AUSTIN ENERGY **2022 BASE RATE REVIEW**	**§** **§** **§**	**BEFORE THE CITY OF AUSTIN** **IMPARTIAL HEARING EXAMINER**

EXCEPTIONS OF SIERRA CLUB, PUBLIC CITIZEN, AND SOLAR UNITED NEIGHBORS TO THE INDEPENDENT HEARING EXAMINER'S FINAL RECOMMENDATION

September 26, 2022

Joshua Smith
Dru Spiller
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
Tele: 415-977-5560
Email: joshua.smith@sierraclub.org
dru.spiller@sierraclub.org

James Z. Brazell
Law Office of James Z. Brazell
P.O. Box 183
Coupland, TX 78615
jbrazell@brazelllaw.com

Counsel for Sierra Club, Public Citizen, and Solar United Neighbors

On behalf of its Texas members, including many members who are customers of Austin Energy, Sierra Club, Public Citizen, and Solar United Neighbors ("the Conservation Organizations" or "SC-PC-SUN") respectfully submit these exceptions to the Independent Hearing Examiner's ("IHE") September 9, 2022 Final Recommendation. Although the IHE recommends that Austin Energy "revisit" its proposed fixed charge increase and rate design changes to mitigate rate shock to low-income customers, the IHE "recommends approval of a substantial portion of AE's revenue requirement, cost allocation methods, and [Value of Solar tariff]."[1] As discussed below, the Final Recommendation is not supported by substantial evidence, fails adhere to "applicable law,"[2] and should be modified.

INTRODUCTION

In this proceeding, Austin Energy proposes to dramatically redesign its residential rates, increasing its monthly fixed residential service charge by *150% per customer* and flattening its variable energy rate structure in a way that constrains captive ratepayers' ability to reduce their energy usage and costs. Austin Energy also proposes to slash its Value of Solar ("VOS") rate for rooftop solar owners, crediting those customers with only a fixed "avoided cost" of energy based on average ERCOT day-ahead market prices, despite widely-recognized and quantifiable additional system benefits from rooftop solar. Austin Energy further proposes to recover a portion of the VOS credit through the Energy Efficiency Service ("EES") Fee, while also exempting high energy industrial customers from contributing to that fund. Finally, without providing any evidence supporting the prudence of continuing to operate the Fayette power plant, Austin Energy proposes to recover $50.3 million in costs, despite previously committing to retire that increasingly expensive, highly-polluting plant by the end of 2022.[3] Taken together, Austin Energy's continued investment in the Fayette Power Plant and its proposed restructuring of its residential electric rates would be detrimental to the City's energy efficiency, distributed solar, and climate goals, and harmful to customers.

[1] Final Recommendation at 7, 107.

[2] Tex. Gov't Code Ann. § 2001.058(e)(1).

[3] Response to Data Request SCPC 2-1.

The IHE's Final Recommendation recognizes that Austin Energy failed to meet its burden of proof and that the utility's proposed rate design changes are flawed in several ways, but inexplicably declines to recommend that the Council reject those changes. Separately, the Final Recommendation erroneously recommends that the City Council approve Austin Energy's unjustified spending at the Fayette coal plant and its proposed changes to the Value of Solar tariff and Energy Efficiency Service fee. Accordingly, the Final Recommendation should be modified or reversed, as discussed below.

First, the Final Recommendation makes clear that Austin Energy failed to carry its burden of demonstrating that its proposed rate design changes—including its proposed 150% fixed charge increase and the flattened variable energy rate structure—are just and reasonable to residential ratepayers. Indeed, Austin Energy failed to demonstrate a need for additional "revenue from the residential customer class,"[4] failed to demonstrate that the proposed rate design changes provide adequate conservation price signals,[5] and failed to demonstrate that the proposed changes "adequately address[]" affordability and protect low-income customers.[6] Consequently, the City Council must reject Austin Energy's proposed fixed charge increase and the flattened variable rate structure. There is no support for the IHE's suggestion that the Participants be required to "revisit" and fix Austin Energy's flawed proposal.[7] Austin Energy bears the burden on demonstrating that its proposal is reasonable, not the other parties.

Second, the IHE's recommendation that the City Council rubberstamp Austin Energy's spending at the Fayette power plant is arbitrary, capricious, and contrary to law. Austin Energy indisputably failed to submit *any* "documentation of its decision-making process,"[8] or any analysis demonstrating that continuing to invest tens of millions of dollars to operate Fayette is prudent "given the information" about future environmental compliance risk and the "alternatives

[4] Final Recommendation at 104.

[5] *Id*. at 110.

[6] *Id*. at 112-14.

[7] *Id*. at 107.

[8] *Gulf States Utilities Co. v. Pub. Util. Comm'n of Tex.*, 841 S.W.2d 459, 476 (Tex. App. Austin 1992) (footnote omitted).

available" to the City.[9] In other words, Austin Energy has failed to meet is burden of demonstrating the prudence of "each dollar" spent at Fayette,[10] and the Council should deny those costs.

Third, and alternatively, the City Council should remand the Final Recommendation and direct the IHE to reconsider the implications of the newly-enacted Inflation Reduction Act for the continued operation of the Fayette plant. The new law directs nearly $400 billion in tax credits and direct spending to fund clean energy investments, and will likely have significant implications for Austin Energy's revenue requirement and the economics of its current generation assets. Because the City Council has an obligation to evaluate the prudence of Austin Energy's spending in light of "applicable law,"[11] and must consider "changing circumstances . . . [that] arise as a project progresses,"[12] the City Council should remand with instructions to reconsider the Fayette spending in light of the new law. At a minimum, the Council should also direct Austin Energy to reopen its Resource Planning process to evaluate the implications of the law for its resource portfolio.

Fourth, the IHE erred by approving Austin Energy's proposed changes to the methodology for determining the Value of Solar ("VOS") credit. Austin Energy's proposed backward-looking method undervalues 25+ year investments by residents and businesses in clean, local rooftop generation, made on forward-looking cost. The Council should reject Austin Energy's proposed changes to the VOS tariff and order a transparent stakeholder process to determine any new VOS structure. In the meantime, Austin Energy should continue using the existing tariff.

Finally, The IHE erred in recommending that the City approve Austin Energy's proposal to exempt large "high load" industrial customers from any obligation to contribute to the Energy Efficiency Service ("EES") Fee. All customers, including the High Load customers, benefit from the Customer Energy Solutions programs—energy efficiency, demand response, and distributed

---

[9] *Entergy Gulf States, Inc. v. Pub. Util. Comm'n of Texas*, 112 S.W.3d 208, 210 (Tex. App. Austin 2003).

[10] *Entergy Gulf States*, 112 S.W.3d at 214.

[11] Tex. Gov't Code Ann. § 2001.058(e)(1).

[12] *Gulf States Utilities Co. v. La. Pub. Serv. Comm'n*, 578 So.2d 71, 85-86 (La. 1991) (applying the prudence standard in the utility's application for rate support and concluding that the decision to restart and continue the construction of a nuclear power plant was imprudent in light of changed federal regulations and costs).

generation—and all customers should contribute to the fund for those programs. Exempting high load customers from the EES Fee is unlawfully discriminatory and prejudicial to other customer classes, and the City Council should reject the IHE's recommendation approving that exemption.

Before approving Austin Energy's proposed rate changes, the City Council must ensure that there is substantial evidence demonstrating that those rates are just and reasonable, and that the utility's spending decisions are prudent and the least-cost option for meeting the needs of captive ratepayers. The IHE's Final Recommendation fails to meet that standard, and fails to support the approval of Austin Energy's proposed rates. Accordingly, and for the additional reasons discussed below, the City Council should reject and modify the Final Recommendation.

LEGAL STANDARD

As noted, the City Council has a fundamental obligation to ensure just and reasonable retail electric utility rates.[13] That principle is intended to protect captive electricity customers from arbitrary and capricious costs or rates imposed by municipally owned monopolies, like Austin Energy.[14] Applying those principles electricity rates "cannot be deemed just and reasonable unless the utility was prudent in incurring the operating expenses it seeks to pass through to consumers,"[15] and the proposed rates are fair and nondiscriminatory. Austin Energy bears the burden of proof in making a "convincing showing that the amounts that it has charged to operating expenses for depreciation have not been excessive,"[16] and that its rates are just and reasonable.

The City of Austin's Procedural Rules do not articulate the standard of review for the IHE's Final Recommendation, but the Public Utility Commission's procedural rules are instructive. Under Public Utility Commission Procedural Rule § 22.262, the utility regulator may modify the

[13] *Gulf States Utilities*, 841 S.W.2d at 465–66; *see also San Antonio Indep. Sch. Dist. v. City of San Antonio*, 550 S.W.2d 262, 265 (Tex. 1976) (municipally owned utilities may not unfairly burden captive ratepayers with unreasonable costs); *City of Texarkana v. Wiggins*, 151 Tex. 100, 104, 246 S.W.2d 622, 624 (1952) (recognizing the "common-law rule" that municipalities "engaged in rendering a service affected with a public interest or, more strictly, what has come to be known as a utility service, may not discriminate").

[14] *Wiggins*, 246 S.W.2d at 625.

[15] *Gulf States Utilities*, 841 S.W.2d at 465–66.

[16] *Lindheimer v. Illinois Bell Tel. Co.*, 292 U.S. 151, 169 (1934).

IHE's proposed finding of fact or conclusions of law to ensure that any final decision "properly appl[ies] or interpret[s] applicable law" and City Council policy, and is "supported by a preponderance of the evidence."[17] The Council may also remand the proceeding for further consideration with or without reopening the hearing, and may limit the issues to be considered.[18]

EXCEPTIONS

EXCEPTION 1: Because the IHE Concludes that Austin Energy Ultimately Failed to Meet Its Burden of Demonstrating that Its Proposed Rate Design Would Result in Fair and Reasonable Rates, the City Council Must Reject the Proposed Changes.

Austin Energy proposes to completely redesign its residential rates, increasing its monthly fixed residential service charge by 150% per customer and flattening its variable energy rate structure in a way that detrimentally constrains customers' ability to reduce their energy bill. As explained by Dr. Ezra Hausman and other witnesses in this case, that proposal is antithetical to the City's goals of encouraging energy efficiency and providing customers with more control over their energy costs. Moreover, Austin Energy's proposal is fundamentally unfair to those with lower monthly usage, and discourages conservation while incentivizing waste. It is also unfair to low-income customers, who will be detrimentally affected by the abrupt and unavoidable increase in monthly rates.

As the proponent of new and changed rates for customer-generators, Austin Energy—not the other parties—bears the burden of demonstrating with substantial and competent evidence that its proposed rate structure is just and reasonable.[19]

In the Final Recommendation, the IHE ultimately (and correctly) concluded, Austin Energy failed to meet that burden, in several ways. Although Austin Energy's concerns about financial stability are legitimate, the IHE correctly found that utility "has not offered a complete

[17] 16 Tex. Admin. Code § 22.262(a).

[18] *Id*. § 22.262(c).

[19] *Coalition of Cities for Affordable Util. Rates v. Pub. Util. Comm'n of Tex.*, 798 S.W.2d 560, 563 (Tex. 1990), *receded from on other grounds by Barr v. Resolution Trust Corp. ex rel. Sunbelt Federal Sav.*, 837 S.W.2d 627, 629 (Tex. 1992); *see also* July 13, 2022 Hearing Tr. at 44-45 (Q: "The utility bears, the burden of proving the reasonableness . . . of all its rates." A: "Correct"); Final Recommendation at 110.

analysis of its ability to secure additional needed revenue from the residential customer class."[20] Moreover, the "IHE is also not persuaded that AE's analyses support AE's conclusions" that customers are not responsive to conservation price signals, or that its proposed rate design—including both the fixed charge increase and flattening of rate tiers—provide adequate conservation incentives.[21] As the IHE recognized, "a tiered rate structure could be designed to send customers price signals,"[22] but Austin Energy's proposal does not.

The IHE also correctly observed that there are "serious questions" about Austin Energy's proposed rate changes do not adequately "protect economically vulnerable customers as well as the potential for rate shock under AE's proposed rate structure."[23] Indeed, "the IHE is not persuaded that AE has adequately addressed the affordability of the new rates for economically vulnerable customers."[24] With those concerns in mind, the IHE rightly determined that if AE's proposed fixed rate and flattened rate tiers are adopted, "the billing increases applied to low usage sub-groups of the residential class will likely be large enough to cause rate shock."[25]

The Final Recommendation thus makes clear that Austin Energy's proposed rate design changes are fundamentally flawed and cannot be approved. Indeed, Austin Energy failed to carry its burden of demonstrating that its proposed rate design changes are just and reasonable to residential ratepayers. Consequently, the City Council must reject those changes.

Sierra Club, Public Citizen, and Solar United Neighbors appreciate the IHE's efforts to balance competing policy considerations, but the IHE's recommendation that "the parties revisit" potential rate design solutions is contrary to law.[26] The Participants to this proceeding do not bear the burden of developing just and reasonable changes to Austin Energy's current rate structure. That burden is squarely on Austin Energy, and Austin Energy alone. Having failed to

[20] Final Recommendation at 104.

[21] *Id*. at 110.

[22] *Id*. at 107.

[23] *Id*. at 107.

[24] *Id*. at 113.

[25] *Id*. at 114.

[26] *Id*. at 107, 128.

meet that its burden of demonstrating a need for additional "revenue from the residential customer class,"[27] that the proposed changes provide adequate price signals,[28] or that the proposed changes "adequately address[]" affordability and protect low-income customers,[29] Austin Energy's proposed rate redesign must be rejected. Austin Energy is free to file an alternative rate structure or seek to reopen the record, but the City Council should reject the IHE's suggestion that the other "parties revisit" Austin Energy's proposal, or that they bear any responsibility for developing a new rate structure.

In sum, the City Council should direct Austin Energy to retain its existing residential base rate schedule until it can develop and file an alternative rate plan that retains these benefits and is less harmful to customers. Alternatively, and for the reasons explained in the Initial Briefs of the Independent Consumer Advocate ("ICA") and the Conservation Organizations, the Council could adopt the proposal by the ICA to move to four tiers with a modest increase in the fixed per-customer charge, which the IHE suggested could be supported by the record.[30]

EXCEPTION 2: There Is No Evidence In the Record Supporting the IHE's Conclusion that Austin Energy's Continued Spending at the Fayette Power Plant Is Prudent.

The City Council has a fundamental obligation to set just and reasonable retail rates, but a rate "cannot be deemed just and reasonable unless the utility was prudent in incurring the operating expenses it seeks to pass through to consumers."[31] Austin Energy bears the burden of proof to make a "convincing showing that the amounts that it has charged to operating expenses for depreciation have not been excessive."[32] Moreover, it is well settled that Austin Energy must submit "documentation of its decision-making process, thereby enabling the [Council] to review

[27] *Id*. at 104.

[28] *Id*. at 110.

[29] *Id*. at 112-14.

[30] Final Recommendation at 118; *see also* ICA Br. at 38-42; Sierra Club-Public Citizen-Solar United Neighbors Br. at 19-20.

[31] *Gulf States Utilities*, 841 S.W.2d at 465–66.

[32] *Illinois Bell Tel.*, 292 U.S. at 169.

the actual investigations and analyses leading to the utility's decision,"[33] and determine whether those test year expenses are within a "range of options which a reasonable utility manager would exercise or choose in the same or similar circumstances given the information or alternatives available . . . ."[34]

As explained in Sierra Club's initial brief, Austin Energy wholly failed to meet that burden. Indeed, Austin Energy failed to submit *any* evidence that would allow the Council to independently assess the reasonableness of the Company's decision to continue investing tens of millions of dollars annually at Fayette. In fact, Austin Energy admits that it has not performed *any* studies of the economics of continued operation of the Fayette plant or any alternatives, such as retiring or selling the plant and replacing it with lower cost resources.[35] The Company also refused to provide any information regarding future costs and operations[36] or future capital or environmental compliance costs at the plant.[37] As a result, Austin Energy has effectively precluded the Council and the Participants from reviewing the utility's decision-making process or "the actual investigations and analyses leading to the utility's" spending decisions"[38] at Fayette, Thus, the Council should deny those costs.

The IHE's recommendation to the contrary is arbitrary, capricious, and contrary to binding precedent. First, the IHE recommends approving Austin Energy's Fayette costs because the utility provided documentation of "its power production costs, which include FPP fuel, labor, routine maintenance, system control, and dispatch costs," as well as capital spending.[39] But it is well settled that Austin Energy enjoys no presumption of prudence by "simply opening its books to

---

[33] *Gulf States Utilities*, 841 S.W. 2d at 476.

[34] *Entergy Gulf States*, 112 S.W.3d at 210.

[35] *See* Austin Energy Response to SCPC 2-3 (attached to SC-PC-SUN Ex. 3, Hausman Direct, as EDH-4).

[36] *See* Austin Energy Response to SCPC 2-5 (attached to SC-PC-SUN Ex. 3, Hausman Direct, as EDH-4).

[37] *See* Austin Energy Response to SCPC 2-8 (attached to SC-PC-SUN Ex. 3, Hausman Direct, as EDH-4).

[38] *Gulf States Utilities*, 841 S.W. 2d at 476 (emphasis added).

[39] Final Recommendation at 24-25.

inspection."[40] Rather, the utility bears the burden of demonstrating the prudence and reasonableness of "each dollar" of its expenditure.[41] To meet that burden, Austin Energy must present "*documentation of its decision-making process*, thereby enabling the [Council] to review the actual investigations and analyses leading to the utility's" expenditures[42] and determine whether those expenses are reasonable "given the information or alternatives available . . . ."[43] Here, Austin Energy indisputably failed to submit *any* documentation of its process for determining whether it is economical and reasonable to continue investing tens of millions of dollars at Fayette annually, or whether customers would benefit by replacing Fayette with lower-cost alternatives. The Council should reject Austin Energy's Fayette spending on that basis alone. The IHE's recommendation otherwise is contrary to law.

Second, the IHE suggests, without citing any evidence, that Austin Energy "cannot unilaterally decide to spend less" on Fayette because it has a contractual obligation to pay those costs with the Lower Colorado River Authority.[44] But under Texas law, *the regulated utility* bears the burden of demonstrating the prudence of its proposed capital and O&M expenses; and the Council has a right and an obligation to Austin residents and ratepayers to independently evaluate the prudence of those investments. The IHE neither cites, nor are the Conservation Organizations aware of, any precedent that would allow the Council to simply defer to the investment decisions of a non-jurisdictional entity. Nor does the IHE attempt to grapple with whether the actual terms of the Fayette power plant's operational agreement allow Austin Energy to dispute costs. Because Austin Energy failed to submit any evidence supporting its spending at Fayette, the utility should not be allowed to include those costs in rates.

Finally, the IHE suggests that Austin Energy is entitled to Fayette's costs because the plant is "provides benefit to AE's customers and the ERCOT grid." But the record is devoid of any such

---

[40] *Entergy Gulf States*, 112 S.W.3d at 214.

[41] *Id.*; *see also Coalition of Cities*, 798 S.W.2d at 563; *see also* July 13, 2022 Hearing Tr. at 44-45 (Q: "The utility bears, the burden of proving the reasonableness . . . of all its rates." A: "Correct").

[42] *Gulf States Utilities*, 841 S.W. 2d at 476.

[43] *Entergy Gulf States*, 112 S.W.3d at 210.

[44] Final Recommendation at 24.

evidence. Despite repeated discovery requests and the testimony of expert witness Dr. Ezra Hausman disputing the Fayette expenses, Austin Energy refused to provide any evidence actually evaluating, quantifying, or supporting the notion that the plant benefits customers or the grid, relative to alternatives.

The IHE's conclusion that Fayette provides a "benefit" to customers is also inconsistent with the City's resource policy, which specifically directs Austin Energy to pursue the goal of retiring its share of Fayette by the end of 2022—a policy objective that the City Council has expressly adopted as necessary to achieve the City's climate goals.[45] Thus, rather than benefiting customers, Austin Energy's continued spending at Fayette frustrates and impedes the City's policy goals.

Moreover, despite that still-effective City policy goal and Austin Energy's efforts to "exit" Fayette Power Plant,[46] the utility failed to evaluate opportunities for reducing spending at Fayette to avoid expenses that are not necessary to maintain the City's share of the plant through its useful life. Instead, Austin Energy appears to take the position that it was not required to evaluate any reduction in spending because the operator of the plant made those investment decisions, and the costs are reasonable and necessary. But that is not correct. Where, as here, a utility has accelerated the retirement of a generation resource, the utility should likewise reduce capital and O&M spending to reflect its shortened useful life.[47]

In sum, the record demonstrates that Austin Energy wholly failed to meet its burden of demonstrating that its continued capital and O&M investments at Fayette were prudent and reasonable relative to alternatives. The City Council should reject the IHE's contrary conclusion. At a minimum, the City Council should direct Austin Energy to immediately provide project justification analyses for all capital expenditures at Fayette in excess of $100,000, and these analyses should be available for Participants in this case to review under appropriate non-

[45] *See* SC-PC-SUN Ex. 3 at 22-23 (Hausman Direct) (quoting Austin Energy 2030 Resource and Plan, attached as Exhibit EDH-3 to Hausman Direct); *see also* July 13, 2022 Hearing Tr. at 40.

[46] Austin Energy Ex. 3 at 22 (Dombrowski Rebuttal).

[47] *In re DTE Elec. Co.*, No. 349924, 2021 WL 743782, at *4 (Mich. Ct. App. Feb. 25, 2021) (concluding that continued capital and O&M investment in a power plant that was no longer economic to operate was imprudent).

disclosure agreements. As explained in the Conservation Organizations Initial Brief, the City should also direct Austin Energy to evaluate the risks and cost implications of all proposed or likely future environmental regulations at Fayette, including the Good Neighbor Rule, the Regional Haze Rule, and other environmental control requirements, and provide that evaluation to the City Council by the end of 2022.[48]

EXCEPTION 3: Alternatively, the Commission Should Remand the Proposal for Decision, and Direct the IHE to Reopen the Record and Reconsider the Implications of the Inflation Reduction Act for Austin Energy's Resource Portfolio.

As explained above, Austin Energy failed to meet its burden of demonstrating the prudence of "each dollar" of the Fayette expenses that it seeks to pass on to captive ratepayers because the utility failed to present *any* documentation "documentation of its decision-making process," thereby preventing the Council to evaluate the reasonableness of those expenses in light of any alternatives.[49] Even if Austin Energy had submitted evidence of the reasonableness of its resource planning process or Fayette investments (which it did not), the Council has an obligation to evaluate those expenses in the context of the "applicable law" and changed circumstances at the time of any final decision.[50] Indeed, evaluating the prudence of a utility's investment decision is not a static or "once-and-done" obligation.[51] That requirement is ongoing. Where, as here, "changing circumstances . . . arise as a project progresses," a utility must "respond prudently" and reevaluate the prudence of "its *continuation* of an investment as well as its decision to enter into that investment."[52] Thus, Austin Energy and the City Council have an ongoing obligation, throughout this proceeding, to continuously analyze the municipally-owned utility's decision to continue to invest in the Fayette coal plant, to ensure that decision is the most reasonable option to fulfill the public's utility needs.

[48] Conservation Organizations Initial Br. at 7-8.

[49] *Entergy Gulf States*, 112 S.W.3d at 210; *Coalition of Cities*, 798 S.W.2d at 563.

[50] Tex. Gov't Code Ann. § 2001.058(e)(1).

[51] *Gulf States Utilities*, 578 So.2d at 85-86.

[52] *Id.* (emphasis in original).

Here, the enactment of the Inflation Reduction Act, which directs nearly $400 billion in tax credits and direct spending to fund clean energy and transmission resilience investments, will likely have significant implications for Austin Energy's revenue requirement and the economics of its current generation assets. In light of significant changes in the applicable law and factual assumptions underlying Austin Energy's revenue requirement and continued reliance on fossil generation, the City Council should remand the Final Recommendation and direct the IHE to reconsider the implications of the new law for Austin Energy's resource portfolio.[53]

First, the enactment of the Inflation Reduction Act significantly decreases the cost of resources that could replace Fayette. Before the enactment of the IRA, for example, battery storage resources were not entitled to any federal tax credits. Now, the base Investment Tax Credit ("ITC") for batteries (and any other zero carbon resource, including solar and wind resources) is 30% of the total cost. The tax credit increases by 10% if the facility is located in an "energy community," which is defined, as relevant here, as a community located in the same U.S. Census tract as a coal unit that has retired since 2009.[54] An entity would be entitled to another 10% credit if the resource is manufactured with domestically-produced materials. Thus, Austin Energy could immediately retire Fayette and construct a battery storage project (or other renewable resource) at the facility and qualify for up to a 50% tax credit, which is now also fully transferrable to any entity with tax liability. Moreover, by siting additional renewable and battery resources at Fayette, Austin Energy

---

[53] The Inflation Reduction Act of 2022 is available at https://www.congress.gov/117/bills/hr5376/BILLS-117hr5376enr.pdf. The Congressional Research Service's analysis of the law is available at https://crsreports.congress.gov/product/pdf/R/R47202

Under Texas Rule of Evidence 201, the IHE and Council have broad authority to take notice of the text of the new law, and the Congressional Research Office's evaluation of the law because the law can be "accurately and readily determined" from review of the federal government's publicly-accessible website, "whose accuracy cannot reasonably be questioned."

[54] The IRA defines an "energy community" as three different categories of areas that have been impacted by the transition away from fossil fuels. For purposes of locating facilities close to the Fayette power plant, the third category is most relevant, and includes the census tract or adjoining census tracts at which a coal unit has been retired since 2009:

> ''(iii) a census tract—I) in which— (aa) after December 31, 1999, a coal mine has closed, or ''(bb) after December 31, 2009, a coal-fired electric generating unit has been retired, or''(II) which is directly adjoining to any census tract described in subclause (I).'

could take advantage of its existing interconnection rights and avoid the transmission costs associated with procuring new generation offsite. Under a separate provision of the IRA, the U.S. Department of Agriculture has broad authority to issue low-cost loans directly to municipalities for renewable and battery storage investments.[55] And under certain circumstances, those loans can be converted into outright grants, which could dramatically reduce the costs of any Fayette replacement alternatives.[56]

The Inflation Reduction Act will not only slash battery and renewable investment costs by 30-50%, but it allows wind and solar projects to opt for an alternative $25/MWh Production Tax Credit ("PTC") through December 31, 2032.[57] Like the IRA's ITC provisions, the renewed solar and wind PTC is eligible for an additional 10% tax credit if they are located in what the act defines as an "energy community."[58] These projects are also entitled to *another* additional 10% increase if certain U.S. manufactured components requirements are met. In short, taking advantage of the IRA's renewable energy and battery tax credits would likely materially alter the cost analysis for any Fayette replacement analysis.

Second, the IRA will not only materially decrease the cost of replacing Fayette, but it will have a direct, adverse impact on the continued economics and operation of the plant. The IRA's tax credits and direct subsidies are specifically designed to increase of solar, wind, and battery resources on the grid. The increased penetration of those zero marginal cost resources into the energy market will have a material impact on the operation and revenues at Fayette by driving down energy market prices, thereby decreasing Austin Energy's revenues. Moreover, those zero-

[55] Inflation Reduction Act, Section 22001.

[56] *Id*.

[57] Inflation Reduction Act, Section 13102 (extension of existing ITC through December 31, 2024); Section 13701, 13702 (creating of a new Clean Electricity Production Credit and Clean Electricity Investment Credit that takes effect on January 1, 2025).

[58] An energy community is defined as being 1) a brownfield site; 2) an area which has or had certain amounts of direct employment or local tax revenue related to oil, gas, or coal activities and has an unemployment rate at or above the national average; or 3) a census tract or any adjoining tract in which a coal mine closed after December 31, 1999, or in which a coal-fired electric power unit was retired after December 31, 2009. *See* Inflation Reduction Act, Section 13101, 13102, 13701, and 13702.

marginal cost resources will be dispatched by the system operator ahead of expensive fossil resources like Fayette, further decreasing the energy market revenues and value associated with Fayette. As a result, the IRA will likely render obsolete the IHE's conclusion that Fayette "operational and provides benefit" Austin Energy customers.[59]

Moreover, unlike wind, solar, and battery resources, Fayette will also be subject to fuel price volatility, which could become worse if utilization of fossil generation resources in the region continues to drop or becomes unpredictable. Thus, it is likely that Fayette will quickly become uncompetitive relative to clean energy resources, and as a result of the IRA, it will be cheaper for Austin Energy to build out battery storage and renewables and retire Fayette than to continue paying the costs necessary to operate and maintain it. The material changes to the governing legal regime and the implications for the continued operation of Fayette warrant remand and reconsideration of the IHE's recommendation to force Austin ratepayers to pay tens of millions of dollars annually to continue operating Fayette.

EXCEPTION 4: The City Council Should Reject Austin Energy's Proposed Changes to the Value of Solar Tariff.

The IHE also erred in recommending that the City Council approve Austin Energy's proposed changes to the methodology for determining the Value of Solar credit. The utility's proposed methodology is incorrect for determining the correct cost to Residential and Small Commercial customers of installing rooftop solar.

Austin Energy's proposed backward-looking method undervalues 25+ year investments by residents and businesses in clean, local rooftop generation, made on forward-looking cost. Moreover, Austin Energy's method undervalues, ignores, and marginalizes environmental benefits, avoided emissions, distribution, capacity, long-term generation, transmission, and local resilience benefits. Austin Energy's promised performance-based incentive is vague and undefined and a step backwards toward hard-to-manage incentives. Austin Energy's proposal for part of the charge to be recovered in the Power Supply Adjustment ("PSA") and part of it to be recovered

[59] Final Recommendation at 24.

through the EES adds unneeded complexity and creates confusion. Instead the VOS should continue to be recovered through the PSA.

In addition, Austin Energy's proposed changes are inconsistent with City's commitment to reach 200 MW of local customer-sited solar by 2030. The new method will not produce the same level of investment as the existing method. Austin Energy's proposed changes abandon the highly successful methodology, initiated decades ago at the utility—a methodology that paved the way for other programs across the country.

The City Council should reverse the IHE and reject Austin Energy's proposed changes to the Value of Solar tariff. The Council should reject the proposed VOS method and order a new study and stakeholder process to set a new VOS a year from now. In the meantime, the existing VOS can be utilized for another year.

<u>EXCEPTION 5:</u> The City Council Should Reject Austin Energy's Proposal to Exempt "High Load" Industrial Customers from the Energy Efficiency Service Fee.

The IHE erred by failing to disapprove Austin Energy's treatment of its new high load primary voltage rate class that exempts large "high load" industrial customers from any obligation to contribute to the Energy Efficiency Service ("EES") Fee.

In an amendment to its rate filing, Austin Energy proposed a new Primary II High Load tariff. AE proposes that, like other current high load customers, customers in this new class should be exempt from paying the EES Fee that other customers are required to pay. Thus, under this proposal, Austin Energy is adding another customer "high-load" customer class that has a demand between 3 and 20 MWs. Like other high-load customers, these customers will not contribute to the EES Fee, lowering revenues to the account;

First, the exemption fails to reflect that the High Load customers benefit from the programs funded by the EES Fee. All customers, including the High Load customers, benefit from the Customer Energy Solutions programs—energy efficiency, demand response, and distributed generation—and all customers should contribute to those budgets. Moreover, half of these high load customers have previously participated in Austin Energy programs, demonstrating that any claim that these customers do not benefit from the utility's energy efficiency and demand response programs is false.

In fact, high load customers can participate in the Value of Solar program. But part of the proposed Value of Solar tariff would be paid from the EES fund which the high load customers do not pay, making the high load customers exempt from any responsibility for their benefits under the EES programs. In short, customers that do not pay into the fund are allowed to benefit from it, creating a cross subsidization from some rate classes to others.

Finally, and fundamentally, exempting high load customers from paying the EES Fee is simply unlawfully discriminatory and prejudicial to other customers. Customers in other rate classes are not given the same exemption, nor are they given any opportunity to demonstrate that they should be allowed to claim the exemption because they are providing energy efficiency benefits to the system.

The exemption is unfair and inequitable and should not be allowed. However, if high-load commercial and industrial customers are not required to contribute to the EES Fee, then Austin Energy must (at the very least0 require these customers to submit an annual report on a standardized form of efforts they have made to lower energy and peak demand use and should provide some solution addressing the cross-subsidization problem with the VOS proposal.

The City Council should reverse the IHE and should reject Austin Energy's proposal to exempt "high load" industrial customers from contributing to the EES Fee, and, alternatively, should require high load customers to demonstrate entitlement for the exemption annually by reporting energy efficiency programs and benefits provided to the system by the high load customers.

CONCLUSION

For these reasons, the Conservation Organizations respectfully request that the City Council reject and modify the IHE's Final Recommendation as follows:

1. Reject Austin Energy's proposal to increase its fixed per-customer charge from $10 to $25, along with its proposed revisions to its current five-tier residential rate structure. In doing so, the Council should leave the current customer charge and rate design in place. Alternatively, the Council should adopt the proposal by the ICA to move to four tiers with a modest increase in the fixed per-customer charge.

2. Find that Austin Energy failed to satisfy its burden of demonstrating the prudence of its proposed test year spending at Fayette. Moreover, the Council should make clear that, once Austin Energy decided to accelerate the planned retirement of Fayette to

2022, the utility should have reduced capital and O&M spending at the plant to reflect its shortened useful life. Alternatively, and at a minimum, Austin Energy should be required to immediately evaluate all future capital investments in the Fayette Power Plant in excess of $100,000, including potential costs associated with proposed environmental regulations, and show that continued investment in and operation of the units remain in customers' interests. The Council should further direct Austin Energy to oppose all life-extending capital investments in the units starting immediately, and should continue in or redouble its efforts to close the plant permanently in favor of cleaner generation sources.

3. Alternatively, the City Council should remand the Fayette matter to the IHE with instructions to evaluate the implications of the Inflation Reduction Act for the continued operation and spending at Fayette. The Council should also direct Austin Energy to reopen its Resource Planning process to evaluate the implications of the law for its resource portfolio.

4. Reject Austin Energy's proposed changes to the Value of Solar tariff, and direct the Company to conduct a comprehensive study, with an independent and impartial consultant and including engagement with customers, solar technology and service providers, and other key stakeholders to evaluate how customer-sited generation rates impact current and prospective solar customers. Austin Energy should also conduct a comprehensive and transparent Value of Solar analysis using a Benefit-Cost Analysis framework developed in accordance with industry-standard guidance.

5. Require all high load factor customers should be required to pay equitable EES charges, adjusted for line losses, to fund Austin Energy's energy efficiency programs. Alternatively, if the City approves Austin Energy's proposed high load exemption from the EES charge, customers seeking exemption from EES charges to report and quantify their energy efficiency savings and/or submit an opt-out request with quantified data justifying the request is reasonable and appropriate.

Dated: September 26, 2022

Respectfully submitted,

/s/ Joshua Smith

Joshua Smith
Dru Spiller
Sierra Club Environmental Law Program
2101 Webster St., Suite 1300
Oakland, CA 94612
Tele: 415-977-5560
Email: joshua.smith@sierraclub.org
dru.spiller@sierraclub.org

James Z. Brazell
Law Office of James Z. Brazell
P.O. Box 183
Coupland, TX 78615
jbrazell@brazelllaw.com

Counsel for Sierra Club, Public Citizen, and Solar United Neighbors

CERTIFICATE OF SERVICE

I, Joshua Smith, certify that a copy of the foregoing Sierra Club submission was served upon all parties of record in this proceeding on September 26, 2022, by electronic mail, as permitted by the presiding officer.

/s/ Joshua Smith

Joshua Smith
Counsel for Sierra Club, Public Citizen, and Solar United Neighbors