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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER,

Petitioner,

vs.

TOOELE COUNTY,

Respondent.

**REPLY TO RESPONDENT'S
RESPONSE TO PETITION FOR
REVIEW**

Petitioner, Rocky Mountain Power (the "Company"), hereby submits its reply to the Response to Petition for Review (the "Response") filed by the Respondent, Tooele County (the "County"), on April 22, 2010.

SUMMARY

Tooele County denied the Company's conditional use permit ("CUP") for the Mona to Oquirrh transmission project (the "Project") on March 30, 2010, and conditioned any future approval upon the relocation of the Project to some other, unidentified location. Through its Response, the County would have the Utility Facility Review Board (the "Board") believe that

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

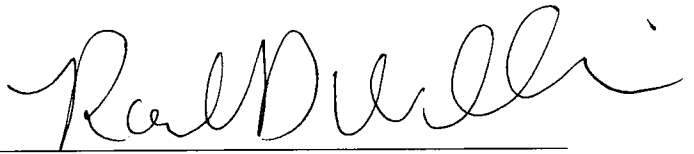
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D. Matthew Moscon
Richard R. Hall
Attorneys for Petitioner
Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that on this 4th 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



A handwritten signature in cursive script, appearing to read "Karl D. Miller", is written over a horizontal line.

Exhibit 1

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

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BEFORE THE TOOELE COUNTY COMMISSION

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vs.

TOOELE COUNTY,

Respondent.

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

I. INTRODUCTION

Having received the Transcript of the Tooele County Planning Commission's (the "Planning Commission") March 3, 2010 meeting and its Findings of Fact, Rocky Mountain Power (the "Company") hereby supplements its Notice of Appeal with this memorandum outlining some of the bases for its appeal of the Planning Commission's decision denying the Company's application for a conditional use permit (the "CUP") for the construction and operation of the Mona to Oquirrh transmission project (the "Project"). The Company asserts that the Planning Commission erred in its decision to deny the CUP, and requests that the Tooele

County Commission (the “County Commission”) reverse the decision and approve the CUP application.

II. BACKGROUND

For many years Tooele City and Tooele County have relied on electricity supplied over high voltage transmission lines running from Mona, Utah to the Salt Lake Valley and then into Tooele County. Those transmission lines run through many communities in the State of Utah. Those lines are the price that is paid to enjoy electrical service. The Utah Public Service Commission and the Utah Legislature decided long ago that Utah is an above ground, over-wire electrical transmission state. This method of transmitting electrical service is the safest, most efficient, reliable and cost effective system to provide power to the residents of this state, including those living throughout Tooele County. As the demand for electricity has increased in Tooele County and throughout northern Utah, the Company has worked to increase its capacity to transport electricity from its generation facilities in southern Utah to the communities in northern Utah. However, these existing transmission corridors will soon no longer have sufficient capacity to meet the increasing demand for electricity. Additionally, it is no longer feasible to construct additional transmission lines within the existing corridors. A new transmission corridor is required.

After extensive review, the Company has identified the Project, outlined below, as the best alternative to increase the transmission capacity to northern Utah. The Project will consist of a 500 kilovolt (“kV”) transmission line between the existing Mona Substation located near the community of Mona in Juab County, Utah, to a proposed future 500/345/138 kV substation to be located in the western portion of the Tooele Valley (the “Limber Substation”). An additional 345 kV extension will be constructed from the future Limber Substation to the existing Oquirrh

Substation, located in West Jordan, Utah. Ultimately, an additional 345 kV transmission line will be constructed from the Limber Substation to the existing Terminal Substation, located in Salt Lake City. To accommodate the new transmission lines, upgrades to the existing Mona and Oquirrh Substations will also be necessary.

The Company's CUP application seeks approval for the portion of the transmission line running from the southern border of Tooele County up to the proposed site for the Limber Substation, and then continuing on to the Oquirrh Substation in West Jordan, as outlined in the CUP application. The Company will seek approval for the Limber Substation and Limber to Terminal transmission line in the future.

The Project is part of an overall transmission expansion program in Utah and will provide needed support within northern Utah for future imports of power from power plants in southern Utah. The Company's need for the Project is based on its obligations as a publicly regulated electric utility to provide safe, reliable, adequate, and efficient electric transmission service to its customers and other users of the transmission system.

III. SUMMARY OF ARGUMENT

The Planning Commission 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" of certain specific issues relating to the development of the Project. The Planning Commission's decision is in error. Contrary to the Planning Commission's conclusion, the record provides 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 planning staff and the Planning Commission. The Planning Commission ignored this evidence, and instead relied on unsubstantiated concerns, conjecture, speculation and public clamor as the basis of its decision.

The County Commission should reverse the Planning Commission's decision because that decision was based on insufficient and impermissible grounds, and should approve the Company's CUP application.

IV. STANDARD OF REVIEW

Under Utah Code Ann. § 17-27a-707(2), the County Commission's review of the Planning Commission's decision to deny the CUP application is *de novo*, meaning the County Commission should give no deference to the findings and conclusions of the Planning Commission. The County Commission is required to "determine the correctness" of the Planning Commission's decision "in its interpretation and application of a land use ordinance." Utah Code Ann. § 17-27a-707(3). As set forth in further detail below, the "land use ordinance" in question, Chapter 7-5 of the Tooele County Land Use Ordinance, provides that the Planning Commission "shall approve a conditional use permit if reasonable conditions can be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use." This language is paraphrased from the governing state statute, Utah Code Ann. § 17-27(a)-506. That statute also expresses an affirmative obligation on a local government to approve a proposed land use so long as the applicant also proposes reasonable mitigation conditions that "substantially" mitigate anticipated impacts from the proposed use. *Id.* Once that occurs, meaning, in this instance, once the Company proposed what it believes to be reasonable mitigation conditions that substantially mitigate anticipated impacts of the Project to the County, then the Planning Commission had a legal obligation to fully consider the proposed mitigation conditions and either (1) approve the Company's CUP application, or, (2) make specific findings, supported by substantial evidence, that the Company's proposed mitigation conditions would not substantially mitigate the anticipated detrimental impacts. *Id.* While a such decision may not be without public

opposition, the Planning Commission had a legal obligation to accept the Company's proposed mitigation plan in the absence of "substantial evidence" that the proposed conditions would not "substantially" mitigate the impacts. Instead, the Planning Commission appears to have taken the position that, whether there is evidence in the record supporting its decision or not, the Planning Commission can simply doubt the Company's conditions are sufficient or decline to consider them. The Planning Commission erred in not granting the Company's application and, therefore, absent the "substantial evidence" to support the Planning Commission's decision, the County Commission has a legal duty to approve Conditional Use Permit Application 2010-1.

V. ARGUMENT

A. The Planning Commission's decision is not supported by "substantial evidence."

During the CUP application process, the Company worked closely with the County planning staff to address each of the concerns that had been raised by community leaders, residents, County planners, and from each of the County departments. As part of this effort, the Company provided extensive information regarding the mitigation measures that would be implemented to address potentially detrimental impacts of the Project. The Planning Commission, however, dismissed the proposed mitigation measures as "insufficient," without identifying *why* the measures were not adequate or what additional measures it considered necessary. Under Utah law, a local government's land use decision involving a grant or denial of a conditional use permit is arbitrary and capricious if it is not supported by "substantial evidence." *Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, 999 P.2d 1240, 1242 (Utah App. 2000). In this case, the record plainly demonstrates that the Company addressed each potential impact that was raised and presented substantial, credible and unrefuted evidence regarding the nature, scope and adequacy of the mitigation measures that would be implemented in conjunction with the Project. The Planning Commission, however, simply ignored this

evidence, and based its decision on pure conjecture, speculation and public concerns regarding the Project. The Planning Commission's decision, therefore, cannot be sustained.

Utah courts have traditionally defined "substantial evidence" as "that quantum and quality of relevant evidence that is adequate to convince a reasonable mind to support a conclusion." *Bradley v. Payson City Corp.*, 70 P.3d 47, 51-52 (Utah 2003); *First Nat'l Bank of Boston v. County Bd. of Equalization*, 799 P.2d 1163, 1165 (Utah 1990). In applying the "substantial evidence test," an appeal authority must consider "*both the evidence that supports the . . . factual findings and the evidence that detracts from the findings.*" *First Nat'l Bank of Boston*, 799 P.2d at 1165 (emphasis added). This test does not require or specify a quantity of evidence, but requires only such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Harken Southwest Corporation v. Board of Oil, Gas and Mining*, 920 P.2d 1176, 1180 (Utah 1996). The appeal authority, however, will not sustain a decision which ignores uncontradicted, credible evidence to the contrary. *Id.* Moreover, the appeal authority must "review the evidence in the record to ensure that the [local government] proceeded within the limits of fairness and acted in good faith" and to "determine whether, in light of the evidence before the [local government], a reasonable mind could reach the same conclusion as the [local government]." *Springville Citizens for a Better Community v. The City of Springville*, 979 P.2d 332, 337 (Utah 1999). Considering all evidence presented to the Planning Commission, it is clear that its decision was not based on "substantial evidence," and would not be a conclusion reached by a reasonable mind reviewing the information in good faith.

With respect to the evidence required for the CUP application, Chapter 7-5 of the Tooele County Land Use Ordinance provides that the Planning Commission "shall approve a

conditional use permit if reasonable conditions can be imposed to mitigate the reasonably anticipated detrimental effects of the proposed use.” (Emphasis added) (see also Utah Code Ann. § 17-27a-506.) Chapter 7-5 does *not* require all impacts of the proposed action be completely eliminated. Rather, “reasonable conditions” should be imposed to mitigate potentially detrimental impacts. *Id.*

Land use decisions can sometimes be challenging and require local land use officials to balance competing interests. These decisions can at times be politically unpopular with some residents. However, public opposition and outcry cannot be used to sustain a decision, or ignore facts. Elected officials are sworn to uphold the law, even in the face of “public clamor.”

The record in this case demonstrates clearly that the Company met this mitigation standard. Nonetheless, the Planning Commission bent to public pressure and denied the CUP application. Accordingly, its decision can and should be reversed.

In denying the application, the Planning Commission 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

Each of the areas of concern cited by the Planning Commission were addressed in detail by the Company in its CUP application and its subsequent February 23, 2010 filing (the “Supplemental Filing” is attached hereto as Exhibit A and incorporated herein by this reference). The

information on each of these points is briefly outlined below. The County Commission is directed to the Company's CUP application filing for a more detailed assessment of these issues, which filing is attached hereto as Exhibit B and incorporated herein.

1. Wildlife – The Planning Commission failed to present any basis for its reasoning that the Project would impact wildlife, nor did it state what the anticipated impacts would be. Nonetheless, the Company indicated to the Planning Commission that it would work with state wildlife resource managers if the Project in any way impacted wildlife. In fact, the Project has been specifically design to avoid impacts on wildlife. It should be noted that the Company's proposed route was also selected as the preferred route by the BLM after consideration and study of potential impacts to wildlife. No specific evidence or information was presented at any of the hearings before the Planning Commission to indicate that the Project would be a detriment to wildlife, or that Rocky Mountain Power would not earnestly work with state wildlife agencies to mitigate potential impacts if such impacts were later discovered. Therefore, the Planning Commission's finding that the Company has failed to mitigate impacts on wildlife is devoid of any reference to specific detrimental impacts and fails to identify what mitigation measures it believe were reasonably appropriate. The Planning Commission's finding is not supported by any evidence, much less substantial evidence.

2. International Smelter Site – The Supplemental Filing outlines the Company's plans to address the mitigation measures within the International Smelter Site. The Company made clear that it is working with the appropriate agencies, including the US EPA, the Utah Department of Wildlife Resources that manage the site, and the landowners. Further, the Company is fully aware of and is legally bound to comply with

all state and federal regulations governing the use of the site, along with the terms and conditions set out in the Record of Decision for the International Smelter Site (the “ROD”). The Planning Commission’s findings provide no guidance on what additional mitigation measures it considered necessary, or why the applicable state and federal regulations, along with the terms and conditions of the ROD, were not adequate in the view of the Planning Commission. During the hearing some members of the Planning Commission expressed opinion that the EPA would not allow this route. No one, however, actually presented any evidence to that effect. The opinion was pure conjecture and in error. As it has committed to do, the Company has been working with the EPA and other environmental regulatory agencies to ensure that all mitigation issues relating to the International Smelter site are adequately addressed.

3. Settlement Canyon Reservoir – In response to the concerns of community leaders and residents, the Company shifted the transmission line alignment approximately 400 feet to the south edge of the reservoir. With respect to concerns over whether helicopter access to the reservoir for fire suppression activities would be impaired, the Company confirmed with two different operators and the BLM that the line location would not present a problem. Given that this information was provided to the Planning Commission, and was not contradicted, it is unclear what additional mitigation measures the Planning Commission considered necessary. What is clear is that the concerns of the Planning Commission are based on pure supposition, not facts. No evidence was offered by the Planning Commission indicating the reservoir could not be used for fire suppression with the Project in place.

4. View Sheds including Road Scars – In response to the view shed concerns, the Company provided visual simulations depicting the impact the Project would have on the view shed. The Company also committed to implement measures to minimize the impact on the view, such as the use of self-weathering towers, and reclamation and revegetation measures for the access and any cuts and fills. While it is not feasible to completely eliminate the impacts on the view shed, the Company proposed substantial measures to reduce the impact. In reviewing the simulations provided by the Company, the Planning Commission raised the concern that the professionally prepared simulations of the Project “looked too good” and the wires and towers were not visible enough to be credible. The Planning Commission dismissed the accuracy of the simulations simply because the visual impacts were not as substantial as they had anticipated. Hence, without any evidence to indicate the graphics were erroneous, the Planning Commission concluded that the view shed could not be mitigated even though the graphics presented to them demonstrated there was no basis for this concern, and there was no evidence presented by anyone that the Company’s view shed studies were flawed. (See Exhibit B (Supplemental Filing Binder) at tab 5, “Viewshed”). The Planning Commission’s findings with respect to the impacts on the view shed are simply unsupported in light of the evidence before it.

5. Potential Contamination of Water Sheds and Springs – During the CUP process, there was no credible evidence presented to suggest that the Project would violate any applicable water quality regulations or pose any risk to the water sheds or springs. On this point, during the March 3, 2010 hearing, the Tooele City Attorney informed the Planning Commission that the areas in question were within the 3-year protection zones,

a zone designation within which the towers *are* permitted. In addition, Jeff Coombs, the Tooele County Health Department Deputy Director informed the Planning Commission that Kim Johnson from the Utah Department of Environmental Quality stated that she was not aware of *any* transmission lines causing contamination to water sheds or springs. The evidence presented to the Planning Commission confirmed that any concerns regarding water shed or spring contamination was purely speculative. Nonetheless, the Planning Commission expressly based its decision, in part, on this speculation, ignoring the fact that there was no credible evidence in support of its conclusion.

6. Tooele High School's T for Safety and Visual Look – As set forth in the Supplemental Filing, the Company confirmed that the view of the “T” would not be impaired, and that safety precautions would be implemented, including the use of pole-type towers to prevent individuals from climbing the towers. While the public expressed concern that students would climb these towers, no one could or even tried to refute the evidence of the Company to the contrary. The fact is specialized equipment is required to even begin climbing these pole structures, which are constructed in strict accordance with National Electrical Safety Code (“NESC”).

7. Health Risks Regarding High Power Lines – Significant information was provided to the Planning Commission on the question of potential health risks relating to electric and magnetic fields (“EMFs”) from high voltage transmission lines. The evidence provided, including expert testimony, clearly demonstrated that EMF’s did not pose a risk to human health, and that no further actions were required to reasonably mitigate this issue. One or more local physicians (who coincidentally oppose the line for aesthetic reasons) stated to the Planning Commission that they had concerns with health

impacts of the lines. None of these individuals provided any specific factual evidence in support of their concerns, nor did they allege to have any specific expertise on the issue. In contrast to the unsubstantiated concerns raised by opponents of the Project, EMF expert Dr. William Bailey provided direct testimony to and responded to questions from the Planning Commission. In his testimony, as reflected in the Planning Commission meeting transcript, Dr. Bailey stated that with respect to EMF exposure to residential homes, the closest of which is approximately 960 feet from the transmission lines:

If you go out 960 feet from [the transmission line], you're not going to measure a magnetic field in anyone's home that could be attributed to this transmission line. But like everyone else when we go driving around town, we'll pass underneath the distribution lines. We'll pass underneath transmission lines. . . But what happens is those are limited short-term exposures that contribute very little to our overall average exposure. So I can live 960 feet away. And I can pass back and forth underneath the line every day and not have it change my time weighted average exposure by very much at all.

Planning Commission Transcript, Pgs. 105, 107-108. The Supplemental Filing also contains a response by Dr. Bailey to the claims of Dr. David Carpenter, who had previously raised concerns about EMF exposures and recommended the lines be routed away from schools and child care facilities. In responding to Dr. Carpenter's testimony, Dr. Bailey concluded:

Dr. Carpenter's testimony and the opinions that he has offered in materials such as the BioInitiative Report are inconsistent with the conclusions of scientific agencies, which have reviewed the literature using standard scientific methods. The public should look to the conclusions of these agencies, which have organized panels of multidisciplinary experts to review the research.

Dr. Bailey also noted:

Given that you have determined that the closest home to the proposed route from the Mona-Oquirrh line is approximately 960 feet from the right

of way, the proposed line would contribute virtually no magnetic field exposure to the surrounding homes. Furthermore, no schools, child care facilities, or other locations where children may congregate are located near the proposed route. Thus, regardless of the validity of Dr. Carpenter's opinions on the relationship between magnetic fields and cancer, his recommendations would be met by this project.

The EMF testimony and information provided by Company to the Planning Commission was substantial, and demonstrated that EMFs from the Project posed no risk to human health. The Planning Commission dismissed this evidence without explanation, electing to accept the speculation and unsupported assertions of those opposing the Project.

8. Loss of Property Value – The Company provided a report and testimony from an independent appraiser indicating that generally property devaluation based on the existence of transmission lines is de minimis and that any such impacted property owners had the right to compensation via negotiation with the Company, the state Ombudsman's office, or through the Courts. No evidence was submitted to the contrary. To state that the Company has failed to mitigate against loss of property value simply highlights the Planning Commissions misunderstanding of Utah law on this point. The Company must and will compensate property owners whose property is within the Project right of way.

9-12. EIS Not Complete/ Completion Date Uncertain/ROD from BLM Unavailable

Unmitigated factors 9-12 of the Planning Commission's Findings of Fact basically go to the point that they thought the application was premature because there is no finalized environmental impact statement ("EIS") and there is no record of decision ("ROD") from the BLM as of this date, and the completion date for the EIS and the ROD are not known at this time.

First, as noted above, a conditional use permit should be denied by the Planning Commission only if it finds that there are detrimental impacts from the proposed land use

that the Company has failed to mitigate. The timing of the CUP application in contrast to the completion of the EIS or the BLM's ROD or Plan of Development ("POD") is not a land use impact or a mitigation factor. The County has authority independent of the BLM or other state or federal agencies to impose reasonable mitigation measures on the Project. While the County may look to the EIS, ROD or POD for guidance, it is not bound by those documents. These administrative procedures do not impact land use in Tooele County and these are not mitigation requirements for the Company and, therefore, are not grounds for denial.

Certainly the Company will comply with the finalized EIS and the BLM's ROD and POD. The Company must comply with all regulations, state, federal or local, in completing the Project. However, as made clear to the Planning Commission, there is simply no reason to permit this Project in a chronologically linear fashion. In fact, given the time it takes to engineer and construct a project such as this one, the Company is required to seek all of the permits simultaneously. It cannot seek one permit from one body, and then begin to seek a permit from another body after the first is approved. There simply isn't time. The need for more power is imminent.

As further explained to the Planning Commission, every other impacted local municipal or county body involved in the Project has already approved conditional use permits and Tooele County is the last body to act. Obviously, then, the fact that the EIS is not yet finalized, or that the BLM has not officially announced the ROD, does not prevent a County from issuing a conditional use permit. As evidence of this fact, on May 7, 2008 the Planning Commission approved the conditional use permit application for the UNEV pipeline more than 6 months prior to the issuance of even the Draft EIS, much less the Final EIS. As further testified at the

Planning Commission meeting, if there is an amendment to the EIS or any modification to the BLM's preferred route in its ROD, the Company may amend its conditional use permit. At the hearing, staff for the Planning Commission indicated this approach is appropriate and acceptable, and as noted above, has been the approach followed in prior matters before the Planning Commission. Therefore, this is not a valid mitigation point and is certainly not a basis for the Planning Commission to deny the conditional use permit.

Written Findings of Fact. In follow up to the Findings of Fact issued during the March 3, 2010 meeting, the Planning Commission staff prepared written Findings of Fact. The written Findings of Fact restate that findings made during the March 3rd meeting, and also identify "further" findings of the Planning Commission (the "Further Findings"). As outlined below, the Further Findings consist of unsubstantiated statements that are either duplicative of the concerns identified in the March 3rd Findings of Fact (and previously addressed in detail by the Company), or are simply statements without any reference to mitigation measures.

Further Finding #1: This finding simply identifies the findings of the draft EIS with respect view shed impacts. The finding makes no mention of the adequacy of proposed mitigation measures, or additional measures that may be required by the County.

Further Finding #2: As with the first finding, this finding consist of a statement regarding the view shed and the potential impact of the Project. The finding provides no conclusion regarding the proposed mitigation measures.

Further Finding #3: This finding states the "Butterfield Canyon route shown in the Draft EIS ranks as number one but has been opposed by Kennecott." The finding provides no information or conclusion on the propose route or the adequacy of the mitigation measures.

Further Finding #4: Finding #4 refers to the issue of increasing demand on the Company transmission system and suggests that due to increased demand from Kennecott, Kennecott should be responsible in part for providing the transmission corridor. The statement has no bearing on the proposed alignment for the Project or the proposed mitigation measures.

Further Finding #5: The Company has proposed mitigation measures to address the OHV-related issues raised in the finding. This finding simply restates those concerns, ignoring the proposed mitigation measures.

Further Finding #6: Similar to Further Finding #1, this finding simply identifies the findings of the draft EIS with respect to the Carr Fork WMA and the International Smelter site. The finding makes no mention of the adequacy of mitigation measures proposed by the Company. As with the other Further Findings, this finding simply ignores the mitigation measures and information provided by the Company.

Further Finding #7: Finding #7 refers to unsubstantiated, speculative claims by the public of health risks posed by the Project. The issue was thoroughly addressed by the Company, and mitigation measures proposed to the extent necessary and reasonable.

Further Finding #8: This finding simply states that no air quality impacts were addressed in the CUP application. However, air quality matters will be regulated by the State Department of Environmental Quality. Company has committed to comply with all applicable regulations, including air quality regulations.

Further Finding #9: Finding #9 restates the water quality concerns that were previously addressed by the Company. As noted above, no credible evidence of detrimental impacts to groundwater sources was presented to the Planning Commission.

Further Finding #10: Finding #10 simply states that high winds and geologic faults could pose a risk to construction, operation and maintenance of the line. These conditions are not unique to Tooele County, and have been successfully address by the Company in other projects. The statement ignores the evidence provided by the Company with respect to compliance with all applicable construction standards, and does not raise any mitigation issues.

Further Finding #11: Finding #11 restates the aerial firefighting access concerns raised with respect to Settlement Reservoir. This issue, and the proposed mitigation measures, were thoroughly addressed with the Planning Commission, as set forth above.

Further Finding #12: This finding makes an vague statement that error were identified in the draft EIS that should be corrected in the final EIS. This finding, with many of the other findings, does not present a basis for denial of the CUP application

In general, the issues raised in the Further Findngs have been previously addressed, or ahve no bearing on the Planning Commission's consideration of the CUP application, and in no way relates to the mitigation measures required in conjunction with the proposed action. In addition, several of the findings were not even raised or discussed by anyone at the hearing. The statements contained in the Further Findings provide no guidance with respect to mitigation, but simply consist of unsubstantiated statements and speculation masquerading as factual findings in support of the Planning Commission's decision.

The mitigation measures proposed by the Company were extensive. Nonetheless, the Planning Commission denied the CUP application without a clear explanation or rationale as to why the proposed mitigation measures were not sufficient to warrant approval. Nor did the decision identify what additional mitigation measures the Planning Commission believed should have been implemented. The absence of a clearly articulated basis for Planning Commission's

decision is itself evidence that the decision was based on something other than substantial evidence or factual findings.

B. The Planning Commission's Decision is based on "Public Clamor."

The Planning Commission's insufficiency finding is simply a guise. It is clear that the Planning Commission's action was not based on factual findings supported by substantial evidence, but rather opposition by a vocal minority and the County's 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 Planning Commission. The true "findings" in support of the Planning Commission's decision are 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 Planning Commission adequately investigated the concerns raised by the public, or explains why the Planning Commission accepted the unsubstantiated concerns of the citizens and ignored the credible information provided by the Company. This is a classic case of "public clamor" and what is often referred to as "not in my backyard" or "NIMBY" arguments from a vocal group of residents and community leaders.

Although consideration of public comments 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 Constr.*, 999 P.2d at 1243. "[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.*

In this case, while the record is devoid of substantial evidence supporting the Planning Commission’s decision, it is full of the opponents’ emotions, suppositions, and unsubstantiated allegations. It is clear that this public clamor is the sole basis of the Planning Commission’s decision.

In sum, a denial of a CUP application must 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. But, having ignored the uncontradicted, credible evidence from the Company, this is exactly the type of public clamor that the Planning Commission relied upon. Based on the information before it, the Planning Commission did not act “within the limits of fairness” or “in good faith.” *Springville Citizens*, 979 P.2d at 337. The County Commission cannot sustain a decision which ignores uncontradicted, credible evidence to the contrary, especially in light of the absence of any evidence in support of the Planning Commission’s decision. *Harken Southwest*, 920 P.2d at 1180. Because the Planning Commission’s decision was wholly unsupported by any factual evidence, much less substantial evidence, and ignored the uncontradicted, credible evidence in favor of the CUP application, the Planning Commission’s decision is arbitrary and capricious and cannot stand.

IV. CONCLUSION

For the reasons set forth above, the Tooele County Planning Commission's decision denying Rocky Mountain Power's CUP application for the Mona to Oquirrh transmission project is arbitrary, capricious. Accordingly, the County Commission should reverse the Planning Commission's decision and grant the conditional use permit to the Rocky Mountain Power.

DATED this 23 day of March, 2010.

STOEL RIVES LLP



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Exhibit A
Supplemental Filing

Exhibit B

Conditional Use Permit Application