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COMPLAINT OF CALPINE	§	
CORPORATION AND NRG ENERGY,	§	PUBLIC UTILITY COMMISSION
INC. AGAINST THE ELECTRIC	§	
RELIABILITY COUNCIL OF TEXAS	§	
AND APPEAL OF DECISION	§	OF TEXAS
CONCERNING THE HOUSTON	§	
IMPORT PROJECT	§	

**ERCOT'S RESPONSE TO CALPINE CORPORATION'S AND NRG ENERGY, INC.'S MOTION TO COMPEL ERCOT TO ANSWER REQUESTS FOR INFORMATION**

Electric Reliability Council of Texas, Inc. ("ERCOT") files this response to Calpine Corporation's and NRG Energy, Inc.'s (collectively, "Houston Generators") Motion to Compel ERCOT to Answer Requests for Information, which was filed with the Public Utility Commission of Texas ("Commission") on June 30, 2014. ERCOT was never served with the Houston Generators' motion. However, in the interest of moving this case forward expeditiously, ERCOT responds to the motion five working days after it was filed. This response is timely filed.

ERCOT filed objections on June 23, 2014, to requests for information submitted by the Houston Generators that (1) would require ERCOT to produce documents that do not exist and would require new analysis to create, or (2) are irrelevant to this docket.<sup>1</sup> The Houston Generators filed a motion to compel ERCOT to respond to those requests. For the reasons set forth in ERCOT's objections and in this response, the Houston Generators' motion should be denied.

**I. ERCOT Should Not be Compelled to Perform New Analysis for the Houston Generators (RFIs 1-29, 2-10 and 2-11)**

P.U.C. Procedural Rule 22.141(a) states that "[a] person is not required to produce a document or tangible thing unless it is within that person's constructive or actual possession,

<sup>1</sup> Objections of Electric Reliability Council of Texas, Inc. to Calpine Corporation's and NRG Energy, Inc.'s First and Second Request for Information to ERCOT (June 23, 2014).

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custody, or control.” In its independent review of the Houston Import Project, ERCOT performed analysis consistent with the applicable transmission planning requirements. ERCOT also performed sensitivity analyses to verify the reasonableness of ERCOT’s conclusions and to respond to comments from stakeholders (including the Houston Generators). In its Independent Review of the Houston Import RPG Project and in response to discovery requests from the Houston Generators, ERCOT has provided hundreds of pages of information about those analyses.<sup>2</sup> But the Houston Generators also request that ERCOT provide the results of analysis that ERCOT has not performed. ERCOT is not required to produce such results because they do not exist and ERCOT, therefore, does not have them within its constructive or actual possession, custody, or control.<sup>3</sup>

In addition, the Commission’s discovery procedures cannot reasonably be read to require ERCOT’s transmission planning staff to perform the Houston Generators’ analysis for them. If the Houston Generators believe that additional analysis should be performed, they should retain an expert to do so. ERCOT has provided the power flow base case models used for the HIP analysis in response to discovery requests from the Houston Generators. Those models could be used by the Houston Generators to perform the requested analysis.

Furthermore, the dockets cited by the Houston Generators do not support the relief they seek and, even if they did, would represent bad policy if applied to this proceeding. The most recent docket cited is TXU Energy Company’s 2001 application for a price to beat fuel factor

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<sup>2</sup> Electric Reliability Council of Texas, Inc.’s Response to Calpine Corporation’s and NRG Energy, Inc.’s Complaint Against the Electric Reliability Council of Texas and Appeal of Decision Concerning the Houston Import Project at Bates 32-77 (June 10, 2014); Electric Reliability Council of Texas, Inc.’s Responses to Calpine Corporation’s and NRG Energy, Inc.’s First Request for Information to ERCOT (July 3, 2014); Electric Reliability Council of Texas, Inc.’s Responses to Calpine Corporation’s and NRG Energy, Inc.’s Second Request for Information to ERCOT (July 3, 2014).

<sup>3</sup> P.U.C. PROC. R. 22.141(a).

tariff in connection with the implementation of customer choice.<sup>4</sup> That docket does not support the Houston Generators' request for two reasons. First, the information requested in the TXU price to beat docket was estimates of costs that TXU would incur in the future. The ALJ determined that TXU was in the best position to forecast its own future costs. Here, ERCOT has already provided information to the Houston Generators that would allow them to perform the requested analysis if they are willing to commit the resources to doing so. Second, this is not a utility ratemaking proceeding in which the utility bears the burden of proof to justify a new tariff. Rather, this is an appeal of an ERCOT Board decision made following months of stakeholder review and ERCOT's independent analysis. ERCOT processed the Houston Import Project through the Regional Planning Group ("RPG"), responded to numerous comments from stakeholders (including the Houston Generators), presented its recommendations to the ERCOT Technical Advisory Committee ("TAC") and the ERCOT Board of Directors ("Board"), and received endorsements of those recommendations from both TAC and the ERCOT Board. Remaining dissatisfied after the conclusion of this robust analysis and review process, the Houston Generators now appeal the ERCOT Board's decision. Rather than requiring ERCOT's transmission planning staff to perform new analysis for them, the Houston Generators should be required to bear the cost of performing the new analysis they believe will show error in the ERCOT Board's decision. It would be bad policy to require otherwise.

The Houston Generators also cite to a 2001 Southwestern Public Service Company fuel factor docket.<sup>5</sup> In that docket, the SOAH ALJ ordered Texas Industrial Energy Consumers ("TIEC") to produce information in the possession of TIEC members. That order does not

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<sup>4</sup> *Application of TXU Energy Company to Implement Price to Beat Fuel Factor*, Docket No. 24040, Order No. 10 (June 15, 2001).

<sup>5</sup> *Application of Southwestern Public Service Company for Authority to: (1) Revise its Fixed Voltage Level Fuel Factors; (2) Surcharge its Historical Fuel Under-Recoveries; (3) Surcharge its Estimated Fuel Under-Recoveries*, Docket No. 23718, Order No. 9 (May 3, 2001).

support the Houston Generators' request that ERCOT produce information that does not presently exist and would require new analysis to create. Rather, the order addressed whether an organizational party could be required to produce information in the possession of the organization's members.

Finally, the third docket cited by the Houston Generators is a 1994 El Paso Electric rate case.<sup>6</sup> As explained above, this is not a ratemaking proceeding in which the utility bears the burden of proof to justify a new tariff. Rather, this is an appeal of an ERCOT Board decision following months of analysis and public review. It would be bad policy to require ERCOT's transmission planning staff to perform the Houston Generators' analysis for them, especially in light of the significant efforts made by ERCOT to respond to comments from the Houston Generators during the RPG process and subsequent review by TAC and the ERCOT Board.

For all of these reasons, the Houston Generators' motion to compel ERCOT to respond to the following requests (including the underlined portion of requests 1-29 and 2-11 and all of request 2-10) should be denied:

1-29. *On February 17, 2014, Calpine filed with ERCOT Supplemental Comments that questioned ERCOT's 2010-2020 load growth assumptions for ERCOT, Houston Load Zone, the North Central Zone and Southern Zone because the assumptions varied widely from actual zone growth rates for the period 2003-2013. ERCOT's response stated, in part, "ERCOT concludes that Calpine's assertion 'if the relative growth rate for Houston and the South weather zone is lower or on par with that of North Central, the need for additional import capability into Houston, under the same G-1+N-1 reliability requirement, would have disappeared' is not supported based on the reliability and sensitivity studies that ERCOT has performed for the this review." Please provide the reliability and sensitivity studies referenced in ERCOT's response. Please provide analysis results that show how the need for North – Houston transfer capability will change, if load in the Coast, North Central and Southern weather zones grows at a similar rate from 2010 to 2018 (i.e., start from the 10DSA 2010 SUM1 Final 04162010 SSWG case, and then grow the load through 2018 at a same rate for these zones). Also, please provide analysis to confirm, using a uniform 1.30% growth rate for all*

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<sup>6</sup> *Application of El Paso Electric Company for Authority to Change Rates and of Central and South West Corporation and El Paso Electric Company for Approval of Acquisition*, Docket No. 12700, 20 P.U.C. BULL. 79, Order No. 18 (April 15, 1994).

weather zones, whether the need for additional import will completely disappear. If not, please confirm how much additional import capability is needed.

- 2-10. *At page 19 of ERCOT's Response to the Complaint, ERCOT asserts "[t]hat analysis showed that 1,800 MW of additional generation or demand response would be required to defer the project for one year." How much additional generation or demand response would be necessary to defer the HIP for five years?*
- 2-11. *At page 20 of ERCOT's Response to the Complaint, ERCOT states "[t]he Houston Generators complain that ERCOT's new load forecasting methodology should have been used in ERCOT's Houston Import Project analysis. But that load forecast was not completed until February of 2014, the same month that ERCOT published its Independent Review." Has ERCOT run its HIP analysis using the new load forecasting methodology from the latest CDR? Why or why not? If not, please rerun the HIP analysis using the same assumptions and methodologies, but using the load forecasting methodology used in the latest CDR.*

**II. ERCOT Should Not be Compelled to Respond to Irrelevant Requests (RFIs 1-7(b)(i), 1-18, 1-27, 2-2, 2-3 and 2-9)**

P.U.C. Procedural Rule 22.141(a) states that “[p]arties may obtain discovery regarding any matter, not privileged or exempted under the Texas Rules of Civil Evidence, the Texas Rules of Civil Procedure, or other law or rule, that is relevant to the subject matter in the proceeding.” The Houston Generators brought this complaint under P.U.C. Procedural Rule 22.251.<sup>7</sup> Subsection (b) of that rule allows an affected entity to challenge ERCOT conduct “that is in violation or claimed violation of any law that the commission has jurisdiction to administer, of any order or rule of the commission, or of any protocol or procedure adopted by ERCOT pursuant to any law that the commission has jurisdiction to administer.” Parties may, therefore, obtain discovery in this docket regarding ERCOT conduct that is in claimed violation of any law, rule, order, or protocol within the Commission’s jurisdiction. Because the requests to which ERCOT has objected do not fall within that scope, the Houston Generators’ motion to compel should be denied.

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<sup>7</sup> Calpine Corporation’s and NRG Energy, Inc.’s Complaint Against the Electric Reliability Council of Texas and Appeal of Decision Concerning the Houston Import Project at 10 (May 13, 2014) (“This proceeding seeks relief under P.U.C. PROC. R. 22.251”).

The Houston Generators assert that ERCOT's relevance objections are based on ERCOT's interpretation of the applicable transmission planning authorities. But, in fact, the Houston Generators have either failed to cite a law, rule, order, or protocol within the Commission's jurisdiction to which their requests relate or have themselves adopted an interpretation that is inconsistent with the relevant authorities.

The Houston Generators take issue with ERCOT's citation to P.U.C. Procedural Rule 22.251 in its objections because that rule "is not a discovery rule."<sup>8</sup> But ERCOT cited that rule in support of its relevance objection, and the rule defines the scope of this proceeding. Few things are more germane to the question of whether a discovery request seeks relevant information than the rule defining the scope of the proceeding.

The Houston Generators purport to quote P.U.C. Procedural Rule 22.141(a) as allowing discovery of inadmissible evidence that is "reasonably calculated to lead to the discovery of admissible evidence."<sup>9</sup> ERCOT notes that the rule language purportedly quoted by the Houston Generators does not appear in the cited rule or any other Commission procedural rule. Furthermore, the Houston Generators fail to explain how, even if the information they seek is not itself admissible, it would lead to the discovery of admissible evidence.

ERCOT responds to the Houston Generators' motion as to the individual requests as follows:

*1-7. The following requests for information are in reference to the Independent Review.*

*b. Page 2 of the Independent Review states, "Historical data indicates that approximately 1,800 MW of new generation has been added in the Houston region over the past ten years (2004 to 2013), while approximately 3,800 MW of generation has been retired over that time."*

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<sup>8</sup> Calpine Corporation's and NRG Energy, Inc.'s Motion to Compel the Electric Reliability Council of Texas to Answer Requests for Information at 6 (June 30, 2014).

<sup>9</sup> Calpine Corporation's and NRG Energy, Inc.'s Motion to Compel the Electric Reliability Council of Texas to Answer Requests for Information at 6 (June 30, 2014).

- i. *Please provide historical data showing the amount of generation added and the amount of generation retired in the North Central weather zone region over this same timeframe.*

1-18. *Please produce the gross and net capacity additions of generation capacity interconnected and capable of delivering electricity to the ERCOT grid within the Coastal weather zone for each year from 2006 to the present. Please provide the same information for the North weather zone and the North Central weather zone.*

In support of the relevance of these requests, the Houston Generators once again *state their argument* that additional generation is needed in the North Central weather zone to solve the identified reliability issues.<sup>10</sup> But the Houston Generators once again *fail to cite* a single law, rule, order, or protocol within the Commission's jurisdiction to which the requested information relates. In the power flow modeling that found a reliability need for the Houston Import Project, ERCOT did not include this historical generation information because the applicable transmission planning authorities do not instruct ERCOT to do so. The requested information, therefore, would have no bearing on whether ERCOT violated a law, rule, order, or protocol within the Commission's jurisdiction, as illustrated by the Houston Generators' failure to cite such an authority.

1-27. *Please explain the reason the Pondera King Power Project is included in the available capacity for 2018 in the February 2014 CDR, but excluded in the May 2014 CDR. Please confirm or deny that the April 2014 ERCOT System Planning Monthly Status Report shows a "Projected COD" for the Pondera King Power Project of July 2017.*

As with the above requests, the applicable transmission planning authorities do not instruct ERCOT to consider whether a resource is included in the Capacity, Demand, and Reserves ("CDR") report when performing its analysis of the reliability need for a transmission project, so whether Pondera King was included in the CDR is not relevant to this docket. The Houston Generators seem to argue that ERCOT's response to the Houston Generators' claims

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<sup>10</sup> Calpine Corporation's and NRG Energy, Inc.'s Motion to Compel the Electric Reliability Council of Texas to Answer Requests for Information at 11 (June 30, 2014).



about Pondera King establishes that those claims are relevant. ERCOT has never stated that whether Pondera King is included in the CDR is relevant to this docket, and ERCOT's response to an irrelevant issue cannot reasonably be read as an admission that the issue is relevant.

2-2. *Do you agree that reliability transmission projects recommended by ERCOT, if constructed, affect future LMPs in the ERCOT market place as compared to what they would be if the reliability projects were not constructed? If not, please explain the basis of your disagreement.*

2-3. *Do you agree that to the extent future ERCOT LMPs are affected, the economics of new resources (generation or load) will also be affected? If not, please explain the basis of your disagreement.*

In support of the relevance of these requests, the Houston Generators once again state their argument that the Houston Import Project will suppress locational marginal prices by reducing congestion costs.<sup>11</sup> But they fail to establish how that issue relates to an alleged violation of a law, rule, order, or protocol within the Commission's jurisdiction.

The Houston Generators attempt to show the relevance of these requests by reading into the ERCOT Protocols and Planning Guides a requirement that ERCOT must perform an economic analysis of congestion costs in its analysis of the need for a reliability project. While P.U.C. Substantive Rule 25.101(b)(3)(A)(i) requires an economic analysis for a transmission project recommended for economic reasons, it explicitly states that this requirement "does not apply to an application for a transmission line that is necessary to meet state or federal reliability standards." And in fact, ERCOT has recommended, and the Commission has approved, construction of thousands of miles of transmission lines to address reliability criteria violations without the analysis urged by the Houston Generators. The Houston Generators have once again failed to show how the requested information is relevant to an applicable law, rule, order, or protocol within the Commission's jurisdiction.

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<sup>11</sup> Calpine Corporation's and NRG Energy, Inc.'s Motion to Compel the Electric Reliability Council of Texas to Answer Requests for Information at 13 (June 30, 2014).

2-9. Is it possible for generation projects to address transmission reliability criteria violations? If yes, how does ERCOT assess cost-efficiency of a transmission-only solution, a generation and transmission combined solution, and a generation-only solution?

- a. *Do you agree that for the HIP to solve the reliability criteria violation you claim exists, generation and other resources must be available outside the Coastal weather zone to produce the energy to be imported into the Coastal weather zone?*
- b. *Under the conditions studied, is there sufficient generation capacity actually in ERCOT to meet demand in all cases considered in the HIP analysis? If not, does ERCOT recommend investors must build generation to address the generation capacity aspects of transmission reliability criteria?*

ERCOT objected to the underlined portion of this request. As with requests 2-2 and 2-3 above, the Houston Generators assert that the underlined portion of this request is relevant because ERCOT should have performed a full economic analysis. But, as discussed above, P.U.C. Substantive Rule 101(b)(3)(A)(i) expressly provides that such an analysis is not required for a reliability project like this one. The Houston Generators have once again failed to show how the requested information is relevant to an applicable law, rule, order, or protocol within the Commission's jurisdiction.

### **III. ERCOT Has Not Prejudiced the Houston Generators by Stating that it May Later Respond to Requests to Which it Objected.**

The Houston Generators complain about the statement in ERCOT's objections that "ERCOT may re-evaluate its objection to this request after the Commission provides guidance to the parties regarding the issues to be addressed."<sup>12</sup> ERCOT properly objected to each of the discovery requests discussed in this pleading. Pursuant to P.U.C. Procedural Rule 22.144(d)(4), "[t]he requirement to respond to those requests, or portions thereof, to which objection is made shall be postponed until the objections are ruled upon and for such additional time thereafter as

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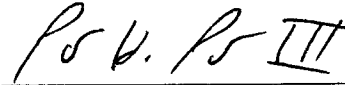
<sup>12</sup> Calpine Corporation's and NRG Energy, Inc.'s Motion to Compel the Electric Reliability Council of Texas to Answer Requests for Information at 8 (June 30, 2014).

the presiding officer may direct.” Consequently, ERCOT is not presently required to respond to the requests to which it objected. In the event that ERCOT later responds voluntarily to requests to which it objected, ERCOT would oppose a supplemental reply filing by the Houston Generators unless and until they establish good cause for such a filing. The Houston Generators’ claim of prejudice at this point is mere speculation and completely unsupported.

#### **IV. CONCLUSION**

For the reasons stated above, ERCOT respectfully requests that the Commission deny the Houston Generators’ motion to compel.

Respectfully submitted,



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### CERTIFICATE OF SERVICE

I hereby certify that a copy of this document was served on all parties of record on July 8, 2014 by hand delivery, first-class U.S. mail, or facsimile.

