

the Company alone selected the Limber to Oquirrh Segment¹ based solely on cost, without regard to other available routes or the impact on local communities or the environment. The County would also have the Board believe that the County's denial of the Company's CUP was justified based on solid evidence that the impacts of the transmission line along the Proposed Route could not be reasonably mitigated. The facts, however, do not support the County's claims.

The Limber to Oquirrh Segment opposed by the County was independently identified by the Bureau of Land Management ("BLM"), after exhaustive analysis during the NEPA permitting process, as its "Preferred Alternative" route and its "Environmentally Preferred Alternative" route. Independently and after detailed analysis, the Company adopted this route as the best at providing safe, reliable, adequate and efficient service. Furthermore, during the CUP process, the Company agreed to comply with each and every mitigation measure proposed by the County's own planner, and provided substantial, credible evidence that all substantial impacts would be reasonably mitigated. These are the facts. Despite this evidence, the County bent to public clamor, avoided making an unpopular political decision, and denied the Company's conditional use permit, without providing any guidance with respect to what further mitigation should have been taken, and without providing the Company any specific alternatives. In short, perhaps understandably from its perspective, the County prohibited the construction of the Project for purely political reasons, even though the County concurs the Project is absolutely necessary to provide safe, adequate, reliable and efficient electric service to the residents of Tooele County and the rest of this State.

¹ The Limber to Oquirrh Segment is identified in Mr. Brandon Smith's testimony filed with the Company's Petition for Review. The Limber to Oquirrh Segment is also referred to herein as the "Proposed Route."

The County claims it will one day give the Company a permit, but not for the Proposed Route. The County doesn't say which route it will permit. Presumably, the County wants the Company to continually apply, reapply, and reapply again in the hope that it will someday find that certain route the County will accept based on political winds. But by then, unfortunately, the consumers of electricity in the Critical Load Area, including Tooele County, will have long since exhausted the available transmission capacity for the area. As indicated in the testimony of Mr. Darrell Gerrard, the Project must be in service by June 2013. The Company must locate, permit and build this Project now.

The County is now attempting to pass the responsibility of making the difficult political decision on to the Board and absolve itself of any responsibility for this matter. However, the Company, the BLM and numerous outside firms, agencies and consultants have spent more than two years analyzing and developing the route that is in the best interest of the greater public. The results of this work are uncontested. No contradictory testimony was filed. The Board should look to the FEIS, along with the information provided by the Company, in deciding this matter, as this information is far more comprehensive than any analysis the Board could possibly complete in the limited time the Board has to consider this matter. In short, this Board should uphold the Proposed Route.

ARGUMENT

A. The Selection of the Proposed Route, including the Limber to Oquirrh Segment, was made after extensive analysis by both the BLM and the Company.

Every argument raised by Tooele County in its Response ignores a fundamental fact: the selection of the transmission alignment for the entire Project, including the Limber to Oquirrh Segment (also referred to herein as the "Proposed Route"), is supported by exhaustive analysis conducted by both the BLM and the Company, independently. The County's Response

downplays the BLM's leading role in the route selection process. Tooele County would have the Board believe that the Company alone selected the Proposed Route's alignment on the basis of cost alone, and without regard to the impacts on the communities and the environment, or the availability of alternative routes. The County's argument on this point could not be further from the truth, and tellingly, the County had no actual testimony to support this contention.

As set forth in extensive detail in the testimony of Mr. Brandon Smith filed with the Company's Petition for Review, the Company spent several years and over 14 million dollars evaluating the Project, including numerous alternative transmission line alignments.

Equally important, the BLM, acting as the lead agency in the NEPA Environmental Impact Study ("EIS") process, independently conducted a full land use and environmental impact review, commencing in October 2007, and culminating with the issuance of the Final Environmental Impact Statement ("FEIS") on April 23, 2010. In contrast to the County, which concedes in its Response that it "lacks the expertise or resources (qualified personnel and/or budget) to credibly advocate for the construction of a particular route" (*see* Response, pg. 3), the BLM possesses vast resources, numerous specialists and exceptional expertise to fully evaluate the Project (including all the alternative routes), address the impacts and consequences flowing from the Project, and advocate a transmission route alignment that best protects the quality of the human environment and the quality of life for Tooele County's citizens. That is exactly what the BLM did. After all of its analysis and studies (which admittedly Tooele County has not performed), the BLM independently adopted a "Preferred Alternative" route and an "Environmentally Preferred Alternative" route. *See* FEIS Figure 2-5. Significantly, the BLM's Preferred Alternative route and Environmentally Preferred Alternative route follow the same alignment (referred to herein collectively as the "Preferred Route") and were adopted by the

Company as the Proposed Route. This is this route the Company now asks this Board to approve. It is also the route the County denied.

In developing its Preferred Route, the BLM undertook extensive analysis of a range of reasonable alternative routes and corridors. With respect to the alternative route analysis, NEPA directs the BLM to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources; . . .” 42 U.S.C.A. § 4332(2)(E) (2009). “In determining the alternatives to be considered, the emphasis is on what is ‘reasonable’ rather than on whether the proponent or applicant likes or is itself capable of implementing an alternative. Reasonable alternatives include those that are practical or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from standpoint of the applicant.” *See* BLM NEPA Handbook H-1790-1, pg. 50. The EIS analysis takes into consideration known and predicted environmental effects. The effects identified in the EIS can include ecological, aesthetics, historic, cultural, economic, social, or health. *Id.* at 54. *See also* 40 C.F.R. § 1508.8. Consistent with this direction, the BLM completed its EIS process with the release of the FEIS, and the identification of its Preferred Route.

While the County acknowledges that it does not have the expertise or resources to evaluate and “credibly advocate” an alternative route alignment for the Project, it dismisses entirely the BLM findings and the extensive siting analysis conducted by the BLM and the Company, independently. In the face of the Company’s and BLM’s findings, and without providing any specifics, the County simply asserts “that there are multiple routes through Tooele County which are ‘safe, reliable, adequate, and efficient.’ ” *See* Response, pg. 3.

What Tooele County has wholly failed to do, though, is put forward any actual evidence to support its assertion, or that challenge the findings of the BLM. Nor does it, or can it, deny that the Proposed Route (which shares its alignment with the BLM Preferred and Environmentally Preferred routes) is the safest, most reliable, and most efficient route. Ultimately, that is the measuring stick to be used by this Board. The Board must determine from all routes proposed the one that is the safest, most reliable, adequate, and efficient for the state as a whole. Utah Code Ann. § 54-14-102. The Company, consistent with the BLM's findings, maintains that the Proposed Route is the safest, most reliable, adequate and efficient route. At no time has Tooele County claimed that there is a route that is safer, more reliable, adequate and more efficient for all of Utah than the Proposed Route.

B. The County has not proposed any specific, reasonable alternative route to the Company that the County has indicated that it is willing to approve.

The County alleges in its Response that it “did propose several alternative routes.” *See* Response, pg. 3. This statement is not accurate, as the County has at no time identified to the Company an alternative alignment that the County would approve. In support of its statement referenced above, the County refers to the “consensus letter” sent to the BLM on September 21, 2009, and attached as Exhibit C to the Response (the “Consensus Letter”). With respect to the Limber to Oquirrh Segment, the letter reads:

We propose the Limber to Oquirrh transmission line be routed to minimize impact to Tooele Valley's residents. This proposal concurs with Tooele City Mayor, Tooele City Council and The Citizens Committee of Tooele as well as the Tooele County Commission who are opposed to RMP's proposed routes through or south or east of Tooele City and have been designated by the same officials and citizens as unacceptable having the greatest amount of negative impact on the greatest amount of citizens. We propose these routes be eliminated for those reasons and because they are no longer practical considering the northern location for the Limber substation.

(Consensus Letter, pg. 2 (emphasis added)). The above-referenced sentences set forth in their entirety the “several alternative routes” proposed by the County in the Consensus Letter. In review, the County (along with other parties) proposed (1) “the Limber to Oquirrh transmission line be routed to minimize impact on Tooele Valley’s residents,” and (2) the Limber to Oquirrh Segment be eliminated “because they are no longer practical considering the northern location for the Limber Substation.”² These statements contain nothing that could be perceived as a proposed alternative route to the Proposed Route, much less a consensus route. Furthermore, the parties most impacted by the changes suggested in the “Consensus Letter,” Grantsville City and the Grantsville City Concerned Citizen’s Group, did not sign the letter, putting in serious doubt what level of “consensus” was actually achieved.

Simply stated, prior to this proceeding, the County has been careful not to formally propose or advocate any specific alternative route. In its Response, the County did identify two routes that the County alleges it “suggested,” but were dismissed by the Company. *See* Response, pg. 6.

Based on the Company’s understanding from the County’s Response, the first route follows a portion of the Questar gas pipeline corridor and is a variation of the Silcox Canyon Route previously evaluated by the BLM and the Company. This route is a departure from the BLM’s Preferred Route, and would result in greater environmental impacts attributable to the extensive access road construction required along the route. Additionally, the route would require additional engineering and construction techniques as a result of the steeper topography,

² Both the BLM and the Company have rejected the proposal to locate the Limber Substation in the northern location suggested in the Consensus Letter, as described in the testimony of Mr. Brandon Smith.

and increased right-of-way acquisition costs due to the presence of the Kennecott mineral properties along this route.

The second route along the I-80 corridor was also fully considered by the BLM and the Company, independently.³ With respect to this route, which is designated as Alternative G in the FEIS, the BLM determined:

Alternative G does not appear to meet the Western Electricity Coordinating Council (WECC) guidelines for reliability (Appendix A) and does not meet the Proponent's purpose or need for the Project. Alternative G would parallel either of the alternatives from Limber to Terminal (Alternative H and I) around the Lake Point area for a minimum of 5 miles. Due to topography and existing transportation and utility infrastructure around Lake Point, it would not be possible to maintain a 1,500-foot separation between the two transmission lines in compliance with the WECC guidelines for reliability do not meet part of the Proponent's purpose and need for the Project to increase reliability and capacity of the transmission system.

(See FEIS, pg. 2-20). As set forth in the testimony of both Mr. Brandon Smith and Mr. Darrell Gerrard, the Company also fully evaluated this route, and found it to be unacceptable. (See Direct Testimony of Brandon D. Smith, pgs. 25-27, and Direct Testimony of Darrell T. Gerrard, pgs. 17, 24-25).

The fact is, while it has made general, off-the-record suggestions of where it would like a corridor sited, the County has gone to great lengths to avoid proposing or advocating any specific route alignment in an official sense. In refusing to do so, the Company can only infer that Tooele County is attempting to avoid making a decision on a difficult local issue, thereby

³ In the Response, the County indicates that "the I-80 corridor has been designated a Federal 'Section 368 Energy Corridor.'" This is incorrect. Section 368 of the Energy Policy Act of 2005 directed that energy corridors be designated on federal lands and identified in the West-wide Energy Corridor Programmatic EIS prepared by the Department of Energy (DOE January 2009). However, the Record of Decision for designating energy corridors in the BLM West Desert District is pending amendment of the Pony Express Resource Management Plan and is not yet approved on BLM lands in the Salt Lake Field Office. In addition, the energy corridors only apply to federal lands, and there are no federal lands crossed by the Project along the Interstate 80 route alignment between Limber and Terminal substations.

avoiding the risk of inciting the ire of the voters in the communities that may be impacted by such a decision. The Company also suspects the County has avoided advocating a route in order to avoid paying “excess costs,” setting up the argument that it was not the County that required a specific alternative route. From its remarks in the Response, it is clear the County is passing the burden of identifying an alternative route to the Board. For example, in the Response, the County states “Tooele County should not be required to make independent engineering studies on alternative routes in order to have them seriously considered by RMP. . . Tooele County needs the Board to provide critical analysis of the proposed and alternative routes identified by RMP and any routes identified by the public that the Board believes warrant consideration or, in the alternative, require RMP to more fully evaluate routes the Board determines to be viable.” *See* Response, pg. 4 (emphasis added). Further, in the Response’s Conclusion, the County requests the Board “[i]ssue an appropriate order directing Tooele County to approve the route that the Board has determined to be viable based upon all relevant criteria.” *Id.* at pg. 12 (emphasis added).

In light of these directions from Tooele County, this Board should not hesitate to mandate a route. Both Tooele County and the Company are telling this Board that it should determine the route. Utah Code Ann. § 54-14-305(4) expressly states that this Board must establish the location of the route. And yet, there is only one route that has been put before the Board that is viable, the Proposed Route. The BLM, the Company, numerous agencies and consultants have all validated this route.

C. Independently, the Company and the BLM have exhaustively considered all reasonable routes, including those routes suggested by the community participants.

Tooele County alleges in its response that the County “made numerous suggestions beyond the consensus route,” but that the Company has “summarily denied every suggested

route.” See Response, pg. 3. First, as described above, the communities, including Tooele County, never proposed a specific “consensus route” for the Limber to Oquirrh Segment. The only consensus between the communities (or at least those that signed the letter) was the “transmission line be routed to minimize impact to Tooele Valley’s residents.” Like the County’s allegation regarding the “consensus route” and the proposal of alternative routes to the Limber to Oquirrh Segment, the County’s statement that the Company “summarily denied every suggested route” is simply false. The testimony of Mr. Brandon Smith demonstrates the extensive efforts made and resources expended by the Company to analyze all reasonable alternative routes. This analysis by the Company is in addition to the exhaustive analysis conducted by the BLM as part of the NEPA process. The level of analysis conducted by the BLM and the Company assessing alternative routes and identifying the Proposed Route is beyond question, and the County’s allegation that the Company “summarily denied every suggested route” is simply political posturing.

D. The Company’s CUP met the County’s Land Use Requirements.

While the County alleges in its Response that the CUP was denied for “insufficient mitigation,” the facts of the case tell a completely different story. While Tooele County purportedly denied the Company’s CUP application based on its stated findings that there was “insufficient mitigation” and a “failure to meet the burden of proof showing mitigation,” the record before the County provided substantial evidence of the nature, scope and adequacy of the mitigation measures proposed by the Company to reduce each of the potential impacts of the Project that were identified by the County. In fact, on the record the Company agreed to implement *every* mitigation measure proposed by the County’s Planner. The County ignored the evidence and mitigation measures proposed by the Company, ignored their own planner’s

recommendation to grant the permit, and instead relied on unsubstantiated concerns, conjecture, speculation and public clamor to deny the CUP.

1. The Company's CUP adequately addressed all mitigation concerns.

The Company agreed to comply with all mitigation measures proposed by the County. Significantly, prior to the March 3rd Planning Commission meeting, the County Planner proposed 22 mitigation conditions on the Proposed Route. During the March 3rd meeting, a 23rd condition was proposed. The Company agreed to comply fully with all 23 mitigation conditions proposed by the County. Nonetheless, the County bent to public pressure and denied the CUP application. In denying the application, the County identified the following as “areas in which mitigation was not shown or was insufficiently shown”:

1. Wildlife
2. Disturbance of International Smelter site
3. Settlement Canyon reservoir use
4. View sheds including road scars
5. Potential contamination of water sheds and springs
6. Tooele High School's T for safety and visual look
7. Health risks regarding high power lines
8. Loss in property value
9. The EIS is not complete
10. The completion date is uncertain
11. The record of decision from BLM is unavailable
12. The Plan of Development is non-existent

As outlined in detail in the Company's Memorandum in Support of Appeal filed with the Tooele County Commission, attached hereto as Exhibit 1, each of the areas of concern cited by the County were addressed in *detail* by the Company in its CUP application and its subsequent February 23, 2010 filing (the “Supplemental Filing”), as well as the BLM's Draft EIS. Despite this fact, the County denied the CUP without identifying why the proposed mitigation was not adequate. The absence of a clearly articulated basis for the County's decision is itself evidence that the decision was based on something other than substantial evidence or factual findings.

2. The County's Decision was based on "Public Clamor."

It is clear that the County's action was not based on factual findings supported by substantial evidence, but rather opposition by a vocal minority and the County's general preference that the Project be located "somewhere else." The fact is, no amount of mitigation proposed by the Company would have changed the decision of the County. The true reason for the County's decision is simply the unsubstantiated concerns of some County residents, concerns based on conjecture, speculation, subjective opinions about the Company, and uninformed ideas regarding the need for the Project. Nothing in the record suggests that the County adequately investigated the concerns raised by the public, or explains why the County accepted the unsubstantiated concerns of the citizens and ignored the credible information provided by the BLM and the Company. This is a classic case of "public clamor" as that term is used in Utah caselaw.

Although consideration of public comment is important, those comments cannot be the basis of a decision unless they provide actual evidence for the decision made, especially when there exists uncontradicted, credible evidence to the contrary. Utah courts have long recognized that adverse public comment alone is insufficient to provide a legal basis for denial of a conditional use permit. *Ralph L. Wadsworth Construction Inc. v. West Jordan City*, 999 P.2d 1240, 1243 (Utah App. 2000). "[W]hile there is no impropriety in the solicitation of or reliance on the advice of neighboring landowners, the consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit." *Davis County v. Clearfield City*, 756 P.2d 704, 712 (Utah Ct. App. 1988). A local government may not rely on mere emotion, unsubstantiated allegations, or public opposition or expressions of concern for property values, public safety and welfare. *Id.* A local government must instead rely on facts

and base its decision objectively on the applicable criteria for approving conditional use permits, even in the face of public opposition and difficult political decisions. *Id.* Of course, the reasoning behind these decisions is applicable to the Board as well.

Contrary to the County's assertions in its Response, the record before the County is devoid of substantial evidence supporting its decision. It is, however, full of the opponents' emotions, suppositions, and unsubstantiated allegations. It is clear that this public clamor, and not factual findings, was the sole basis of the County's decision.

The denial of the Company's CUP was required to be based on something more than public opposition and expressions of concern for unsubstantiated negative impacts or vague references to public safety and welfare. *Davis County*, 756 P.2d at 712. It was not. Having ignored the uncontradicted, credible evidence from the Company, the County relied on unsubstantiated allegations, emotions and conjecture.

E. Through its denial of the Conditional Use Permit, Tooele County has prohibited the construction of the Project, and has made any future approval of the transmission project subject to "excess costs" for a local benefit.

Tooele County alleges that the "denial of RMP's CUP does not prohibit construction of the Project, rather, it prohibits siting of the route in a particular location." *See* Response, pg. 2. This assertion mischaracterizes the effect of the County's action, and simply ignores the facts. Tooele County's Land Use Ordinances require the Company to obtain a conditional use permit prior to constructing the Project. In accordance with the land use ordinance, the Company applied for a conditional use permit to construct the Project along the Preferred Route selected by the BLM and adopted by the Company as its Proposed Route after extensive analysis by both entities, as outlined in the testimony of Mr. Brandon Smith. Tooele County's ordinances

prohibit construction without the permit the County refuses to issue. Therefore, in denying the CUP, the County has denied the Project.

The fact is, in denying the CUP, the County has “prohibited construction of a facility which is needed to provide safe, reliable, adequate, and efficient service to the customers” of the Company within the State of Utah, including Tooele County. Utah Code Ann. § 54-14-303(1)(d). Furthermore, by imposing as a condition to granting any CUP that the Company relocate the Limber to Oquirrh Segment to “some other location,” the County has “imposed requirements on the construction of the facility that result in estimated excess costs without entering into an agreement with [the Company] to pay for the actual excess costs.” Utah Code Ann. § 54-14-303(1)(a).

Therefore, the County’s decision has prohibited the Company from building the Project, which is needed to provide safe, adequate, reliable and efficient service to its customers. Further, the County has imposed requirements on any future approval of the Project for the benefit of the local community for which the County has not agreed to pay the “excess costs” associated with those local benefits. It is the duty of this Board to require the County to issue the required CUP for the Proposed Route, or require the County to pay the “excess costs” associated with any other alternative route required by the County. The County has already stated it cannot pay excess costs for any alternate route. Hence, this Board has no alternative but to require the County to issue a permit for the Proposed Route.

F. The Proposed Route is the proper measure of the “Standard Cost.”

The Proposed Route was selected by the Company through the Company’s “normal practices.” Utah Code Ann. § 54-14-103(9)(b). This is the way the Company would plan and build this Project if it did not have to get a permit from the County. Thus, by law, the Proposed

Route must be used to measure “standard cost.” Utah Code Ann. § 54-14-103(9)(a). The County, however, argues that the route should not be used to establish the “standard cost,” because the County would otherwise be unable to pay “excess costs” associated with any alternative routes. The County’s position is without support.

First, it should be noted that by making this argument, the County is acknowledging that the Proposed Route is not only the least expensive, but that it is significantly less expensive than any other alternative alignments considered. The County’s inability to pay “excess costs,” to revise the route is not a basis for dismissing the Proposed Route for purposes of establishing the “standard cost” under the Utility Facility Review Board Act. To the contrary, the higher the “excess costs” created as a result of a local government’s requirements, the stronger the justification for imposing those costs on the local government putting the demands on the whole system.

Utah Code Ann. §§ 54-14-103(9)(a) and 201(1) & (2) make clear that the Company is to plan its facility according to “the public utility’s normal practices.” This, in fact, is the definition of “standard cost” in the Act, notwithstanding Tooele County’s argument that it shouldn’t be so. Thereafter, if the County does not want a facility to be built as it would be under “normal practices,” the County can propose conditions that would vary from standard practice.

This is not a matter that this Board needs to expend significant time resolving, however. The state legislature has already determined the issue. Utah Code Ann. § 54-14-103(4) states that “any material differences in estimated cost between the cost of a facility, including any necessary right-of-way, if constructed in accordance with the requirements of a local government and the standard cost of the facility” is the definition of “estimated excess cost” under this Board’s governing Act. Tooele County has stated that the Company can only build this Project

if it does it at some location “other than” the proposed route. That is the condition of the County. Hence, if it costs the Company more, including increased right-of-way costs, to build the Project in this other, undisclosed location, then Tooele County must agree to pay for those excess costs. Utah Code Ann. § 54-14-201(2). Here Tooele County is trying, without any legal support, to have it both ways. It wants to impose its desires of where the lines and substations will and will not be built, but, it wants the rate payers across the system to pay for its choices. Fortunately for the rate payers, that is precisely the scenario the Act was written to prevent. If the County will not pay excess costs, as it states it will not, then this Board must mandate that it permit the Proposed Route.

CONCLUSION

There is no dispute about the need of the Company to construct a new transmission line in Tooele County. Tooele County has stipulated to this fact in its Response.

Likewise, the need for the siting of the Project along the Proposed Route selected by the BLM and adopted by the Company has not been refuted by any credible evidence. In opposition to the Proposed Route, Tooele County has simply stated that it would have approved a route “somewhere else,” but has never put forth any evidence indicating where else an alternative line route could run without impacting reliability, safety, adequacy or efficiency.

The evidence is clear and uncontested. Overall, the Proposed Route is the best at providing a safe, reliable, adequate and efficient transmission line through the Tooele Valley. Further, the Company has met the requirements for the issuance of the CUP for the Project.

This Project is the last link in the Gateway Central Project, a very costly and important project necessary to increase transmission capacity to the Critical Load Area, including Tooele County. This Project must be completed and in service by June 2013. Tooele County cannot be

allowed to jeopardize such a vitally important project based purely upon local preference to not view transmission towers, and without even proposing any alternative routes that it would permit.

As a political body, Tooele County serves at the will of its citizens. Perhaps its actions were understandable from that standpoint. It simply cannot permit this route for political reasons even though it can't point to another equally viable route.

This Board is not a political body. It was appointed to guard the interests of the state as a whole. Board members should ask themselves what credible evidence has been put forward by Tooele County that another route can be built without sacrificing reliability, safety, and efficiency. There is no such evidence. The Board should issue a ruling locating the transmission line within the Company's proposed transmission corridor as specified in Exhibit BDS-9.1 of Mr. Brandon Smith's testimony. There is no viable alternative.

DATED this 4th day of May, 2010.

STOEL RIVES LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this ____ day of May, 2010, I caused to be sent by hand delivery a true and correct copy of the foregoing **PETITION FOR REVIEW**, to the following:

Doug Hogan
Tooele County Attorney
Gordon R. Hall Courthouse
74 So. 100 E., Suite #26
Tooele, UT 84074

Exhibit 1

Memorandum in Support of Appeal of the
Conditional Use Permit Application No. 2010-1