AUSTIN ENERGY'S TARIFF PACKAGE:	§	
2015 COST OF SERVICE STUDY	§	**BEFORE THE CITY OF AUSTIN**
AND PROPOSAL TO CHANGE BASE	§	**IMPARTIAL HEARING EXAMINER**
ELECTRIC RATES	§	

DATA FOUNDRY, INC. RESPONSE TO NXP/SAMSUNG AND AUSTIN ENERGY REQUEST FOR PREHEARING CONFERENCE

Data Foundry ("Data Foundry" or "DF") files this Response to the Requests for Prehearing Conference submitted by NXP/Samsung and Austin Energy.

NXP/Samsung filed its Request for Prehearing Conference on May 20th. On the same day AE submitted its Motion Regarding Hearing Procedures and Request to Change Procedural Schedule. The two motions in tandem request that the IHE convene a prehearing conference to address outstanding motions, other procedural matters, and the conduct of hearing. Both seek to have the prehearing conference occur before May 31. AE also supplied a recommended order of proceeding. This is Data Foundry's response to both requests.

The hearing must be structured to achieve as much actual presentation of useful information as is possible given the available time. Every party must receive some semblance of due process. AE's proposal simply will not work to obtain those ends. The suggestions and observations below are posed to assist in the reduction of inefficiencies, accelerate the process and re-inject some procedural fairness.

1. Whether to have a prehearing conference and when it should occur.

Data Foundry concurs that there should be a prehearing conference. Data Foundry also agrees that the conference should take place prior to May 31. NXP/Samsung suggests May 25th or 26th, while AE proposes May 27th, at 1:00 pm.

Data Foundry's counsel has a scheduling conflict that prevents attendance in the morning on May 26th and another for the afternoon of May 27th. Data Foundry can attend any time on May 25th, in the afternoon on May 26th or in the morning on May 27th.

2. Topics to be addressed.

Data Foundry does not necessarily take the same position as NXP/Samsung or AE on how the issues they raise should be resolved, but does believe that the topics mentioned in each of the requests are appropriate for resolution during the conference. Data Foundry also believes that everyone must know how the case will proceed – and the amount of time each party will

have – no later than May 27th so everyone can have the weekend to organize and strategize how they will present their respective cases given their allotted time.

3. Response to AE's specific proposals.

Given the number of witness presentations and the volume of information we already have a very compressed schedule. It will be imperative that the time be used as efficiently as possible, by all concerned. The need for efficiency and speed – balanced by fairness to everyone – drives the recommendations and positions set out below.

AE estimates that there will be approximately twenty-three available hours for the actual conduct of the hearing. It then asks that AE be given one-half of the available time "for AE's opening or closing statements, examining or cross examining of witnesses, or presenting legal arguments." AE wants 11.5 hours for itself and then disclaims any interest regarding how the remaining 11.5 hours are allotted between all of the other parties. Simple math demonstrates a significant problem with AE's recommendation. The eleven participating parties will have to fight over the remaining 11.5 hours. If that time is evenly divided each intervenor will have 62.7 minutes in which to conduct its opening statement, examination, cross-examination and closing statement. That is simply not enough for the more active participants. ICA and Samsung, for example, cannot fairly be limited to 62.7 minutes given the number, breadth and scope of the matters they raise. Data Foundry has a lesser number, but counsel can still state with certainty that he will need more than 45 minutes to cross AE's witnesses,[1] and perhaps 10-15 minutes for a few opposing intervenor witnesses about those issues. 62.7 minutes is strict even for those with fewer issues. Every intervenor naturally and reasonably believes that its favorite issues are paramount even if few in number. No one should be denied due process merely because others have more to say.

Data Foundry firmly disagrees that AE should be given so much time. One way to mitigate the problem, however, would be to not allow AE to put four of its eight witnesses on

[1] Practiced expert witnesses are quite adept at running out the clock when hostile cross-examination time is severely limited. Data Foundry's cross-examination will require concurrent and sequential recourse to quite a few different pieces of the rate filing package. Some of the print on these documents is really small. An AE witness that wants to frustrate full examination could easily burn much of the available time pretending to look for a document or entry, asking for documents or sources and then leisurely reading the items before trying to actually answer the question. Then will inevitably come pretention at not remembering or understanding the question, and after having it repeated the witness will of course have to take more time to carefully read the small print or maybe even locate another document. This is not a slur on anyone's character or ethics. It is just a part of the game. AE's proposal provides too much incentive for such gaming.

twice – once in direct and then again in rebuttal[2] – even though AE did not actually present any direct testimony by the four witnesses AE wants to present in "its direct case."[3] Although AE submitted a rate filing package, it does not have a "direct case" in the normal sense of the term. What *testimony* will the intervenors be cross-examining during AE's "direct case?" There is none. It makes no sense to have two rounds for AE witnesses. If AE is allowed to do a "direct" and "rebuttal" and thereby put four of its eight witnesses on two separate times then at least one-half, if not more, of the available time will almost certainly be required for a proper examination of AE witnesses by all of the intervenors.

Allowing AE to go twice – with four witnesses on "direct" and then eight witnesses on rebuttal, including the same four it wants for direct – would be horrendously inefficient. It would necessarily lead to redundant and wasteful cross-examination and testimony since some of the same topics are obviously the same for both "phases" so AE's witnesses and all the parties will have to scramble for the same documents twice, rather than once.[4] Intervenor cross-examination of AE's witnesses will be far more organized and will flow much better if we only do this once. There is simply not enough available time for AE's witnesses to appear twice. Doing it that way will not serve the public interest. AE will surely benefit from every wasted minute, but the record – and reasoned decision-making – will suffer.

Many of the parties to this case are fairly well-versed in the conduct of a utility rate proceeding. There is no petit jury charged with fact-finding, so the need to have an entirely smooth information flow progression is significantly lower. In PUC cases the parties routinely present their entire case – both direct and rebuttal – in one sitting. The IHE will still be able to assimilate and comprehend the evidentiary record if each party's witness or witnesses take the stand only once.

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[2] One aspect of AE's suggestion is highly illuminating, however. AE claims to have the right to open and close the evidence. That necessarily means AE admits it has the burden of going forward and of ultimate proof regarding its claimed revenue requirement, the size of the revenue surplus, and then on cost allocation, revenue distribution and rate design. Data Foundry requests that the IHE confirm that this is so in each respect.

[3] AE Motion p. 1.

[4] Once again this would provide powerful incentives for witness games. Counsel may have a need to confront a rebuttal witness with some testimony adduced during cross-examination on direct. Assuming the witness admits to some recollection of the prior testimony the witness would, of course, want to be sure the characterization of that prior testimony is correct, and may even disagree with the characterization. We waste 10 minutes while the court reporter finds and then reads aloud the transcribed testimony from the prior day. Doing this all only once will materially reduce the need for impeachment.

Most counsel and the IHE are used to the situation where a party's witness take the stand with direct and rebuttal at the same time, even if some of the rebuttal is directed at other parties' witnesses whose testimony has not yet been adduced into evidence. Although AE wants two rounds for itself AE proposes that the other parties that are presenting witnesses do that very thing, by offering their direct and cross-rebuttal evidence at the same time and passing their witnesses for cross-examination on both direct and cross-rebuttal at the same time. Under AE's proposed order, for example, ICA's Mr. Johnson would appear 6th and NXP/Samsung's witnesses Fox and Goble would appear 8th. Mr. Johnson, however offers cross-rebuttal to NXP/Samsung. This means Mr. Johnson's cross-rebuttal testimony would be received in evidence and NXP/Samsung will cross-examine him regarding his cross-rebuttal before the NXP/Samsung evidence Mr. Johnson is rebutting is entered into the evidentiary record.

All of this can be dealt with by using a different presentation format. Data Foundry is not aware of any motion to strike any portion of AE's rate filing package. AE has already indicated which of its witnesses are responsible for the various parts of the rate filing package, but since AE did not present any direct testimony there is obviously no testimony that could be stricken.[5] The entirety of the rate filing package is going to be offered into evidence in the beginning of receipt of evidence. There is no legal or practical requirement that AE present a witness or several witnesses to identify, authenticate or personally swear to the rate filing package but even if we must tend to that technical step we can get the package admitted and then defer cross-examination of the sponsoring witnesses.

Data Foundry suggests that all questions of admissibility of any of the rate filing package or witness written testimony be resolved at the prehearing conference. Then all of the evidence can be offered and received, at least tentatively,[6] before or immediately after opening statements.

[5] There are some outstanding motions to strike other parties' material, and more such motions may yet come. Presumably the IHE will rule on all such motions at the prehearing conference. We will then know exactly what testimonial evidence will be received into the evidentiary record before the hearing actually convenes. The actual timing of the offers is ultimately unimportant, so long as all offers and receipts are accomplished before the hearing concludes.

[6] There is always the possibility that some basis to strike or some need to correct or substitute might be revealed during the hearing. If that occurs it can be handled at the time. AE's rebuttal contained some desired corrections to the rate filing package. That too can be done through substitution of supplementation/replacement at the beginning rather than awaiting the presentation of AE's rebuttal case at the end like AE suggests.

Data Foundry then recommends that the conduct of the hearing/order of presentation be as outlined below:

a. Convene and appearances
b. Any procedural matters or instructions by IHE
c. Receipt of written evidence (rate filing package and all testimony)
d. Opening statements
e. Cross-examination of AE witnesses (both "direct" and rebuttal). Data Foundry would much prefer that AE's witnesses all simultaneously appear as a panel.[7] But if that is not how it works then AE can choose the order in which its witnesses appear.[8]
f. Cross-examination of ICA/intervenor witnesses (direct and cross-rebuttal).[9]
    1. ICA Witness Johnson and NXP/Samsung witnesses Fox and Gobel.
    2. All remaining ICA intervenor witnesses in a single panel, with each party being allowed to cross all hostile witnesses[10] on the panel.
g. Closing statements
h. Any concluding matters

The hearing must be structured to achieve as much actual presentation of useful information as is possible given the available time. Every party must receive some semblance of due process. AE's proposal simply will not work to obtain those ends. The suggestions and observations above are posed to assist in the reduction of inefficiencies, accelerate the process and re-inject some procedural fairness. Data Foundry cannot presently devise a specific suggestion on how much time AE and each of the other individual parties should be given. We

[7] Sequential presentation offers more opportunity for gaming. Another typical tactic is for early witnesses to kick a question over to a later witness, who then claims it should have been directed to an earlier witness that has already come and gone. In any event, panel format is far more efficient since a party can fully address a line of questions involving interrelated subjects and documents that have different sponsors by directing questions on that line to all the witnesses who touch on it, all at the same time. The record is better and less time is required to make it.

[8] City of Austin Procedural Rule 8.3(b) prescribes that AE must go first. Notably, however, it does not mention an opportunity for an AE rebuttal round after all intervenor witnesses have appeared, so AE's request to both open and close through separate appearances is not supported by the text of the rules. If AE prefers to put its witnesses up after the other parties rather than at the beginning Data Foundry will not object, so long as they only appear once and are available for cross-examination for both "direct" and rebuttal when they do appear.

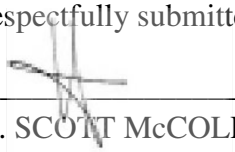
[9] AE lists eleven parties in its proposed sequence. Two intervenors – ICA and NXP/Samsung – offered complete cases that touch on all aspects of the case. The remainder addressed discrete topics. It would probably be more efficient if ICA and NXP/Samsung precede the others as part of a separate panel. There is also, however, some appeal to a single panel with all intervenors, although that means several witnesses will end up sitting for a long time while under oath with little for them to do. Data Foundry is relatively indifferent to the order for the non-ICA/NXP/Samsung intervenor witnesses if they do appear in series.

[10] Data Foundry agrees there should be no friendly cross, consistent with rule 8.4(b).

will each understandably lobby for as much as we can get. But actual time cuts for each party can only occur as a practical matter after the actual order and manner of presentation is decided.

All of these matters must be resolved at the prehearing conference so that the parties can then prepare for the hearing with a complete understanding of what will happen, and how they can do what they need to do given the amount of time they will have to do it.

Respectfully submitted,



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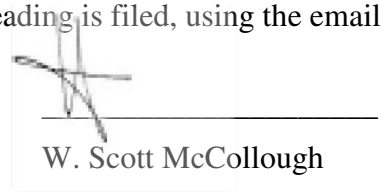
CERTIFICATE OF SERVICE

I, W. Scott McCollough, certify that I have served a copy of Data Foundry's Response to Austin Energy's First Request for Information/Production on all parties listed on the Service List for this proceeding as it exists on the date this pleading is filed, using the email address provided for the party representative.



W. Scott McCollough

May 23, 2016