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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER, Petitioner, vs. WASATCH COUNTY, Respondent.	**ROCKY MOUNTAIN POWER'S MEMORANDUM IN OPPOSITION TO BLACK ROCK'S MOTION TO STAY** **Docket No. 16-035-09**

Petitioner, Rocky Mountain Power (the "Company") hereby submits its Memorandum in Opposition to the Motion to Stay (the "Stay Motion") brought by Mark 25, LLC; Black Rock Ridge Master Homeowners Association, Inc.; Black Rock Ridge Townhome Owners Association, Inc.; and Black Rock Ridge Condominium Association, Inc. (collectively, "Black Rock") on May 5, 2016.

INTRODUCTION

Black Rock's request to stay this proceeding fails to comply with the requirements for the issuance of a stay. Black Rock cannot demonstrate it meets a single one of the several criteria needed for a stay, including a showing that Black Rock is likely to prevail on its claims before the Utah Court of Appeals. Furthermore, the Utah Utility Facility Review Board Act (the "Act") does not contemplate a delay such as the one requested by Black Rock. The Board's denial of Black Rock's request to intervene as a party in this proceeding was proper, and is fully supported by Utah law. The Board should deny Black Rock's motion for a stay.

ARGUMENT

I. Black Rock Cannot Meet the Standards for a Stay.

Black Rock's Stay Motion cannot be granted by the Board because nothing in this Board's enabling Act, nor in the Utah Administrative Procedures Act ("UAPA") contemplates an interlocutory stay. The acts allow for a stay of a final action prior to implementation, but neither act permits this Board or an agency to stay a proceeding prior to conclusion. UAPA provides that "A party aggrieved may obtain judicial review of *final agency action*." Utah Code Ann. 63G-4-401(1) (emphasis added). Similarly, this Board's enabling Act expressly notes that a petition for review "does *not* stay or suspend the effectiveness of a written decision of the board" and requires that a party seeking a stay must do so under section 63G-4-405 of UAPA. *See* Utah Code § 54-14-307 (emphasis added). Since this case is still pending and the Act and UAPA only allow review of a final action, a stay cannot be granted.

However, assuming for the sake of argument that the threshold for a stay by a court of a final agency action is applicable here, which point the Company does not concede, Black Rock still fails to qualify for a stay of the proceeding. Section 63G-4-405 prohibits a court from

granting a stay following the issuance of an administrative order unless the party can satisfy four elements:

> [T]he court ***may not*** grant a stay or other temporary remedy ***unless*** it finds that:
>
> (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;
> (ii) the party seeking judicial review will suffer irreparable injury without immediate relief;
> (iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; ***and***
> (iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's actions under the circumstances.

Utah Code Ann. § 63G-4-405(4)(b) (emphasis added). Black Rock cannot meet its burden with regard to any one—much less ***all four***—of the foregoing elements. Moreover, satisfying the elements (which Black Rock certainly does not) would only justify a stay of a final agency action. Thus, Black Rock's motion for stay must be denied.

A. Black Rock Has Not Demonstrated a Likelihood of Success on the Merits.

Even if the Board's intervention Order dated April 21, 2016 (the "Intervention Order") were an appealable final agency action, Black Rock has not met its burden of demonstrating that it is likely to prevail on the merits of its appeal.

Assuming for the sake of argument that intervention under UAPA is applicable to the Board's interim Intervention Order, Black Rock still must show that it is likely to prevail before the Court of Appeals – in other words the Board would have to conclude that its own decision to deny intervention is likely to be overturned on appeal, which would be nonsensical. The Board was correct in denying the motion to intervene for the reasons stated in its order. As noted by the Board's Order, section 54-14-303(2) of the Act clarifies the circumstances under which a property owner is allowed to intervene, and Black Rock does not meet that standard, because,

among other reasons, it does not own property in the corridor that the is subject of this proceeding. Similarly, for a party to be permitted to intervene under general UAPA standards, those rules require **(1)** proof that "the petitioner's ***legal interests*** may be ***substantially affected*** by the formal adjudicative proceedings" and **(2)** the interests of justice and the orderly and prompt conduct of the proceedings will not be materially impaired. Utah Code Ann. §63G-4-207(2) (emphasis added). Black Rock has failed to even identify what its legal interests are that will be adjudicated by this Board, much less prove that those legal interests have been impaired. The Intervention Order demonstrates that the Board properly considered and applied the intervention criteria set forth above in denying Black Rock's intervention request, and Black Rock has subsequently failed to prove an error in the Board's reasoning. Accordingly, Black Rock cannot prevail on the merits of its appeal.

a. Black Rock Has No "Legal Interest" that Will be Addressed, Much Less Affected, by the Proceeding.

First and foremost, Black Rock has not demonstrated, and cannot demonstrate, that it has any "legal interest" that can be adjudicated by this Board, much less "legal interests [that] may be substantially affected" by this proceeding. Utah Code Ann. § 63G-4-207(2). Black Rock continues to assert that its "legal interests" arise out of concerns relating to "safety and the value of their property." *See* Stay Motion, pg. 5. However, these issues are not relevant to this proceeding; the Board's duty is limited to determining whether the Project is needed to provide safe, reliable, adequate and efficient service to the Company's customers as described in section 54-14-303(d) of the Act. The Board's governing authority does not extend to consider what impacts a utility facility may have on adjacent property values. Black Rock's misguided view of what constitutes a "legal interest" in this proceeding arises out of its refusal to acknowledge the limited scope of the Board. Black Rock's purported "legal interests" do not relate to the need for

the Project and will not be affected by the Board's decision. Accordingly, the Board properly denied Black Rock's intervention motion.

The scope of the Board's authority, as established by the Act, and stated repeated by the Board in the Intervention Order and in the Board's previous order, is to determine if "*the facility is needed* to provide safe, reliable, adequate and efficient service to utility customers, and if so, that it should be constructed." See *RMP v. Tooele County*, 2010 Utah PUC LEXIS 160, *14 (the "Tooele Order")(emphasis added). The Act defines "facility" as the physical infrastructure, not the *location* of the facility. *See* Utah Code Ann. § 54-14-103(5) ("'Facility' means a transmission line, a substation, a gas pipeline, a tap, a measuring device, or a treatment device."). Accordingly, the Board's duty in this case is to determine whether the facilities required by the Company are needed to provide safe, reliable, adequate and efficient service to its customers. In other words, will safety and reliability be at risk if the Company is not allowed to construct the Project? The undisputed answer to that question is: yes.

And although Black Rock has never produced any evidence that the proposed lines are in any way unsafe or violate any applicable codes, to the extent that the safety of a line within 100 feet of a proposed structure is the interest Black Rock claims it has, that is also a red herring. First, safety is an issue the County can address and it does not require Black Rock's intervention. More importantly, we know the issue to be illusory because Wasatch County has previously permitted lines in *closer* proximity to structures than the proposed line in this matter. Attached hereto as Exhibit 1 are photographs of actual lines already located in Wasatch County that are much closer to structures than these lines will be to Black Rock's structures.[1] Black Rock

[1] To the extent the Board would like these photographs authenticated, Company witnesses Donald Watts and Kenneth Shortt will be present during the deliberation on this motion and could lay any requested foundation.

cannot demonstrate that it is likely to prevail at the Court of Appeals by saying it needs to raise this safety concern because it has neither the standing to make the argument nor a valid argument to make.

If the Board makes a determination as to the need for a facility and orders the local government to issue any required permits, the local government may impose conditions on the facility that do not impair the delivery of safe, reliable, adequate and efficient power. *Id*. at § 305(5). If those conditions increase the project costs, the governmental entity is obligated to pay the excess costs. *Id. at* § 203(1). This is the extent of the Board's authority in this proceeding.

Despite the clear statutory mandate of the Board, Black Rock continues to argue that the scope of the Board's authority extends not only to the need for the Project, but also to the need for *the location* of the Project. Based on this erroneous view of the Board's jurisdiction, Black Rock asserts that hypothetical impacts on its adjoining property must be considered in evaluating the "need for the location" of the Project. Black Rock's position, however, is directly contradicted by the Act's language. Nonetheless, Black Rock continues embrace its position, arguing in its Stay Motion that "[i]n this proceeding the Board is charged with deciding whether a sufficient necessity allows Rocky Mountain Power to override Wasatch County's ordinances and build a large transmission line directly parallel to Intervenors' residential development." Stay Motion, pgs. 5-6. Even if this *were* an accurate statement of the Board's mandate, it would be in the County's purview to ensure that its ordinances are enforced, not Black Rock's.

The simple fact is that Black Rock's alleged "legal interests" are not, in fact, "legal interests" as contemplated in UAPA, and are matters that the Board can or should consider in determining whether the Project is needed to provide safe, reliable, adequate and efficient service to its customers. On this point, Black Rock has already conceded to this Board that the Project is

needed – they just don't want it in view of their property. But, since the Board lacks authority to consider the concerns Black Rock raises, there is no way that the Board's decision could be seen to affect, much less "substantially affect" those legal interests. To this point, the Board correctly noted in its Intervention Order that "it would serve no purpose to recognize the property value, view shed and related impacts Black Rock asserts as sufficient to justify intervention and then to ignore those impacts, as we are required to do, in resolving the dispute before us." Intervention Order, pg. 6. The Intervention Order is correct, and Black Rock should not be allowed to delay this proceeding while it seeks a third hearing on its motion to intervene.

b. Black Rock's Intervention Will Materially Impair the Orderly and Prompt Conduct of the Proceedings.

Beyond the absence of any legal interest held by Black Rock that would be affected by this proceeding, the interests of justice would be frustrated if Black Rock were permitted to intervene. In *In re Questar Gas,* 2007 UT 79, ¶¶33-35, the Utah Supreme Court further illuminated this factor, laying out five considerations: (1) timeliness, (2) increased time and expense, (3) participation in prior administrative hearings, (4) whether another party adequately represents the intervenor's interest, and (5) whether any complications can be minimized by the agency. As made clear by the Company in its previous filings, Black Rock fails all but one – the timeliness of their motion – of these tests.

As to the second factor, the Board has an expedited schedule to resolve disputes brought under the Act. Allowing this intervention will certainly impinge on the time and expense required to address the only germane issue – whether this facility is necessary to provide safe, reliable, and efficient service to electric customers. During the previous hearings, there was significant discussion surrounding the differences between Black Rock and other residents of the County; the distinctions were the fact that the Black Rock group consist of HOAs and

"adjoining" landowners. But consider how many "adjoining landowners" follow every transmission line. That by itself cannot be a "legal interest" sufficient to intervene under UAPA. Otherwise, literally hundreds of parties would be proper party litigants to such proceedings, further constraining the already expedited statutory process this Board must follow, and resulting in extraneous arguments that are beyond the scope of the Board's legal oversight. The Act was never intended to allow anyone who had an opinion as to the location of a proposed utility facility to intervene in a proceeding before the Board. Further, the fact that two of the Black Rock parties' are homeowner's associations is a distinction without a difference. Adjoining landowners, however constituted, do not have a legal interest in a dispute between a utility and the local government.

As to the third factor, Black Rock was not a participant in the prior administrative proceedings. The only proper parties to a conditional use application are the applicant and the local government. Members of the public are allowed to speak in public meetings to express their concerns, but they are not parties to the proceedings. Indeed, Black Rock availed themselves of that right during the County process, and again during this Board's public witness hearing. In fact, the Board indulged Black Rock to allow its attorney to appear, present exhibits and make a full legal argument about the Project, though that is hardly what could have been contemplated as "comment from the public."

To the extent that Black Rock still maintains that the arguments it already presented to the Board during public comment are germane (*i.e.*, that the Company should not be allowed to ruin views, and that the Company allegedly *could* locate this line entirely in Summit County on Promontory's property), those arguments can and have been made by the County. Black Rock's

duplicative argument is unnecessary. Black Rock has identified **no** argument that it claims will go unheard by this Board if only the County proceeds as a party.

Finally, the Board has correctly recognized that certain complications would arise by allowing Black Rock to intervene. The arguments they wish to make are either inapplicable to the proceeding or are already being advanced by the County, the type of discovery they sought to undertake is irrelevant and does not bear on the issue to be decided, and simply stated they are not the types of entities contemplated by the Act: local governments or public utilities.

Allowing Black Rock to intervene would unjustifiably delay the proceeding and impair the Board's ability to orderly adjudicate the issue at hand, whether the Project is required to provide safe, reliable, adequate and efficient service to the Company's customers.

Black Rock cannot demonstrate that it meets the requirements for intervention in this proceeding and, therefore, cannot prove that it is likely to prevail on its appeal before the Utah Court of Appeals. Accordingly, its motion for stay should be denied.

B. Black Rock Has Failed to Identify Any Irreparable Harm it Will Suffer Absent a Stay.

In addition to demonstrating a likelihood of success on the merits, which Black Rock cannot show, in order to prevail Black Rock must prove that it will suffer irreparable harm absent the grant of a stay of these proceedings. In an attempt to meet this burden, Black Rock simply alleges that if the Board does not stay the proceeding, Black Rock "will necessarily be deprived of this important opportunity in light of the expedited nature of this proceeding." Stay Motion, pg. 7. Black Rock, however, identifies **no** specific harms that will result from not being a party, because there are none to identify. Assuming Black Rock refers to its previous claims regarding property value and the general safety of transmission lines, Black Rock has failed to show that such claims are based on anything more than speculation. Speculative harm,

unsupported by any evidence, is insufficient. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation omitted). Black Rock has put forth no evidence to demonstrate that the Project will cause "certain, great, actual, and not theoretical" damage. Rather, Black Rock's "evidence" is nothing more than a list of speculative concerns used to allegedly support the Wasatch County's denial of the permit for the Project. The fact that Black Rock fears these harms may occur, without support, fails to satisfy its burden of *proving* irreparable harm.

C. The Company and its Customers Will Suffer Substantial Harm if a Stay is Granted.

In contrast to Black Rock, the Company—and its customers within Wasatch and Summit Counties—will truly suffer substantial harm if the Board stays this proceeding. As outlined in the Company's Memorandum in Support of Petition for Review, along with the accompanying Direct Testimony of Kenneth M. Shortt, the critical need for the increased reliability and additional capacity provided by the Project, in the short term, has been thoroughly substantiated and is unrefuted. Black Rock has repeatedly conceded this point to the Board, demonstrating the flaw in Black Rock's current argument that no harm will come to the Company or its customers if a stay is entered. Black Rock simply argues that the Company would not be materially disadvantaged by a stay because, it claims, "[t]he transmission line has been located on Promontory's property for 100 years, so delaying a decision potentially allowing the line to be relocated does not impose any additional burden on Promontory." Stay Motion, pg. 7. Whether *Promontory* is or is not burdened is irrelevant. A stay would certainly harm the Company and its customers, as described in Mr. Shortt's testimony describing the need for the Project, as well as in the arguments regarding a bond, below.

The Company has made clear that the Project must be permitted and constructed as soon as possible or customers within Wasatch and Summit Counties will be subject to outages and continued loss of reliability, particularly during winter peaking months. *See* Direct Testimony of Kenneth M. Shortt, pg. 4. This risk continues to increase as customer demand increases over time, and has already reached unacceptable levels. Significantly the requested stay is of indefinite duration. Appeals can easily last more than a year. No testimony filed or proffered by any party contradicts the testimony of Mr. Shortt that this line upgrade is needed now. Delaying a project that Black Rock concedes is needed will obviously harm the Company and its customers.

On the record before the Board, the only reasonable conclusion is that further delays would substantially harm the Company and its customers.

D. Public Interest Supports Denial of Black Rock's Motion for Stay.

Black Rock's claim that the public interest is insufficient to warrant denial of the stay is contrary to the unrefuted testimony and demonstrates a lack of understanding of this Project and the electric service the Company provides to its customers in Wasatch and Summit Counties.

Black Rock asserts, based on nothing more than its own lay speculation, that "another minor delay will not put the public health, safety or welfare at risk." Stay Motion, pg. 8. Black Rock would have this Board believe that, despite all the testimony before the Board regarding the urgent need for the Project, the Company can afford another "minor delay." The fact is, as stated above, appellate reviews can take years, even when such appeals lack any merit. Meanwhile, demand on the Company's system continues to increase and the current system lacks the redundancy required to provide sufficient reliability to the Company's customers. Black Rock's baseless claims lead one to believe that Black Rock is simply applying delay tactics in

hopes that if it stalls this proceeding long enough, the Company will be forced to give up and pursue another alignment. Black Rock has presented no credible evidence to contradict the testimony and data presented by the Company on the public's urgent need for the Project, and the potential impacts of further delays. It is in the public's interest, and in particular the interest of Wasatch and Summit Counties' residents, to proceed with this proceeding in the expedited manner specified by the Act. Black Rock's entire premise—that the public at large should have its power supply put at risk indefinitely so Black Rock can delay a project it merely fears but can't prove will cause substantial injury—is completely contrary to this element to obtain a stay.

II. The Hearing Schedule set out in the Facility Review Board Act Does Not Provide for Stays that Exceed the Statutory Timelines.

Recognizing the inherent need for time certainty in utility facility planning and construction, the Act contains an express and expedited hearing schedule. This unique aspect of the Act distinguishes proceedings before this Board from other administrative proceedings governed by UAPA. This schedule directs the Board to "convene an initial hearing within 50 days after the date review is initiated" and "hold a hearing on the merits within 60 days after the initial hearing." *See* Utah Code Ann. § 54-14-304. The Act even goes as far as specifying the time frame for the Board to issue its decision. *Id*. at § 305(1). The entire proceeding is to be completed within 125 days, as noted by the Board in its Order. Nothing in the Act expressly grants the Board the authority to issue a stay prior to the final agency action, or to depart from the schedule set forth by the Act. While the Company agrees that, like other tribunals, this Board would have discretion to stay, continue or modify its schedule generally, that discretion does not appear to go beyond 125 days from the date of the initial hearing. *Id.*

Black Rock requests that this Board ignore that clear language of the Act, and delay the hearing for an undetermined period of time. Notably, Black Rock seeks a stay on an

interlocutory appeal, not in response to a final order of the Board. As discussed above, neither UAPA nor the Act expressly provides the Board authority to issue a stay of a proceeding based on an interlocutory order. Black Rock fails to provide any basis or legal authority for departing from the schedule set forth in the Act, or granting a stay pending its appeal of an interlocutory order. The language of the Act clearly establishes the time period, set forth under Utah Code Ann. § 54-14-304, for which the hearing before the Board is to be completed and a final decision issued. The Act is silent regarding the Board's authority to issue a stay prior to the hearing, raising serious questions about whether the Board has the authority to depart from the statutorily-designated schedule. Accordingly, Black Rock's motion for a stay should be denied.

III. Black Rock Should be Required to Bond for a Stay if it is Issued.

Although the Company maintains that Black Rock is not entitled to a stay of this proceeding, if and to the extent the Board entertains Black Rock's motion, irreparable harm would occur to Rocky Mountain Power and its customers unless Black Rock posts a bond to offset the damages that will result if this project is delayed. But just as the Company wonders whether the Board lacks discretion to exceed the statutorily mandated timeframe of 125 days, it concedes the statute is equally silent as to whether the Board could order Black Rock to post a bond.

Rule 17 of the Utah Rules of Appellate Procedure states that a court "may condition relief under this rule upon the filing of a bond or other appropriate security." Utah R. App. P. 17 (2016). Black Rock seeks this stay in order to prosecute an appeal under the appellate rules. If a party were bringing this motion before the Court of Appeals, seeking a stay of the Board's final action, the Company would be allowed to put on evidence about the size of the bond needed.

Black Rock should not be permitted to circumvent the bond process by filing its Stay Motion in front of this Board instead of the Court of Appeals.

The likelihood of significant damages from a delay is great. In addition to increased construction costs imposed by general inflation, the Company and its customers would be subject to another year (or possibly more) of outages and reliability concerns. The Company may lose the ability to add new customers. If the Board determines that it has no authority to require Black Rock to post a bond, it certainly should not stay the proceedings. That would risk very significant harm to the Company and its customers with little hope of recourse.

CONCLUSION

For the reasons stated above, the Company respectfully requests that the Board deny the Motion for Stay.

DATED this 9th day of May, 2016.

STOEL RIVES LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of May, 2016, I caused to be sent a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S MEMORANDUM IN OPPOSITION TO BLACK ROCK'S MOTION TO STAY**, to the following:

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