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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

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

ROCKY MOUNTAIN POWER,

Petitioner,

v.

TOOELE COUNTY,

Respondent.

Docket No. 10-035-39

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

Respondent Tooele County (the "County") respectfully submits this Memorandum in Support of its Motion for Partial Stay of Order.

Summary

The Board should stay its June 21, 2010 order (the "Order") during the pendency of judicial review insofar as the Order requires the County to issue a conditional use permit to Rocky Mountain Power (the "Company") for the southern arm of the transmission line from the

proposed Limber substation to the Oquirrh substation. The County does not seek to stay any other aspect of the Order.

The County's appeal will provide Utah appellate courts their first opportunity to interpret and clarify the Utah Utility Facility Review Board Act, Utah Code Ann. § 54-14-301 et seq. (the "Act"). The County believes that its appeal to the Court of Appeals is essential to protect the environmental, recreational, and aesthetic values at the core of the County's zoning and conditional use permit ordinances and the state's land use laws. The County will argue that the Board erroneously interpreted the Act to ignore those values. By arbitrarily restricting its review of County decision to questions of the transmission line's safety, reliability, adequacy, and efficiency, the Board effectively nullified county ordinances and substituted the Board as the land use authority for all land use decision on utility construction in the County. The questions the County will present on appeal are at least so serious, substantial, difficult, and doubtful as to make them ripe for appeal and further deliberate investigation.

If a stay is not granted, the County will suffer irreparable injury in two respects. First, construction of the southern arm of the transmission line (the segment from the Limber substation to the Oquirrh substation) will result in immediate and irreversible injury to the values protected by the County's ordinances and state land use law. Second, immediate construction of the project as proposed by the Company will render the County's appeal rights meaningless. Absent a stay in circumstances such as those presented here, section 54-14-306(2)'s 60-day deadline by which local governments must comply with Board decisions would routinely operate to deprive local governments of judicial review because public utilities would receive all relief sought before judicial review.

In contrast, the Company will suffer little, if any, harm if the stay is granted. The scope of the stay includes only the disputed southern arm of the transmission line in Tooele County; the Company may begin construction of all other aspects of its project. Just as importantly, the projected need for the southern arm of the transmission line—which is redundant of the northern arm of the line—has diminished with the dramatic decline in projections for residential construction and commercial and industrial growth in Tooele County, in the Daybreak development, and in Salt Lake County generally.

The Board should exercise its authority under section 63G-4-405(1) to stay the Order “during the pendency of judicial review.”

Facts

1. On March 3, 2010, the Tooele County Planning Commission denied the Company’s application for a conditional use permit to construct a 500kv single-circuit line from Twelve Mile Pass to a proposed Limber substation and a 345kv double-circuit line between the Limber substation and the Oquirrh substation in South Jordan. The project also includes a 345kv double-circuit line between the Limber substation and the Terminal substation in Salt Lake City. (Minutes of the March 30, 2010 Special Meeting at 3, attached as Exhibit A.)

2. The Planning Commission denied the application because the southern arm of the transmission line would cause the following harms: (i) harm to wildlife; (ii) disturbance of an international smelter site; (iii) impact on the use of Settlement Canyon Reservoir; (iv) harm to viewsheds; (v) road scars; (vi) potential contamination of watersheds and springs; (vii) safety in maintaining and effects on the view of Tooele High School’s “T”; (viii) health risks stemming from high-voltage power lines; and (ix) loss in property values. (Id. at 3-4.)

3. The Planning Commission found that if the southern arm of the transmission line was located as proposed in the Company's application, it would (i) diminish "the most pristine and heavily recreationally used areas in the County;" (ii) have significant long-term impacts in "areas of high scenic quality;" (iii) "increase OHV use and traffic in areas where access was previously limited or non-existent and represent a permanent impact visually" due to new road construction; and (iv) impact "the Carr Fork Wildlife Management Area and the International Smelting and Refining superfund site." (Id. at 4-5.)

4. On March 30, 2010, the Tooele County Board of Commissioners affirmed the decision of the Planning Commission based on Tooele County's zoning ordinances and Utah land use law. (Id. at 1-2.)

5. On June 21, 2010, the Board ordered the County to approve the Company's application for a conditional use permit. The board held that the County's findings concerning all irreparable harms other than those with safety implications were "outside the statutory scope of the Board's review." (Order at 4, 9, 10, attached as Exhibit B.) Thus, most of the County's findings concerning irreparable harm remain undisturbed.

6. The Board held that the southern arm of the transmission line to the Oquirrh substation would be redundant with the northern arm of the transmission line to the Terminal substation. (Order at 20.) Thus, any need for electricity that would be served by the project as a whole can be served by the northern arm of the line until the redundant southern arm is completed.

7. The Board also recognized that the primary need for the project is based on projected residential growth in Tooele County, in the Salt Lake Valley generally, and particularly

in Rio Tinto’s Daybreak community in South Jordan. (Order at 21, 22.) The Company began its planning for the project in 2006. (Order at 6.)

8. Since 2006, both Tooele County and Daybreak have experienced sharp declines in residential construction and commercial and industrial growth. For example, the number of building permits issued by Tooele City has dropped steadily:

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>
Permits	254	150	68	62

(Tooele City Building Permit Activity Log, attached as Exhibit C.) The number of building permits issued by Grantsville City has dropped steadily.

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>
Permits	361	295	135	114

(Grantsville City Building Permit Activity Log, attached as Exhibit C.) And the number of building permits issued by the County has dropped.

	<u>2006</u>	<u>2007</u>	<u>2008</u>	<u>2009</u>
Permits	884	1216	803	451

(Tooele County Building Permit Activity Log, attached as Exhibit C.)

9. In 2006, the Daybreak development planned to build 162,800 homes over more than 50 years. (Peak Perspectives, April 20, 2006, attached as Exhibit D.) By 2009, however, Daybreak had shortened its master plan process to 20 years, “implying that perhaps the latter phases of development won’t be built,” and had reduced the number of projected homes in the project to about 13,000. (Planetizen, October 28, 2009, attached as Exhibit E.)

10. The reduction in development projections at Daybreak is important because 1 in every 7 homes sold in the Salt Lake Valley in 2008 was sold in Daybreak. (Daybreak Today, October 29, 2008, attached as Exhibit F.) In South Jordan, home sales have declined from 600 sales in both the second and third quarters of 2006 to 140 sales in the first quarter of 2010. (City-Data, South Jordan, Utah at 3, attached as Exhibit G.)

Argument

The Board should exercise its discretion to stay the effectiveness of its Order during the pendency of judicial review. Utah Code section 54-14-307 provides the Board authority to stay the effectiveness of its decision under the terms outlined in section 63G-4-405, which authorizes stays “during the pendency of judicial review.” This is precisely what the County seeks here.

Section 63G-4-405 does not limit the Board’s discretion to stay the effectiveness of the Order pending appeal. The statute nevertheless requires the County to provide additional support when subsequently seeking a court-ordered stay in the event the Board denies this Motion and finds that a stay would pose a “substantial threat” to health, safety, or welfare. Utah Code Ann. § 63G-4-405(4). In that event, the County must demonstrate before the appellate court (i) likelihood of success on the merits; (ii) irreparably injury to the moving party; (iii) a lack of substantial harm to the non-moving party; and (iv) a public interest insufficiently weighty to justify enforcement of the order pending judicial review. Id. Although the Board has not found, and could not justifiably conclude, that a stay would pose a “substantial threat” to health, safety or welfare, it is nevertheless clear that the County meets all of these requirements and that a stay should issue now.

I. The County Is Likely to Prevail on the Merits

On appeal, the County will demonstrate that the Board misinterpreted the Act by erroneously restricting its “review” to questions of a facility’s safety, reliability, adequacy and efficiency from the perspective of the utility’s customers, without regard to the requirements of the County’s land use laws. Nothing in the Act compels this interpretation. The Board’s interpretation of the Act would render the County’s land use requirements and its conditional review process meaningless. The Board would not “review” decisions made by the County; rather, the Board would effectively replace the County as the local land use authority for all utility facilities in the County.

In the Order, the Board observed that it was a “practical impossibility” given the complexity of the project for the Board to review possible routes for the transmission lines within 45 days. (Order at 7.) Yet the County had scarcely more time to perform these tasks, and it lacked the legal authority to do so. The Company initially filed its application for conditional use permit on December 10, 2009, and its application was not complete until December 28, 2009. (Ex. A at 3.) The Tooele County Planning Commission denied the application 65 days later on March 3, 2010. (Id.) The Tooele County Board of Commissioners affirmed that denial 27 days later on March 30, 2010. Thus, the County faced the same “practical impossibility” as the Board, while lacking the expertise of the Board in assessing the location of transmission lines.

Absent the Company’s applying for conditional use permits for alternative routes for its transmission lines, the County lacked authority to approve a conditional use permit for any route other than the one proposed by the Company. (Conditional Uses, Tooele County Land Use

Ordinance, attached hereto as Exhibit H.) Yet the Board's Order rests upon the County's supposed failure to present an alternative conditional use permit it would have approved and to provide its own studies to rebut studies done by the Company over the last five years. (Order at 8.) Without an alternative conditional use permit, the Board simply decided the merits of the Company's favored route versus no route at all, a determination that unsurprisingly found construction of the southern arm of the transmission line to be necessary for "safe, reliable, adequate, and efficient service to its customers state-wide." (Order at 30.) The Board misinterpreted its own role as merely assessing the need for transmission lines, rather than the need for the transmission lines to be located along a particular route, which, after all, is the only dispute.

The Board's interpretation of the Act would essentially nullify the Utah Land Use and Development Act and the corresponding land use ordinances of local governments, to the extent they require consideration of factors other than facility safety, reliability, adequacy, and efficiency. As the Board recognized, in denying the application for a conditional use permit, the County considered such factors as views, impact on wildlife, aesthetics, impact on property values, all of which were required to be considered under County ordinances. Under the Board's interpretation of the Act, however, all of those factors are irrelevant to land use decisions whenever those decisions involve a public utility. Under the Board's interpretation of the Act, the public utility can reverse any land use decision by appealing to this Board, which will not even consider the factors that informed the County's decision. The County will argue on appeal that the Legislature did not intend the Act to nullify either the Land Use and Development Act or

the County's zoning and conditional use permit ordinances. Nor did it intend for the Board to ignore the County's decisions on land use issues.

The Board's interpretation of the Utah Utility Facility Review Board Act places local governments in an impossible position. A public utility with vast resources can spend years generating studies and expert opinion to support its favored position. Local government, with limited resources and expertise on utility facility siting and construction, then has days to generate and propose an alternative, even assuming the local government has authority to do so as an adjudicative body rather than a "party." If the local governmental entity denies the public utility's application on grounds appropriate under its land use ordinances, but which do not directly impact safety, reliability, adequacy, and efficiency of utility services, then those grounds become irrelevant before this Board, which then reviews the local government's action by assessing only the need for the project proposed by the public utility.

The Act should not be read to strip the Board of the ability to engage in a meaningful review of alternatives in light of all relevant legal standards. For these reasons, the County will at least present "questions going to the merits so serious, substantial, difficult, and doubtful as to make the issue ripe for litigation and deserving of more deliberate investigation." Prairie Band of Potawatomi Indians v. Pierce, 253 F.3d 1234, 1246 (10th Cir. 2001) (where the harm factors favor the movant, the probability of success factor is relaxed).¹

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

Absent a stay, the County and its residents will suffer two types of irreparable harm.

First, the numerous irreparable harms identified by the Planning Commission remain undisturbed

¹ Where legal issues under federal law are similar, Utah courts may look to federal law for guidance. First Sec. Bank v. Conlin, 817 P.2d 298, 299 (Utah 1991).

by the Board's Order, providing ample basis for a stay. Second, absent a stay the Company could render the County's right to judicial review meaningless by proceeding with construction of the southern arm of the transmission line during appeal. Both types of irreparable harm warrant a stay.

A. Construction of the southern arm of the transmission line will result in immediate and irreversible injury to the County and its residents

The Planning Commission provided an extensive list of harms that would result from construction of the southern arm of the transmission line in its proposed location. Those harms include: (i) harm to wildlife; (ii) disturbance of an international smelter site; (iii) impacts on the use of Settlement Canyon Reservoir; (iv) harm to viewsheds; (v) road scars; (vi) potential contamination of watersheds and springs; (vii) safety in visiting and effects on the view of Tooele High School's "T"; (viii) health risks stemming from power lines; and (ix) loss in property values. The Board addressed only the few harms related to safety, leaving all other findings of harm undisturbed.

Of particular relevance are the Planning Commission's findings that the location of the southern arm of the transmission line would (i) diminish "the most pristine and heavily recreationally used areas in the County;" (ii) have significant long-term impacts in "areas of high scenic quality;" (iii) "increase OHV use and traffic in areas where access was previously limited or non-existent and represent a permanent impact visually" by creating new road access; and (iv) impact "the Carr Fork Wildlife Management Area and the International Smelting and Refining superfund site."

Impacts of development on wildlife and aesthetics are inherently irreparable. Where wildlife is involved, “a possibility of irreparable harm” is sufficient. Defenders of Wildlife v. Hall, 565 F. Supp. 2d 1160, 1178 (D. Mont. 2008) (preliminarily enjoining the United States Fish and Wildlife Service from removing the northern Rocky Mountain wolves from the endangered species list pending the final disposition of a challenge to the rule). Here, there is an undisturbed finding that the location of the southern transmission lines would impact wildlife. And environmental injuries are irreparable. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 545 (1987) (“[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable”); Environmental Def. v. Army Corps of Eng’rs, No. 04-1575, 2006 U.S. Dist. LEXIS 47969 at *25-*26 (D.D.C. Jul. 14, 2006) (“[b]ecause of the irremediable nature of many environmental claims, courts have been wary of even relatively modest environmental harm”); Fund for Animals v. Clark, 27 F. Supp. 2d 8, 14 (D.D.C. 1998) (aesthetic injury demonstrates irreparable harm based upon impact on public enjoyment).

Finally, while the loss in property values may be quantifiable, such losses represent another harm residents will suffer during an appeal if the Board denies the Motion to Stay. Again, the Planning Commission has a specific finding concerning that harm left undisturbed by the Order. For all of these reasons, if the County is required to demonstrate irreparable harm, it will do so.

B. Construction of the southern arm of the transmission line will render the County's appeal rights moot

The County also would be irreparably harmed absent a stay because its appeal rights would be rendered meaningless. Under the Board's Order, the County must issue the conditional use permit by August 20, 2010. Because the conditional use permit is the entirety of the relief sought by the Company, and it is not clear whether the County may lawfully revoke the conditional use permit if the appellate court concludes that the Board should not have required the County to issue the permit, once the County issues the permit, no dispute remains for adjudication.

As the Utah Supreme Court has observed, an appeal becomes "moot when the appellant failed to obtain a stay and the requested relief was subsequently rendered impossible." Richards v. Baum, 914 P.2d 719, 720 (Utah 1996). Here, the relief the County would seek is for it not to have to issue the conditional use permit, something it is required to do under the Order. "An appeal is moot if during the pendency of the appeal circumstances change so that the controversy is eliminated, thereby rendering the relief requested impossible or of no legal effect." Baker v. Stevens, 2005 UT 32, ¶ 9, 114 P.3d 580. The extinguishment of the County's right to judicial review constitutes a separate irreparable harm sufficient to warrant a stay of the Order.

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

The Company will not be materially disadvantaged by the issuance of a stay. As the Board recognized in the Order, the southern arm of the transmission line to the Oquirrh substation would be redundant with the northern arm of the transmission line to the Terminal substation. (Order at 20.) Thus, any need for electricity that would be served by the project as a

whole can be served by the northern line until the redundant southern arm is completed. Because the County seeks a stay only of that aspect of the Order requiring the County to allow construction of the southern arm of the transmission line in the location proposed by the Company, the stay would not prevent the Company from proceeding with other aspects of its project.

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

As the Board also recognized, the primary public interest in the project concerns projected future electricity needs of Tooele County and the Salt Lake Valley. (Order at 21, 22.) The Company began its planning for the project in 2006. (Order at 6.) Over the last 5 years, both Tooele County and Daybreak have experienced sharp declines in residential construction and commercial and industrial growth. In Tooele County, the number of building permits has declined by nearly 75 percent. Consistent with this, development projections for Daybreak have declined by about 90 percent. In South Jordan, home sales have declined by about 75 percent. In short, the projected demand for electricity has diminished significantly since the Company began planning the project in 2006.

Along with the fact that the Company can begin construction on all aspects of its project other than the redundant southern transmission, the reduction in projected demand for electricity in Tooele County and the Salt Lake Valley demonstrates that the public interest is insufficient to warrant enforcement of the Order during judicial review.

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

If the Board declines to issue a stay during judicial review of the Order, the Board should issue a stay until the Utah Court of Appeals can consider and rule upon a motion to stay. The alternative stay would scarcely impact the Company or the public, but it would provide the County an opportunity to present these same arguments to the appellate court. And all of the reasons for granting the stay pending judicial review are stronger in warranting the alternative stay. Thus, if the Board declines to stay its Order during all judicial review, it should stay its Order until 30 days after the Utah Court of Appeals decides whether to stay the Order during all judicial review.

Conclusion

The Board should stay the effectiveness of the Order with respect to the southern transmission line during the pendency of judicial review. In the alternative, the Board should stay the effectiveness of the Order until the Utah Court of Appeals determines whether to stay the Order during the pendency of judicial review.

DATED this 20th day of July, 2010.

Snell & Wilmer L.L.P.

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CERTIFICATE OF SERVICE

I certify that on the 20th day of July, 2010, a true and correct copy of the **Memorandum in Support of Tooele County's Motion for Partial Stay of Order** has been served on the following by U. S. Mail:

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