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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 Consideration by the Utility
Facility Review Board**

ROCKY MOUNTAIN POWER,

Petitioner,

vs.

TOOELE COUNTY,

Respondent.

Docket No. 10-035-39

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

Respondent Rocky Mountain Power (the "Company") submits the following Memorandum in Opposition to Tooele County's (the "County") Motion for Partial Stay of Order.

Concurrently filed herewith, and in further opposition to Tooele's Motion, the Company also files the affidavits of Brandon Smith and Darrell Gerrard, who testified at the hearing on this matter. The Company respectfully asks the Utility Facility Review Board (the "Board") to deny the motion for the reasons set forth below.

INTRODUCTION

On June 21, 2010, following a thorough evidentiary hearing, this Board ruled that the construction and operation of the Mona to Oquirrh transmission project (the "Project") is needed to provide safe, reliable, adequate and efficient service to the Company's customers in Utah, and ordered Tooele County to issue the conditional use permit ("CUP") for the Project sought by the Company within 60 days of the Board's Order. The County stipulated to the need for the Project at the hearing, and chose to call no witnesses of its own, even to question the disputed location of the lines. Nevertheless, displeased with the Board's inevitable ruling, the County now appeals and asks this Board to stay its Order for what could be two or more years while it asks Utah's appellate courts to consider the matter. To make this request more palatable, Tooele County attempts, now, to suggest the Project isn't immediately needed, though this Board, the Company, this state's Public Service Commission, and even Utah's Division of Public Utilities, have all found otherwise.

To be sure, there can be no meaningful dispute about the immediate need for the Company to construct the Project, including the Limber to Oquirrh segment. In fact, the County conceded this point during the hearing before the Board. The Board will recall the argument Tooele County made at the hearing:

Tooele County agrees that there's a need for the project. Tooele County agrees that the corridor should be in Tooele County. *Tooele County agrees that the number of customers in the critical need area, as defined by Rocky Mountain*

Power, has increased. And that Tooele is part of that critical need area. Tooele County also agrees that Rocky Mountain Power's customers within that area are consuming more and more power. We absolutely agree that we need more power.

(Hearing Transcript at 367) (emphasis added). Now, displeased with the Board's ruling, the County is changing its position. Contrary to its statements from the hearing, Tooele County now claims building permits are down, the Daybreak development is behind schedule, and otherwise relies on evidence it *never* presented at the hearing to somehow convince the Board that this Project isn't really needed and a stay of one or two years would cause no harm.¹

Contrary to Tooele County's assertion, a stay of any duration will cause irreparable harm to the Company and its customers within the Critical Load Area² who will bear the risk of power interruptions or the inability to add additional service (i.e. new houses, new businesses, new buildings, etc.) onto the power grid if the Project is delayed (Smith Aff. ¶ 18). Tooele County asks this Board to risk the power supply of the *entire* Wasatch front *and* Tooele valley while it tries to develop new arguments and theories it never articulated during the hearing of this matter. And as the Board will realize upon even a light reading of the County's papers, the County's arguments are based upon what are at best severe misunderstandings, or at worst, complete misstatements about the Project.

¹ The Board should note that these unsubstantiated "reports" relied upon by Tooele County, and introduced for the first time while its appeal is pending, do not actually call into question the most recent data supplied to the Board by Mr. Gerrard at the hearing. That is, *current* studies by the Company, that *were* introduced into evidence, concluded that the Project is absolutely needed at this time. That evidence was never contradicted at the hearing. Certainly the Board should not rely on the hearsay testimony of magazine clippings or self-serving building-permit statistics that pre-date the hearing, and that were never subject to cross-examination, to override the data introduced and explained at the hearing—particularly when Tooele County stipulated to that need at the hearing. Furthermore, Mr. Gerrard's affidavit concurrently filed herewith expressly states that these "reports" in no way yield a diminished need for the Project (Gerrard Aff. ¶ 7).

² The largest electric load center in the state of Utah is located within an area encompassing all or portions of Salt Lake, Tooele, Utah, Davis, Weber, Cache, and Box Elder Counties, accounting for nearly 80% of all electrical demand in the state. This area is referred to in this memorandum as the "Critical Load Area."

Tooele County's "facts" are unreliable and have no evidentiary support. For instance, the County claims as a "fact" (Fact 6. Tooele Memo. at p. 4) that this Board found the Limber to Oquirrh line to be purely redundant to the Limber to Terminal line and states that a stay would cause no diminished power flow to the Critical Load Area because the Company can simply direct power along the Limber to Terminal line. As the Board knows, however, there is no Limber to Terminal line, nor will there be one for approximately 8 to 9 years. The Company doesn't even have a Certificate of Public Convenience or Necessity from the Utah Public Service Commission, nor has it even sought a CUP from Tooele County itself for the Limber to Terminal arm of the Project. Hence, the Company couldn't choose to immediately begin construction of the Limber to Terminal line now—even if it wanted to do so. Obviously, then, the Limber to Terminal line will not provide *any* of the needed power into the Critical Load Area if this Board's ruling is stayed. Tooele County either misunderstands, or is simply choosing to misstate, the Board's findings on the matter. Contrary to Tooele County's reported facts, this Board's conclusion was actually that "the record also shows *any further delay in obtaining the CUP will jeopardize* the company's ability to [provide safe, reliable power]." Order at 22 (emphasis added).

As a public utility, the Company has a duty to "furnish, provide and maintain such service, instrumentalities, equipment and facilities as will promote the safety, health, comfort and convenience of its patrons, employees, and the public, as will be in all respects adequate, efficient, just and reasonable." Utah Code Ann. § 54-3-1 (2010). This is its statutory mandate, and a mandate the Company takes very seriously. Service to the Company's customers throughout the Critical Load Area is at risk. The CUP must be issued now so that the Company can proceed with pre-construction operations this fall. Any further delay in the issuance of the

CUP beyond August 2010 will significantly increase the likelihood that the Project will not be completed by June 2013, which in-service date is critical to meet electric power demand.

ARGUMENT

I. Standard for Granting a Stay

As an initial matter, the Board should consider what rules it will apply in deciding the County's request, and, if the County is free to make such a request at this late hour. Tooele County refers the Board only to Utah Code Ann. Section 63G-4-405(1) as the statute that it claims gives this Board authority to grant a stay. Actually, that statute simply refers the Board back to any internal rules it has adopted in order to determine whether it can or will grant a stay:

Unless precluded by another statute, the agency may grant a stay of its order or other temporary remedy during the pendency of judicial review, *according to the agency's rules.*

(Utah Code Ann. § 63G-4-405(1) (2010) (emphasis added). And, as the Board knows, there have been no such rules adopted. This Board has never promulgated rules allowing for a stay of any standing order. The Code section Tooele County refers to only says the Board can grant a stay if it has already promulgated other rules allowing for a stay. In short, the Board has no express authority to stay an order that has passed its point of reconsideration.

Since the Utah Code only refers this Board to its own rules in order to determine whether a stay can be granted, and because there are no such rules, if the Board does have some inherent ability to stay its ruling, it then must derive that ability through its authority to reconsider and alter its own Order. Certainly issuing a stay would completely contravene the Board's earlier ruling. As stated above, this Board expressly found that "any" further delay to the issuance of the CUP by Tooele County "will jeopardize" the Company's ability to provide safe and reliable power to its many customers—not just those in the County. Hence, if the Board decided now to

stay its own Order, it would necessarily be completely reconsidering and revising its ruling that the CUP should be issued immediately, and that “any delay” “will jeopardize” the Company’s many power customers across the entire state. Yet any motion to have this Board reconsider its ruling was due on or before July 12th, as clearly articulated in the body of the Order. Tooele County chose not to file any request before this deadline and, in fact, never asked for a reconsideration at all. The County offers no explanation for the timing of its request.

Simply stated, there is no express rule granting the Board the authority to issue a stay of a final order. Though the Board certainly has the authority to reconsider its ruling, if the County’s request is authorized by those powers of the Board, then Tooele County’s request is untimely, and should be denied.

Although the Board should simply deny Tooele County’s request on timing and other procedural grounds, even if the Board applies the standard the County asks this Board to follow while considering it’s belated request, it will find Tooele County simply cannot meet the burden to justify a stay. As the County itself argues, generally, to be afforded a stay, a movant bears the very high burden of proving (1) that it needs the stay to preserve the status quo pending a review, and, that it is likely to prevail on the merits of that claim; (2) that it will be permanently and irrevocably harmed if a stay is not issued; (3) that the opposing party (here, Rocky Mountain Power) will not be harmed or prejudiced by the stay; and (4) that the public interest in enforcing the Order is “insufficiently weighty” to justify enforcing the Order during the review period. (Tooele Memo. at p. 6). Tooele County cannot prove any, much less all, of these elements.

A. Tooele County Is Very Unlikely to Prevail on the Merits

Under the County’s own standard, it concedes that in order for this Board to issue a stay, the County must first convince this Board that its own ruling (which Tooele County did not even

ask the Board to reconsider) is *likely* to be overturned on appeal. The County is certainly unlikely to prevail on the merits of its appeal. Indeed the argument it raises as deserving appellate review is self-contradicting and demonstrates a simple failure to closely read the statutes at issue.

The County asserts that the Board “misinterpreted the Act erroneously restricting” its review of the County’s CUP decision to questions of a facility’s safety, reliability, adequacy and efficiency. *See* Tooele Memo. at 7. The County further argues that the Board has “replaced the County as the local land use authority.” *Id.* The County’s argument, however, fails on at least two points. First, the County’s analysis would endow the Board with powers beyond what are expressly granted under the governing statute. Second, the County’s analysis fails to recognize that the Act expressly leaves to the local government the authority to address factors that do not impact the safety, reliability and adequacy of a facility. The Board’s interpretation of its role and authority was correct, and the County’s assertions are simply wrong.

1. Authority of the Board

The County challenges the Board’s interpretation of the Act, claiming that the Board’s review of a proposed facility should extend beyond the safety, reliability, adequacy and efficiency of that facility, and to include all factors considered by a local government. The claim finds no support in the Act, and is, in fact, directly refuted by the language of the Act.

In its Order, the Board correctly noted that as a legislative creation, the Board “has only the authority clearly delegated by the Legislature and must exercise that authority within the parameters and upon the criteria set by the Legislature.” *See* Order at 9. “It needs no citation or authorities that where a specific power is conferred by statute upon a tribunal, board, or commission with limited powers, the powers are limited to such as are specifically mentioned.” *Bamberger E.R. Co. v. Public Utils. Comm’n*, 204 P. 314, 320 (Utah 1922)(emphasis added); *See*

also cf. *Hi-Country Estates Homeowners Ass'n v. Bagley and Co.*, 901 P.2d 1017 (Utah 1995)(holding that the Public Service Commission has no “inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it . . . [and] any reasonable doubt of the existence of any power must be resolved against the exercise thereof.”)(emphasis added).

In support of its claim that the Board “misinterpreted the Act by erroneously restricting its ‘review,’” the County cites no section of the Act that it believes contradicts the Board’s action. In fact, there is no support in statute or caselaw for the County’s interpretation. A public utility may seek review by the Board if “a local government has prohibited construction of a facility which is needed to provide safe, reliable, adequate, and efficient service to the customers of the public utility.” See UCA § 54-14-303(1)(c). The Board’s review and decision is to “leave to the local government any issue that does not affect the provision of safe, reliable, adequate, and efficient service to customers of the public utility.” See UCA § 54-14-304(4) (emphasis added). Once again, the Board is to “leave to the local government” issues not affecting the safety, reliability, adequacy and efficiency service,” factors such as “views, impact on wildlife, aesthetics, [and] impact on property values.” See Tooele Memo. at 8. There is simply no reasonable argument that this language could be read to allow the Board to consider issues beyond the question of safe, reliable, adequate and efficient service.

The Board correctly interpreted and implemented its authority under the Act, and the County’s argument is without merit.

2. Land Use Authority of the County

The County argues that the Board’s interpretation of the Act in some way nullifies the Utah Land Use and Development Act and local government land use ordinances to the extent

they address issues other than safety, reliability, adequacy and efficiency. *See* Tooele Memo. at 8. Once again, the County’s argument simply ignores the clear language of the Act, which directly refutes the County’s claim. Furthermore, it is evident the County does not understand (or more likely is ignoring), the role the excess cost provision plays in the Act.

Acknowledging the reality that “the construction of facilities by public utilities . . . is a matter of statewide concern,” (*see* UCA § 54-14-102(1)(1)) the Act establishes a mechanism whereby multi-jurisdictional factors relating to safety, reliability, adequacy, and efficiency could be evaluated by the Board from a statewide perspective, while purely local concerns and benefits could be addressed by the local land use authority. In addressing the interplay between the Board’s authority and the land use authority of the local government, § 54-14-201 provides that:

a local government may require or condition the construction of a facility in any manner if:

- (1) the requirements or conditions do not impair the ability of the public utility to provide safe, reliable, and adequate service to its customers; and
- (2) the local government pays for the actual excess cost resulting from the requirements or conditions . . .

UCA § 54-14-201 (emphasis added). Pursuant to this section, the local government retains authority over issues that do not impair the safety, reliability and adequacy of a public utility’s system. Furthermore, if the local government so chooses, it *can* impose conditions on a facility for the benefit of the local community that may affect the efficiency of that facility so long as the local community is willing to reimburse the public utility and its customers statewide for the cost of the local benefit.

As noted by the Board in its Order, the Utah Legislature determined that “the construction of facilities by public utilities . . . is a matter of statewide concern,” and that the construction of electrical transmission lines, among other facilities, may “affect the safety,

reliability, adequacy, and efficiency of service to customers in areas within the jurisdiction of more than a single local government.” UCA § 54-14-102(1)(a). Given the multi-jurisdictional impact that the land use decision of a single local government can have, the Legislature determined that:

[e]xcess costs imposed by requirements of a local government for the construction of facilities may affect either the rates and charges of the public utility to customers other than customers within the jurisdiction of the local government or the financial viability of the public utility, unless the local government pays for those excess costs.

UCA § 54-14-102(1)(c). In short, the excess cost provision allows a single local government to impose those restrictions it believes necessary to comport with its local land use values, while protecting other communities from the costs incurred by the public utility in response to land use requirements and local benefits required by any single community.

For instance, if a community has concerns regarding the visual impact of an overhead power line, that community can require the utility to underground the line so long as such action does not impair the safety, reliability and adequacy of service, and so long as the community agrees to cover the incremental cost of undergrounding the power line. In this way, the “excess costs” of purely local benefits are imposed on the community receiving such benefits, and not on the utility’s customers statewide. The local government retains authority over purely local concerns, while the safe, reliable, adequate and efficient service to residents statewide is preserved.

In the context of the “excess cost” provision, the error in the County’s argument becomes apparent. The County faults the Board in refusing to take into account factors such as “views, impact on wildlife, aesthetics, impact on property values, all of which were required to be considered under the County ordinances.” *See Tooele Memo.* at 8. The County claims that

“[u]nder the Board’s interpretation of the Act . . . all of those factors are irrelevant to land use decisions whenever those decisions involve a public utility.” *Id.* The factors identified by the County, however, are purely of local concern and benefit, and the Board correctly determined that it “cannot consider such issues as property values, viewshed, and the cultural significance of man-made landmarks” because such decisions address local benefits and are left to the authority of the local government. For the Board to evaluate such factors would violate its statutory mandate and encroach on the land use authority left to the local government.³ The Board did not evaluate these factors because these factors properly remained within the scope of the County’s land use authority. Tooele County implies that the Board somehow prevented Tooele County from considering these factors in determining what conditions, if any, should apply to this Project. This implication is simply false. The County was free to impose whatever local land use conditions it deemed necessary to protect local values on the Project so long as it was willing to pay the “excess costs” associated with those conditions. Rather than accept that responsibility, the County chose to simply deny the CUP, something the Board concluded it could not do without impairing the ability of the Company to provide safe, adequate and reliable service.

Finally, Tooele County’s argument that the Board somehow usurped the County’s right to oversee its own land use decisions ignores the true procedural history of this matter. Uncontroverted testimony at the hearing demonstrated that:

³ It is worth noting that in addition to ignoring the clear language of the statute, the County’s argument is self-defeating. On the one hand the County argues that Board should have considered and ruled on each factor evaluated by the County as part of the CUP, while on the other hand the County argues that the Board usurped the land use authority of the local government. This is non-sensical. Tooele County cannot complain that the Board did too little in not considering all of the factors it would have considered, and then argue that the Board did too much by taking over the entire process of land use governance. Such a self-contradicting argument cannot be considered to be *likely* to prevail on the merits of an appeal.

1. Tooele County was invited to be a Cooperating Agency⁴ in the BLM's environmental impact review process, and chose not to do so (Hearing Transcript at 120);
2. The Company convened numerous community outreach meetings and Community Working Group meetings to involve County leaders in the decision making process (*Id.* at 131-32 and 293-94); and
3. The Company was willing (during the formation of route alternatives developed for further analysis) to consider alternative routes, such as the railroad corridor, but Tooele City officials refused to allow these alternatives to be considered and Tooele County made no effort to engage Tooele City in a discussion of whether those routes that Tooele City was rejecting would alleviate the County's concerns (*Id.* at 296-98).

Hence, the County cannot truthfully claim that the Company or this Board has deprived it of an opportunity to be involved in this process. Rather, the County has consistently declined to be involved, and simply asked this Board to make decisions for it. As the County argued to this Board:

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.

(Response to Petition for Review at 4.) At the conclusion of its argument, the County told the Board its role was to take on the land use review process for the County:

Tooele County requests that the Facility Review Board take the following actions:

⁴ A Cooperating Agency is a defined term under relevant NEPA statutes, and is generally a participant in the review process who is allowed to review, comment, recommend, and otherwise participate in the BLM's determination of a preferred route. Though Tooele County now complains its land use "values" (whatever they may be) have been left out of this process, if that is so, it is the County itself who squandered the opportunity to have its "values" included.

* * *

3. Conduct its own analysis of all alternative routes identified in RMP's petition and any other route that the Board believes to warrant consideration as a result of this hearing. In the alternative, order RMP to apply for an alternate route.
4. Identify all routes that the Board believes to be viable routes.
5. Issue an appropriate order directing Tooele County to approve a route that the Board has determined to be viable based upon all relevant criteria.

(*Id.* at 11.) Having argued to the Board that this was its role,⁵ the County cannot now argue that the Board usurped the County's authority. The County certainly cannot claim that this argument is "likely" to prevail on the merits.⁶

B. The County Will Not Suffer Irreparable Injury If a Stay Is Not Granted

In addition to demonstrating that it is likely to prevail on the merits (which the County cannot do), the County must also prove that it will suffer irreparable injury without immediate relief. In an attempt to meet its burden, the County identifies two types of irreparable harm it claims it (and its residents) will suffer if a stay is not issued. Neither has merit.

First, the County contends that construction of the Limber to Oquirrh segment "will result in immediate and irreversible injury to the County and its residents." *See Tooele Memo.* at 10.

⁵ As indicated in Section A.1, Tooele County's request was actually too broad and asked the Board to entirely take over the County's land use governance. The Board rightfully rejected this request, but the request highlights how disingenuous the County's current argument is, claiming the Board took away power that Tooele County wanted to keep.

⁶ Recall also that Tooele County conceded at the hearing that it had not, and would not, put forward its "proposed route" so that it would not be obliged to pay for the excess costs associated with any other route. Again, Tooele County cannot claim the Board has robbed the County of the opportunity to have its desires enacted. It bluntly conceded that it would not propose any other route itself because it did not want to pay for the Company to build another route. (Hearing Trans. at 386-87).

In support of that claim, the County begins by reproducing the list of twelve areas of concern identified by the County Planning Commission in support of its denial of the CUP. *See id.* It is true the County purportedly denied the CUP based on its finding that the Company had failed to meet its burden of showing mitigation in the twelve identified areas. *See Tooele Mot. Ex. A (Tooele County Planning Commission Decision)* at 4. However, there was no finding, and no evidence upon which to base a finding, that if the CUP issued in August 2010 the County would suffer immediate and irreparable harm in any of these areas. *See id.* Thus, any suggestion by the County that findings of irreparable harm have been made, and are somehow binding on this Board, is entirely without support. As the Board is aware, when it was Tooele County's opportunity to put on evidence at the hearing of any alleged harm it would suffer if the Project went forward, it did not do so. It put on no witnesses. It filed no report claiming or supporting its contentions that the Project would impair wildlife or the environment.⁷ Nor has Tooele County filed any sworn testimony of anyone with proper foundation testifying as much.

The County simply has not identified any evidence that the purported harms of which it complains are based on anything more than speculation. “To constitute irreparable harm, an injury must be certain, great, actual ‘and not theoretical.’” *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (quoting *Wis. Gas Co. v. FERC*, 758 F.2d. 669, 674 (D.C. Cir. 1985)); *see also Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir. 2005) (“The purpose of a preliminary injunction is . . . to protect plaintiffs from irreparable injury that will surely result without their issuance. . . . Speculative harm does not amount to irreparable injury.”)

⁷ The County also identifies an anticipated loss in property values, but admits that such loss—even if the County could prove it was more than speculative—is unquantifiable. *See Mot.* at 11.

(internal quotations omitted). The “evidence” upon which the County bases its request for a stay does not demonstrate that issuance of the CUP will cause “certain, great, actual, and not theoretical” damage to wildlife or the environment. Rather, the County’s “evidence” is nothing more than a list of areas of concern that the County erroneously used to (allegedly) support its denial of the CUP. The fact that Tooele County planning officials feared these results, without support, hardly satisfies the standard required here of *proving* a need for extraordinary relief.⁸

Second, the County argues that it would be irreparably harmed without a stay “because its appeal rights would be rendered meaningless.” *See* Tooele Memo. at 12. The County argues that because “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,” it would be irreparably harmed if required to issue the CUP now. *Id.* Once again, the County fails to satisfy its burden of showing “certain, great, actual, and not theoretical” harm. *Heideman*, 348 F.3d at 1189. The relief the County presumably will seek from the Court of Appeals is a reversal of the Board’s decision ordering the issuance of the CUP. The County’s land use ordinances allow for the revocation of a conditional use permit due to the failure of the permittee to observe any condition the County chooses to reasonably specify. Again, the harm the County complains of is purely speculative, not certain and irreparable. *See* Tooele Mot. Ex.

⁸ The Board will recall that the BLM independently considered in the FEIS each of the issues raised by Tooele County, including interaction with the “T,” the smelter site, the reservoir, wildlife, water contamination, road scars, and the like. (*See* Smith Aff. ¶ 25) At the risk of repetition, the FEIS concluded that the Company’s route is the “environmentally preferred route.” (*Id.*) It also concluded that there is no real threat to wildlife, water sources, contamination from the smelter, etc., if the Company follows the BLM’s restrictions, which the Company already must do. Simply stated, Tooele had no evidence at the hearing and has no evidence now that any of these alleged harms will come about as a result of the Project. In contrast, the Company has the FEIS which concludes these harms will *not* come about. With only this evidence to consider there is no way this Board could reasonably conclude that Tooele has *proven* it will be irreparably harmed by the Project.

H (Tooele County Land Use Ordinance) Ch. 7-13. This is precisely the type of “theoretical harm” that the *Heideman* court concluded did not warrant a stay.

Moreover, Tooele’s logic would grant *every* litigant a stay. Arguing solely that judgment may be carried out before an appeal is heard, by itself, provides no inherent justification for a stay; otherwise *every* appeal would automatically result in a stay. Rather, this argument only has bearing *if* the County can also prove that (1) likely to be irrevocably harmed, (2) likely to prevail on appeal, and (3 & 4) there is no harm to the public or the Company if the stay is issued. Otherwise every unhappy litigant would be able to stay every ruling pending a appeal.

C. The Company (and the Citizens of Utah) Will Suffer Substantial Harm If a Stay Is Granted.

In contrast to the County, the Company—and the citizens of Utah—will truly suffer irreparable harm if the Board stays its decision. The County’s pre-emptive arguments on this point simply denote its lack of understanding of this Project. For instance, the County argues that the Company would not be materially disadvantaged because, it claims, “any need for electricity that would be served by the project as a whole can be served by the northern line [the Limber to Terminal line] until the redundant southern arm is completed.” (Tooele Memo. at 12-13.) The County’s argument is misguided for several reasons.

First, the portion of the Project referred to by the County as the “northern line” is the second 345 kV transmission line that will ultimately be built from the Limber substation to the existing Terminal substation near the Salt Lake City International Airport as the load growth increases within Tooele County. While part of the Company’s larger Energy Gateway Transmission Expansion Project, as the evidence before the Board already proved, that line is not scheduled to be built for approximately 5 years following completion of the Limber to Oquirrh

line (Smith Aff. ¶ 4).⁹ Thus, there will be no “northern line” to carry electricity to customers in the Critical Load Area, including Tooele County, should the Company be forced to wait to construct the Limber to Oquirrh segment.

Second, even if the “northern line” could be constructed by 2013 (which it cannot), that line serves a separate purpose: getting more power to Terminal. As this Board recognized, the North American Electric Reliability Corporation (NERC) Standards for Bulk Electric Systems and the Western Electricity Coordinating Council (WECC) regional standards and criteria dictate the minimum levels of transmission system reliability, redundancy, and performance required for the Energy Gateway to interconnect into the larger western grid. *See* Order at 19. “These standards address both normal system operations, and generation and transmission plant outages, including planning for simultaneous outages of two or more lines due to a common mode of failure, e.g., a wildfire.” *See id.* at 19-20. The Company has (as it must) designed its systems to comply with the NERC and WECC reliability standards, including requirements of redundancy so that the system can withstand outages that would otherwise impair multiple lines on common or nearby towers. *See id.* at 20. The Limber to Oquirrh segment, and eventually the “northern line,” are necessary components of the Company’s system. The Company cannot choose not to construct one line simply because that line could supply redundancy for another line. Rather, the Company must construct both lines so as to guard against power outages and to comply with applicable federal and regional reliability standards.

⁹ Nor could the Company simply now begin building that line as the Utah PSC has not issued a certificate for that line, nor has a CUP even been sought for that line.

Third, although it bears the burden of demonstrating that a stay would not cause the Company substantial harm, the County ignores the very real harm the Company would suffer if the CUP is not issued by August 20, 2010. In fact, if the County does not issue the CUP by August 20th, the Project will be irreversibly delayed and the necessary in-service date will be missed, causing harm to the Company's customers.

Indeed, immediately upon issuance of the CUP from the County, the Company will begin to acquire the necessary rights-of-way for the construction of the Limber to Oquirrh segment. This process needs to be completed at once so that the Company can define the exact line route and give the successful contractor time to prepare the resulting change in work and begin pre-construction work (Smith Aff. ¶¶ 13-14). Once a bid is awarded, the Company's contractor will need to collect necessary terrain, soil, and elevation data before the winter weather arrives and on-site work along the Limber to Oquirrh Segment is no longer feasible. With this data in place, the Company can proceed with specific design work and material procurement during the upcoming winter (Smith Aff. ¶ 14). If the Company can maintain this schedule (which will be tight, but achievable) (Smith Aff. ¶ 9), the Company will be positioned to proceed with site preparation and on-ground construction activities during the 2011 and 2012 construction seasons.

However, if the Company does not receive its CUP from the County until after the judicial review process has been exhausted, the Company will not be able to acquire the necessary rights-of-way, award the construction project, sample the terrain, design the Limber to Oquirrh segment, and order the necessary materials in time to begin construction in spring 2011 (Smith Aff. ¶ 16). And, even if the judicial review process was complete by spring 2011, the Company would not be able to start its specific design work until then, requiring it to acquire the

necessary construction materials in late Summer 2011 (at the earliest), and leaving only a single summer construction season (and not enough time) to complete the entire Limber to Oquirrh segment by June 2013 (*Id.*).

The Company, however, cannot complete the construction of the Limber to Oquirrh Segment in a single construction season (*Id.*). Unlike the portions of the Project located on flat, desert lands, the majority of the Limber to Oquirrh Segment is located in mountainous terrain. Construction in this area will require extensive site preparation work, including the construction of access roadways. Additionally, the Company (and its contractor) will have to accommodate for steep terrain, varying elevations, harsher weather conditions, restrictions with regards to wildlife, and heightened environmental requirements. With these conditions, it is highly likely that the construction season would be shortened, making it next to impossible to complete the construction within one summer and by the in service deadline of June 2013 (Smith Aff. ¶¶ 15-16).

Finally, if the Project is not in-service by June 2013, the Company (1) will be unable to reliably meet the electrical demand of its existing Customers in the Critical Load Area, including but not limited to all of Tooele County and Salt Lake County; (2) will be unable to meet load service obligations to customers under its FERC tariff; and (3) may not be compliance with NERC Reliability Standards. In fact, to meet demand, the Company would be forced to operate its existing transmission system above established reliability limits, and/or would conduct unscheduled customer power outages in order operate within reliability limits (Smith Aff. ¶ 18; Gerrard Aff. ¶¶ 9, 18). This would, in turn, increase the risk of potential non-compliance with national reliability standards for which the Company may be sanctioned and fined pursuant to FERC and NERC's authority under Section 215 of the Federal Power Act. The Company cannot

and will not operate its transmission system in a non-compliance fashion and must complete the Project to add new transmission capacity.

Moreover, due to the presence of insufficient transmission capacity and in order to maintain adequate system reliability, the Company, under specific operating conditions, would be required to curtail service to its customers (Smith Aff. ¶ 18; Gerrard Aff. ¶ 12). During system peak conditions (extreme summer heat) the system has experienced more than 1580 operating hours annually where customers could not be reliably served in the event of a transmission system outage. During this same period the peak customer demand at risk has reached in excess of 700 MW. This risk continues to increase as customer demand increases over time and has reached unacceptable levels.

In short, if the CUP is not issued by August 20, 2010, there is increased risk that sufficient electricity will not be available to reliably meet the needs of residents and businesses located within the Critical Load Area. While the specific impact that the unavailability of electricity would have on each individual resident or business cannot be accurately quantified, the impacts and losses would be significant. Existing customers would go without power at unscheduled intervals and the Company would lose its ability to add new customers. This would effectively put limits on new building and commercial development in the Critical Load Area.

D. The Company Would Face Huge Financial Consequences from a Stay Hence Tooele County Must Be Required to Bond for a Stay If a Stay Is Issued.

The Company maintains that (1) this Board lacks rule-based authority to issue a stay, (2) that if the Board can issue a stay the County is time barred from seeking one now by failing to ask for a stay during the 20-day limit for requests for reconsideration, and (3) if somehow this Board does consider the merits of Tooele County's request, the County cannot meet the burden

necessary to obtain a stay. If, however, for any reason, a stay is allowed, the Board must require Tooele County to post a bond for the stay.

Rule 54-7-17(3) of the Public Service Commission, which the Company acknowledges applies only by analogy *requires* any stay of order to be secured by a bond from the movant. Filed concurrently herewith are the affidavits of Brandon Smith and Darrell Gerrard, who testified at the hearing of this case. Mr. Smith testifies that a stay of just one year could reasonably cost the Company \$8,000,000.00 in additional construction costs (Smith Aff. ¶ 17). Mr. Gerrard testifies that a stay of only one year would reasonably cost the company \$39,500,000.00 (Gerrard Aff. ¶ 13) as it would be required to bring in temporary generation equipment to meet peak demand in the summer of 2013 if the Project is delayed at all. Note that these numbers do not include the fines the Company could be subject to for failing to comply with NERC and other standards, or claims by third-parties for unscheduled power interruption. At a *minimum* then, the Company demands that if a stay is entered, the County be required to post a cash bond of at least \$47,500,000.00, as supported by the affidavits of Mr. Gerrard and Mr. Smith.

E. The Public Interest Supports Enforcement of the Order

The County's claim that the "public interest is insufficient to warrant enforcement of the Order during judicial review" misstates the Board's Order, ignores the unrefuted testimony provided by the Company, and demonstrates a lack of understanding of this Project and the electric service the Company provides to its Customers.

The County states that "[a]s the Board also recognized, the primary public interest in the project concerns projected future electricity needs of Tooele County and the Salt Lake Valley." See Tooele Memo. p. 13. In addition to misstating the Board's findings, the County is either

unaware or intentionally ignoring the broader impacts of this Project. As the Board is aware, the Project will provide necessary additional transmission capacity to more than just Tooele County and the Salt Lake Valley. As has been clear throughout this proceeding, this Project addresses the electrical service needs of the Critical Load Area, which as the Board notes “includes all or portions of Salt Lake, Tooele, Utah, Davis, Weber, Cache and Box Elder Counties.” *See* Order at p. 20.

Next, the County argues, for the first time, that due to a slowdown in development of the Daybreak development, the urgency to complete the Project no longer exists. The County would have this Board believe that, despite all the testimony at the hearing, the Company has not revisited the issue of growing electric demand since 2005,¹⁰ or adjusted its transmission service plans to address changing demand conditions. The fact is, however, the Company constantly monitors and evaluates the demand projections for its electric system. In fact, the electric demand information presented to the Board by the Company accounted for the slowdown in the building market over the past few years. The County has presented no credible evidence to contradict the testimony presented by the Company. As the Board pointed out in the Order,

[i]n deciding the issues before it, the Board’s determinations of fact, made or implied, must be supported by substantial evidence when viewed in light of the whole record before it. *See Utah Code § 63G-4-403(4)(g)*. The law does not invest the Board with any such arbitrary power to disbelieve or disregard uncontradicted, competent, credible evidence. *See Cf, US West Communications v. Public Serv. Comm’n, 901 P.2d 270 (1995)*.

(*See* Order at 7, fn. 2). The testimony presented by the Company to the Board on the need for the Project to be constructed by June 2013 remains uncontradicted, competent, credible, *and*

¹⁰ On page 13 of the County’s memorandum, it states that “[t]he Company began its planning for the project in 2006.” This statement is incorrect. The testimony before this Board was that the Company commenced the siting process in 2005 (see Hearing Transcript at 346), with planning for the Project starting much earlier.

current (See, e.g., Gerrard Aff. ¶ 7). The County has presented no evidence to put those facts in question.

The County further claims that the Company could commence construction on all other portions of the Project, including the Limber to Terminal segment (referred to by the County as the “northern arm”), and delay construction of the “redundant” Limber to Oquirrh segment until after the appeal. As explained above in Section III, a delay in the issuance of the CUP for the Limber to Oquirrh segment will jeopardize the June 2013 in-service date. The Company cannot simply commence at the southern end of the line and proceed with construction northerly in a linear fashion as suggested by the County. Such an approach would leave the Company a single construction season to complete the Limber to Oquirrh segment, which is simply not sufficient time.

Finally, as explained above and made clear during the hearing, there will be no “redundant” northern arm in place before June 2013. The Limber to Terminal segment is not scheduled for completion until at least 2018 (Smith Aff. ¶ 4). The Limber to Terminal segment was not even considered for approval in the CUP application. Nor has the Company obtained a Certificate of Public Convenience and Necessity for the line segment at this point. Furthermore, the purpose of the Limber to Terminal line is to get power to the Terminal substation. The need at issue is to get more power to the Oquirrh substation. That line, even if it could be built, does not satisfy this need. It is not simply “redundant.”

A final note that should go without saying, but belies the County’s entire argument, is that without completing the portion of the line from Limber to Oquirrh, *no* power will be brought into the Critical Load Area by the Project. Even if the Company could construct 80% of the Project now, staying construction on the last 20% of the line will keep 100% of the needed

power from reaching the public who need the power. Tooele County's plan to stay only a portion of the Project completely eliminates all of the benefit of the *entire* Project. And, for that reason, the Company cannot be expected to invest the capital involved in a Project of this magnitude before it has assurance it will be able to complete the Project.

The County's argument that the need for additional transmission capacity by June 2013 as "insufficiently weighty to justify enforcement" is simply false, is not even a credible argument that can be made in good faith, and arises out of the County's apparent denial or disregard of the dire need for the Project, and the severe impact on the public that will result in the event the Project is not in service by June 2013.

As described at length in his testimony during the hearing and also reiterated in the affidavit of Mr. Gerrard, the Company will almost certainly fall short of power by peak summer, 2013 (Gerrard Aff. ¶ 8). Without this Project, the only hope for the Company would have of maintaining power in the Critical Load Area would be the introduction of generation units in the Critical Load Area. That would not guarantee all service demand would be met, it would be the minimum requirement the Company would be faced with. The Company's actual bid for these units for only one summer is in excess of \$39,500,000.00 (Gerrard Aff. ¶13). That money should be borne by Tooele County, who is demanding the stay. Alternatively, it would be borne by the general public served by the Company, who would get no benefit from the stay. Public interest demands the Project go forward immediately.

II. Temporary Stay Pending Court Stay Decision

In the event the Board declines to issue a stay of the Order during the pendency of the judicial review, the County requests that the Board issue a stay while the County seeks a stay from the Court of Appeals. The Board should deny this request as well. The County has failed

to present any information or evidence to bring in question the Board's Order and, therefore, it is unlikely the Court will grant the County's request. Furthermore, the County could have sought a stay from the Board a month ago, allowing both the Board and the Court to consider the stay request long before the County was required to issue the CUP. Instead, the County elected to delay its request for a stay. The County provides no information, nor could it, on how long it will take the Court of Appeals to act on such an (as of yet) unfiled request. As such, even this stay, which Tooele implies could be brief, would actually be an open-ended stay. Again, Tooele has not even petitioned the Court for a stay. Simply stated, as this Board already concluded in its Order, "any" further delay in issuance of the CUP will jeopardize the Company's ability to provide safe, reliable, adequate and efficient service to the residents of Utah during the summer of 2013 and thereafter.

CONCLUSION

For all the foregoing reasons, Rocky Mountain Power requests the Board deny the Motion for Partial Stay of the Order.

DATED this _____ day of August, 2010.

STOEL RIVES LLP

D. Matthew Moscon
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Attorneys for Petitioner
Rocky Mountain Power

CERTIFICATE OF SERVICE

On the 4th day of August, 2010, I hereby certify that I caused to be served a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO TOOELE COUNTY'S MOTION FOR PARTIAL STAY OF ORDER**, as well as the **AFFIDAVIT OF DARRELL T. GERRARD** and the **AFFIDAVIT OF BRANDON D. SMITH**, as indicated below, addressed as follows:

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