

**TEXAS INDUSTRIAL ENERGY CONSUMERS' MOTION TO COMPEL AUSTIN  
ENERGY TO RESPOND TO TIEC'S FOURTH REQUEST FOR INFORMATION**

**I. INTRODUCTION**

Texas Industrial Energy Consumers (TIEC) moves to compel Austin Energy to respond to TIEC's Fourth Set of Requests for Information (RFI) TIEC 4-5 and TIEC 4-10. TIEC served its Fourth RFI to Austin Energy on May 27, 2022, and on June 6, 2022, Austin Energy served its objections.<sup>1</sup> Since that time, the parties have engaged in negotiations regarding Austin Energy's objections, and Austin Energy agreed to extend TIEC's deadline to file a motion to compel a response to TIEC 4-5 and TIEC 4-10 to June 14, 2022.<sup>2</sup> Those negotiations were unsuccessful, and TIEC therefore timely files this motion.

**II. EFFORTS TO CONFER**

TIEC has diligently conferred with Austin Energy regarding its objections to TIEC 4-5 and 4-10 on several occasions by phone and email, including explaining why TIEC believes these RFIs seek relevant information. However, Austin Energy has simply reiterated that it believes the requests at issue seek irrelevant information, and the parties have been unable to reach an agreement. Accordingly, TIEC files this motion to compel.

**III. ARGUMENT**

**A. The relevance standard**

Austin Energy's principal objection is that the RFIs at issue seek information that it believes is not relevant to this base rate review. Under the 2022 Austin Energy Base Rate Review Procedural Guidelines § F(1)(a), discovery is allowed on relevant information that is not unduly prejudicial, which includes information related to the Rate Filing Package and information to help

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<sup>1</sup> Austin Energy's objections are attached to this motion as Attachment A.

<sup>2</sup> TIEC's Letter to Impartial Hearing Examiner (June 13, 2022).

prepare a Position Statement.<sup>3</sup> Relevance is a low threshold.<sup>4</sup> Information is relevant if it has *any* tendency to make a fact of consequence more or less probable than it would be without the evidence.<sup>5</sup> In the discovery context in particular, tribunals liberally construe the relevance standard to “allow the litigants to obtain the fullest knowledge of the facts and issues prior to trial.”<sup>6</sup> Indeed, the information sought by a discovery request does not have to be admissible as long as the request appears reasonably calculated to lead to the discovery of admissible evidence.<sup>7</sup> In short, preemptive denial of discovery is improper unless there exists “no possible relevant, discoverable testimony, facts, or material to support or lead to evidence” that would support a claim or defense at issue in this case.<sup>8</sup>

## **B. Response to Austin Energy’s objections on TIEC 4-5**

*TIEC 4-5: Provide a copy of Austin Energy’s most recent short/long-term electricity sales and peak load forecast.*

Austin Energy’s first objection to this RFI is that it seeks information that is not relevant. The sole basis for this objection is that the Rate Filing Package (RFP) that Austin Energy submitted is based on a historical test year. Austin Energy thus takes the position that its most recent sales and peak load forecast are completely irrelevant to the establishment of just and reasonable base rates. That objection should be overruled.

As an initial matter, utility sales (and peak loads) are undoubtedly relevant to the rate setting process. Austin Energy itself acknowledges that customer growth and sales trends impact

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<sup>3</sup> Austin Energy Base Rate Review Procedural Guidelines § F(1)(a).

<sup>4</sup> In the 2016 Austin Energy Base Rate Review, the Impartial Hearing Examiner recognized that the Texas Rules of Civil Procedure supplied the applicable relevance standard for that proceeding. *Austin Energy’s Tariff Package Update of the 2009 Cost of Service Study and Proposal to Change Base Electric Rates*, Austin Energy 2016 Rate Review, Impartial Hearing Examiner’s Memorandum No. 12 at 1 (Mar 11, 2016) (available at: <https://www.austintexas.gov/edims/document.cfm?id=250131> ).

<sup>5</sup> Tex. R. Civ. Evid. 401.

<sup>6</sup> *Ford Motor Co. v. Castillo*, 279 S.W.3d 656, 664 (Tex. 2009).

<sup>7</sup> See Tex. R. Civ. Proc. 192.3(a).

<sup>8</sup> *Castillo*, 279 S.W.3d at 664; see also *State v. Lowry*, 802, S.W.2d 669, 671 (Tex. 1991) (“Only in certain narrow circumstances is it appropriate to obstruct the search for truth by denying discovery.”).

its finances.<sup>9</sup> Utilities recover their costs through billing determinants (e.g, kWh, kW). Thus, changes in billing determinants (i.e., increased sales or decreased sales) will, all else equal, change the amount of revenue that the utility recovers without any changes in rates. If, for example, Austin Energy experiences increasing billing determinants in the future due to load growth, it will recover a greater amount of revenue than in the historical test year. Further, the characteristics of a utility's loads, including when the utility peaks, are relevant to the cost-allocation analysis under the principle of cost-causation.<sup>10</sup>

Austin Energy stresses that rates are set based on a historical test year, contending that circumstances that will actually be in place when the rates set in this proceeding are in effect have no relevance whatsoever and cannot even be considered (or discovered). That is incorrect. While it is true that rates will be set based on a historical test year, that test year data is subject to evaluation and adjustment during the rate setting process. Austin Energy recognizes this, and states that it has in fact made various adjustments to the test year data.<sup>11</sup> For example, Austin Energy states in the Rate Filing Package that: “To ensure that rates adequately recover costs, the utility examines historical expenditures, capital improvement requirements, and customer loads, ***which are adjusted for known and measurable changes that occur after the end of the Test Year and produce a revenue requirement under normalized conditions.***”<sup>12</sup> Indeed, the very purpose of making test year adjustments (where appropriate) is “to make the test year data as representative as possible of the cost situation that is apt to prevail in the future.”<sup>13</sup> Austin Energy's own projections of future loads are a relevant data point to consider in evaluating whether the test year data is normal, and whether the adjustments that Austin Energy chose to make (along with any adjustments it did not make) to the test year are reasonable.

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<sup>9</sup> Austin Energy's 2022 Base Rate Filing Package (“RFP”) at 9 (Apr. 18, 2022) (“If customer growth and sales trends continue, Austin Energy will be better able to maintain the proposed rates without the accompanying financial strain that currently impacts the utility.”).

<sup>10</sup> Austin Energy's RFP recognizes that costs should be allocated based on the principle of cost-causation. *Id.* at 13 (“For costs that cannot be directly assigned, an appropriate allocation methodology must be developed consistent with cost causation principles.”).

<sup>11</sup> *Id.* at 27.

<sup>12</sup> *Id.* at 26 (emphasis added); *see also id.* at 27 (describing requirements for test year adjustments and providing examples of annualization and normalization adjustments).

<sup>13</sup> *City of El Paso v. Pub. Util. Comm 'n of Texas*, 883 S.W.2d 179, 188 (Tex. 1994) (citations omitted).

These considerations are particularly salient here given that the test year for this proceeding included the anomalous Winter Storm Uri event, as well as the ongoing COVID pandemic. If the test year included unusually low sales, that will impact the amount of revenue that the rates set in this case will actually generate in the future, which bears on the future financial condition of the utility, the debt service coverage ratio these rates will generate, and other relevant considerations.

Notably, Austin Energy has provided at least one load forecast (albeit in a high level chart) in response to Sierra Club/Public Citizen 2-3(d).<sup>14</sup> It is clear that these forecasts exist, and TIEC has not requested that Austin Energy conduct any additional analysis beyond what it already possesses. Austin Energy's relevance objection to TIEC 4-5 should be overruled.

In addition to its relevance objection, Austin Energy has also provided notice that it considers TIEC 4-5 to seek information that is protected from disclosure under the Texas Public Information Act. However, as noted, Austin Energy has provided at least some projected load information in Sierra Club/Public Citizen 2-3(d) in a public format and has also provided other projected financial information in response to other discovery requests as discussed below. TIEC therefore requests that (1) the Impartial Hearing Examiner overrule Austin Energy's relevance objection to TIEC 4-5, and (2) order Austin Energy to carefully determine the extent to which it can provide at least some responsive information to TIEC 4-5 without violating what it believes to be its confidentiality obligations. TIEC notes, for example, that it would be helpful if Austin Energy would at least provide the underlying data from the above referenced chart included in Sierra Club/Public Citizen 2-3(d).

**C. Response to Austin Energy's Objection to TIEC 4-10**

*TIEC 4-10: Provide a schedule showing each of the following metrics for Austin Energy over the past five years and projected for the next five years:*

- a) Debt service coverage ratio.*
- b) City transfer.*
- c) The amount of cash available to fund construction.*

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<sup>14</sup> Austin Energy's Response to SCPC's Second Request for Information 2-3(d) at Bates 046 (June 6, 2022).

Austin Energy objected to the portion of this question that sought projections of the referenced data for the next five years on the grounds of relevance. This objection should be overruled.

One of the major questions in any utility proceeding is what rate of return is necessary to allow the utility to attract capital on reasonable terms and maintain its financial integrity. This proceeding is no different, as Austin Energy seeks to establish rates that will provide it with what it believes is sufficient cash flow to fund its operations, including making transfers to the City of Austin and providing an adequate debt service coverage ratio.<sup>15</sup> As Austin Energy puts it, “[m]eeting the utility’s revenue requirement is critical to ensuring *the long-term financial health* of the utility, which is one of the main objectives of this rate review.”<sup>16</sup> Among Austin Energy’s goals in this case is to obtain rates that will allow it to meet its financial policies on an annual basis going forward,<sup>17</sup> including provide a debt service coverage ratio of at least 2.0x.<sup>18</sup> Of course, from the ratepayer perspective, it is critical that Austin Energy’s rates not be set any higher than is necessary to provide it with an adequate return and allow it to meet relevant financial benchmarks.

To probe these issues, TIEC sought information about Austin Energy’s projected future financial condition in TIEC 4-10. While Austin Energy again argues that the relevant analysis is completely limited to the historical test year, the question of whether the rates set in this case will be sufficient—but not excessive—turns in part on future circumstances while the rates are in effect. An inquiry into whether, for example, Austin Energy will be able to maintain a certain credit rating and its financial integrity going forward is not one that is decided purely by looking backwards at a historical test year. TIEC has little doubt that, if Austin Energy opposes revenue requirement reductions proposed by Participants in this case, it will argue in rebuttal that such recommendations could impact its financial standing and ability to efficiently meet its obligations going forward. Participants should be allowed to probe Austin Energy’s own future projections of its future financial condition.

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<sup>15</sup> See RFP at 27-38.

<sup>16</sup> *Id.* at 26 (emphasis added)

<sup>17</sup> *Id.* (“City Council adopts financial policies that govern Austin Energy’s requirements related to capital structure, funding sources, debt and debt service coverage, general fund transfer, and reserves. These financial policies are reviewed annually for compliance.”).

<sup>18</sup> RFP at B-1 (“Debt service coverage of a minimum of 2.0x shall be targeted for the Electric Utility Bonds.”).

As with TIEC 4-5, TIEC 4-10 also bears on the reasonableness of the adjusted test year data that Austin Energy has submitted in its RFP. The evidence will show that the adjusted test year that Austin Energy has submitted includes a larger transfer to the City of Austin than has been typical in recent years, which in turn increases the revenue requirement sought in this case. Ratepayers should be able to probe whether Austin Energy projects that it will continue to make a larger transfer in future years, or whether that is an anomalous non-recurring increase in cost.

Ultimately, anticipated conditions that will impact Austin Energy's financial picture are, at a minimum, a factor to consider in reviewing Austin Energy's rates and required revenue requirement. There is no basis for Austin Energy to withhold the requested information and preemptively cut off discovery on how its financial condition may be improving or otherwise changing since the end of the test year.

TIEC notes, again, that Austin Energy has provided certain projected financial information in response to other discovery responses.<sup>19</sup> It is thus unclear why it will not simply answer TIEC's request here. TIEC requests that the Impartial Hearing Examiner overrule Austin Energy's objection to TIEC 4-10.

#### **IV. CONCLUSION**

For the foregoing reasons, TIEC requests that its Motion to Compel be granted, and that Austin Energy be required to produce all information responsive to TIEC 4-5 and 4-10 as set forth above. TIEC also requests all other relief to which it is justly entitled.

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<sup>19</sup> Austin Energy's Response to ICA Second Request for Information at 2, 4 (May 13, 2022) (showing AE provided projected principal payments in response to ICA 2-1 and projected GFT for 2022 in ICA 2-3); see also Austin Energy's Response to SCPC's Second Request for Information at Bates 008 (showing AE provided a 5-year financial forecast in SCPC 2-3B).

Respectfully submitted,

O'MELVENY & MYERS LLP

*/s/ Ben Hallmark*

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**ATTORNEYS FOR TEXAS INDUSTRIAL  
ENERGY CONSUMERS**

**CERTIFICATE OF SERVICE**

I, John R. Hubbard, Attorney for TIEC, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 14<sup>th</sup> day of June, 2022 by electronic mail, facsimile, and/or First Class, U.S. Mail, Postage Prepaid.

*/s/ John R. Hubbard*

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John R. Hubbard

**AUSTIN ENERGY'S  
2022 BASE RATE REVIEW**

§ **BEFORE THE CITY OF AUSTIN**  
§  
§ **IMPARTIAL HEARING EXAMINER**

**AUSTIN ENERGY'S OBJECTION TO TEXAS INDUSTRIAL ENERGY CONSUMERS'  
FOURTH REQUEST FOR INFORMATION**

Austin Energy files this Objection to Texas Industrial Energy Consumers' ("TIEC") Fourth Request for Information ("RFI"), and respectfully shows as follows:

**I. PROCEDURAL HISTORY**

TIEC served its Fourth RFI to Austin Energy on May 27, 2022. Pursuant to the 2022 Austin Energy Base Rate Review Procedural Guidelines § F(2)(g), this objection is timely filed.

Counsel for Austin Energy and TIEC conducted good faith negotiations that failed to resolve the issues. While Austin Energy will continue to negotiate with TIEC regarding this and any future objections, Austin Energy files this objection for preservation of its legal rights under the established procedures. To the extent any agreement is subsequently reached, Austin Energy will withdraw such objection.

**II. GENERAL OBJECTIONS**

Austin Energy generally objects to these RFIs to the extent they are irrelevant.

**III. SPECIFIC OBJECTION**

TIEC 4-5: Provide a copy of Austin Energy's most recent short/long-term electricity sales and peak load forecast.

**Objection:**

Austin Energy objects to this Request to the extent it requests Austin Energy's most recent short/long-term electricity sales and peak load forecast. The Request seeks information that is neither relevant to the issues presented in this matter nor is reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the 2022 Austin Energy Base Rate Review Procedural Guidelines § F(1)(a), "[d]iscovery is limited to relevant information that is not unduly prejudicial. In other words, Participants can ask for information related to the Rate Filing Package." As indicated in Austin Energy's Base Rate Filing Package, Austin Energy is proposing changes to its base electric rates based on a 2021 Test Year in this proceeding. Austin Energy's base rates as proposed in its 2022 Base Rate Filing Package were developed to reflect an embedded cost of service analysis based on a 2021 Test Year. Therefore, Austin Energy's most recent short/long-term electricity sales and peak load forecast have no relevance to the 2022 Base Rate Review. Thus, this request seeks information outside the scope of this proceeding.



- TIEC 4-10: Provide a schedule showing each of the following metrics for Austin Energy over the past five years and projected for the next five years:
- a) Debt service coverage ratio.
  - b) City transfer.
  - c) The amount of cash available to fund construction.

Objection:

Austin Energy objects to this Request to the extent it requests a schedule showing Austin Energy's debt service coverage ratio, city transfer, and the amount of cash available to fund construction projected for the next five years. The Request seeks information that is neither relevant to the issues presented in this matter nor is reasonably calculated to lead to the discovery of admissible evidence. Pursuant to the 2022 Austin Energy Base Rate Review Procedural Guidelines § F(1)(a), "[d]iscovery is limited to relevant information that is not unduly prejudicial. In other words, Participants can ask for information related to the Rate Filing Package." As indicated in Austin Energy's Base Rate Filing Package, Austin Energy is proposing changes to its base electric rates based on a 2021 Test Year in this proceeding. Austin Energy's base rates as proposed in its 2022 Base Rate Filing Package were developed to reflect an embedded cost of service analysis based on a 2021 Test Year. Therefore, projections for the next five years of Austin Energy's debt service coverage ratio, city transfer, and the amount of cash available to fund construction have no relevance to the 2022 Base Rate Review. Thus, this request seeks information outside the scope of this proceeding.

**IV. PRAYER**

WHEREFORE, PREMISES CONSIDERED, Austin Energy requests this objection be sustained. Austin Energy also requests any other relief to which it may show itself justly entitled.

Respectfully submitted,

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**ATTORNEYS FOR THE CITY OF AUSTIN  
D/B/A AUSTIN ENERGY**

**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 on June 6, 2022, in accordance with the 2022 Austin Energy Base Rate Review Procedural Guidelines.

  
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THOMAS L. BROCATO