 17.004(a)(6) and 39.101(a)(2).²⁵ In doing so, however, the Attorney General again agreed that those sections of PURA *could* be used to confer confidentiality upon certain information—just not the specific information argued by the parties in that case.²⁶

In sum, the combined weight of the Legislature’s clear policy statement in support of confidentiality for competitively sensitive information in PURA Section 39.001(b)(4), along with the explicit, specific, and mandatory statement in PURA Section 39.155(a) that the PUCT shall implement reporting requirements concerning wholesale sales of electricity in a manner that “ensures the confidentiality of competitively sensitive information,” provides that competitively sensitive information such as the Protected Information that is filed pursuant to PURA Section

²⁰ PURA § 39.155(a) (emphasis added).

²¹ PURA § 39.352(f).

²² PURA §§ 17.004(a)(6), 39.101(a)(2).

²³ Tex. Att’y Gen. Opinion JC-0424 at 6 (2001) (emphasis added).

²⁴ Tex. Att’y Gen. ORL 5755 (2002).

²⁵ *Id.* at 3.

²⁶ *Id.* at 6.

39.155(a) is confidential as a matter of law and that, therefore, such information should be excepted from disclosure pursuant to Section 552.101(a) of the TPIA.

B. The Protected Information is “commercial or financial information” exempt from disclosure under TPIA § 552.110(b).

Section 552.110(b) of the TPIA exempts from public disclosure “[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.”²⁷ This section was amended by the Texas Legislature in 1999 to remove the requirement that the information also be privileged or confidential by statute or judicial decision to be exempted from disclosure.²⁸ The relaxed standard more comprehensively protects commercial and financial information in order to foster competition.

There are two elements required to show substantial competitive harm: (1) the entity actually faces competition; and (2) substantial competitive injury would likely result from disclosure.²⁹ The first prong of the substantial competitive harm test is satisfied in this instance by the fact that the wholesale electricity market in Texas is competitive and thus TXU Wholesale actually faces competition in making wholesale sales. The second prong is satisfied because, as discussed in Section II above, public disclosure of the Protected Information would cause substantial harm to the competitive position of TXU Wholesale by unfairly revealing to competitors its current and future market positions and competitive strategies and thus conferring upon those competitors an artificial competitive advantage.

Several Attorney General opinions directly support a determination that information related to contracts and transactions, including customer identities, pricing and quantity information and unique terms and conditions, is confidential commercial and financial information for which disclosure would cause substantial competitive harm. For example, in Open Records Decision No. 541, the Attorney General prohibited public disclosure of confidential business information in a railroad transportation contract, including information such as the *rate for service, the service volume amounts on which those rates are based, the bases for adjusting the service rates, and the applicable service standards*, because, if disclosed, the disclosure would subject the Companies to substantial competitive harm *by allowing competitors to know the companies’ pricing strategies* and thus gain an advantage in bidding.³⁰ The same would be true if TXU Wholesale was required to reveal to all market participants its customer identities, pricing and quantity information, and the term of its on-going and recently completed transactions and contracts. The Attorney General also recently found in Open Records Letter Ruling 2002-4570 that certain information included in a bid proposal, including pricing and customer information, is confidential commercial and financial information because revealing it would allow competitors to adjust their bids against the entity in future procurements

²⁷ TPIA § 552.110(b).

²⁸ Act of Sept. 1, 1999, 76th Leg., R.S., ch. 1319, § 7, 1999 Tex. Gen. Laws 4500, 4503.

²⁹ Tex. Att’y. Gen. ORD-639 (1996) (citing *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir. 1985), cert. denied, 471 U.S. 1137 (1985)).

³⁰ Tex. Att’y. Gen. ORD-541 (1990) (emphasis added).

for similar equipment and, accordingly, the entity could lose future sales because a competitor would have “enhanced knowledge” of the cost-basis of the entity’s services.³¹

In sum, the Protected Information is commercially valuable and releasing it to a competitor or wholesale customer would cause TXU Wholesale substantial competitive harm. Disclosure of this highly sensitive competitive information could be used to gain a competitive advantage over TXU Wholesale in future competitive situations as it could be used to determine the companies’ positions in the wholesale electricity marketplace. Therefore, the Protected Information is confidential commercial and financial information that the Commission may not lawfully disclose under Section 552.110(b) of the TPIA.

C. The Protected Information is “trade secret” information exempt from disclosure pursuant to TPIA § 552.110(a).

1. The “Trade Secrets” Criteria

Section 552.110(a) of the TPIA prohibits the release to the public of trade secrets submitted by third parties to a regulatory agency.³² Trade secrets have been defined by the Texas Supreme Court using the definition found in the Restatement of Torts:

A trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers.³³

The Texas Attorney General has likewise recognized the Restatement definition of trade secrets as the appropriate standard.³⁴ The Restatement lists six factors to be considered when determining whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company’s] business;
- (2) the extent to which it is known by employees and others involved in [the company’s] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and to [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information; and
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.³⁵

The determination of whether information is a trade secret is often a question of fact.³⁶ Therefore, the Protected Information should be treated by the Commission as a trade secret if

³¹ Tex. Att’y Gen. ORL 4570 (2002) (noting, however, that because the bid involved procurement by a governmental agency, certain pricing information would be required to be released if the bid was successful because of the public interest in disclosure of prices related to government contract awards). *Id.*

³² TPIA § 552.110(a).

³³ *Restatement of Torts* § 757 cmt. b (1939) (emphasis added); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 766 (Tex. 1958), cert. denied, 358 U.S. 898 (1958).

³⁴ *See* Tex. Att’y. Gen. ORD-552 at 2 (1990).

³⁵ *Id.* at 2-3.

³⁶ *Id.* at 2.

TXU Wholesale makes a prima facie case for exemption and no argument is submitted that establishes as a matter of law that the information is not a trade secret.³⁷

A trade secret need not be a patentable device or process; when an entity has made an effort to keep information important to its business from competitors, trade secret protection is warranted.³⁸ Texas courts have ruled that items such as customer lists, pricing information, market strategies and unique contract provisions can all warrant trade secret protection.³⁹ In addition, Texas Attorney General Open Records Decisions clearly support the trade secret nature of customer information, pricing and quantity information, and detailed terms and conditions of contracts and transactions.⁴⁰ In Open Records Decision No. 552, the Attorney General held that customer lists were trade secrets that are exempt from disclosure because the information was valuable to the company, the company had taken steps to ensure the lists' secrecy, and, if disclosed, the customer lists could be combined with publicly-available information contained in other company filings to ascertain contract and pricing information.⁴¹ The Attorney General held in Open Records Decision No. 541 that contractual provisions regarding the particular terms of business transactions, such as the *rate for service, the service volume amounts on which those rates are based*, the bases for adjusting the service rates, and the applicable service standards are protected trade secret information because if a competitor obtained such information, that competitor could determine the methodology and structure of the company's pricing and gain an advantage in bidding for future contracts.⁴² This decision is directly applicable to the pricing, quantity, and termination date of electric power transactions and structured contracts that are unknown to competitors and are competitively sensitive. If every competitor could discern every other competitor's purchase and sale details (i.e., their market position), then the fundamental nature of the competitive market would be irreparably undermined.

Notably, in addition to the analysis related to the Restatement of Torts definition of a trade secret, PURA also specifically instructs the Commission to consider "customer names and addresses, prices, individual customer contracts, and expected load and usage data" that is required to be filed by regulated utilities as "highly sensitive trade secrets . . . [that are] not subject to disclosure under the [TPIA]."⁴³ If such data related to regulated utility filings is considered to be trade secret information, then certainly the data is also trade secret information with regard to *competitive* sales of electricity by non-utility competitive market participants.

2. *The Protected Information Satisfies the Trade Secrets Criteria and is Exempt from Public Disclosure*

A comparison of the Restatement factors to the Protected Information supports a determination that it should be protected as trade secret information.

³⁷ *Id.* at 5.

³⁸ See *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 601 (Tex. App.—Amarillo 1995, no writ); *T-N-T Motorsports, Inc. v. Hennessey Motorsports, Inc.*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, no writ).

³⁹ See *Evan's World Travel, Inc. v. Adams*, 978 S.W.2d 225, 231 (Tex. App.—Texarkana 1998, no writ).

⁴⁰ Tex. Att'y. Gen. ORD-255 (1980), ORD-89 (1975), and ORD 552(1990).

⁴¹ Tex. Att'y. Gen. ORD-552 (1990).

⁴² Tex. Att'y. Gen. ORD-541 (1990) (emphasis added).

⁴³ PURA § 32.101(c).

(1) The extent to which the information is known outside of [the company's] business.

TXU Wholesale has made every effort to guard and keep the Protected Information confidential. Outside of the TXU Wholesale and its legal counsel, the Protected Information has not been disclosed. Furthermore, the Protected Information is not available from any public source. It is proprietary information specific to TXU Wholesale and its customers.

Notably, the standard Edison Electric Institute (EEI) Master Power Purchase and Sale Agreement, which TXU Wholesale uses for the majority of its contracts, contains the following language:

10.11 Confidentiality. If the Parties have elected on the Cover Sheet to make this Section 10.11 applicable to this Master Agreement, neither Party shall disclose the terms or conditions of a Transaction under this Master Agreement to a third Party (other than the Party's employees, lenders, counsel, accountants or advisors who have a need to know such information and have agreed to keep such terms confidential) except in order to comply with any applicable law, regulation, or any exchange, control area or independent system operator rule or in connection with any court or regulatory proceeding, provided, however, each Party shall, to the extent practicable, use reasonable efforts to prevent or limit the disclosure. The Parties shall be entitled to all remedies available at law or in equity to enforce, or seek relief in connection with, this confidentiality obligation.

TXU Wholesale and its customers routinely elect that this confidentiality language apply. Thus, the confidentiality terms evidence that both TXU Wholesale and its customers consider the Protected Information to be confidential and that even if ordered to release the information pursuant to a regulatory proceeding, the parties must take reasonable efforts to prevent or limit the disclosure.

(2) The extent to which it is known by employees and others involved in [the company's] business.

Within the Companies, TXU Wholesale only allows access to the Protected Information on a limited basis to Company personnel who have a need to know such information.

(3) The extent of measures taken by [the company] to guard the secrecy of the information.

As discussed above with respect to paragraphs (1) and (2), TXU Wholesale has made every effort to guard and keep the Protected Information confidential, both internally and externally.

(4) The value of the information to [the company] and to [its] competitors.

The Protected Information is the core of TXU Wholesale's confidential and proprietary information related to the wholesale electricity market and is extremely valuable to the Companies. The Protected Information would be of great value to TXU Wholesale's competitors precisely because it is competitive information that is generally not known by or shared with TXU Wholesale's competitors, and because it would be impossible for such competitors to develop the Protected Information on their own. As discussed in Section II, TXU Wholesale's competitors could use the Protected Information to determine the Companies' market positions and competitive strategies. Moreover, contractual and transactional information

concerning sales of electricity could be used by a competitor to design similar, competitive products, but with intentional material differences. These variances could mean the difference between a winning offer and a losing offer. Price differentiation is the key competitive advantage that an electricity supplier can offer to potential customers.

(5) The amount of effort or money expended by [the company] in developing the information.

TXU Wholesale has spent a significant amount of time and money developing its wholesale electricity market strategy and the systems necessary to implement that strategy. TXU Wholesale has similarly dedicated significant resources to ensuring that its market strategy and market position are not disclosed to competitors.

(6) The ease or difficulty with which the information could be properly acquired or duplicated by others.

It would be extremely difficult for persons outside of TXU Wholesale to acquire or duplicate the Protected Information because of the nature of the information and protections taken to guard it, which is discussed above in paragraphs (1) and (2).

Accordingly, the Protected Information is trade secret information and thus may not be disclosed to the public pursuant to Section 552.110(a) of the TPIA.

IV. CONCLUSION

The information contained in TXU Wholesale's Quarterly Wholesale Electricity Transaction Report for "Counterparty," "Counterparty ID," "Affiliate," "Termination Date," "Quantity," "Price," and "Total Charge" reveal the identity of TXU Wholesale's customers and transaction-specific terms and pricing of TXU Wholesale's wholesale electricity sales. For the reasons discussed above, such information is proprietary, competitively sensitive information, protected commercial and financial information, constitutes TXU Wholesale's trade secrets, and is classified as confidential by law. As a consequence, such information is protected from public disclosure by the TPIA and PURA.