

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' Response to Austin Energy's Objection and Motion to Strike Portions of the Direct Testimonies of Gary L. Goble and Marilyn J. Fox on Behalf of NXP and Samsung

NXP Semiconductor, Inc. ("NXP") and Samsung Austin Semiconductor, LLC, ("Samsung"), each on its own behalf, by and through its attorneys of record, files this Response to Austin Energy's ("AE's") Objection and Motion to Strike Portions of the Direct Testimonies of Gary L. Goble and Marilyn J. Fox on behalf of NXP and Samsung.

On Friday, May 6, 2016, AE filed *Austin Energy's Objection and Motion to Strike Portions of the Direct Testimonies of Gary L. Goble and Marilyn J. Fox on Behalf of NXP and Samsung, the Seton Healthcare Family Presentation on the Issues, and Public Citizen's and Sierra Club's Position Statement/Presentation on the Issues* ("AE Motion to Strike"). Pursuant to the City of Austin Procedural Rules for the Initial Review of Austin Energy's Rates ("Procedural Rules") § 3.3(b) "Parties shall have five Business Days after a motion is filed to respond to the motion in writing."¹ Therefore, this Response is timely submitted.

I. Background

In AE's Motion to Strike, AE cites Procedural Rule § 9.1(a) as a rationale for striking testimony related to adjustments to AE's transmission costs and AE's use of the Cash Flow Method for determining return. AE stated that Procedural Rule "§ 9.1(a) provides that '[i]rrelevant... evidence shall be excluded.'" AE further stated that "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.'" ² AE concluded that therefore, "evidence that has no tendency to make a fact more or

¹ The City of Austin Procedural Rules for the Initial Review of Austin Energy's Rates § 3.3(b) ("Procedural Rule").

² *Austin Energy's Tariff Package: 2015 Cost of Service Study and Proposal to Change Base Electric Rates, Austin Energy's Objection and Motion to Strike Portions of the Direct Testimonies of Gary L. Goble and Marilyn J. Fox on Behalf of NXP and Samsung, the Seton Healthcare Family Presentation on the Issues, and Public Citizen's and Sierra Club's Position Statement/Presentation on the Issues* at 1 (May 6, 2016) ("AE Motion to Strike").

less probable than it would be without the evidence, or is of no consequence in determining the action is irrelevant. Irrelevant evidence burdens the record of the proceeding and obscures the issues to be properly addressed.”³

In its Motion to Strike, AE objects specifically to page 4, lines 8-13 and page 44, lines 11-12 of the Direct Testimony of Gary L. Goble and page 22, line 14 through page 27, line 8 of the Direct Testimony of Marilyn J. Fox.⁴ AE argued this testimony is “irrelevant because it has no tendency to make a fact more or less probable” because “transmission issues are outside the scope of this proceeding” as determined by the Independent Hearing Examiner’s (“IHE”) Memorandum No. 11 (“Memo 11”).⁵ NXP and Samsung disagree with this assessment. Additionally, AE asked the IHE to strike page 4, line 12 through page 10, line 17 of the Direct Testimony of Marilyn J. Fox⁶ regarding AE’s use of the cash flow methodology. AE stated that this testimony is “irrelevant because it has no tendency to make a fact more or less probable...” and is “irrelevant because AE’s use of the cash flow method is not at issue in this proceeding” and should be stricken to “avoid burdening the record with irrelevant testimony that risks confusing the issues.”⁷ NXP and Samsung disagree that including this testimony in the record will in any way “burden” it.

II. Response to Objection to Testimony and Presentations on Adjustments to AE’s Transmission Cost of Service (“TCOS”)

The testimony AE is objecting to, and asking the Impartial Hearings Examiner to strike, is summarized in the following statement found in the Direct Testimony of Gary L. Goble: “I recommend that AE’s transmission cost of service be revised to comport with the Order issued by the PUC in Docket No. 45382.”⁸ AE portrays the recommendations of both Mr. Goble and

³ *Id.*

⁴ AE also objects to page 2, 4th Issue of the Seton Healthcare Family Presentation on the Issues for the same reasons AE is objecting to the above referenced portions of NXP and Samsungs’ Direct Testimony. For these reasons, NXP and Samsung respectfully request that arguments pertaining to inclusion of this issue in NXP and Samsungs’ Direct Testimony should also apply to Seton Healthcare Family Presentation on the Issues.

⁵ AE Motion to Strike at 2.

⁶ Though AE’s Motion to Strike states “AE objects to pages 4, line 12-10, line 17 of the Direct Testimony of Marilyn J. Fox,” NXP and Samsung have confirmed the correct reference is pages 4, line 12 – page 10, line 17.

⁷ AE Motion to Strike at 3-4.

⁸ *Austin Energy’s Tariff Package: 2015 Cost of Service Study and Proposal to Change Base Electric Rates*, Direct Testimony and Exhibits of Gary L. Goble on Behalf of NXP Semiconductor, Inc. and Samsung Austin Semiconductor, Inc. at 4 (May 3, 2015).

Ms. Fox as solely going to the reasonableness of AE's TCOS. However, this is not true and testimony related to AE's TCOS is pertinent to this proceeding. Though IHE Memo 11, states "[e]xcept as noted above in Issue No. 23 regarding Austin Energy's Transmission Cost of Service, the reasonableness of Austin Energy's Transmission Cost of Service ("TCOS") is outside the scope of this proceeding[.]" the language also carves out issues related to AE's TCOS which are within the scope of this proceeding.⁹ AE fails to recognize this fact. Memo 11 specifically includes within the scope of this proceeding whether "any costs related to Austin Energy's Transmission Cost of Service [is] also being recovered through base rates."¹⁰ The testimony AE is asking to be stricken goes directly to this question. Without the recommended adjustment of NXP and Samsung, AE will be allowed to overstate base rates. By not recognizing the *actual level of revenue* that will be collected by AE through its TCOS during 2016 (and until the Public Utility Commission ("PUC") changes its cost matrix) AE will be allowed to pass TCOS expenses along to customers *without* also passing along the benefits that are associated with the increased TCOS revenues AE will experience; resulting in over recovery.¹¹

Independent of the fact that this testimony is squarely and completely within the scope of this rate proceeding, AE has maintained that it does not have any control over its TCOS as it is set by the PUC and AE just applies the PUC set rate.¹² Though it is true the PUC establishes a company's TCOS, AE has demonstrated that they are not treating the TCOS in the way they have previously indicated; they are not truly applying the PUC set rate. If AE truly treated TCOS as they have repeatedly stated then AE would be using the most recent **commission approved** TCOS instead of an outdated formula that hurts customers to the benefit of AE's base rates. To strike all material related to AE's TCOS would be unreasonable and a miscarriage of

⁹ *Austin Energy's Tariff Package: 2015 Cost of Service Study and Proposal to Change Base Electric Rates*, Impartial Hearing Examiner's memorandum No. 11: Statement of Issues at 4 (Mar. 11, 2016) ("Memo 11").

¹⁰ *Id.* at 3.

¹¹ The distinction is TCOS *expense* versus TCOS *revenue*. AE TCOS *expense* goes to the regulatory charge for recovery and is within the scope of this proceeding (see issue 16 of Memo 11). AE TCOS *revenue* is used to reduce AE base rate revenue transmission costs. Both pieces being squarely within the scope of this proceeding.

¹² As a rational for excluding all questions regarding TCOS from this rate proceeding AE stated that issues related to their wholesale transmission tariff "should be excluded as the wholesale transmission tariff is set by the PUC." *Austin Energy's Tariff Package: 2015 Cost of Service Study and Proposal to Change Base Electric Rates*, Austin Energy's Response to Impartial Hearing Examiner Order No. 6 at 3 (Feb. 22, 2016).

justice. The Austin City Council should be made aware of instances where the rates and charges AE is recommending be approved are squarely against what should be approved, and what would be approved at the PUC.

More importantly, this issue brings credence to an issue NXP and Samsung have increasingly been arguing is an underlying issue in this case; AE has increasingly been hiding accounting strategies that benefit them and result in an overstatement of their revenue requirement, either through using old data or preventing parties from thoroughly vetting their numbers by hiding information behind the veil of the Public Information Act. If this proceeding is truly intended to provide a reasonable recommendation to the Austin City Council, then the IHE should not strike relevant information that goes to the heart of the proceeding and highlights underlying issues AE has as a utility.

III. Response to Objection to Testimony on AE's Use of the Cash Flow Method

Additionally, AE is objecting to all testimony related to AE's use of the cash flow method to determine rate of return as being "irrelevant" and having "no tendency to make a fact more or less probable." NXP and Samsung disagree with this assessment. AE maintains that the use of the cash flow method is not at issue in this proceeding. Though the IHE in Memo 11 stated that "Austin Energy's decision to utilize a cash flow basis to determine just and reasonable base rates *in lieu of* debt service coverage is outside the scope of this proceeding," Memo 11 did not say that the use of the cash flow method was *wholly and completely outside the scope of this* proceeding. In fact, this does not seem to be the intent of the IHE as Memo 11 recognized the just and reasonableness of AE's proposed base rate revenue to be **within the scope of this proceeding**,¹³ which inherently encompasses the choices and principles AE employed when determining their proposed base rate revenue, which includes return. The testimony AE is asking to be stricken goes to why Ms. Fox determined AE's rates **are not just and reasonable** and are **over inflated**. Based on this finding, Ms. Fox's testimony then recommends what, in her view, are "just and reasonable rates that Austin Energy should be permitted to charge."¹⁴ The analysis Ms. Fox goes through in her statements as to why the cash flow method is not a reasonable choice, provides explanation and evidence as to why AE has overstated its

¹³ Memo 11 at 1 & 4.

¹⁴ These are issues 1 and 2 in issues within the scope of the rate review process, included in IHE Memo 11.

“reasonable and necessary cost of providing service.”¹⁵ Ultimately, Ms. Fox concluded that because AE used the cash flow method, AE’s rates are **not reasonable**, which is the ultimate issue in this proceeding.

Pages 4 through 10 of Ms. Fox’s testimony also highlights poor accounting and policy decisions AE continues to make and recommend to the City Council. AE has been hiding behind a **settlement** reached in PUC Docket 40627¹⁶ as if the **settlement** was precedential and somehow long term commission approval of their policies. The settlement in PUC Docket 40627¹⁷ was a settlement in the final hours before trial. Parties likely took trial costs into consideration when deciding to settle, as well as the Commission’s limited jurisdiction and the difficulty inherently in applying different principles to inside city limits and outside city limit customers. This settlement was **not intended to be precedential**. In fact, portions of the testimony AE is asking to be stricken was taken from testimony in the PUC proceeding, which demonstrates the PUC’s **inherent disagreement and concern** with AE using the cash flow method to determine return. These statements should be the precedential statements, if anything, because they show what PUC Staff thought to be the appropriate method for determining return.

Finally, AE stresses that by including this issue, the record will be “burdened.” However, the record is being created for the City Council. Therefore, the City Council will need information regarding general accounting principles, including the various methods a utility can use to calculate return, including the drawbacks of the method they ultimately adopt. Additionally, as the testimony demonstrates, the use of the cash flow method goes to the heart of the reasonableness of the rates AE is requesting the City Council approve. The City Council is composed of sophisticated individuals with Staff assistance, and the IHE was hired due to his experience, therefore, it is hard to believe that information regarding the detriments of picking a cash flow method over another method would somehow burden the record.¹⁸ Also, because this

¹⁵ This is issue 3 in IHE Memo 11 as an issue within the scope of the rate review process.

¹⁶ *Petition of Homeowners United for Rate Fairness to Review Austin Rate Ordinance No. 20120607-055*, Docket No. 40627 (Apr. 29, 2013).

¹⁷ Please note AE’s reference of Docket No. 31462 is extremely out of date (Final Order was issued June 9, 2006) and is not the last case the PUC spoke on AE’s use of the cash flow method for determining return. We urge the IHE to recognize that the most recent PUC statements on this issue express extreme reservation about the use of this method for a municipally owned utility.

¹⁸ Though NXP and Samsung find all testimony to be relevant, if the IHE feels certain portions of the discussion regarding AE’s use of the cash flow method to be outside the scope of this proceeding, NXP and Samsung urge him to limit his ruling to only strike page 9, line 14 to page 10 line 17 from the Direct Testimony of

issue goes to the heart of whether the rates are reasonable, it is not irrelevant as AE has suggested. All statements provided in the testimony of NXP and Samsung have probative value and provide background and information to help both the IHE and the City Council make a sound and reasonable decision, and therefore should not be stricken from the record.

IV. Conclusion

NXP and Samsung stress the importance of remembering the purpose of this proceeding as well as the final audience. Procedural Rule § 6.1(b) 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.**”¹⁹ The City Council has set up this proceeding in order to gain information and a quality recommendation from an independent fact finder as to what rates the Austin City Council should approve for their utility. The City Council has a responsibility to govern and manage AE and facts like AE not using the most recent PUC approved rates to determine their TCOS is important, especially when AE’s treatment ultimately hurts customers. Additionally, the City Council should be made aware of accounting principles AE uses that result in their base rates being inflated, like the use of the cash flow method to determine return. The Austin City Council has charged the IHE with helping them determine **just and reasonable rates** for AE and this cannot be done unless all information can be presented that relates to the management decisions of AE and AE’s inflation of their revenue requirement. Ultimately this is an administrative proceeding where information that can be verified, or that is supported by experts who can be cross-examined at a hearing, should be allowed into the record. NXP and Samsung have full faith that the IHE will be able to accurately and fairly determine the weight of true evidence in this proceeding.

For these reasons NXP and Samsung urge the IHE to deny AE’s motion to strike portions of the direct testimonies of Mr. Goble and Ms. Fox, because all information provided in their testimony is relevant and within the scope of this proceeding. The inclusion of this testimony will allow the IHE to fulfill his duty of having “**an efficient and fair hearing**”²⁰ that “promotes

Marilyn Fox as this is the only portion of her testimony that is even remotely related to AE’s decision to use the cash flow method *instead of* the debt services method for determining rates, which is all the IHE limited in Memo 11.

¹⁹ Procedural Rule § 6.1(b) (emphasis added).

²⁰ Procedural Rule § 8.1(a) (emphasis added).

the development of the record consistent with the applicable laws.”²¹ Not allowing this testimony would create “unfair prejudice”²² in the record and allow AE to continue to inflate their base rate requirement to the Austin City Council without challenge. NXP and Samsung continue to urge the IHE to not strike any portion of the testimony of Ms. Fox or Mr. Goble as it is all relevant.

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 13th day of May, 2016.

Maria Faconti
Maria C. Faconti

²¹ Procedural Rule § 8.1(b) (emphasis added).

²² *Id.* (emphasis added).