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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER, Petitioner, vs. WASATCH COUNTY, Respondent. _____ MARK 25, LLC; BLACK ROCK RIDGE MASTER HOMEOWNERS ASSOCIATION, INC.; BLACK ROCK RIDGE TOWNHOME OWNERS ASSOCIATION, INC.; BLACK ROCK RIDGE CONDOMINIUM ASSOCIATION, INC., Intervenors.	**OPPOSITION TO PETITIONER'S MOTION FOR RECONSIDERATION OR CLARIFICATION WITH RESPECT TO THE BOARD'S DECISION ON INTERVENORS' MOTION TO INTERVENE** **Docket No. 16-035-09**

Intervenors Mark 25, LLC ("***Mark***"); Black Rock Ridge Master Homeowners Association, Inc. ("***Master Association***"); Black Rock Ridge Townhome Owners Association, Inc. ("***Townhome Association***"); and Black Rock Ridge Condominium Association, Inc. ("***Condo Association***"), by and through counsel of record, submit the following memorandum in

opposition to Petitioner's Motion to Reconsider the Board's decision granting Intervenors' motion to intervene. (The Master Association, Townhome Association, Condo Association, and Mark are collectively referred to as the "***Intervenors***" herein.)

INTRODUCTION

Rocky Mountain Power ("***RMP***") asks the Board to reconsider its ruling allowing Intervenors the right to intervene in this proceeding under the Utah Administrative Procedure Act ("***UAPA***"). RMP appears to question whether UAPA even applies, and even if it does, RMP maintains that Intervenors' property rights are insufficient to qualify as the kind of "legal interest" that justifies intervention because the Board lacks authority to adjudicate harm to property rights. Additionally, RMP argues that the interests of justice factors under the intervention statute weigh against allowing Intervenors to participate in this proceeding. The Board should reject each of these arguments.

First, the language of UAPA unequivocally extends the statute's reach to proceedings before any agency in the State of Utah. And while UAPA outlines a number of exceptions to that general rule, Utah Facility Review Board proceedings are not among them. Second, the UAPA intervention statute provides a conditional right of intervention to any party whose "legal interest" could be "substantially affected" by the proceedings. As explained in more detail below, Utah courts have held that potential adverse effects to a person's livelihood, health, property values, or even recreational enjoyment qualify as the kind of "legal interest" sufficient to warrant intervention in an administrative proceeding. That standard is easily satisfied here, and the much narrower construction RMP urges is inconsistent with Utah case law.

Third, RMP has failed to advance any persuasive reason why Intervenors' participation would be contrary to the interests of justice under UAPA and Utah case law. And in fact, allowing the interests of hundreds of property owners to be represented by a single group of intervenors is precisely the kind of arrangement the Utah Supreme Court suggested is an effective way for agencies to minimize the administrative burdens associated with intervention.

In the alternative, RMP asks the Board to clarify the Order allowing intervention. There is no need to clarify the Order, however, because it already addresses RMP's primary concern—the nature and scope of Intervenors' participation. In this regard, the Order states that Intervenors' petition "is limited to the scope of this proceeding as defined under the [Utah Facility Review Board] Act," and that Intervenors' petition "does not expand the scope of this proceeding." There is no reason for the Board to reconsider or otherwise modify its Order.

ARGUMENT

I. The Utah Administrative Procedure Act applies.

RMP first argues that the Utah Facility Review Board Act does not permit the Board to "adjudicate grievances raised by third parties," so Intervenors cannot have any "legal interest" that the Board is competent to adjudicate. *See* RMP's Mot. Reconsider, 2–3. While it is not entirely clear from RMP's motion, RMP seems to imply that the UAPA intervention statute may not even apply to this proceeding. *See, e.g., id.* at 3 ("Assuming for argument sake that the intervention process under the Utah Administrative Procedures Act . . . is applicable, . . . "). To the extent RMP asserts UAPA does not apply, it is mistaken.

The provisions of UAPA "apply to every agency of the state." Utah Code Ann. § 63G-4-102(1). That means absent more specific provisions in an agency's organic statute, UAPA

broadly "govern[s]" any "state agency action that determines the legal rights, duties, privileges, immunities, or other legal interests of an identifiable person, including agency action to grant, deny, revoke, suspend, modify, annul, withdraw, or amend an authority, right, or license." *Id.* UAPA lists a number of exceptions for certain administrative proceedings with their own unique procedural rules, but proceedings before the Utah Facility Review Board are not among them. *Id.* § 63G-4-102(2). Nor is there any provision within the Utah Facility Review Board Act that makes UAPA inapplicable.

There was some discussion at the hearing on the petition to intervene about whether the specific intervention provisions in the Utah Facility Review Board Act somehow rendered UAPA's intervention procedures inapplicable. It is true that section 54-14-308(2) grants an automatic right of intervention to any "affected landowner" in a proceeding initiated by a local government. But there is nothing inconsistent with this mandatory right of intervention in proceedings initiated by a local government and the *conditional* right of intervention under UAPA that applies to proceedings brought by a public utility. Moreover, if the legislature intended to modify that intervention right in proceedings before this Board, it could have done so. Indeed, the legislature exempts state agencies from particular provisions of UAPA, but it decided not to do so in the Utah Facility Review Board Act. *See*, *e.g.*, Utah Code Ann. § 63G-2-104 (providing that UAPA "does not apply" to proceedings under the Government Records Access and Management Act); Utah Code Ann. § 59-12-209 (modifying the right of counties and cities to participate in administrative proceedings to enforce local sales and use taxes); Utah Code Ann. § 57-21-10(3) (eliminating the right of judicial review for certain agency decisions

that would be reviewable under UAPA). For these reasons, UAPA, including the intervention provision therein, plainly applies to this proceeding.

II. Intervention is proper under Utah Code section 63G-4-207(2).

RMP maintains that even if UAPA applies, Intervenors cannot satisfy the standard in UAPA's intervention provision. UAPA allows "[a]ny person not a party" to the agency action to "file a signed, written petition to intervene in a formal adjudicative proceeding with the agency." Utah Code Ann. § 63G-4-207(1). The statue further provides that the "presiding officer shall grant a petition for intervention" if (1) "the petitioner's legal interests may be substantially affected by the formal adjudicative proceeding," and (2) "the interests of justice and the orderly and prompt conduct of the adjudicative proceedings will not be materially impaired by allowing intervention." *Id.* § 63G-4-207(2). As explained below, the Board has correctly determined that Intervenors satisfy both of these requirements.

A. Intervenors legal interests will be substantially affected.

As explained below, Intervenors clearly have "legal interests" that will be "substantially affected" by this proceeding. In arguing otherwise, RMP advances an extremely narrow construction of those terms without citation to any legal authority. *See* RMP's Mot. Reconsider, at 2–3. In essence, RMP argues that because the Board lacks authority to provide a remedy for the diminution of Intervenors' property values, Intervenors can have no legal interest in these proceedings. *See id.* at 2 ("The Board, however, was not created, nor is it authorized under statute, to adjudicate the grievances raised by third parties . . . relating to possible market impacts on surrounding properties . . . ."). RMP's position, however, is contrary to Utah law.

Utah's appellate courts have interpreted the term "legal interests" in intervention statutes broadly to mean the kind of particularized injury sufficient to confer standing to sue; they have not tethered the right of intervention to the proposed intervenors' ability to independently seek and obtain relief from the agency. *See, e.g., Sevier Citizens v. Dep't of Env't Quality*, 2014 UT App 257, ¶ 10, 338 P.3d 831. Intervenors must show only that the outcome of the Board's decision will substantially affect their legal interests (in this case, their property). *See id.* Intervenors do not, as RMP argues, have to show that they are entitled to relief from the Board separate and apart from the Board's statutory duty to determine if Wasatch County must issue a building permit to RMP for RMP's preferred transmission line route.

In *Sevier Citizens v. Department of Environmental Quality*, for example, an association of citizens sought to intervene in an administrative proceeding reviewing the grant of a license to construct a gas-fired power plant. 2014 UT App 257, ¶¶ 2–3. The intervention statute at issue allowed a party to intervene if, among other things, the party's "legal interests may be substantially affected by the permit review adjudicative proceeding." *Id.* ¶ 7 (quoting Utah Code Ann. § 19-1-301.5(7)(c)(ii).[1] The agency denied the petition to intervene, and the association appealed. *Id.* ¶ 3.

The Utah Court of Appeals affirmed. *Id.* ¶ 11. In so holding, it first noted that the "term 'legal interests' is not defined in the statutes governing permit review adjudicative procedures or in Utah's Administrative Procedure Act." *Id.* ¶ 10. But drawing from Utah Supreme Court

[1] The court of appeals noted that the intervention statute it analyzed was "substantially similar" to UAPA's intervention statute. *See Sevier Citizens v. Dep't of Envt'l Quality*, 2014 UT App 257, ¶7 n.3, 338 P.3d 831. And in fact, that statute actually required that the petition to intervene also comply with UAPA's intervention provisions. *Id.*

precedent on standing, it construed the term broadly to require "a 'sufficiently particularized injury' to 'livelihood, health, and property values.'" *Id.* (quoting *Utah Chp. of the Sierra Club v. Utah Air Quality Bd.*, 2006 UT 74, ¶¶ 26–27, 148 P.3d 960). Ultimately, the court of appeals held that the association did not have any "legal interests" sufficient to allow intervention, because it "failed to identify a specific impact that the power plant's operation is likely to have on any member's recognized legal interests, such as a negative impact on livelihood or property values or diminution in a particular member's health or recreational enjoyment." *Id.* ¶ 11.

The Utah Supreme Court's analysis in *Millard County v. Utah State Tax Commission* mirrors the reasoning in *Sevier Citizens*. *See* 823 P.2d 459 (Utah 1991). In *Millard*, a power company filed a petition asking the tax commission to correct its sales and use tax liability. *Id.* at 460. Millard County moved to intervene based on its local option tax, a tax which allows counties and municipalities to impose a local sales or use tax on any transaction that is already taxed by the state. *Id.*; *see also Salt Lake City v. Tax Comm'n*, 813 P.2d 1174, 1175 (Utah 1991). The tax commission argued that intervention was improper because after the county moved to intervene, the commission settled the dispute with the power company. *Id.* at 462–63. The Utah Supreme Court concluded that notwithstanding the settlement, the county was entitled to intervene because its revenue from the local option tax was calculated as a percentage of the power company's state sales and use tax liability. *Id.* at 462. Accordingly, even though the tax commission's task in the proceeding was rather narrow—to determine the company's state tax liability, not collect the local option tax and remit revenue to the county—the county's legal interests in the proceeds of the local option tax "could have been 'substantially affected' by" the power company's settlement with the tax commission, so intervention was proper. *Id.*

The "legal interests" analysis in both cases focused generally on the harm the agency's decision posed to the potential intervenors' interests, not whether the agency had authority to entertain a private cause of action regarding those interests. Accordingly, both cases support this Board's order granting intervention. Unlike the association in *Sevier Citizens*, Intervenors have identified a "particularized injury" to their legal interests posed by this proceeding. RMP seeks to construct a massive transmission line paralleling Intervenors' property, which will obstruct ridge-line views, violate county ordinances,[2] create noise and safety issues, and harm the marketability, value, and future development of that property. If harm to "recreational enjoyment" is a sufficient legal interest to justify intervention (as the *Sevier Citizens* court held), surely potential harm to Intervenors' livelihood and property values passes muster. Indeed, Intervenors' direct interest in property—which will unquestionably be affected by this proceeding—is akin to the direct interest in *Millard* that prevented the tax commission from settling the taxpayer's state sales tax liability without input from the county. For these reasons, Intervenors have sufficient "legal interests" that will be "substantially affected" by this proceeding. The Board correctly held as much in ruling on the petition to intervene, and there is no need to reconsider that decision.

B. The interests of justice favor intervention.

RMP agrees that the Utah Supreme Court has articulated five factors to determine whether the "interests of justice" favor intervention under UAPA—(1) the timeliness of the

[2] RMP argues that "no property owner has a legal interest in a neighbor's lawful use of their property." *See* RMP's Mot. Reconsider, at 3. While the accuracy of this statement is dubious, it is irrelevant to this matter. Here, Promontory and RMP are seeking to upgrade and relocate a transmission lines in violation of county ordinances, including a ridgeline ordinance.

intervention; (2) the extent to which intervention will increase the time and expense of the proceedings; (3) whether the party seeking to intervene participated in administrative hearings prior to the petition for review; (4) whether the intervenors' interests are adequately represented by one of the parties; and (5) whether the agency can devise procedures to minimize the effects of any complications imposed by intervention. *See In re Questar Gas Co.*, 2007 UT 79, ¶¶ 33–37, 175 P.3d 545; *Millard County v. Utah State Tax Comm'n*, 823 P.2d 459, 463 (Utah 1991). In its motion to reconsider, RMP addresses factors (2), (3), and (5). But each of these factors favors intervention.

Beginning with (2)—the extent to which intervention will increase time and expense—RMP advances the same argument the Board correctly rejected when ruling on the petition to intervene. That is, by allowing intervention under UAPA, RMP claims that "literally hundreds of parties would be proper party litigants to such proceedings, further constraining the already expedited statutory process this Board must follow." RMP's Mot. Reconsider, at 4. This argument is both factually and legally wrong. First, the deadline to intervene has passed and only Promontory, the landowner seeking to relocate the transmission line to border its and Intervenors' property, has sought to intervene. Second, the Utah Supreme Court rejected an identical argument in *Millard*. In that case, the tax commission argued that allowing the county to intervene in a tax liability reassessment proceeding would effectively allow any political subdivision or taxing entity to intervene in any proceeding involving the collection of local sales or use taxes. *See* 823 P.2d at 463. The Utah Supreme Court nevertheless allowed intervention, noting that there was a "vast difference" between the county's interest in intervening in a tax proceeding involving a single large tax payer within its jurisdiction and "routine proceedings

involving sales tax audits of all business in that city or county." *Id.* The court concluded that the tax proceeding was simply "not a run-of-the-mill sales tax audit case," so to "disallow intervention in this case would justify disallowing it in every case and render the intervention statute a nullity." *Id.*

Here, Intervenors are not like every other landowner in Wasatch County. Intervenors are, or represent the interests of, the property owners in Wasatch County whose property will directly border the relocated transmission line. This is precisely the kind of arrangement that the *Millard* court suggested an agency should encourage to minimize administrative burdens without undermining the right of intervention under UAPA. *See* 823 P.2d at 463 ("In cases where a number of political subdivisions have a legitimate interest in a proceeding, the Commission might, for example, allow one local taxing agency to act on behalf of other similarly situated agencies if intervention and full participation of all would be unduly burdensome to the Commission."). Additionally, Intervenors are interested in an expedited resolution of this matter and have no incentive to delay the proceedings. But if the Board has any concerns in this regard, it has authority to impose conditions on intervention that it deems are "necessary for a just, orderly, and prompt conduct of the adjudicative proceeding." *See* Utah Code Ann. § 63G-4-207(3)(b). Indeed, the Utah Supreme Court has held that agencies have an obligation to "devise procedures to minimize" such burdens "without undermining the right" of intervention under UAPA. *See Millard,* 823 P.2d at 463. For these reasons, Intervenors' participation in this proceeding will not unduly increase time and expense, so this factor favors intervention.

Moving to factor (3)—whether the party seeking to intervene participated in administrative hearings prior to the petition for review—RMP maintains that Intervenors were

"not a participant in the prior administrative proceeding." RMP's Mot. Reconsider, at 4. That assertion is based on a false premise: there is no procedure before the Wasatch County Planning Commission or the Board of Adjustment that allows a party to intervene. Nevertheless, Intervenors vigorously participated in the proceedings and were permitted to present evidence and legal argument, so they participated to the full extent permitted by law. This factor therefore favors intervention.

Finally, as to factor (5)—whether the Board can devise procedures to minimize any complications posed by intervention—RMP argues that allowing Intervenors to participate "is inconsistent with the Board's statutory mandate," which it asserts is a complication that "cannot be minimized." RMP's Mot. Reconsider, at 5. This argument fails to identify any of the practical considerations of increased time, expense, and other administrative burdens that courts typically discuss when analyzing this factor. *See, e.g.*, *Millard*, 823 P.2d at 463. As discussed above, any such practical concerns are largely resolved by the fact that Intervenors represent the interests of virtually all the affected property owners in Wasatch County.

Further, allowing intervention is consistent with both of this Board's statutory mandates—the Utah Facility Review Board Act and UAPA. Intervenors have never claimed that this Board has authority to do anything besides review the narrow question put to it under Utah Code section 54-14-303(1)(d): whether relocating the transmission line as RMP has requested "is needed to provide safe, reliable, adequate, and efficient service" to its customers. Under UAPA, Intervenors' legal interests confer a right to intervene in this proceeding to present evidence and legal argument regarding the merits of that question, because the way in which the Board answers that question will have a substantial effect on Intervenors' property interests. Adopting

RMP's suggestion that property owners categorically lack any legal interests in proceedings before this Board would eviscerate UAPA's intervention provisions, and the Board should accordingly decline RMP's invitation to conclude otherwise.

Each of the pertinent factors favors intervention, and RMP has accordingly failed to show that the "interests of justice" and "the orderly and prompt conduct of the adjudicative proceedings" would be impaired by allowing intervention. *See* Utah Code Ann. § 63G-4-207(2)(b). The Board should therefore deny RMP's motion to reconsider the petition to intervene.

III. There is no need to clarify the Board's Order.

Finally, there is no need to clarify the Board's Order allowing intervention. The Order already addresses one of RMP's primary concerns—the nature and scope of Intervenors' participation. In this regard, the Order states that Intervenors' petition "is limited to the scope of this proceeding as defined under the [Utah Facility Review Board] Act," and that Intervenors' petition "does not expand the scope of this proceeding."

RMP's remaining concern is that this order will be cited by future parties with property near a transmission line "to argue that [they] have standing to intervene as a party opponent, to conduct discovery, to cross examine witnesses, and the like, whenever they are opposed to such a facility being constructed 'near' their property." RMP's Mot. Reconsider, at 6. Based on this concern, RMP asks the Board to set forth why Intervenors are "an appropriate party and what distinguishes it from other property owners or residents that are opposed to a facility." *Id.* at 6. In effect, RMP asks the Board to supplement its Order with a clearer definition of the "legal interests" that are sufficient to permit intervention under UAPA. Utah's appellate courts,

however, have already set forth an authoritative interpretation (as discussed above). Any property owner who would suffer a particularized injury from a formal adjudicative proceeding before this Board already possesses a qualified right to intervene under UAPA. Clarifying the order in the manner RMP suggests risks running afoul of controlling Utah case law on this issue. The Board is not authorized to make law. Rather, the Board must follow the existing, controlling case law. Intervenors therefore ask the Board to leave the Order undisturbed.

CONCLUSION

The Board should deny RMP's motion to reconsider its decision regarding the petition to intervene. The narrow construction RMP advances regarding the applicable "legal interests" that permit intervention under UAPA is unsupported by Utah case law, and Intervenors' interests easily meet the much broader standard established by the Utah's appellate courts. Additionally, RMP has failed to identify any reason why allowing intervention would unnecessarily complicate the proceedings or impose prohibitive costs on the parties or the Board. Finally, because the Board's order already addresses RMP's concerns, there is no need to disturb it.

DATED this 8th day of April 2016.

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CERTIFICATE OF SERVICE

I CERTIFY that on April 8, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

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