

AUSTIN ENERGY 2016 RATE REVIEW

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

IMPARTIAL HEARING EXAMINER'S MEMORANDUM NO. 14:

**RULINGS ON NXP/SAMSUNG'S MOTION TO COMPEL
WITH REGARD TO NXP/SAMSUNG'S
SECOND REQUEST FOR INFORMATION**

After reviewing the parties' pleadings and pursuant to City of Austin Procedural Rule § 8.1(a), the Impartial Hearing Examiner hereby **GRANTS** NXP/Samsung's Motion to Compel regarding NXP/Samsung Request for Information ("RFI") No. 2-6.

The Impartial Hearing Examiner underscores that a ruling that an issue is within the scope of discovery does not necessarily mean that a related issue is relevant from an evidentiary perspective and thus within the scope of the issues in this proceeding. The standard for "relevance" for purposes of discovery is whether discovery of the requested information is reasonably calculated to lead to the discovery of admissible evidence. See *Tex. Rules of Civil Procedure, Rule 192.3(a)*. As the Impartial Hearing Examiner noted at the pre-hearing conference convened on March 4, 2016, the Impartial Hearing Examiner believes there is no material difference between whether a request "can lead to the discovery of admissible evidence," and whether a request is "reasonably calculated to lead to the discovery of admissible evidence."

AUSTIN ENERGY'S OBJECTION TO NXP/SAMSUNG RFI NO. 2-6

NXP/Samsung submitted the following request for information ("RFI") to Austin Energy:

NXP/Samsung 2-6. Please provide the monthly balances of the PSA for the test year and for FY 2014-2015.

Austin Energy objected to RFI No. 2-6 arguing that the data sought in this RFI were not reasonably calculated to lead to the discovery of admissible evidence, in short-cut form, that the data are not “relevant.” Austin Energy closes its objection by noting that it is processing RFI No. 2-16 as a “formal request under the Texas Public Information Act, Tex. Gov’t Code Ch. 552.

NXP/Samsung timely filed a motion to compel. Although Austin Energy objected to RFI Nos. 2-6 and 2-19, it appears that NXP/Samsung’s motion to compel is limited to RFI No. 2-6.

NXP/Samsung argued that the data it seeks in RFI No. 2-6 are within the scope of discovery because (1) Austin Energy included information regarding the Power Supply Adjustment in its Tariff Package; (2) nothing in Ordinance No. 20120607-055 that limits the scope of the review to base rates; (3) 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 ... ;” (4) taken together Ordinance No. 20120607-055 and Resolution No. 201440828-157 “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 in the lower 50% of the Texas rates overall;” (5) “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;” (6) “[t]he 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;” and (7) because 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.”

Austin Energy responds that because Austin Energy is only proposing changes to its base electric rates in this proceeding, the rate review in this proceeding is limited to Austin Energy’s base electric rates, and therefore, discovery in this proceeding should be limited to issues concerning Austin Energy’s base electric rates. Austin Energy also (1) refutes NPX/Samsung’s reading of Resolution No. 201440828-157 noting that, “Resolution No. 20140828-157 is a resolution to reduce greenhouse gas emissions and mitigate the effects of climate change;” that “[i]t is not a directive from Council to AE to conduct a full rate review;” and that Resolution No. 20140828-157 “has no relation whatsoever to how Austin Energy is to set its electric rates;” (2) notes that the City Council’s historical practice in each of the past three years of adjusting Austin Energy’s “pass-through rates,” including Austin Energy’s PSA, during the budget process “evidences Council’s desire for pass-through rates to be determined during the budget process;” and (3) reiterates its position that the review prescribed in Ordinance No. 20120607-055 is limited to Austin Energy’s base rates.

The Impartial Hearing Examiner finds merit in two of NXP/Samsung’s arguments. The data sought in RFI No. 1-6 are reasonably calculated to lead to the discovery of admissible evidence regarding whether non-base rate costs and revenues are comingled with base rate costs and revenues, and whether Austin Energy uses different and inconsistent financial policies for their base rates versus its non-base rates. This is

consistent with the Impartial Hearing Examiner's conclusion in Memorandum No. 11 at Issue Nos. 14 and 15.

Further, the Impartial Hearing Examiner notes that it is unclear what the effect of Austin Energy's statement that it is treating NXP/Samsung's RFI No. 2-6 as a formal request under the Public Information Act. It is the Impartial Hearing Examiner's opinion that irrespective of whether data are or are not viewed as a formal request under the PIA, if the data sought are within the scope of discovery, then the data must be provided in accordance with the City of Austin Procedural Rules applicable to this proceeding. The Impartial Hearing Examiner has made clear his concerns regarding the process Austin Energy is employing with regard to data it believes to be competitively sensitive or otherwise confidential. But with regard to data that otherwise may be available under the PIA, the Impartial Hearing Examiner is of the opinion that, to the extent the data are within the scope of discovery, such data must be provided in response to a valid discovery request in this proceeding and within the time frames provided for in the City's Procedural Rules.

For the foregoing reasons the Impartial Hearing Examiner **GRANTS** NXP/Samsung's Motion to Compel regarding NXP/Samsung RFI No. 2-6 and further directs Austin Energy to provide a response to NXP/Samsung RFI No. 2-6 by no later than March 25, 2016.

Alfred R. Herrera
Impartial Hearing Examiner

DATE: MARCH 17, 2016

Xc: Copy Transmitted via Email to following:

Rate.Review@austinenergy.com;
andrea.rose@austintexas.gov;
andy.perny@austintexas.gov;
tleisey@lglawfirm.com;
hwilchar@lglawfirm.com;
tbrocato@lglawfirm.com;
Chris.Hughes@huschblackwell.com;
maria.faconti@huschblackwell.com;
roger@borgeltlaw.com;
mwhellan@gdhm.com;
carolb@texasrose.org;
tsalinas@3pointpartners.com;
john.sutton@tgsle.org;
bdunkerley1@austin.rr.com;
lcooper@tlsc.org;
kwhite@citizen.org;
Rebecca@ibuyaustin.com
paul_robbins@greenbuilder.com
Charles.girard@hcahealthcare.com
cbirch@citizen.org
john@johncoffman.net
cjenergyconsult@att.net
janeebrie@gmail.com
paul@austinaptassoc.com
jim78731@gmail.com
wsmc@dotlaw.biz
barry.dreyling@cypress.com
bryan_stevenson@amat.com
mrollins@austinchamber.com
ed@arma-tx.org
customerscare.austinenergy@gmail.com
jerry.davis@goodwillcentraltexas.org
nsimpson@streamrealty.com
Cyrus.reed@sierraclub.org
Maureen.whitfield@crowncastle.com
cliff.wells@bethany-umc.org