

IMPARTIAL HEARING EXAMINER'S MEMORANDUM NO. 1

I. Introduction

On January 14, 2016, the Impartial Hearings Examiner convened a prehearing conference. The primary purpose of the prehearing conference was for the recently appointed Impartial Hearings Examiner to introduce himself to interested stakeholders and to discuss procedural matters regarding Austin Energy's 2016 Rate Review proceedings.

Several persons and entities representing different ratepayer interests registered an appearance at the prehearing conference. Representatives for Austin Energy also entered an appearance. A list of those who entered an appearance at the prehearing conference is shown on Attachment A.

At the prehearing conference the stakeholders raised several issues generally involving the scope of and the procedures to be employed for review of Austin Energy's rates. More specifically the stakeholders representing the ratepayer interests raised the following issues:

1. The Extent of the Impartial Hearings Examiner's Authority
2. The Nature of the Process and the Related Procedural Rules
3. The Procedural Schedule for Review of Austin Energy's Rates
4. Access to Austin Energy's Confidential Data
5. Mechanisms for Citizen Participation and Citizen Access to Data
6. Ex Parte Prohibitions
7. Time for Intervention

8. The Scope of Issues within the Rate Review

This Memorandum will present a summary of the prehearing conference convened on January 14, 2016. Unless necessary for context, no reference is made to a particular stakeholder with regard to concerns a stakeholder may have identified or raised during the prehearing conference or in writing to the Impartial Hearings Examiner.

II. The Extent of the Impartial Hearings Examiner's Authority

The Impartial Hearings Examiner noted at that he did not have the authority to establish the procedural rules or modify the start date or the end date for the proceedings. The Impartial Hearings Examiner noted that just as an administrative law judge ("ALJ") at the State Office of Administrative Hearings ("SOAH") could not modify, for example the procedural or substantive rules adopted by the Public Utility Commission of Texas applicable to rate proceeding in which an investor owned utility seeks a change in its rates, the Impartial Hearings Examiner was equally bound the procedural rules as established by the City of Austin through its corporate structure and management.

With regard to the scope of the Impartial Hearings Examiner's authority, the Impartial Hearings Examiner believes he has the authority to interpret the procedural rules adopted by Austin Energy, to determine whether a particular issue was relevant to the proceedings, and to establish the scope of issues to be addressed in the proceeding. Regarding the scope of issues to be addressed, Austin Energy clarified that while it would in the near future issue its statement of issues to be addressed in the proceeding, that the list of issues it would identify would not serve to establish the scope of issues to be addressed. Austin Energy agreed that other parties could raise issues those parties believed to be of relevance to Austin Energy's rates and revenues, and that the Impartial

Hearings Examiner had the authority to determine whether the issues raised for discussion by the other parties were within the scope of the proceeding.

The Impartial Hearings Examiner believes that it is crucial to the integrity of the process that he have the authority to interpret the procedural rules adopted by Austin Energy, to determine whether a particular issue was relevant to the proceedings, and to establish the scope of issues to be addressed in the proceeding.

III. The Nature of the Process and the Related Procedural Rules

A. Impartial Hearings Examiner's Authority to Establish the Procedural Rules

The Impartial Hearings Examiner does not have the authority to establish the procedural rules applicable to Austin Energy's 2016 Rate Review. That authority lies with the City Manager's Office, and ultimately with the City Council.

The Impartial Hearings Examiner's lack of authority to establish the procedural rules applicable to the Austin Energy 2016 Rate Review process appeared to be the issue of greatest concern to the stakeholders representing the ratepayers' interests at the prehearing conference. The consensus of those stakeholders expressing concern with the procedural rules was that a process by which the entity whose rates were the subject of review to be also able to be the entity that determines the procedures under which that review is to be conducted, was a fundamentally unfair procedure. Further, to instill public confidence in the rate-setting process and ensure that all parties are fairly and equally treated, those stakeholders urged that it should be the Impartial Hearings Examiner that should have the final authority on the content of the rules.

The Impartial Hearings Examiner believes that a process by which parties can propose changes to the procedural rules presented by Austin Energy would help ensure

that stakeholders and the public view the 2016 Rate Review proceedings as one of integrity. Whether the changes proposed to the procedural rules presented by Austin Energy are to be approved by the Impartial Hearings Examiner or some other city organization, committee, or department, is beyond the Impartial Hearings Examiner's authority to dictate. As noted above, in proceedings before an ALJ at SOAH in rate proceedings involving investor owned utilities does not have the authority to modify the rules properly adopted by the Public Utility Commission of Texas; that authority ultimately lies with the PUCT itself. Here, that authority lies either with the City Manager's Office, or the City Council.

While most stakeholders urged establishment of procedural rules that closely tracked the procedural rules employed by the PUCT in rate cases before that state agency, sentiment was also expressed for rules that allowed for a more simplified process so as to allow those with a lesser understanding of the PUCT'S ratemaking process, to participate.

The Impartial Hearings Examiner suggests that the procedural rules should be such that any ratepayer wishing to provide input, may do so without the need to engage the services of attorneys or expert witnesses. So long as the data presented is based on verifiable sources and is not hearsay, the Impartial Hearings Examiner will be able to weigh the credibility of the evidence presented by a party.

B. Applicability of the Administrative Procedures Act (Government Code Chapter 2001)

Several stakeholders also noted that Austin Energy 2016 Rate Review should adhere the procedures employed by ALJs at SOAH in prosecuting rate cases originating at the PUCT. The Administrative Procedures Act ("APA") governs proceedings before the PUCT. No one at the prehearing conference urged that the APA applies to

proceedings before the City of Austin, nor could they. The APA does not apply to proceedings before the City of Austin and its commissions and departments.

While the APA provides parties in contested cases before SOAH and the PUCT with certain procedural safeguards, simply put, the APA does not apply to the City of Austin's processes. Further, the Impartial Hearings Examiner does not recommend that the City apply to itself those procedures. The City of Austin has its own long established avenues for citizen input and here the City along with Austin Energy is taking an extra step in providing customers served by Austin Energy a venue through which those customers may not only express their concerns, but also provide substantive input on the level of Austin Energy's rates. The Impartial Hearings Examiner is not aware of any other city that owns its utility, that is, a municipally owned utility, that provides a hearings process of the type contemplated by Austin Energy.

Nonetheless, the Impartial Hearings Examiner reiterates that to instill confidence in the process, there should be a mechanism in place to allow interested stakeholders to provide input on the procedural rules and that Austin Energy should not be the sole arbiter of the content of the procedural rules applicable to Austin Energy's 2016 Rate Review.

C. Time for Intervention

Some parties also expressed concern with the deadline for interested stakeholders to formally participate in Austin Energy's 2016 Rate Review. The long and short of it is that the procedural rules establish a date by when an interested person provides notice of its intent to "intervene" in the proceedings and that deadline as proposed by Austin Energy is thirty (30) days after Austin Energy presents its tariff package. The Impartial

Hearings Examiner believes that 30 days is an appropriate deadline by when an interested person should submit its request to intervene. However, any interested person should also be allowed to submit a late-filed request to intervene, but that person will take the case as she/he finds it and will not have the ability to affect the procedural schedule or otherwise present data beyond the deadlines ultimately approved.

D. Mechanisms for Citizen Participation and Citizen Access to Data

Representatives for residential ratepayers and/or small commercial ratepayers also suggested that a person should not have to formally intervene in order to provide comments expressing their concerns with Austin Energy's rates. The Impartial Hearings Examiner agrees.

Any ratepayer wishing to express their concerns regarding Austin Energy's rates should be allowed to state those concerns in a manner akin to "public citizen" communications. However, because of the short schedule within which to conduct these proceedings and provide a recommendation to the City Council, such comments will of necessity need to be brief. Further, the Impartial Hearings Examiner will not consider such comments to be evidence in the case nor may such comments form the basis for the Impartial Hearings Examiner's recommendations to the City Council on the merits of Austin Energy's rates.

With regard to the general public's access to data regarding Austin Energy's rates, all non-confidential data will be made available at the City of Austin's web site.

E. Ex Parte Prohibitions

1. Ex Parte Prohibitions Regarding Communications with the Impartial Hearings Examiner.

All participants at the prehearing conference agreed that no person, whether formally in the proceeding as an “intervenor” or from the general public, should have any discussions with the Impartial Hearings Examiner regarding a substantive issue in the proceeding. The Impartial Hearings Examiner agrees. No party should communicate with the Impartial Hearings Examiner regarding any substantive issue pending in the proceeding. However, a party may inquire of the Impartial Hearings Examiner or his assistants on matters purely of a procedural nature seeking to determine, for example, the due date for a particular filing.

2. Ex Parte Prohibitions Regarding Communications with Members of the City Council.

Some stakeholders suggested that city employees working for Austin Energy, including Austin Energy’s attorneys, who are in actuality the City’s attorneys as members of the City Attorney’s Office, be precluded from discussing with members of the City Council issues pertaining to Austin Energy’s rates until after the Austin Energy 2016 Rate Review is completed.

Austin Energy stated that such an approach is not workable noting that the City Council is in reality the City Attorney’s client and that as the City’s attorney it not only as a right to communicate with its client, but a duty to keep its client fully informed.

One stakeholder suggested that no party, including Austin Energy, should be communicate with members of the City Council regarding Austin Energy’s rates until the Rate Review process concluded.

Another stakeholder suggested that members of the City Council themselves refrain from participating in discussions with the public or with the employees of Austin

Energy, presumably including employees of the City Attorney's Office, during the pendency of the Rate Review process.

While the Impartial Hearings Examiner is sympathetic to the concerns raised by the stakeholders, the Impartial Hearings Examiner in the end observes that Austin Energy is a municipally owned utility that is ultimately governed by its City Council. In turn the City Council is responsible to its citizens. Further, a prohibition against communications by members of the City Council with their constituents, or with their attorney, the City Attorney and members of the City Attorney's Office, is not an workable, and perhaps not even an enforceable solution.

F. The Scope of Issues within the Rate Review

Several parties expressed concern, as with the procedural rules, that Austin Energy would be able to dictate the scope of issues to be addressed in the proceeding. Austin Energy clarified that, while it would present a list of issues it believed to be of relevance to the proceeding, other parties had the right to present their own list of issues and that the Impartial Hearings Examiner had the authority to determine whether the issue was within the scope of the case.

The Impartial Hearings Examiner suggests that it is crucial to the integrity of the process that any intervenor in the case be allowed to present issues it believes need to be addressed in establishing Austin Energy's rates and that the Impartial Hearings Examiner should be authorized to determine the relevance of those issues.

IV. The Procedural Schedule for Review of Austin Energy's Rates

At the prehearing conference Austin Energy presented its proposed schedule for the proceeding. Austin Energy noted that, while there may be some flexibility with

regard to dates between the start of the proceeding and the end date, the end date in particular was not subject to change. Austin Energy stated that from its view the direction it received from the City Manager and the City Council was that the proceeding should be concluded so that the City Council could make its decisions on Austin Energy's rates by June 30, 2016. With that in mind, Austin Energy proposed the following schedule:

- January 25, 2015 — Austin Energy releases rate recommendations
- January 25, 2016 — Utility Oversight Committee briefing on rate design recommendations
- January 25, 2015 — Electric Utility Commission briefing on rate design recommendations
- Late January, 2016 — Begin proceedings before Impartial Hearings Examiner
- May 6, 2016 — Impartial Hearings Examiner's recommendations report released
- May 2016 — Hold three Council Work Sessions
- June 2016 — Hold two City Council public hearings
- June 23, 2016 — Final Council decision meeting

Most, if not all persons in attendance at the prehearing conference expressed serious concerns with the schedule and questioned the need to conclude the proceedings by June 30, 2016. Those parties familiar with rate-setting proceedings at the PUCT noted that the schedule Austin Energy proposed made ineffective or meaningless the review the City was undertaking. All parties urged a longer schedule.

The Impartial Hearings Examiner notes that in major rate proceedings before the PUCT, the PUCT is required to enter its final order within 185 days from the date the

utility files its application to increase rates. Often by agreement of the parties, including the utility, that schedule is extended. Absent an extension, a hearing on the utility's proposed increase is held on about the 100th day after the utility files its application to increase rates. Holding a hearing on the 100th day means that the parties have approximately 86 days to undertake their investigation of the utility's "rate-filing package." That investigation occurs through the discovery process akin to the discovery process in civil litigation.

Under Austin Energy's proposed schedule, if it provides its "Tariff Package" on January 25, 2016, that would suggest that under the procedural schedule in a proceeding before the PUCT, the hearings on the merits of its proposals would begin in early May, 2016 (about May 4, 2016). But under Austin Energy's proposed schedule, the Impartial Hearings Examiner's final report to the City Council is due by about May 6, 2016, so that the Impartial Hearings Examiner's report may be presented to the City Council by June 23, 2016.

For the Impartial Hearings Examiner to issue his recommendations by May 6, 2016, this means that the hearings on Austin Energy's "Tariff Package" must conclude by about April 1, 2016 and that the parties will have presented their initial "closing briefs" to the Impartial Hearings Examiner by no later than April 8, 2016.

Assuming a 5-day hearing, the hearings process would begin on about March 28, 2016 and conclude on April 1, 2016. If Austin Energy makes available its "Tariff Package" on January 25, 2016, this means that the parties would only have about 56 days to undertake their evaluation and prepare their respective recommendations to the Impartial Hearings Examiner.

From the Impartial Hearings Examiner's perspective a schedule that calls for conclusion of the proceedings by June 30, 2016, and here, by June 23, 2016 as proposed by Austin Energy, is a challenging proposition. The Impartial Hearings Examiner is fully prepared to meet the deadline of May 6, 2016, but has serious concerns that the quality of the parties' presentations, including the Impartial Hearings Examiner's report, may suffer because of the tight schedule.

The Impartial Hearings Examiner also observes that the heavier lifting will be done by the "intervenor" parties in preparing their recommendations regarding Austin Energy's Tariff Package.

V. Access to Austin Energy's Confidential Data

The other major area of concern is the ability of parties to the proceedings, that is, "intervenor," to gain access to data that Austin Energy considers to be of a competitive nature, and thus confidential and not subject to public disclosure.

Austin Energy proposes that if a party seeks to view data that Austin Energy deems to be confidential, that a party must seek an opinion from the Attorney General of Texas and only if and after the Attorney General issues an opinion that the data are subject to public disclosure, will Austin Energy make the data available.

The stakeholders at the prehearing conference expressed serious reservations with Austin Energy's proposal noting that at a minimum, obtaining an opinion from the Attorney General could take at least six months, if not longer. Obviously, a delay of such length in effect means that the data Austin Energy deems confidential would not be available for use in the Austin Energy 2016 Rate Review. The stakeholders suggested

that Austin Energy utilize the procedures employed at the PUCT in most contested cases to allow access to confidential data.

At the PUCT the ALJs at SOAH enter a “Protective Order” that provides a mechanism by which parties to a rate case that agree to abide by the Protective Order and be bound by it, may gain access to confidential data. The stakeholders at the prehearing conference noted that in the appeal of Austin Energy’s rates in 2012, the PUCT adopted a Protective Order that allowed all intervenors access to data Austin Energy considered to be confidential. Those stakeholders questioned why such a mechanism could not be employed in the Austin Energy 2016 Rate Review.

Austin Energy noted that because Austin Energy is but one department within the City of Austin, that it could not depart from the process the City Attorney’s Office deemed necessary for protection of the City’s confidential data, and that it could not and would not agree to use of a Protective Order along the lines employed by the PUCT.

The Impartial Hearings Examiner acknowledges the concerns expressed by the non-Austin Energy stakeholders: how can a party undertake a full evaluation of Austin Energy’s rates if it is in effect going to be denied access to what may be critical data relevant to Austin Energy’s rates. At the same time, the Impartial Hearings Examiner is also sympathetic to the concerns expressed by Austin Energy: it is a public entity subject to the Public Information Act and its concerns and the City Attorney’s concerns go beyond those of only Austin Energy.

Further, in proceedings before the PUCT, licensed attorneys represent most intervenors and if a party breaches the Protective Order there can be serious repercussions to that party and its attorney(s). Here, if an individual ratepayer is

representing him or herself, and violates the Protective Order, there are few, if any, enforceable sanctions against that party.

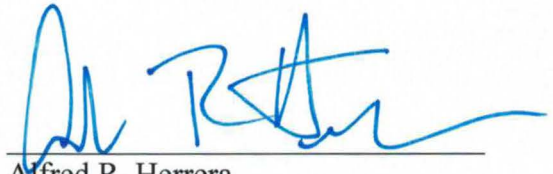
The Impartial Hearings Examiner proposes that Austin Energy and the interested stakeholders continue to examine whether any mechanism exists, or may be created, that meets the interests of Austin Energy and the City Attorney's Office, and those interested stakeholders granted "intervenor" status in the Austin Energy 2016 Rate Review that may allow them access to data Austin Energy deems confidential in nature.

VI. Proposed Changes to Austin Energy's Proposed Procedural Rules

It was the Impartial Hearings Examiner's intention to opine and make recommendations regarding Austin Energy's proposed rules, incorporating some of the suggestions proposed by, for example counsel for NXP/Samsung and Texas Legal Services Center. But in light of the letter dated January 20, 2016 that several of the stakeholders sent to the City Council, and given the apparent lack of authority the Impartial Hearings Examiner has to modify the procedural rules, the Impartial Hearings Examiner declines at this point to make any recommendations on the procedural rules unless and until the Impartial Hearings Examiner's authority to do so is clarified by the City Manager's Office or the City Council.

The Impartial Hearings Examiner does observe, however, that the more transparent and open to meaningful participation the proceedings are, the less the integrity of the process will be questioned. There will be no process that will please everyone and no process will be beyond criticism, but the ultimate goal should be as transparent and open a process as is reasonably obtainable.

The Impartial Hearings Examiner stands ready to respond to questions the City Council, the Electric Utility Commission, the City Manager, the City Attorney, or other city committees may have of him.



Alfred R. Herrera
Impartial Hearings Examiner

DATE: JANUARY 24, 2016

Xc: Copies Transmitted via Email to All Participants
That Registered an Appearance at the Prehearing
Conference Convened on January 14, 2016:

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Attachment A

PRE-CONFERENCE HEARING

AUSTIN ENERGY'S TARIFF	\$	BEFORE THE
PACKAGE: UPDATE OF THE 2009	\$	CITY OF AUSTIN
COST OF SERVICE STUDY AND	\$	
PROPOSAL TO CHANGE BASE	\$	IMPARTIAL HEARING
ELECTRIC RATES	\$	EXAMINER

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January 14, 2016

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The pre-conference hearing in the above-entitled matter came on to be heard before ALFRED HERRERA, Independent Hearing Examiner, beginning on the 14th day of January 2016, from 10:34 a.m. to 11:55 a.m. The proceedings were reported by Sandra S. Givens, Certified Shorthand Reporter in and for the State of Texas, reported by machine shorthand method, at Town Lake Center, 721 Barton Springs Road, Room 100, Austin, Texas 78704.

A P P E A R A N C E S

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