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AUSTIN ENERGY 2016 RATE REVIEW

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

**NXP Semiconductors and Samsung Austin Semiconductor, LLCs' Motion to Compel  
Austin Energy**

NXP Semiconductors (f/k/a Freescale Semiconductor, Inc.) ("NXP") and Samsung Austin Semiconductor, LLC ("Samsung"), files this Motion to Compel Austin Energy in response to Austin Energy's Objections to NXP and Samsungs' First Request for Information, and respectfully shows as follows:

**I. Procedural History**

NXP and Samsung served its first Request for Information (RFI) to Austin Energy on February 4, 2016. Pursuant to an agreement between the parties, filed on February 12, 2016, to extend the deadline pursuant to the City of Austin's Procedural Rule § 7.3(k), Austin Energy served on NXP and Samsung the *Objections of Austin Energy to NXP/Samsung's First Request for Information* ("Objections") on February 18, 2016. Under the same agreement between NXP, Samsung, and Austin Energy, NXP and Samsung had until February 25, 2016 to submit their motions to compel, therefore this motion is timely filed.

**II. General Response to Objections**

Pursuant to Procedural Rule § 7.3(e), "[i]f the requesting Party believes that the responding Party is unreasonably objecting to the Requests [for information], the requesting Party shall file a motion to compel..."<sup>1</sup> Austin Energy generally objected to several of NXP and Samsungs' RFIs stating they were "irrelevant, seek information concerning confidential competitive matters, seek publicly available information or seek information not in Austin Energy's possession."<sup>2</sup> NXP and Samsung disagree with these assertions because all questions

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<sup>1</sup> City of Austin Procedural Rules for the Initial Review of Austin Energy's Rates § 7.3(e) (Feb. 2, 2016) (Procedural Rules).

<sup>2</sup> Objections of Austin Energy to NXP/Samsung's First Request for Information at 1 (Feb. 18, 2016) (Objections).

asked by NXP and Samsung are within the scope of discoverable material as defined by Austin Energy in its Procedural Rules.

#### **A. RFIs Based on Information Related to the Tariff Package**

Austin Energy, who created the procedural rules with little substantive input from other parties, defined the scope of discovery in § 7.1(a). It defined discovery as “the formal process by which Parties can ask each other for information **related to the Tariff Package**, Statement of Issues, and the Parties’ Presentations.”<sup>3</sup> Section 7.1(a), which relates to the scope of discovery, continues by stating “[d]iscovery is limited to **relevant information** that is not unduly prejudicial and **can lead to discovery of admissible evidence.**” The RFI’s Austin Energy is objecting to ask questions related to the Tariff Package, and the rates discussed in the Tariff Package. Therefore, any Austin Energy assertions stating that information provided in the Tariff Package is not discoverable because they have defined the information as “irrelevant,” goes against Austin Energy’s own Procedural Rules. Austin Energy’s Procedural Rules specifically allows discovery as to “information related to the Tariff Package.” It is important to note that Austin Energy, on its own discretion, filed a comprehensive rate-filing package that included its costs and realized revenues from all of its tariffed rates, including both base rates and non-base rates, and for its non-utility operations. Austin Energy brought this information within the scope of discovery by including it in the Tariff Package.

Austin Energy wrote the procedural rules and provided the Tariff Package; therefore, if they truly did not want information to be questioned, they had the power to not include it in this proceeding by not referencing it in the Tariff Package. By referencing information regarding pass-through charges, including the Power Supply Adjustment, Regulatory Charge, and Community Benefits charge, Austin Energy itself brought this information within the scope of discoverable material as defined by *their* rules. As a result, it should not be permitted to object to questions raised related to these charges.

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<sup>3</sup> Procedural Rule § 7.1(a) (emphasis added).

## B. RFIs Can Lead to Discovery of Admissible Evidence

Though NXP and Samsung believe Austin Energy is attempting to limit the scope of this proceeding in a way that is inconsistent with Austin City Ordinance 20120607-055,<sup>4</sup> even if the scope of this proceeding is limited, as Austin Energy requests, to only base electric rates, the RFIs asked by NXP and Samsung “**can** lead to the discovery of admissible evidence.”<sup>5</sup> This standard is a much less stringent standard than the one Austin Energy believes should be met. In its Objections, Austin Energy seemed to create a different standard by objecting to the material because the “discovery requests seek information that is *neither relevant* to the issues presented in this proceeding nor is *reasonably calculated to lead* to the discovery of admissible evidence.”<sup>6</sup> This is not the standard required by Procedural Rule § 7.1(a). Procedural Rule § 7.1(a) only requires that the question **can lead** to discovery of admissible evidence, which is a very low standard.

NXP and Samsung argue that rates included in a customer’s bill, even if the rate is not part of Austin Energy’s base electric rates, are relevant to determine whether the base rates are reasonable and, therefore, questions related to non-base rates *can lead* to admissible evidence. As Texas Legal Services Center has pointed out in *AE Low Income Customers’ Response to Impartial Hearing Examiner’s Revised Memorandum No. 6*, Austin Energy made no attempt in its Tariff Package to separate costs and revenues associated with non-base rate services from the costs and corresponding revenues attributable to its base rates. Therefore, to truly understand the information presented as to the base rates, Parties will need to fully understand the inputs and corresponding information related to non-base rates. The only way to truly determine that non-base rate costs and revenues are not comingled with base rate costs and revenues is to allow a full vetting of both factors. For example, if Austin Energy was charging customers twice for a certain service, both in their base rates and non-base rates, unless discovery is allowed on non-base rate information, this double counting would never be discovered. Similarly, if this double counting is discovered through a discovery response that pertains to non-base rates, it would be

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<sup>4</sup> An Ordinance Prescribing and Levying Rates and Charges for Sales Made and Services Rendered in Connection with the Electric Light and Power System of the City of Austin for Residential, Commercial, Public, and Other Uses of Electric Light and Power Sold and Served by the City of Austin, Ordinance No. 20120607-055 (Ordinance).

<sup>5</sup> Procedural Rule § 7.1(a) (emphasis added).

<sup>6</sup> Objections at 2.

admissible as to the reasonableness of the base rates. Therefore, NXP and Samsung continue to argue that all inputs to a customer's rates need to be subject to discovery so that the reasonableness of any part of the rate can be determined. Costs and revenues from Austin Energy's non-base rate services need to be thoroughly reviewed and analyzed in order to ensure that Austin Energy has not included these costs and revenues in the costs that underlay its base rates.

Additionally, information related to Austin Energy's non-base rates can be used to refute certain presumptions and statements made by Austin Energy and, therefore, can lead to admissible impeachment evidence. For example, if Austin Energy uses different and inconsistent financial policies for their base rates and non-base rates, this would be admissible as to the reasonableness of the base rate and would likely only be revealed through discovery directed towards understanding the non-base rates. Again, the only way to truly understand the policies, rational, and actual costs of Austin Energy's base rates is to also understand Austin Energy's non-base rates; the analysis is inherently tied. Inconsistencies in policy are relevant and documents related to these inconsistencies are admissible as impeachment evidence.

### **C. Scope Not Limited by a Finalized Statement of Issues**

Again, though Austin Energy has stated in its Tariff Package that this proceeding is only proposing changes to base rates, Austin Energy has brought other issues into the proceeding through inclusion of those topics in their Tariff Package and analysis. Austin Energy and the Austin City Council continue to characterize this proceeding as a Public Utility Commission ("PUC") style proceeding, which means it is the Administrative Law Judge, or the Impartial Hearing Examiner ("IHE"), that decides the scope of the proceeding and what information is relevant. At this time, no definitive determination as to the scope of this proceeding has been made; there is not a final determination that certain pass-through charges, including the Power Supply Adjustment, Regulatory Charge, and Community Benefits Charge, are not at issue in this proceeding. The IHE has recognized this through setting a prehearing conference for March 4, 2016 to discuss these issues. Therefore, until a final determination on the scope of this proceeding is made, it is premature to argue that anything is outside of the scope, especially if it is used to bolster arguments within the Tariff Package. Additionally, and possibly more persuasive, the Scope of Work document that Austin Energy cited in *Austin Energy's Response*

to *Impartial Hearing Examiner Order No. 5*, which it used as legal authority to set aside the IHE's choice of a Procedural Schedule, states under Section – C. Phase 2: Rate Review Process:

1. AE will present its rate recommendations in a formal process before the Austin City Council. Using a similar procedural schedule to that transitionally used by the Texas State Office of Administrative Hearings, the review process will include the following steps....
  - d. Order from the City Council assigning the case to the IHE and giving *direction on Issues to be deliberated in the administrative review process*....<sup>7</sup>

These statements clearly contemplate that the City Council, not Austin Energy, is charged with giving the IHE direction on what issues should be addressed in this proceeding. Therefore, NXP and Samsung would argue that until the IHE has definitively determined the scope of this proceeding, after specific direction from the City Council, all issues related to “Austin Energy’s rates”<sup>8</sup> are within the scope of this proceeding and subject to discovery, as contemplated by Ordinance No. 20120607-055.

### **III. Specific Response to Objections**

Austin Energy specifically objected to the following RFI's as neither relevant or reasonably calculated to lead to the discovery of admissible evidence:<sup>9</sup> 1-8;<sup>10</sup> 1-15;<sup>11</sup> 1-16;<sup>12</sup> 1-17;<sup>13</sup> 1-37;<sup>14</sup> 1-41;<sup>15</sup> 1-43;<sup>16</sup> 1-51;<sup>17</sup> 1-52;<sup>18</sup> 1-53;<sup>19</sup> 1-60;<sup>20</sup> 1-61;<sup>21</sup> 1-74;<sup>22</sup> 1-92;<sup>23</sup> 1-93;<sup>24</sup> 1-102;<sup>25</sup>

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<sup>7</sup> City of Austin Purchasing Office Request for Qualifications Statements No. LAG0501 for Impartial Hearing Examiner for Austin Energy Rate Review Process at 4.

<sup>8</sup> Ordinance Part 12.

<sup>9</sup> NXP and Samsung continue to reiterate that this is not the standard for discoverable material, but instead the standard, as provided by Austin Energy in the Procedural Rules is “can lead to the discovery of admissible evidence.” Procedural Rule § 7.1(a).

<sup>10</sup> 1-8: This question relates to a spreadsheet that supports the allocations and the known and measureable adjustments and on their face can reasonably lead to admissible evidence, as they go to the analysis underlying rates.

<sup>11</sup> 1-15: Energy Efficiency programs and class eligibility were both included in the Tariff Package and thus within the scope of discovery. Additionally, different cost allocation methodologies can lead to impeachment evidence.

<sup>12</sup> 1-16: Can lead to admissible evidence related to known and measurable adjustments.

<sup>13</sup> 1-17: GreenChoice program is included in the Tariff Package and thus within the scope of discovery. Additionally, rational for various subsidies can go to impeachment if inconsistent theories are presented.

<sup>14</sup> 1-37: This question specifically references the Tariff Package and asks for material relevant to information presented in the Tariff Package, which is within the scope of discovery as defined by the Procedural Rules. The information provided can also lead to admissible evidence related to impeachment.

1-114;<sup>26</sup> 1-117;<sup>27</sup> 1-118;<sup>28</sup> 1-119;<sup>29</sup> and, 1-120.<sup>30</sup> As previously stated, NXP and Samsung disagree that these questions are not within the scope of discovery as these questions are related

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<sup>15</sup> 1-41: The Power Supply Adjustment is included in the Tariff Package and thus within the scope of discovery pursuant to the Procedural Rules. Also, methodologies and analysis related to policy choices can lead to admissible evidence related to impeachment as well as the possibility of over-recovery in base rates.

<sup>16</sup> 1-43: Purchase Power Agreements are included in the Tariff Package and thus within the scope of discovery pursuant to the Procedural Rules. Also, methodologies and analysis related to policy choices can lead to admissible evidence related to impeachment as well as the possibility of over-recovery in base rates.

<sup>17</sup> 1-51: The revenue from ERCOT sales directly impacts the cost of electricity through Austin Energy's Power Supply Adjustments and if not included in the non-base revenue should be an offset to base rates, thus this discovery can lead to admissible evidence related to base rates. Additionally, the Power Supply Adjustment is part of the Tariff Package and thus within the scope of discovery independently of its ability to lead to admissible evidence.

<sup>18</sup> 1-52: Non-base costs were included in the Tariff Package and thus within the scope of discovery and can also lead to the discovery of admissible evidence, specifically impeachment evidence.

<sup>19</sup> 1-53: Purchase Power Agreements were included in the Tariff Package and therefore within the scope of discovery information related to these agreements can also lead to the discovery of admissible evidence.

<sup>20</sup> 1-60: Street lighting costs were included in the Tariff Package and thus within the scope of discovery. Also inconsistency on policy treatment and information related to street lighting can lead to admissible evidence, specifically, impeachment evidence.

<sup>21</sup> 1-61: Street lighting costs were included in the Tariff Package and thus within the scope of discovery. Also inconsistency on policy treatment and information related to street lighting can lead to admissible evidence, specifically, impeachment evidence

<sup>22</sup> 1-74: This question is intended to verify that rates set by the PUC include all appropriate costs and Austin Energy is not unfairly collecting from retail customers, which goes to the reasonableness of base rates. The General Fund Transfer is also referenced in the Tariff Package, thus information related to this transfer is within the scope of discovery.

<sup>23</sup> 1-92: Issues related to lighting costs and the Community Benefits Charge have not yet been deemed outside of the scope of this proceeding by the IHE. Additionally, these topics were raised in the Tariff Package and are thus within the scope of discovery as discovery is defined in the Procedural Rules. Differing policy treatments can also lead to the discovery of impeachment evidence.

<sup>24</sup> 1-93: Issues related to lighting costs and the Community Benefits Charge have not yet been deemed outside of the scope of this proceeding. Additionally, these topics were raised in the Tariff Package and are thus within the scope of discovery. Differing policy treatments can also lead to the discovery of impeachment evidence.

<sup>25</sup> 1-102: Issues related to the Decker Creek Power Plant were discussed in the Tariff Package and thus are within the scope of discovery. Additionally, information related to the Decker Creek Power Plant could lead to admissible evidence as related to base rates.

<sup>26</sup> 1-114: As stated previously, information related to Purchase Supply Agreements (PSA) and Regulatory Charges were intermingled with base rate analysis and thus in order for true base rate analysis to be conducted information related to these items is necessary. Additionally, PSAs and Regulatory Charges were discussed in the Tariff Package, and therefore are within the scope of discovery as discovery is defined in the rules.

<sup>27</sup> 1-117: Information related to PSA and Regulatory Charges were intermingled with base rate analysis and thus in order for true base rate analysis information related to these items is necessary. Additionally, PSAs and Regulatory Charges were discussed in the Tariff Package and therefore are within the scope of discovery as discovery is defined in the rules.

to information included in the Tariff Package, which is specifically provided as within the scope of discovery. Additionally, this discovery **can lead** to the discovery of admissible evidence because all of these discovery questions can lead to evidence that can be introduced as impeachment evidence or can lead to evidence related to the reasonableness of base rates. As previously asserted, the scope of this proceeding has not been finalized, and there are serious questions about the ability to limit the scope to only base rates, therefore, any objections made that these questions are outside the scope of this proceeding are premature at this time and would be better characterized at a hearing as inadmissible if truly outside the scope.

Austin Energy has also specifically objected to several questions as calling for an Attorney General's decision because they are protected under the Public Information Act. Austin Energy specifically objected to the following questions in such a manner: 1-8; 1-10; 1-11; 1-12; 1-25; 1-30; 1-33; 1-34; 1-35; 1-37; 1-39; 1-40; 1-42; 1-43; 1-51; 1-52; 1-53; 1-60; 1-102; 1-108; and, 1-114. NXP and Samsung continue to object to Austin Energy's use of the Public Information Act as a shield to hide relevant information from discovery. NXP and Samsung are more than willing to sign a protective order in this proceeding to gain access to this extremely relevant information. As previously argued in filings in this proceeding, the Public Information Act was not designed as a shield for discovery in proceedings that resemble an APA style proceeding. NXP and Samsung will not disclose this highly relevant information. Without this information NXP and Samsung will not be able to make a full, accurate, and adequate analysis of the Tariff Package. As prescribed by the Public Information Act 552.306, the Attorney General does not have to make a final determination on these RFIs until the 45<sup>th</sup> business day after receiving the request, which is well after the information can be used for this proceeding. In the

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<sup>28</sup> 1-118: This question gets at the possibility that co-mingling could have occurred. NXP and Samsung will not be able to determine if non-utility costs were successfully omitted from base rates unless information related to these non-utility costs are known. This question is essential to ensuring that Austin Energy's base rates are just and reasonable and can lead to admissible evidence.

<sup>29</sup> 1-119: This question gets at the possibility that co-mingling could have occurred. NXP and Samsung will not be able to determine if non-utility costs were successfully omitted from base rates unless information related to these non-utility costs are known. This question is essential to ensuring that Austin Energy's base rates are just and reasonable and can lead to admissible evidence.

<sup>30</sup> 1-120: This question gets at the possibility that co-mingling could have occurred. NXP and Samsung will not be able to determine if non-utility costs were successfully omitted from base rates unless information related to these non-utility costs are known. This question is essential to ensuring that Austin Energy's base rates are just and reasonable and can lead to admissible evidence.

interest of fairness and justice, NXP and Samsung strongly urge the IHE to compel responses to these RFIs.

#### **IV. Treatment of Objections when the Information was Provided Pursuant to a Public Information Act Request**

NXP and Samsung make clear their intent to use any information provided through the Public Information Act as admissible evidence, presuming it meets the standards of admissibility as defined by the Texas Rules of Evidence. Simply because Austin Energy provided the information as a Public Information Act request does not somehow take it out of the scope of information that can be used during a hearing or to develop testimony. NXP and Samsung intend to use this information as if it had been provided as a response to a discovery request.

#### **V. Conclusion**

Austin City Council has not itself limited the scope of this rate review, and consistent with Ordinance No. 20120607-055, “Austin Energy’s rates should be reviewed.” There is nothing in this Ordinance specifying that only base rates should be reviewed. Therefore, because Austin Energy filed a consolidated rate case that co-mingled its costs and realized revenues from base rates and non-base rates, a full analysis of rates is necessary. At the very least, an understanding, as obtained through the types of discovery Austin Energy are objecting to, of Austin Energy’s non-base rates is essential for the proper determination of the reasonableness of Austin Energy’s base rates.

Additionally, Austin Energy has brought questions related to non-base rates within the scope of discoverable material because they have included a discussion of non-base rates in the Tariff Package. Section 7.1(a) of Austin Energy’s own Procedural Rules states that the scope of discovery includes information related to the Tariff Package. NXP and Samsung continue to stress the importance of preventing Austin Energy from cherry picking rules and guidelines it wants to follow while abandoning others that are not favorable to them.

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Respectfully submitted,

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**ATTORNEYS FOR NXP SEMICONDUCTORS  
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SAMSUNG AUSTIN SEMICONDUCTOR, LLC**

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this pleading has been served on all Parties and the Impartial Hearing Examiner, in accordance with Austin Energy Instructions, on the 25<sup>th</sup> day of February, 2016.



J. Christopher Hughes