

**AUSTIN ENERGY  
2022 BASE RATE REVIEW**

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**BEFORE THE CITY OF AUSTIN  
HEARING EXAMINER**

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**DATA FOUNDRY, LLC'S CLOSING BRIEF**

Data Foundry, LLC (“Data Foundry”) respectfully offers this timely Closing Brief consistent with the updated briefing schedule memorialized in the Updated Procedural Schedule filed on July 22, 2022 and the Briefing Outline filed on July 18, 2022.

**I. INTRODUCTION**

Data Foundry respectfully asks the Independent Hearing Examiner (“IHE”) to recommend to the City Council the approval of the PRI-2 High Load Factor (“HLF”) tariff without the proposed insertion of an energy efficiency charge on the PRI-2 HLF customers and without the energy efficiency reporting mandate that Sierra Club first proposed at hearing. No party seems to oppose approval of the PRI-2 HLF tariff, even though there are differences amongst the parties regarding energy efficiency. Overwhelming evidence in this proceeding has highlighted that PRI-2 HLF customers have invested substantially in energy efficiency on their own initiative. There is also clear and undisputed evidence that the utilities of Texas under Public Utility Commission of Texas (“PUCT” or “Commission”) jurisdiction expressly rejected the imposition of energy efficiency assessments on industrial customers like those who would receive service under PRI-2 HLF, and those customers are not compelled to report on their own energy efficiency efforts. Additionally, the record clearly shows the fundamental and irreparable flaws in the proposal to mandate reports from PRI-2 HLF customers or to otherwise tax them with a fee for energy efficiency programs if they try to exercise their right to privacy to protect valuable and competitive energy efficiency measures. For these reasons and others, Data Foundry respectfully requests

approval of the PRI-2 HLF tariff as it was introduced, and without the insertion of energy efficiency mandates or the recently proposed “privacy tax.”

## **II. REVENUE REQUIREMENT**

Data Foundry is not briefing this issue at this time.

## **III. COST ALLOCATION**

Data Foundry is not briefing this issue at this time.

## **IV. CLASS REVENUE DISTRIBUTION**

Data Foundry is not briefing this issue at this time.

## **V. RATE DESIGN**

### **C. PRI-2 High Load Factor Tariff**

Approval of the PRI-2 HLF tariff is of paramount importance to Data Foundry because of its large load year-to-year energy consumption in Austin. Data Foundry spent years taking service under a tariff that did not reasonably reflect Data Foundry’s load factor and the relatively low cost of service associated with its extremely flat load shape. The PRI-2 HLF tariff itself is uncontested in this proceeding; therefore, the record can only support its approval. However, two intervenors (Sierra Club and Mr. Robbins) have sought to insert unrelated energy efficiency costs into this tariff that Austin Energy did not include in its application. The energy efficiency issue is addressed in Section (VII)(b) below. One of those intervenors (Mr. Robbins) misunderstood how energy charges are assessed for customers receiving service under PRI-2.<sup>1</sup> In response to Mr. Robbins,

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<sup>1</sup> Ex. Robbins-1 (Position Statement) at Sec. 2.2: “Austin Energy Seeks to Eliminate Conservation Participation in New Commercial Rate Class. If created, the rate would charge a monthly fee, a demand charge per KW, and a fuel charge. But customers would not be charged a kwh fee for energy, nor would they be charged for energy efficiency.”

Austin Energy clarified that PRI-2 HLF customers will be charged the energy rate under the Power Supply Adjustment (“PSA”).<sup>2</sup>

In addition to being uncontested in this proceeding, the PRI-2 HLF tariff, as proposed by Austin Energy, is just and reasonable. The PRI-2 HLF tariff adheres to the principles of cost causation better than existing tariff offerings available to Data Foundry, and it does so while leaving other rate classes unaffected.<sup>3</sup> Austin Energy rightly noted that the PRI-2 HLF rate design better matches the actual unit costs for the PRI-2 HLF class, which means charges assessed under the proposed rate tariff will be closer to the actual cost of service than currently applicable tariffs. Cost-based rates are fair because the charges on the customer’s bill are a more accurate representation of what it costs Austin Energy to provide services to that customer.<sup>4</sup> As such, the PRI-2 HLF tariff should be approved.

## **VI. VALUE OF SOLAR**

Data Foundry is not briefing this issue at this time.

## **VII. OTHER ISSUES**

### **B. Energy Efficiency Service**

Data Foundry takes no position on the energy efficiency service program for residential and small commercial customers, but agrees with Austin Energy and Texas Industrial Energy Consumers (“TIEC”) that customers taking service under High Load Factor tariffs (including PRI-

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<sup>2</sup> Ex. AE-9 (Austin Energy’s Rebuttal Testimony of Brian Murphy) at 60.

<sup>3</sup> Ex. AE-1b (Amendment to Base Rate Filing Package) at 2.

<sup>4</sup> *Id.* at 3. “[A]ll approved rates [must] reflect to some degree the costs actually caused by the customer who must pay them.” *KN Energy, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992); *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 708 (D.C. Cir. 2000); *Pacific Gas & Elec. Co. v. FERC*, No. 03-1025, 373 F.3d 1315, 1320-21 (D.C. Cir. 2004)

2 HLF) should not be compelled to participate.<sup>5</sup> High Load Factor customers already have ample incentive to perform their own energy efficiency measures.<sup>6</sup> Further, all parties agree that High Load Factor customers should not be required to cross-subsidize energy efficiency programs in other customer classes.<sup>7</sup> Consistent with Commission findings almost a decade ago,<sup>8</sup> Austin Energy-administered energy efficiency programs for residential and small commercial customers can and should continue without participation from High Load Factor customers because residential and small commercial customers do not have access to the same markets as High Load Factor customers. There is no compelling reason to require an Austin Energy-administered energy efficiency program for the large, sophisticated customers taking service under the various High Load Factor tariffs and who are far more likely to address these issues independently.

1. *As Proposed by Austin Energy, the PRI-2 HLF Tariff Properly Excludes Large Industrial Customers from Mandated Participation in an Energy Efficiency Program.*
  - i. *Austin Energy Already Excludes Similarly Situated Customers with Demand Over 20 MW from the Energy Efficiency Charges.*

High Load Factor customers with demand over 20 MW currently are excluded from Austin Energy's energy efficiency program.<sup>9</sup> With the PRI-2 HLF tariff, similarly situated customers with demand between 3 MW and 20 MW will be afforded the same treatment as their larger

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<sup>5</sup> Ex. AE-1b (Amendment to Base Rate Filing Package) at 5; Ex. TIEC-2 (Cross-Rebuttal Testimony and Exhibits of Jeffry Pollock) at 11-14.

<sup>6</sup> See Tr. at 37:36-38:11 (July 14, 2022) (Sierra Club witness Mr. Reed noting that large industrial customers, including the HLF customers, can participate in Electric Reliability Council of Texas ("ERCOT") wholesale markets and receive compensation for various demand response products); Data Foundry Ex.-7, 8 (distinguishing the economic incentives for energy efficiency investments by industrial customers from those for residential and small commercial customers).

<sup>7</sup> See Tr. at 38:45-39:15 (July 14, 2022) (Sierra Club witness Mr. Reed stating that any energy efficiency program should be financed solely by customers in that class); Data Foundry Ex.-10 (PUCT finding that energy efficiency programs should not be designed such that one class of customers cross-subsidizes another class).

<sup>8</sup> Data Foundry Ex.-7, 8 (PUCT finding that small commercial and residential customers have fewer market incentives to invest in demand reduction and energy efficiency).

<sup>9</sup> Ex. AE-9 (Austin Energy's Rebuttal Testimony of Brian Murphy) at 61.

counterparts. This is quite logical. PRI-2 HLF customers, like Data Foundry, spend millions of their own dollars on energy efficiency, as do HLF customers with demand over 20 MW.<sup>10</sup> The economic impact of energy consumption makes private investment by these customers prudent. The prior actions of High Load Factor customers prove that an Austin Energy-administered energy efficiency program for these customers is unneeded and an inefficient use of Austin Energy's resources.

- ii. *Because of Their High Load Factor and Operational Profile, PRI-2 Customers Already Use Austin Energy's Facilities in a More Efficient Manner than Residential and Small Commercial Customers.*

The record in this proceeding is replete with examples of the significant investments that Data Foundry and similarly situated High Load Factor customers have made to reduce electricity consumption. Conversely, residential and small commercial customers have less incentive to make private investment than a High Load Factor customer where electricity is one of, if not the largest, cost driver for their business.<sup>11</sup> Moreover, by definition, High Load Factor customers efficiently use Austin Energy's facilities because of their load shape—there is little unutilized capacity caused by High Load Factor customers. By comparison, the need for peak shaving incentives is greater for residential and small commercial customers who drive Austin Energy's summer peaks.

Even Sierra Club's own evidence shows that the proceeds from an energy efficiency rebate are unlikely to shape an industrial customer's energy efficiency investments. Exhibit SCPC-16

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<sup>10</sup> See Ex. TIEC-2 (Cross-Rebuttal Testimony and Exhibits of Jeffrey Pollock) at 12-13; Ex. Data Foundry-3 (describing Data Foundry-parent Switch, Inc.'s self-developed patented HVAC technologies); Ex. Data Foundry-4 (describing Switch Inc.'s energy efficiency and renewable energy commitments). See also, Ex. SCPC-6 (TIEC's Response to SCPC's First Set of RFI) (describing private investments by TIEC members in energy efficiency).

<sup>11</sup> See, e.g., Data Foundry Ex.-7, 8 (PUCT finding that small commercial and residential customers have fewer market incentives to invest in demand reduction and energy efficiency).

shows that four and a half years ago, before the PRI-2 HLF tariff was available to it, Data Foundry received a \$98,714 rebate from Austin Energy on a \$39.6 million energy efficiency investment.<sup>12</sup> Austin Energy expressly noted that the rebate constituted only 0.25% of the \$39.6 million project cost.<sup>13</sup> Given that Data Foundry was not able to take service from a High Load Factor tariff at the time, it makes sense that Data Foundry would defray the expense of a utility-administered energy efficiency program on its bills by using a rebate funded by the program. To do otherwise would be wasteful. However, no rational actor would invest over \$35 million solely because of a \$98,000 rebate. Exhibit SCPC-16 highlights the fact that currently Data Foundry is in a rate class that does not properly account for its load size or shape characteristics. Correlation between the use of the rebate and the investment simply cannot be used to suggest causation. In fact, the record includes many examples of energy efficiency investments that were made by industrial customers without contribution from Austin Energy.<sup>14</sup> High Load Factor customers are making significant energy efficiency investment without the need for rebates from Austin Energy. Consequently, there is no evidence to suggest that compulsory participation in an Austin Energy-administered energy efficiency program would actually increase energy efficiency investment.

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<sup>12</sup> Ex. SCPC-16 (Recommendation for Council Action - Council Date: May 10, 2018). The exhibit also notes that Austin Energy is enjoying about 900 MW of cumulative demand reduction from Data Foundry's \$39.5 million investment and the \$98,000 rebate.

<sup>13</sup> *Id.*

<sup>14</sup> Ex. Data Foundry-3 (describing Data Foundry-parent Switch, Inc.'s self-developed patented HVAC technologies); Ex. Data Foundry-4 (describing Switch Inc.'s energy efficiency and renewable energy commitments).

iii. *The Texas Legislature and PUCT Have Found that Mandated Energy Efficiency Programs Should Not be Imposed on Industrial Customers, Like Data Foundry.*

The debate about compulsory participation in utility-administered energy efficiency programs is a rehash of a decade-old debate at the Commission and the Capitol. There is no need to retread this old ground here because the policy arguments remain unchanged. With House Bill 3693 in 2007, the Texas Legislature codified the exemption of industrial customers from utility-administered energy efficiency programs in areas with retail competition.<sup>15</sup> Notably, TIEC and Sierra Club each testified in support of this legislation.<sup>16</sup> The PUCT conducted a pair of rulemakings on the issue, most recently in PUCT Project No. 39674.<sup>17</sup> The Commission has instructed that industrial customers, including Data Foundry and other data centers, cannot be required to participate in a Commission-jurisdictional energy efficiency program.<sup>18</sup> No one has been able to identify any attribute of energy efficiency in the Austin Energy system that distinguishes it from energy efficiency in Commission-jurisdictional regions. The logic applied by the Texas Legislature and the PUCT should be applied here to exclude High Load Factor customers from utility-administered energy efficiency programs because the incentives for energy efficiency investment by industrial customers differ from those for residential and small commercial customers.

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<sup>15</sup> Ex. Data Foundry-9 (Project 39674 Order at 40); Ex. TIEC-2 (Cross-Rebuttal Testimony and Exhibits of Jeffrey Pollock) at 13-14.

<sup>16</sup> Ex. Data Foundry-5 (HB 3693 House Committee Report – 3.27.2007 Witness list) and Ex. Data Foundry-6 (HB 3693 Senate Committee Report – 5.17.2007 Witness list).

<sup>17</sup> *Rulemaking Proceeding to Amend Energy Efficiency Rules*, PUCT Project No. 39674.

<sup>18</sup> See Ex. Data Foundry-9 (Project 39674 Order at 40).



- iv. *Austin Energy Should Not Become an Outlier by Mandating PRI-2 Customers Pay into an Energy Efficiency Program that Large Industrial Customers Do Not Want.*

Forcing High Load Factor customers into utility-administered energy efficiency programs would place Austin Energy at a competitive disadvantage to areas without such a mandate. Choosing to be an outlier and increasing fees on High Load Factor customers runs contrary to the City's economic development objectives as it incentivizes moving High Load Factor (often high-tech) away from Austin. This could create a ripple effect on property taxes, jobs, and other economic metrics.<sup>19</sup>

The Independent Consumer Advocate ("ICA") at various points in the hearing noted the importance of listening to customers' wishes.<sup>20</sup> This point holds true for all customer classes, not just residential and small commercial customers. The fact that no High Load Factor customers seek to participate in a utility-administered energy efficiency program should be given consideration.<sup>21</sup> The advocates for compulsory participation are not High Load Factor customers and have no direct "skin in the game." This should be telling.

For these reasons, Data Foundry urges the approval of the PRI-2 HLF tariff without the addition of mandatory participation in a utility-administered energy efficiency program.

2. *PRI-2 Customers Should Not Be Taxed with an Energy Efficiency Charge Simply for Seeking to Maintain Their Right to Privacy.*

Sierra Club's proposal to compel PRI-2 HLF customers to disclose their own private energy efficiency investments in order to avoid paying into Austin Energy-administered energy

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<sup>19</sup> Tr. at 40:27-30 (July 14, 2022); Tr. at 125:27-125:33 (July 13, 2022).

<sup>20</sup> See Tr. at 63:17-24 (July 14, 2022) (customer sentiment should be considered in ratemaking).

<sup>21</sup> Cf. Tr. at 40:33-40:41 (July 14, 2022) (Sierra Club witness Mr. Reed explaining that he is not surprised that High Load Factor customers do not advocate for Austin Energy-administered energy efficiency programs for their customer classes because the Legislature has opined that such programs are not needed).

efficiency activities suffers several fatal flaws.<sup>22</sup> Most fundamentally, it disrespects the customer's right to privacy. In effect, it creates a tax on customer privacy because the only way that an industrial customer could avoid a disclosure mandate would be compulsory payment toward Austin Energy's energy efficiency programs, including, potentially toward programs that subsidize energy efficiency measures for the customer's competitors.<sup>23</sup> The proposal also is facially discriminatory because it would only apply to a particular subset of customers.<sup>24</sup> To Data Foundry's knowledge, no utility in Texas requires its customer's to report their private investments in public reports for energy efficiency or for any other reason. Austin Energy should not become the first.

i. *Mandatory Reporting Would Actually Discourage Energy Efficiency Investment by Austin Energy Customers.*

A disclosure mandate thwarts the adoption of new energy efficiency technologies in the Austin Energy service territory because mandated disclosure creates a risk for proprietary and trade secret technologies. As was detailed at hearing and in the pre-filed testimony of TIEC witness Jeffry Pollock, industrial customers, eligible under the proposed PRI-2 HLF tariff, make significant investment in their individual energy efficiency improvements.<sup>25</sup> Customers, like Data Foundry with its parent Switch, Inc., have many patents and valuable intellectual property related

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<sup>22</sup> Tr. at 40:1-3 (July 14, 2022) (Sierra Club testifying that PRI-2 customers should be required to show that they deserve to be excluded from Austin Energy-administered energy efficiency programs by proving that they sufficiently invest in energy efficiency on their own); Tr. at 43:37 (July 14, 2022) (Sierra Club contending that a customer seeking exemption from Austin Energy-administered energy efficiency fees should be required to prove that they are making private investment in energy efficiency).

<sup>23</sup> Cf. TIEC Ex.-2 (Cross-Rebuttal Testimony and Exhibits of Jeffry Pollock) at 12 ("Thus, Dr. Reed's proposal would require large high load factor customers to pay twice for energy efficiency – both for the costs of their own self directed measures and the EES costs incurred by AE to fund measures that directly benefit other customers.")

<sup>24</sup> Tr. at 31:31-33 (Sierra Club witness Mr. Reed testifying that a residential customer who does not seek rebates from Austin Energy is not required to disclose its private energy efficiency investment).

<sup>25</sup> TIEC Ex.-2 (Cross-Rebuttal Testimony and Exhibits of Jeffry Pollock) at 12.

to energy efficiency.<sup>26</sup> Sierra Club witness Mr. Reed acknowledged that these investments can include development of new patented equipment and techniques that the invention-owner creates with its own private investment.<sup>27</sup> Adding a requirement to publicly disclose energy efficiency activity could lead customers to exclude facilities in the Austin Energy footprint from the newest and most commercially-valuable energy efficiency technologies because the surest way to avoid public disclosure of these valuable intellectual properties would be to avoid the place requiring the report. A policy that disincentives use of the newest energy efficiency technologies at sites in Austin runs directly contrary to Austin Energy's energy efficiency goals.

ii. *The Burden of Mandatory Reporting Would Create an Incentive for Industrial Customers to Leave the Austin Energy Service Territory in Favor of Other Service Territories.*

The proposed disclosure mandate creates an incentive to move new investment outside of the Austin Energy service territory. While he does not know how much it might cost, Sierra Club witness Mr. Reed acknowledged that mandated reporting would cause new costs on affected PRI-2 customers that the customer would be required to absorb.<sup>28</sup> This unfunded mandate effectively increases the costs for customers who do not seek to participate in the Austin Energy energy efficiency program by forcing spending on the development of a report that would not otherwise exist. Given the significant role that electricity costs plays in industries like data centers, adding unquantified reporting and compliance costs for loads in the Austin Energy footprint that can be avoided in other sites would place Austin Energy at a competitive disadvantage. Further, no one

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<sup>26</sup> See Ex. Data Foundry-3.

<sup>27</sup> Tr. at 34:14-22 (July 14, 2022). See, also, Ex. Data Foundry-3 at 2 (listing about a dozen examples of Switch-owned patents related to HVAC systems).

<sup>28</sup> Tr. at 44:41-45 (July 14, 2022).

has identified a benefit to Austin Energy ratepayers from compelling customers to create such reports. Public curiosity<sup>29</sup> is not an adequate reason to impose such a burden.

- iii. *The Proposed Financial Mandate for Certain Customers to Publicly Report Their Energy Usage and Energy Efficiency Investments Conflicts with State Law.*

Charging a customer a fee in order for the customer to protect its private electricity-related information conflicts with Tex. Util. Code Ch. 182, Subchapter B. Tex. Util. Code 182.052 (a) and (b) provide:

- (a) Except as provided by Section 182.054, a government-operated utility may not disclose personal information in a customer's account record, or any *information relating to the volume or units of utility usage* or the amounts billed to or collected from the individual for utility usage, unless the customer requests that the government-operated utility disclose the information.
- (b) A customer *may* request disclosure of information described by Subsection (a) by delivering to the government-operated utility an appropriately marked form provided under Subsection (c)(2) or any other written request for disclosure.<sup>30</sup>

This statutory provision clearly applies to protect Austin Energy customers like Data Foundry as Austin Energy is a government-operated utility and the information that Sierra Club seeks for public disclosure directly relates to the customer's utility usage. Moreover, the statute clearly states that a customer *may* at its discretion request release of information. Financial compulsion created by a fee to avoid disclosure conflicts with the decision making right conferred to customers in Tex. Util. Code 182.052 (b)

The proposal to mandate customer reports places a more onerous disclosure requirement on private customers than exists on municipal utilities, like Austin Energy, under the Public

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<sup>29</sup> Tr. at 31:43-45 (July 14, 2022).

<sup>30</sup> Tex. Util. Code 182.052(a)-(b)(emphasis added).

Information Act.<sup>31</sup> Municipally-owned utilities are not required to publicly disclose competitively sensitive information.<sup>32</sup> It makes no sense to suggest that customers should be required to produce information that even the City-owned utility might not for its own competitively sensitive electricity-related data.

Additionally, compelling loads that participate in the ERCOT wholesale market to publicly disclose energy efficiency information improperly inserts the City into the ERCOT wholesale market. Sierra Club witness Mr. Reed explained that PRI-2 HLF customers are large enough to reasonably participate in the ERCOT wholesale market, potentially selling Responsive Reserves, Emergency Response Service, and other wholesale products.<sup>33</sup> In this regard, PRI-2 HLF and other large industrial customers can make bids and offers in the same markets referenced in Tex. Gov't Code § 552.133(a-1)(1)(B). The ERCOT wholesale market is statutorily required to be non-discriminatory<sup>34</sup> and is within the exclusive jurisdiction of the PUCT, not the City of Austin.<sup>35</sup> Mr. Reed specified that the mandated reports should be for individual premises in the Austin Energy service territory.<sup>36</sup> Neither ERCOT nor the PUCT require public disclosure of site-specific

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<sup>31</sup> Tex. Gov't Code Ch. 552.

<sup>32</sup> See Tex. Gov't Code § 552.104(a) (Information is excepted from disclosure if a governmental body demonstrates that release of the information would harm its interests by providing an advantage to a competitor or bidder in a particular ongoing competitive situation or in a particular competitive situation where the governmental body establishes the situation at issue is set to reoccur or there is a specific and demonstrable intent to enter into the competitive situation again in the future.)

Tex. Gov't Code § 552.133 (Excepting from disclosure public power utility information related to generation unit specific and portfolio fixed and variable costs, including forecasts of those costs, capital improvement plans for generation units, and generation unit operating characteristics and outage scheduling; bidding and pricing information for purchased power, generation and fuel, and Electric Reliability Council of Texas bids, prices, offers, and related services and strategies; effective fuel and purchased power agreements and fuel transportation arrangements and contracts).

<sup>33</sup> Tr. at 37:38-38:6 (July 14, 2022).

<sup>34</sup> See PURA § 39.151(a)(1).

<sup>35</sup> See PURA § 39.151(d).

<sup>36</sup> Tr. at 31:38-38:6 (July 14, 2022).

resource capabilities as part of participation in the wholesale market. In fact, doing so would contradict ERCOT's competitive wholesale model.

To the extent that these High Load Factor customers participate in ERCOT wholesale markets, charging them an assessment for keep data confidential that other wholesale market participants can keep confidential for free would create an impermissible discrimination among ERCOT market participants.<sup>37</sup> Likewise, requiring them to publicly disclose information related to site-specific resource costs when their competitors in the ERCOT market do not is similarly discriminatory. Even if the "privacy tax" proposal were a reasonable policy for Austin Energy to adopt (which it is not), it directly conflicts with state-level policies and must not be adopted.

## **VIII. CONCLUSION**

Data Foundry appreciates Austin Energy's inclusion of the PRI-2 HLF tariff as part of the rate filing package in this proceeding. The PRI-2 HLF tariff offers an important and desirable retail electricity product for Data Foundry, and therefore Data Foundry respectfully asks that it be approved and adopted without the injection of an energy efficiency assessment against customers eligible for this product offering.

Respectfully submitted,

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Todd F. Kimbrough  
State Bar No. 24050878  
Stacie L. Bennett  
State Bar No. 24076984  
BALCH & BINGHAM LLP  
919 Congress St., Suite 840  
Austin, TX 78701  
(512) 583-1711

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<sup>37</sup> Cf. PURA § 35.004(h) The commission shall require the independent organization certified under Section 39.151 for the ERCOT power region to modify the design, procurement, and cost allocation of ancillary services for the region in a manner consistent with cost-causation principles and on a nondiscriminatory basis.

tkimbrough@balch.com  
slbennett@balch.com

**CERTIFICATE OF SERVICE**

I, Todd F. Kimbrough, Attorney for Data Foundry, hereby certify that a copy of this document was served on all parties of record in this proceeding on this 26th day of July, 2022 by electronic mail, facsimile, and/or First Class, U.S. Mail, Postage Prepaid.

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Todd F. Kimbrough