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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

In the Matter of the Petition for Review of
Rocky Mountain Power and Tooele County
for Considerations by the Utility Facility
Review Board

ROCKY MOUNTAIN POWER,

Petitioner,

v.

TOOELE COUNTY,

Respondent.

Docket No. 10-035-39

**REPLY MEMORANDUM IN SUPPORT OF
TOOELE COUNTY'S MOTION FOR
PARTIAL STAY OF ORDER**

Respondent Tooele County (the "County") respectfully submits this Reply Memorandum in Support of its Motion for Partial Stay of Order. In the event the Board denies the County's request for a partial stay in its entirety, the County must seek emergency relief from the Utah Court of Appeals by August 10, 2010. The County therefore respectfully requests that the Board issues its ruling on the motion by Tuesday, August 10, 2010.

Summary

On July 20, 2010, the County moved the Board to stay its June 21, 2010 order (the “Order”) during the pendency of judicial review insofar as the Order requires the County to issue a conditional use permit to Rocky Mountain Power (the “Company”) for the southern arm of the transmission line from the proposed Limber substation to the Oquirrh substation. In the alternative, the County requested a more temporary stay until the Utah Court of Appeals can determine whether a partial stay pending appeal is appropriate.

In support of the motion, the County first demonstrated that “substantial and serious issues” concerning the scope of the Board’s statutory authority warrant maintaining the status quo during appellate review to avoid the County’s appeal perhaps becoming moot when it issues the conditional use permit. (Mem. in Sup. at 7-9.) The County then cited undisputed evidence that, if the County issues a conditional use permit to the Company on August 20, 2010, the County will suffer irreparable harm to environmental, recreational, and aesthetic values. (Id. at 9-12.) The County also pointed out that any harm to the Company could be mitigated by the fact that the northern and southern transmission lines are redundant delivery vehicles, and, therefore, any urgently needed capacity could be satisfied by reversing the order of construction to build the uncontroversial northern line first. (Id. at 12-13.) Finally, the County provided evidence that the projected public need for additional transmission lines along the Wasatch Front has diminished dramatically in recent years during the economic downturn. (Id. at 13.)

The Company’s opposition rests upon a number of erroneous assumptions and misinterpretations of Utah law. First, the Company argues that the Board lacks authority to grant a partial stay. The Company’s argument, however, is based upon a mistaken assumption that

when the Utah Legislature provided agencies authority to issue stays “according to the agency rules,” it required agencies to adopt their own rules authorizing stays instead of merely clarifying that the authority to issue stays does not supplant agency rules, such as, for example, rules that allow a party to respond to a motion within a certain time period. (Mem. in Opp. at 5.)

Second, the Company assumes incorrectly that in deciding the motion for a partial stay the Board can consider only evidence the Company presented during the hearing on the merits. (Id. at 3, 14-15.) The Company cites no authority, because there is none, for the proposition that the Board may not consider additional evidence in deciding whether to stay an order.

Third, the Company assumes incorrectly that the County would suffer no irreparable harm because it could rescind the conditional use permit if the appellate court later vacates the Board’s order. (Id. at 15.) The assumption is incorrect because the County’s authorization to rescind a conditional use permit is confined to instances in which conditions are unsatisfied, not where the County later discovers it need not have issued the permit in the first place.

Fourth, the Company incorrectly characterizes the County’s arguments. According to the Company, the County argues that “only the northern line can be constructed” instead of “the northern line should be constructed first.” (Id. at 18.) To be clear, the County’s position is not that only one line is necessary, but that that the northern line should be built first to provide any urgently needed connection to the larger western grid. When the Company does recognize the County’s position as one of timing and location of the southern line, not whether it will be built at all, it asserts that it cannot construct the northern line first because it had not planned to construct the northern line first. (Id. at 17.) The Company does not dispute that the northern line could be built first, but instead asserts that its construction would require a conditional use

permit, something the County is willing to issue. And to the extent the County's conditional use permit for the northern line is a concern for the Board, the Board could condition its partial stay to expire if the County does not issue a conditional use permit within 30 days of the Company applying for one for the northern line as it has been presented by the Company.

Fifth, the Company asserts, without explanation, that the public interest requires immediate construction because the Company's projections for future electricity consumption remain unaffected by the recent, dramatic reduction in residential construction and commercial and industrial growth. (*Id.* at 22-24.) Unless the Company grossly underestimated projected need when, for example, Daybreak was going to need electricity for 162,000 homes instead of 13,000 homes, the claimed urgent need for immediate construction has no basis in fact.

Finally, the Company argues that the Board should deny even a short stay to permit the Court of Appeals to consider a partial stay. On that score, the Company assumes incorrectly that an appellate court is incapable of deciding a motion to stay in a timely manner. (*Id.* at 24-25.) Once the Company's erroneous assumptions are removed from its argument opposing a stay, it becomes clear that a partial stay pending appellate review is warranted.

Argument

The Board should exercise its discretion to stay the effectiveness of its Order during the pendency of judicial review. Utah Code section 54-14-307 provides the Board authority to stay the effectiveness of its decision under the terms outlined in section 63G-4-405, which authorizes stays "during the pendency of judicial review." This is precisely what the County seeks here. The Company argues that section 63G-4-405's statement that stays be issued "according to the agency's rules" means that unless the Board has adopted a specific rule permitting stays, section

63G-4-405 does not apply. (Mem. in Opp. at 5-6.) That is incorrect. The language requiring a stay in accordance with agency rules merely clarifies that the Board must follow its rules when issuing a stay under section 63G-4-405. As the Supreme Court explained in the recent electronic-signature case, even where a statute expressly provides that an agency “may make rules” on a particular subject, the agency’s failure to make rules—in that case, rules to manage electronic signatures—does not preclude the agency from recognizing its statutory authority and obligation. Anderson v. Bell, 2010 UT 47, ¶¶ 22-23, ___ P.3d ___. Here, section 54-14-308 expressly authorizes parties before the Board to seek a stay under section 63G-4-405,¹ which in turn expressly provides the Board authority to grant stays pending judicial review. That is all the authority the Board needs to issue a partial stay pending judicial review.

Not only does the Board have authority to issue a partial stay, under section 63G-4-405 the Board may issue a stay for any reason. Section 63G-4-405(4) requires only courts to consider the factors discussed in the Company’s opposition papers, and courts need only consider those factors if the Board denies the motion on the ground that a partial stay would pose a “substantial threat” to health, safety, or welfare. Those factors include (i) likelihood of success on the merits; (ii) irreparably injury to the moving party; (iii) a lack of substantial harm to the non-moving party; and (iv) a public interest insufficiently weighty to justify enforcement of the order pending judicial review. Utah Code Ann. § 63G-4-405(4). While the Board is not confined by those factors, the County discusses them to show that they can be satisfied.

Although the Board may issue a stay for any reason, it may not, as the Company suggests, order the County to post a \$47.5 million bond under a set of statutes that do not apply

¹ “Any party seeking to stay the effectiveness of a decision of the board shall seek a stay under Section 63G-4-405.” Utah Code Ann. § 54-14-308(2).

to the Board, section 54-7-17(3), which pertains to the regulation of fees public utilities can charge. (Mem. in Opp. at 21.) Despite acknowledging that section 54-7-17 does not apply here, the Company asks the Board to apply it “by analogy.” (Id.) The acknowledgement that the Public Service Commission statutes do not apply should end the matter. Moreover, political subdivisions are expressly exempted from posting security in obtaining a stay. Utah R. Civ. P. 65A(c)(1). Regardless, there is no bond requirement under section 63G-4-405, which is the statute relevant to the motion for partial stay.

I. The County Is Likely to Prevail on the Merits

In its motion papers, the County argued that the Board misinterpreted its role under the Act by erroneously restricting its “review” to questions of a facility’s safety, reliability, adequacy and efficiency from the perspective of the utility’s customers, without regard to the requirements of the County’s land use laws. The Board’s narrow interpretation of the Act places local governments in an impossible position. A public utility with vast resources can spend years generating studies and expert opinion to support its favored position. Local government, with limited resources and expertise on utility facility siting and construction, then has days to generate and propose an alternative. Even assuming local government could create a viable alternative, the utility—like the Company here—need not submit that alternative in a conditional use permit application, leaving local government powerless to approve the alternative. While the County has the ability, as the Company notes, to impose conditions in a conditional use permit, (Mem. in Opp. at 11), it does not have the ability to apply for an alternative route on behalf of a public utility. And if local government denies the public utility’s application on grounds appropriate under its land use ordinances, but which do not directly impact safety, reliability,

adequacy, and efficiency of utility services, those grounds become irrelevant before this Board, which reviews the local government's action by assessing only the need for the project proposed by the utility. It is unlikely that Utah appellate courts will interpret the Act to have that effect.

In response, the Company argues that the County's land use ordinances are not irrelevant because the Act expressly "leaves to local government" to consider all factors under the land use statutes and ordinances. (Mem. in Opp. at 8-11.) What the Company does not explain, because it cannot explain, is how these "other factors" play any role in the final decision, in this case the location of the southern transmission lines. Regardless of how weighty local government finds the "other factors" to be, if this Board cannot consider them, they are irrelevant to whether this Board requires local government to comply with the utility's favored position. Thus, the Company has provided no response to the County's primary arguments. The Legislature did not intend that the Board would ignore the County's decisions on land use issues, nor did the Legislature intend the Act to nullify the Land Use and Development Act and the County's zoning and conditional use permit ordinances.

The Company does not attempt to address the County's other concerns, which compound the problem. Just as the Board observed that it was a "practical impossibility" given the complexity of the project for the Board to review possible routes for the transmission lines within 45 days, it was a practical impossibility for the County to perform these tasks so quickly. (Order at 7.) The County also pointed out that absent the Company's applying for conditional use permits for alternative routes for its transmission lines, the County lacked authority to approve a conditional use permit for any route other than the one proposed by the Company. The Company provides no response to these concerns because there is no response. Instead, the

Company misconstrues the County’s argument as a complaint of not having an “opportunity to be involved in the process.” (Mem. in Opp. at 12.) The County’s complaint is not being excluded from participation, but that its participation, as a practical matter, does not impact the final decision.

It is unlikely the Court of Appeals will interpret the Act to operate as a practical rubber stamp on any proposal brought by a public utility. Thus, there are numerous “questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation.” Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001) (where the harm factors favor the movant, the probability of success factor is relaxed).² The County satisfies the first prong for obtaining a stay from the Utah Court of Appeals.

II. The County and Its Residents Will Suffer Irreparable Injury Unless a Stay Is Issued

In its motion papers, the County also demonstrated that, absent a stay, the County and its residents will suffer two types of irreparable harm. First, the numerous irreparable harms identified by the Planning Commission provide ample basis for a partial stay. Those harms include: (i) harm to wildlife; (ii) disturbance of an international smelter site; (iii) impacts on the use of Settlement Canyon Reservoir; (iv) harm to viewsheds; (v) road scars; (vi) potential contamination of watersheds and springs; (vii) safety in visiting and effects on the view of Tooele High School’s “T”; (viii) health risks stemming from power lines; and (ix) loss in property values. The Company does not dispute the irreparable nature of those harms, but instead complains that these harms were not presented to the Board in the hearing on the merits.

² Where legal issues under federal law are similar, Utah courts may look to federal law for guidance. First Sec. Bank v. Conlin, 817 P.2d 298, 299 (Utah 1991).

(Mem. in Opp. at 14, 3 n.1.) The Company cites no authority, because there is none, for its assumption that the Board in adjudicating the motion for a partial stay may not consider evidence presented that is relevant to the stay issue but which was not presented at the hearing on the merits. The Company's only other response is to suggest that the County should have proposed an alternative route to mitigate these harms. (Id. at 14-15.) Again, the Company simply ignores the fact that the County cannot apply for a conditional use permit on behalf of the Company, so the County could only rule on the application the Company submitted.

Second, absent a partial stay the Company may be able to render the County's right to judicial review meaningless by obtaining a conditional use permit and proceeding with construction of the southern arm of the transmission line during appeal. The Company's only response is that this harm is only "theoretical" because the County could later revoke the conditional use permit for "the failure of the permittee to observe any condition the County chooses to reasonably specify." (Mem. in Opp. at 15.) This response is beside the point. Reversal by the Court of Appeals would mean the County should not have been compelled to issue the conditional use permit. It would not mean that the Company failed to "observe a condition" in the permit. Thus, there remains a substantial possibility that the absence of a partial stay would render the County's right to judicial review meaningless.

Both of the irreparable harms identified by the County Planning Commission and the irreparable harm to the County's appellate rights compel the issuance of a partial stay.

III. The Company Will Not Be Materially Disadvantaged by the Stay

The County also demonstrated that the Company will not be materially disadvantaged by the issuance of a stay. As the Board recognized in the Order, the southern arm of the

transmission line to the Oquirrh substation would be redundant with the northern arm of the transmission line to the Terminal substation. (Order at 20.) Thus, any need for electricity that would be served by the project as a whole can be served by the northern line until the redundant southern line is completed, just as the Company now plans to serve electricity needs to the project as a whole with the southern line until the northern line is completed.

In response, the Company asserts that two lines are needed and it had not planned to construct the northern line first. The first assertion is beside the point and the second does not demonstrate that the Company will be harmed. First, the County has never argued that by staying the Order the Board somehow will somehow changing the overall project such that the Company will “construct one line.” (Mem. in Opp. at 17.) Instead, only the location of the southern line is in dispute. Second, of course the Company would have to change its plans to construct the northern line first, which is why the County suggests it as an alternative to mitigate any harm to the Company. The issue is whether it can be done, not whether it would be an inconvenience to the Company. The County is willing to approve a conditional use permit for the northern line, which would strip the Company of its primary excuse for not constructing that line first. At the very least, any inconvenience in constructing the northern line first is outweighed by the undisputed harm to the County if the southern line is constructed in its current location during the appeal.

IV. The Public Interest Is Insufficiently Weighty to Justify Enforcement of the Order During Judicial Review

The County also demonstrated that, given the dramatic decline in residential construction and commercial and industrial growth, the projected need for electricity has diminished over the

last few years. It is simply not credible for the Company to say that the decline has had no impact on the Company's projections, unless the original projections were seriously flawed and therefore put the entire valley in jeopardy of all the harms described in the Company's opposition papers. (Mem. in Opp. at 21-24.) Regardless, construction of the northern line would mitigate all of these harms because, as a redundant delivery route, the northern line would provide all the electricity the southern line would provide. While redundant lines may be necessary to the overall project, what is not necessary is that the southern line be constructed first. Therefore, the public interest is insufficient to warrant enforcement of the Order during judicial review.

V. If the Board Declines to Issue a Stay, It Should Temporarily Delay the Effective Date of the Order so that the Utah Court of Appeals Can Rule on a Stay

Finally, the County requested, in the alternative, that if the Board declines to issue a stay during judicial review of the Order, the Board should issue a stay until the Utah Court of Appeals can consider and rule upon a motion to stay. The alternative stay would scarcely impact the Company or the public, but it would provide the County an opportunity to ask the appellate court to issue a partial stay.

In response, the Company complains that it cannot determine "how long it will take the Court of Appeals to act on such an (as of yet) unfiled request." (Resp. Br. at 25.) What the Company fails to mention is that the County is precluded from seeking a stay from the appellate court until it has sought one from the Board. Utah R. App. P. 8. And regardless, the Court of Appeals is capable of considering the Company's arguments concerning urgency and rendering a timely decision. Tellingly, the Company took as long as it could to file its response to the

motion and has not requested expedited review by the Board. A short stay is warranted of the Board denies the requested stay during appellate review.

Conclusion

The Board should stay the effectiveness of the Order with respect to the southern transmission line during the pendency of judicial review. And to the extent the County's conditional use permit for the northern line is a concern for the Board, the Board could condition its partial stay to expire if the County does not issue a conditional use permit within 30 days of the Company applying for one for the northern line as it has been presented by the Company. In the alternative, the Board should stay the effectiveness of the Order until the Utah Court of Appeals determines whether to stay the Order during the pendency of judicial review.

DATED this 9th day of August, 2010.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of August, 2010, a true and correct copy of the **Memorandum in Support of Tooele County's Motion for Partial Stay of Order** has been served on the following by U. S. Mail:

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