



JOHN J. CARONA
STATE SENATOR

CHAIRMAN
BUSINESS AND COMMERCE

COMMITTEES:
ADMINISTRATION
CRIMINAL JUSTICE
JURISPRUDENCE
NOMINATIONS

RECEIVED

JUN 26 2013

June 24, 2013

OPINION COMMITTEE

FILE # ML-47309-13
I.D. # 47309

The Honorable Greg Abbott
Attorney General of Texas Legislative Council
209 W. 14th Street
Austin, TX 78701

RQ-1132-GA

Dear General Abbott:

As Chair of the Senate Committee on Business and Commerce ("the Committee"), I respectfully request a formal opinion on the matters discussed herein. In this regard, I waive the requirements of section 402.042(c) of the Government Code.

The Committee exercises jurisdiction over state laws and policy that relate to electric utilities. This includes laws that impact municipally owned utilities like Austin Energy. Austin Energy is the electric generation, transmission, distribution, and retail company that is owned by the City of Austin and that supplies electricity to customers in and around Austin.

Prior to the start of the 83rd Legislative Session, Lieutenant Governor David Dewhurst asked the Committee to study the governance and operation of municipally owned utilities. The Committee held a hearing and received testimony on Texas' approximately 70 municipally owned electric utilities. Much of the testimony pertained to circumstances and features specific to Austin Energy. Austin Mayor Lee Leffingwell, Austin residents, and out-of-city customers discussed specific concerns and options for the future of Austin Energy.

Notably, the Committee learned that Austin Energy is the largest municipally owned electric utility in the nation that continues to be governed by its city council. Out-of-city customers, in particular, also raised concerns regarding the City of Austin's practice of drawing from Austin Energy's revenues. While an established percentage of Austin Energy revenue shared with the city is transferred through a pre-determined formula known as the "general fund transfer," a sizable amount of financial support occurs outside of the general fund transfer through budget and accounting practices where shared services or other costs are accounted for through Austin Energy's budget rather than through the city's general fund. The transparency, equity, and amount of money involved in this practice has led some to question whether the city council is best suited -- independent, experienced, and adequately representative enough -- to continue to exercise

exclusive oversight over the utility. Others aired concerns regarding the affordability of and motivation for the utility's goals for renewable energy, the transparency of the process for approving a contract to purchase biomass power, and the financial condition of the utility during a time when the city leadership proved unwilling to address what some characterized as a critical need for a rate increase. The Committee also heard concerns that city councilmembers are overly influenced by Austin voters and not as concerned with the larger geographic area served by Austin Energy. Also raised were concerns regarding the lack of adequate training and information necessary to oversee an entity of the size and complexity of Austin Energy. This led to a concern that decisions involving Austin Energy are overly driven by political influence and are made outside of the public view by the employees or the City Manager.

Understanding the possible benefits of greater transparency, increased representation, and improved oversight by professionals who are informed about the day-to-day operations of Austin Energy, the Committee's Report to the 83rd Legislature included a recommendation directing the City of Austin to consider "transitioning Austin Energy to a board of directors governance structure with outside ratepayer representation instead of its city council governance structure." The timing of the recommendation coincided with several significant local measures impacting Austin Energy and the Austin City Council. Prior to the Committee's interim hearing, the Austin City Council voted to approve the first rate increase for Austin Energy in nearly two decades and was preparing to defend that action in an appeal to the Texas Public Utility Commission. Additionally, in November, 2012, Austin voters approved amendments to the city charter to alter the structure and composition of the City Council. The approved amendments required that by November, 2014, the City Council must be comprised of ten members elected from single-member districts and one mayor elected at-large. This is a stark change from the current council structure, which consists of six city council members and one mayor, all elected from at-large districts.

These events and the Committee's interim hearing have all contributed to an ongoing, vibrant local discussion related to future oversight of Austin Energy. Recently, the Electric Utility Commission, a committee of volunteers that advises the City Council related to Austin Energy matters, unanimously approved a resolution directing the City Council to transition Austin Energy to board governance. The City Council has held public hearings, conducted work-sessions, and most recently, formed a subcommittee of the City Council to study Austin Energy governance and present a recommendation to the full City Council. Some local interests applauded the establishment of the subcommittee based on its potential to preserve the current governance structure.

During the course of the discussion, legal questions have emerged that remain unresolved. Some have taken the position that without a change in state law, the only means to effectuate a transition in the governance of Austin Energy is through an

The Honorable Greg Abbott
June 24, 2013
Page 3

amendment to Austin's city charter, which can occur only by popular election. However, approximately 15 percent of Austin Energy's customers (about 51,500 residential and 6,500 commercial accounts) are located outside of the municipal boundaries and, therefore, cannot vote in city elections. Furthermore, a large percentage of Austin Energy's load exists to provide reliable service to industrial customers and public facilities owned by the State of Texas -- entities that together comprise the largest employers and economic drivers of the Central Texas region. While the state and those industrial customers have a great interest in the resolution of the governance issues, they have no means by which to participate in a city charter election.

On August 14, 2012, the Austin American Statesman reported that an assistant city attorney told the Austin City Council "state law allows [Austin] to establish an Austin Energy board whenever it chooses — but that the city charter would require that board to report to [the] City Manager ... rendering the change meaningless in practice."

This opinion appears to conflict with the Local Government Code, Section 552.122, which reads as follows:

Sec. 552.122. TRANSFER OF MANAGEMENT AND CONTROL OF ELECTRIC UTILITY SYSTEM. (a) A municipality by ordinance may transfer management and control of the municipality's electric utility system to a board of trustees appointed by the municipality's governing body.

(b) The municipality by ordinance shall prescribe:

(1) the number of members; and

(2) the qualifications for appointment to the board.

The intent of the law seems clear -- a city council is authorized to appoint a utility board. However, the Assistant City Attorney's opinion -- that a board appointed by the Austin City Council would be meaningless in practice because of provisions in the city charter -- prompted the filing of Senate Bill 410 to clarify the intent of the law. Senate Bill 410, bracketed to the City of Austin, added the words "[n]otwithstanding any other law, including a municipal ordinance or municipal charter provision ... a municipality may transfer the management and control of the municipality's electric utility system to a board of trustees appointed by the municipalities' governing body." A majority of the Austin City Council voted to support the passage of Senate Bill 410. They agreed that the bill was permissive and that it clarified the City Council's full authority to transition to a board of directors by ordinance. They also agreed that the bill provided authority to delegate oversight and management, as they determine appropriate, to the board. Senate

Honorable Greg Abbott
June 24, 2013
Page 4

Bill 410 was reported favorably out of the Committee 8-0 on March 12 with only a few individuals registering opposition and no witness testifying against the bill. The bill then passed the Senate 31-0, but was left pending in the House Committee on State Affairs.

While these issues are of particular concern to residents of Austin and customers of Austin Energy, the Committee recognizes that matters of oversight, financial policies, governance, and the day-to-day operation of Austin Energy are also of great interest to the State of Texas. Austin Energy owns generation assets that are critical to the reliable operation of the ERCOT grid and Austin Energy's customer base represents approximately four percent of the load in ERCOT. Additionally, the State of Texas is one of the largest customers of Austin Energy, which provides electric service to the Texas Capitol Complex, the University of Texas at Austin, and other critical buildings and facilities owned by the State. Debates and decisions related to Austin Energy cannot be viewed as matters solely of local concern.

Given all of these circumstances, I respectfully request that you issue an opinion in response to the following questions:

1. Does Local Government Code, Section 552.122 allow the Austin City Council, by ordinance, to transition to a board of director governance, distinct from the Austin City Council, and to allow out-of-city customer representation on the board?
2. Do any provisions of the Austin City Charter, including but not limited to those related to purchasing, personnel matters, or finance, pose a limitation on the powers or responsibilities that may be delegated to a board of directors that includes out-of-city customer representation established by an ordinance adopted by the Austin City Council?
3. If the city charter does present limitations to the powers that may be delegated to a board of directors, does state law provide an option for amending the city charter with respect to the oversight or operation of Austin Energy that would allow all customers to have a voice in the election?

Thank you for your consideration of this request for an opinion.

Sincerely,



Senator John Carona
Chair, Senate Committee on Business & Commerce