

AUSTIN ENERGY 2016 RATE REVIEW

AUSTIN ENERGY  
2016 MAY 12 PM 12:45

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' Objection and Motion to Strike the Position Statement/Presentation on the Issues and Cross Rebuttal Presentation on the Issues of Public Citizen and Sierra Club**

NXP Semiconductor, Inc. ("NXP") and Samsung Austin Semiconductor, LLC, ("Samsung"), each on its own behalf, by and through its attorneys of record, files this Objection and Motion to Strike the Position Statement/Presentation on the Issues and Cross Rebuttal Presentation on the Issues of Public Citizen and Sierra Club.

The City of Austin Procedural Rules for the Initial Review of Austin Energy's Rates ("Procedural Rules") § 3.3(a) states that a "motion shall be made in writing. The motion shall state the relief sought and the specific reasons supporting a grant of relief."<sup>1</sup> It further states, "[a] Party may object to evidence being offered by another Party."<sup>2</sup> At this time, NXP and Samsung are objecting to both *Public Citizen's and Sierra Club's Position Statement/Presentation on the Issues*, filed May 3, 2016, and *Public Citizen's and Sierra Club's Cross Rebuttal Presentation on the Issues*, filed May 10, 2016, and ask that both documents be stricken from the record because the information contained in both documents is being presented as evidence or testimony but is irrelevant, unsupported by an expert or anyone who can be called as a witness during the hearing, and violate the Procedural Rules established to govern this proceeding. In the alternative, Public Citizen and Sierra Club should be required to designate a sponsoring witness responsible for their statement/testimony who is under oath and available for cross examination.

Procedural Rule § 9.1(a) provides that "[i]rrelevant... evidence shall be excluded." Texas Rules of Evidence 401 states, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Irrelevant evidence burdens the record and obscures the issues. In this case, the "evidence" Public Citizen and Sierra Club are supporting is not evidence

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<sup>1</sup> The City of Austin Procedural Rules for the Initial Review of Austin Energy's Rates § 3.3(a) ("Procedural Rule").

<sup>2</sup> Procedural Rule § 9.1(c).

but merely opinion statements and speculation, more akin to a Statement of Position. Due to the fact that they have not provided a supporting witness for this “evidence,” it is nothing more than conjecture, which will burden the record. Therefore, NXP and Samsung move to strike from the record both documents provided by Public Citizen and Sierra Club in their entirety.

### **I. Undermines Cross Examination**

Procedural Rule § 4.3(b) states “all Parties have the right to present a direct case, submit discovery requests to other Parties, make oral or written arguments, **cross-examine other parties’ witnesses in the case**, and otherwise fully participate in any Proceeding.” (emphasis added). However, this presumes that parties will be making arguments in a form that allows for cross-examination. The format Public Citizen and Sierra Club have chosen to present their case severely undermines the process through preventing the validity of the evidence presented from being determined through cross-examination. There is no opportunity to cross-examine this unaligned party on positions they have taken and will likely cross-examine NXP and Samsung on. This is inherently unfair and biased.

Though the Procedural Rules allow a party to submit a Party Presentation as “pre-filed testimony question and answer format” or “a more narrative format,”<sup>3</sup> it also states that the Party Presentation document at a minimum shall “present the Party’s position on the issues identified in the Statement of Issues and will clearly state what course of action the Party believes the Impartial hearing Examiner should recommend to City Council.”<sup>4</sup> It further states that “[t]o the extent possible, the document will contain factual and legal support for the Party’s position.”<sup>5</sup> Public Citizen and Sierra Club have failed to meet this standard. Instead their “Party Presentation” is filled with conjecture and statements made as if they were statements of fact and supported by evidence. However, because there is no person actually supporting the statements made in these documents, the documents are nothing more than opinion statements of their author which cannot be verified. If other parties are going to be cross examined on similar (or opposing) positions, then they have the right to do the same. The statements made by Public Citizen and Sierra Club are being presented as true and verified, yet no party has the opportunity to determine if such is the case. Additionally, they are asking it to have the same weight as

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<sup>3</sup> Procedural Rule § 6.1(b).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

information presented by a sponsoring witness who can answer questions on analysis and assumptions made in the preparation of the opinions held. This is not possible as to Public Citizen and Sierra Club, therefore, their “evidence” should be weighted as nothing more than unsupported accusations and opinions.

## **II. Should not be Treated as Evidence**

Though this is not a Public Utility Commission (“PUC”) hearing, it purports to follow closely the rules and process of a PUC hearing. Several participants in this proceeding have engaged in proceedings at the PUC and are familiar with PUC rules. Under PUC rules, a Statement of Position can be filed by a party and contains: (1) a concise statement of the party’s position in the proceeding; (2) a concise statement of each question of fact, law, or policy the party considers at issue; (3) a concise statement of the party’s position on each issue identified pursuant to paragraph (2).<sup>6</sup> The documents presented by Sierra Club and Public Citizen go well beyond what would resemble a PUC Statement of Position, the statements made within the documents are presented as **factual evidence** with no supporting witness and little to no cited authority. At the PUC, a Statement of Position is not used as evidence and is merely used to show other parties what positions the Party will be taking at trial, and is used by a presiding officer to align parties. The Statement of Position is in not considered evidence because it is inherently a persuasive argument as to what the Party desires the outcome of the case to be and what they will be attempting to show at trial. Statements of Position are not generally relied upon by parties as evidence to the proceeding and are not cited in post hearing briefs in the same way testimony is cited. Ultimately a Statement of Position is used for a very different purpose than testimony and it is unfair to allow a clear statement of position to be treated as verifiable evidence in a proceeding that is intended to be fair.

## **III. Undermines Fairness**

Procedural Rule § 8.1(a) clearly establishes broad authority and discretion in the Impartial Hearing Examiner (IHE) to maintain the fairness of the proceeding. The rule states the IHE “has broad discretion in establishing the course, conduct, and scope of the Proceedings” with authority that includes “but is not limited to, calling and examining witnesses; receiving evidence and testimony; ruling upon the admissibility of evidence and amendments to

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<sup>6</sup> PUC Proc. R. § 22.124(b); 16 Tex. Admin. Code § 22.124(b).

Pleadings... **and taking any other action which is necessary for an efficient and fair hearing.**<sup>7</sup> NXP and Samsung call upon the IHE to exercise this discretion to ensure a **fair hearing.** Section 8.1(b) goes further in stating the IHE “shall conduct the Hearing in a way that **secures fairness in administration,** eliminates unjustifiable delay, and promotes the development of the record consistent with the applicable laws.”<sup>8</sup> The IHE “shall endeavor to limit the presentation of evidence that **creates an unfair prejudice, confuses the issues,** or causes undue delay or needless presentation of cumulative evidence[.]”<sup>9</sup> By allowing the presentations or “evidence” presented by Public Citizen and Sierra Club into the record, the IHE will not be meeting this requirement. It is patently unfair to allow one party to submit as evidence mere conjecture that cannot be authenticated, verified, or disputed.

#### **IV. Conclusion**

For the reasons stated above, NXP and Samsung request *Public Citizen’s and Sierra Club’s Position Statement/Presentation on the Issues* and *Public Citizen’s and Sierra Club’s Cross Rebuttal Presentation on the Issues* be declared inadmissible and be stricken from the record or that Public Citizen and Sierra Club be required to designate a sponsoring witness responsible for their statement/testimony who is under oath and available for cross examination. It is the duty of the IHE to allow for an equitable proceeding to be conducted and by allowing these statements of pure speculation and opinion to be entered into the record as evidence will result in the record becoming unduly burdened and NXP/Samsung will be unfairly prejudiced.

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<sup>7</sup> Procedural Rule § 8.1(a) (emphasis added).

<sup>8</sup> Procedural Rule § 8.1(b) (emphasis added).

<sup>9</sup> *Id.* (emphasis added).

Respectfully submitted,


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

**CERTIFICATE OF SERVICE**

I certify that a true and correct copy of this pleading has been forwarded by fax, e-mail, U.S. first class mail, hand-delivery, or by courier service to all parties and filed with the City Clerk on the 12<sup>th</sup> day of May, 2016.

  
J. Christopher Hughes