AUSTIN ENERGY 2016 RATE REVIEW

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

NXP Semiconductors and Samsung Austin Semiconductor, LLCs' Motion to Compel Austin Energy Regarding Third Request for Information and NXP Semiconductors and Samsung Austin Semiconductor, LLCs' Response to Austin Energy's March 8, 2016 Filing

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 *Objection of Austin Energy to NXP/Samsung's Third Request for Information.* This Motion to Compel also contains NXP and Samsungs' Response to Austin Energy's March 8, 2016 filing, in which Austin Energy responded to NXP and Samsungs' Motion to Compel related to its Second Request for Information. NXP and Samsung respectfully shows as follows:

I. Procedural History

NXP and Samsung served its Third Request for Information (RFI) to Austin Energy on February 25, 2016. Consistent with the City of Austin's Procedural Rule (Procedural Rules) § 7.3(c)(1), Austin Energy served on NXP and Samsung the *Objections of Austin Energy to NXP/Samsung's Third Request for Information* ("Objections") on March 7, 2016. Pursuant to Procedural Rules § 7.3(e), NXP and Samsung have until March 10, 2016 to file this Motion to Compel. Additionally, on March 8, 2016, Austin Energy filed *Austin Energy's Response to NXP Semiconductors' and Samsung Austin Semiconductor, LLC's Motion to Compel Austin Energy Regarding Second Request for Information.* Though this pleading is not a direct response to that March 8, 2016 pleading, several issues are the same and therefore, NXP and Samsung will use this as an opportunity to respond.

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..."[1] Once again, Austin Energy, generally objected to NXP and Samsungs' RFIs stating they are "irrelevant."[2] NXP and Samsung disagree that the question Austin Energy is objecting to is "irrelevant" and NXP and Samsung maintain their argument that the questions presented in all its RFIs ask for items 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

As we have stated previously, Austin Energy created the procedural rules with little substantive input from other parties and 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."[3] 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 object to ask questions related to the Tariff Package, and the rates discussed in the Tariff Package. Therefore, any Austin Energy assertion 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, which were written in order to be clear and accessible to the general public.

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 has argued that because Austin Energy, in their Tariff Package, has indicated that this proceeding is limited to Austin Energy's base electric rates,[4] that this takes information out of the scope of discovery. NXP and Samsung continue to request the

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

[2] Objections of Austin Energy to NXP/Samsung's Third Request for Information at 1 (Feb. 29, 2016) (Objections).

[3] Procedural Rule § 7.1(a) (emphasis added).

[4] Austin Energy's Response to NXP Semiconductors' and Samsung Austin Semiconductor, LLC's Motion to Compel Austin Energy at 2 (Mar. 1, 2016) (Response to Motion to Compel).

Independent Hearing Examiner (IHE) to treat the **Applicant** as a party, a party who cannot merely state an item is not to be considered because they say it shouldn't in their **application**. NXP and Samsung stress the fact that Austin Energy compiled the Tariff Package and willingly included information as to its non-base rates in the Tariff Package and have stated they did this to "present a comprehensive, transparent Tariff Package."[5] Additionally, there have been several instances where Parties have pointed out the problem of intermingled funds and analysis that inherently occurred because of the filing of a comprehensive Tariff Package. Yet it is when Parties attempt to make the Tariff Package "transparent," by inquiring into rationale and figures presented, that they are blocked by Austin Energy by statements that, though this information was included for a "comprehensive" analysis, that we can't question it because this is not a "comprehensive" review.[6] NXP and Samsung find this to be illogical. NXP and Samsung are merely attempting to use discovery as it was intended to be used, to fully understand the information presented to them. Even under the Texas Rules of Civil Procedure, NXP and Samsung would have access to this information as "procedural rules define the general scope of discovery as any unprivileged information that is *relevant to the subject of the action*, even if it would be inadmissible at trial....'" *In re CSX Corp.*, 124 S.W.3d 149, 152 (Tex. 2003) (quoting Tex. R. Civ. P. 192.3(a)). NXP and Samsung continue to maintain that this information is relevant to the **Tariff Package** because it is included and because analysis of the entire Tariff Package is necessary to fully understand Austin Energy's rates and underlying philosophies.

We would remind Austin Energy that not only did they include this information in the Tariff Package, but they also wrote the procedural rules, which they are arguing against now. The procedural rules clearly and unequivocally state that discovery is the formal process where parties seek information related to the Tariff Package.[7] This statement is not modified and opens discovery to anything presented in the Tariff Package that can bring insight into the rational and analysis used by Austin Energy in compiling the Tariff Package. NXP and Samsung merely want to confirm that the numbers presented are accurate and based on actual figures that can be understood in order to fully understand Austin Energy's rates and how the utility is run.

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[5] *Id.*

[6] *Id.*

[7] Procedural Rule § 7.1(a).

Additionally, the scope separates information related to the Tariff Package from information related to the Statement of Issues, indicating that the scope of discovery is different as to these two items; arguably that even information not related to the Statement of Issues, but included in the Tariff Package is within the scope of discovery. Even taking the limited interpretation of their own rules, that goes against the plain language reading of the rules, discovery is only then limited to relevant information that **can lead** to the discovery of admissible evidence.[8] NXP and Samsung continue to argue that discovery related to pass-through charges **can lead to the discovery of admissible evidence**, especially evidence related to impeachment and the reasonableness of Austin Energy's base rates. By including non-base rate components in the Tariff Package, these items became relevant. It is a duty of Austin Energy to show their rates are reasonable and the only way to do this is to prove that there is no intermingling of funds, which cannot be proven unless discovery is allowed based on non-base rates that could impact base rates and base rate analysis.

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* own rules. As a result, it should not be permitted to object to questions raised related to these charges. Rather than being an overtly technical interpretation, as Austin Energy would have you believe, our reading of the rules is plain and simple, and goes with Austin Energy's stated intent that the rules need to be easily understood by non-attorneys.

B. City Ordinance and Resolution Makes the Material Relevant

Contrary to the analysis provided by Austin Energy in *Austin Energy's Response to NXP Semiconductors' and Samsung Austin Semiconductor, LLC's Motion to Compel Austin Energy Regarding Second Request for* Information, NXP and Samsung also cite City Resolution No. 201440828-157 and Ordinance No. 20120607-055 as why non-base rate information is relevant to this proceeding. As Samsung and NXP have emphasized, the Austin City Council in

[8] *Id.*

Ordinance No. 20120607-055 stated that "Austin Energy's rates should be reviewed at least once every five years."[9] There is nothing in the ordinance that limits the scope of the review to base rates. Though Austin Energy points to the fact that non-base rates, like fuel charges, have been reviewed by City Council outside of a rate proceeding, this needs to be put into context; this is the first time Austin Energy has even gone through the appearance of a full rate proceeding that affects all customers. The City Council has not explicitly limited the scope of this proceeding to only base rates so how do we know they didn't intend a full review, especially considering now the budget review will be occurring simultaneously to their review of the IHE's findings in this proceeding.

Additionally, Austin City Resolution No. 201440828-157 directs Austin Energy to "operate so as to control all-in (base, fuel, riders, etc.) rate increases to residential, commercial, and industrial customers to 2% or less per year, and to maintain [Austin Energy's] current all-in competitive rates in the lower 50 percent of Texas rates overall..."[10] Though this ordinance was in reference to an initiative by City Council to respond to global warming, it was an affirmation of their February 17, 2011 affordability goal, which was about the affordability of living in Austin, and specifically keeping Austin Energy competitive in the state. Unlike Austin Energy's presentation, City Council through Resolution and Ordinance has made clear that the **ultimate impact on customer bills** is ultimately what is important to them. Ordinance No. 20120607-055 was approved after heavy scrutiny over the fact Austin Energy had not conducted a proper rate review in over fifteen years despite the changed market and the fact that Ordinance 20120607-055 was appealed to the Public Utility Commission because customers were outraged.[11] This is the historical context by which the City of Austin decided that a rate review needed to occur and it was in the aftermath of this that the City Council reaffirmed their affordability goal.

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[9] 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 at 2 (Ordinance). NXP and Samsung do not assert that this Ordinance somehow does not permit Council to make adjustments to pass-through rates during the budge process, NXP and Samsung are arguing that the Ordinance requires Austin Energy to review **rates** every five years, which is more expansive requirement than just a review of base rates.

[10] Resolution No. 20140828-157 (Aug. 28, 2014).

[11] Petition By Homeowners United for Rate Fairness to Review Austin Rate Ordinance No. 20120607-055, PUC Docket 40627 (Aug. 2, 2012).

These two items taken together are a clear directive to Austin Energy, from the City Council, that a full rate review needs to occur as this is the only way to determine that Austin Energy's **all-in competitive rates** are just and reasonable, and in the lower 50% of the Texas rates overall. This directive is a current point of contention and goes to the heart of the reasonableness of Austin Energy's rates, including their base rates. If Austin Energy is not within the lower 50% of Texas rates as directed by Council, it calls into question whether their rates are reasonable. How is the City's directive that Austin maintains all-in competitive rates in the lower 50% not at issue in this proceeding and not a directive the Austin City Council has given that all parties must operate under? The City Council has stated Austin Energy's rates must be in the lower 50%, which means that base rates plus non-base rates combined must meet this standard and if they do not, then the reasonableness of those rates is in question. NXP and Samsung continue to argue that a full evaluation of rates is necessary in order to properly determine if base rates are reasonable, because only when base rates are combined with pass-through charges can Austin Energy demonstrate that they are meeting this directive set by City Council. Inevitably proving these items and the analysis of both are important and intertwined.

C. 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,[12] 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."[13]

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

[12] Ordinance at 2.

[13] Procedural Rule § 7.1(a) (emphasis added).

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 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. NXP and Samsung also continue to point out that Austin Energy's own affordability goal mandate by the City Council means they must maintain rates in the lower 50%, again, how can this be shown without a full evaluation of all rates? How can base rates be reasonable, when combined with non-base rates, this requirement is not met? It is the Austin City Council by their affordability goal that has made base rates and non-base rates intrinsically connected, where one cannot be deemed reasonable without the combined meeting the affordability goal.

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. Austin Energy seems to argue that if a line of questioning is related to an item that is beyond the scope of the proceeding (is irrelevant) than it is somehow "not capable of leading to the discovery of admissible evidence."[14] However, this overlooks the previous arguments presented as to how this information could lead to admissible evidence; inconsistent rate policies can be used as

[14] Response to Motion to Compel at 2.

impeachment and is wholly relevant to the determination of the reasonableness of Austin Energy's base rates. NXP and Samsung also distinguish that discoverable does not mean admissible and many of Austin Energy's arguments go to the admissibility of these documents, which is an issue for trial.

D. 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 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; a prehearing conference where no determination as to scope was finalized. It is also important to note that even Austin Energy, in their new procedural schedule has set March 21, 2016 as the date the Statement of Issues shall be finalized; therefore, at this time there is no final statement of issues meaning there is no binding determination as to what is within the scope of this proceeding. 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*....[15]

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"[16] are within the scope of this proceeding and subject to discovery, as contemplated by Ordinance No. 20120607-055.

Additionally, Austin Energy is misleading in their assertion that "[s]eparating an examination of base rates from other charges is common and is consistent with the Public Utility Commission's process."[17] The Public Utility Commission has form documents that must be submitted in any rate case, and the Commission has a very liberal view on what is discoverable thereby whatever is in the rate filing package is subject to discovery. Austin Energy is comparing this proceeding to a Public Utility Commission style proceeding when it suits them, and forgetting the many ways this proceeding does not reflect a Public Utility Commission style proceeding. For example, in a Public Utility Commission hearing there is no need to seek an Attorney General's determination on discovery disputes, instead parties sign protective orders and there is the relatively free dissemination of information under the protective order. NXP and Samsung assert that if this proceeding was really intended to be transparent as Austin Energy represents, the Public Information Act would not be utilized, but instead parties would operate under a standard protective order.

Finally, NXP and Samsung continue to reiterate that the **settlement** approved by the Commission in Docket 40627 is **non precedential** and was a settlement as to rates related to customers residing outside of the city limits. It would inherently be unfair to bind parties that could not participate in that proceeding to determinations that were made.

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[15] City of Austin Purchasing Office Request for Qualifications Statements No. LAG0501 for Impartial Hearing Examiner for Austin Energy Rate Review Process at 4.

[16] Ordinance Part 12.

[17] Response to Motion to Compel at 3.

III. Specific Response to Objections

Austin Energy specifically objected to RFI 3-13 as neither relevant or reasonably calculated to lead to the discovery of admissible evidence. As previously stated, NXP and Samsung disagree that this question and the others objected to as part of NXP and Samsungs' first and second sets of RFIs are not within the scope of discovery as these questions are related 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 it can lead to evidence that can be introduce 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 through an evaluation as to admissibility.

More specifically, this RFI gets to test year amounts related to On-Site Energy Resources (OSER), which is a business unit that operates Austin Energy's district cooling plants. A district cooling plant distributes chilled water from a central plant to individual buildings and is used to cool buildings in order to reduce demand during the summer months. This operation can be defined as an affiliate transaction of Austin Energy and a subsidy. However OSER is defined, Austin Energy needs to show that it provides a benefit to consumers. Additionally, how OSER is treated can bring questions related to cost allocation issue, which is within the scope of this proceeding. To the extent that customers are subsidizing this service, which predominantly benefits downtown customers as well as those surrounding the Domain, discovery related to OSER is important. Without a full understanding of OSER, Parties cannot fully understand various cost allocation issues presented in this case, issues related to cost of service, as well as the full scope of subsidization that is occurring under Austin Energy's rates and services. OSER inherently goes to crucial issues in this proceeding and discovery related to OSER can lead to admissible evidence related to class subsidization and inaccuracies in Austin Energy's cost of service study.

IV. 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. When the ordinance is taken together with Resolution No. 201440828-157, it is clear that the only way to analyze if Austin Energy is meeting the standards set for it by City Council is to analyze all rates. Additionally, Ordinance No. 201440828-157 clearly demonstrates how base rate and non-base rates are intertwined and need to be evaluated in relation to one another even if ultimately a determination of reasonableness will only be made as to base rates. 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.

Date: March 10, 2016

Respectfully submitted,

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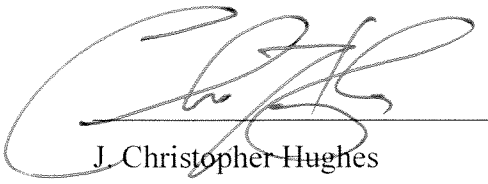
CERTIFICATE OF SERVICE

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 10th day of March, 2016.



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