

- BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD -

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

DOCKET NO. 10-035-39

ORDER

ISSUED: August 18, 2010

SYNOPSIS

The Board denies the County's Motion for Partial Stay of the Board's June 21, 2010, Order which finds the Company's Mona-to-Oquirrh transmission project is needed to provide safe, reliable, adequate, and efficient service to utility customers.

By The Board:

This matter is before the Utah Utility Facility Review Board ("Board") on the Motion of Tooele County ("County") for a partial stay of the Board's June 21, 2010, Order ("Order"). The Order directs the County to issue to Rocky Mountain Power ("Company") the conditional use permit ("CUP") the Company seeks in order to construct the Mona-to-Oquirrh transmission line ("Project"), a segment of which passes through the County. The County moves the Board to stay the effective date of the Order during the pendency of the County's appeal to the Utah Court of Appeals, insofar as the Order requires the County to issue the CUP for that portion of the Project that would extend a transmission line from the proposed Limber substation (located in Tooele County) to the existing Oquirrh substation (located in Salt Lake County). In the alternative, the County moves for a more limited stay until the Utah Court of Appeals rules on the County's motion for a stay in that forum.

Utah Code Ann. § 63G-4-405 provides authority for the Board to stay the Order during the pendency of judicial review. In addressing the potential stay, both the County and the Company apply the criteria set forth in subsection 405(4)(b) which pertain when a court reviews an agency ruling denying a stay to protect the public health, safety or welfare against a substantial threat. The County asserts the Board would not be justified in denying the requested stay for such reasons. The Board disagrees. This proceeding materially affects the important, statewide public interest in a safe, adequate, reliable and efficient energy supply. An extensive evidentiary record shows the Project is urgently required to maintain this supply in accordance with established reliability standards and to avoid involuntary power outages. Moreover, neither the County nor any other party produced any evidence to the contrary. Accordingly, the Board has been guided by the subsection 405(4)(b) criteria¹ in evaluating and denying the County's motion for partial stay.

The Threat to the Public Welfare Is Sufficiently Serious to Deny the Stay

There is a vital statewide public interest in the timely construction of the Project. Due to current and projected growth in the demand for power in the state's Critical Load Area², by 2013 the Company will not be able serve that demand, even using all existing transmission

¹ (i.) The party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter.

(ii.) The party seeking judicial review will suffer irreparable injury without immediate relief.

(iii.) Granting relief to the party seeking review will not substantially harm other parties to the proceedings.

(iv.) The threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances.

² The Critical Load Area is the largest electric load center in the state of Utah. It is comprised of all or portions of Salt Lake, Tooele, Utah, Davis, Weber, Cache, and Box Elder Counties and accounts for nearly 80% of all electrical power demand in the state.

facilities. *Testimony of Darrell T. Gerrard, Transcript of Hearing, May 10, 2010, pp. 49-58; Direct Testimony of Darrell T. Gerrard, p. 27-28.* The undisputed evidence presented to the Board during its three days of hearings compels this finding. Moreover, transmission line outages, planned and unplanned, will significantly exacerbate the projected deficiency. A driving purpose of the Project is to significantly increase the Company's ability to deliver power to the Critical Load Area by June 2013, in advance of the summer peak demand. According to the Company, the consequences of a delay in the Project's planned June 2013 completion would include the need to operate the existing transmission system above established reliability limits or to conduct unscheduled customer power outages. *Affidavit of Darrell T. Gerrard, dated August 3, 2010, pp. 5-7.* Such consequences would jeopardize the public welfare. The Board must act to avoid them.

In the memorandum supporting its motion for stay, the County, for the first time, presents information questioning the Company's projected need for the Project. This information was not included in the County's response to the Company's petition for review that initiated this proceeding. It is in fact at odds with the following unqualified statement on page one of the County's response: "Tooele County stipulates that the Transmission Project is necessary to meet the demands for service in Salt Lake County, and ultimately, Tooele County." *Response to Petition for Review dated April 22, 2010, p. 1.* Nor did the County present this information during the evidentiary hearing held May 10-12, 2010. The County in fact presented no testimony.³ The County offers no explanation for its failure to present during the Board's

³ Moreover, this new information contradicts the County's acknowledgements of need for the Project expressed during the hearings. See Transcript of Hearing, May 12, 2010, p. 367.

evidentiary hearings data it now considers important. Accordingly, the Board is very hesitant to rely on this untested and unsworn information.

Nevertheless, even giving the County's new data due consideration, it does not justify the stay the County seeks. This new information is comprised of building permit data for the Daybreak community in South Jordan and areas within Tooele County showing a substantial declining trend in new construction between 2006 and 2009. *Memorandum in Support of Tooele County's Motion for Partial Stay of Order*, pp. 4-6. What is not clear from the County's information is the degree to which this data has been taken into account in the Company's demand forecasts and how it affects them, if at all. In the affidavit of Company witness Darrell T. Gerrard, dated August 3, 2010, accompanying the Company's Memorandum in Opposition to Tooele County's Motion for Partial Stay of Order, the Company responds as follows:

5. The demand for electricity in the Critical Load Area has outpaced the capacity and operating limits of Rocky Mountain Power's existing transmission system.

6. Due to increasing electrical demand on the Company's transmission system from its Customers⁴ within the Critical Load Area, the Company must increase the capacity of its transmission system by constructing a new high-voltage transmission line from the existing Mona substation west of Mona Utah to the existing Oquirrh substation located in West Jordan Utah ... by June, 2013.

7. Data provided by Tooele County in its motion indicating that the number of building permits issued by Tooele County and Salt Lake County has declined recently and that the Daybreak subdivision is behind schedule do not change my opinion. As stated in my testimony in the Utility Facility Siting Board proceedings, the Company's transmission system as it exists today is over operating limits during certain real and credible transmission line outages that the Company must anticipate. Again, the Critical Load Area is already at or near its capacity limits and any growth, even slow growth, will only push the system further beyond its limits if the Project is not completed by June 2013. This is an unacceptable risk to our Customers and to our Company as further stated in my testimony.

⁴ "Customers" as used in this Affidavit shall be defined to include all retail and network customers of the Company.

8. I have had conducted studies of electrical demand growth and delivery capabilities of the Company which demonstrate that by the summer of 2013, the electrical demand of the Critical Load Area will exceed the capacity of the existing transmission lines. If the Project is not in service by June 2013, the Company will (1) 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) be unable to meet load service obligations to customers under its Federal Energy Regulatory Commission ("FERC") tariff; and (3) may not be compliance with North American Electric Reliability Corporation ("NERC") Reliability Standards.

9. In order to meet this demand of electricity in the Critical Load Area, the Company must commence construction of the Project immediately in order to have the Project in service by June 2013.

Affidavit of Darrell T. Gerrard, dated August 3, 2010, pp.3-4.

This sworn statement is consistent with testimony the Company presented at the hearings supporting the need for the Project to be completed by June 2013. *See Testimony of Darrell T. Gerrard, Transcript of Hearing, May 10, 2010, pp. 49-58; Direct Testimony of Darrell T. Gerrard, p. 27; Testimony of Brandon D. Smith, Transcript of Hearing, May 10, 2010, pp. 155-157.* It makes clear the Company's assessment of need for the Project, including its timing and the consequences of delay, remains current and as presented in the hearings. Moreover, the affidavit emphasizes the need to start construction immediately, if the June 2013 in-service date is to be accomplished.

The need for immediate commencement of construction is also underscored by the affidavit of Brandon D. Smith, the Company's Project Manager. He avers that construction of the Limber-to-Oquirrh segment must begin now and cannot await completion of the Mona-to-Limber segment as the County requests. The segments must be built concurrently in order to avoid significant risk the Project will not be completed by June 2013. *See Affidavit of Brandon D. Smith, dated August 4, 2010, p.5.* Although the Limber-to-Oquirrh segment is only half as

long as the Mona-to-Limber segment, it will require more sophisticated design and construction techniques. This is so because of the mountainous terrain between the Limber and Oquirrh substations. According to the Company, the steep terrain, varying elevations, harsher weather conditions, and shorter construction season in the mountainous region are all complicating factors. *Id.* As a result, the Company asserts it must commence acquisition of the right of way in August 2010. This in turn will allow collection of route-specific terrain, soil, and elevation data before winter weather makes on-site work unfeasible. The Company maintains this collection process is necessary now so that specific design work and material procurement can be accomplished during the winter that will enable physical construction to go forward throughout the 2011 construction season. The Company asserts its construction contractor will need to take full advantage of all remaining time this fall, as well as the 2011 and 2012 construction seasons, to meet the June 2013 in-service date. *Id. at 6.* For these reasons the Company concludes:

28. Despite the assertions of the County to the contrary, even a delay of as little as 60 or 90 days will impact the Company's ability to have the Project operational before the system is unable to deliver Customer demand. A stay of any duration will cause irreparable harm to the Company and its numerous Customers in Utah who will be subject to power interruptions or the inability to add additional service (i.e. new houses, new businesses, new buildings, etc) onto the power grid.

Id. at 11.

The County argues the Company should construct the planned transmission line segment from the Limber substation to the existing Terminal substation, located near the Salt Lake City International Airport, before the Limber-to-Oquirrh segment "to provide any urgently needed connection to the larger western grid." *Reply Memorandum in Support of Tooele*

County's Motion for Partial Stay of Order, p. 3. The County believes this option would avoid the power deficiency the Project is intended to address and allow the requested stay to be granted without adverse consequences for utility customers. There is, however, no evidence before the Board the Limber-to-Terminal segment could be constructed by June 2013, or that doing so would have the intended outcome. On the contrary, whether constructing that segment would be potentially efficacious or not, the evidence strongly suggests it could not be constructed in time to address the projected power deficiency.

The Company's plans show the more northerly Limber-to-Terminal transmission segment will be needed some six years after the Limber substation is completed. *See Affidavit of Brandon D. Smith, dated August 4, 2010, pp. 2-3.* Neither the County, nor any other party challenged this schedule in the Board's proceeding. Moreover, the Company does not yet have a certificate of public convenience and necessity to construct the Limber-to-Terminal segment, nor has it secured the requisite local permit from the County. *See Memorandum in Opposition to Tooele County's Motion for Partial Stay of Order, p. 4.* Consequently, the Board has no basis on which to conclude construction of this segment will, or even could, meet the urgent need for transmission capacity that must be addressed by June 2013. Rather, the undisputed evidence presented to the Board identifies only the Project as the one viable means of avoiding the risks to reliable electrical service projected to exist by the summer of 2013.⁵ Furthermore, if the

⁵ The evidence presented to the Board establishing the need for the facility to be constructed by June 2013 is substantial, credible and uncontradicted, as summarized in detail in the Order. 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).*

necessary new transmission capacity is to be operational in time, the record shows site-specific work on the Limber-to-Oquirrh segment of the Project must begin now.

The County Is Not Likely to Prevail on the Merits.

In this case, where the County has prohibited construction of a utility facility through denying the CUP, the Board's statutory mandate is to determine whether the facility "is needed to provide safe, reliable, adequate, and efficient service to the customers of the public utility." *See UCA § 54-14-303(1)(d)*. The Utah Facility Review Board Act ("Act"), the statute governing the Board's authority, provides no other bases upon which the Board may resolve the dispute, nor may the Board invent its own.

The County argues the Board erred in limiting its review to the question of the need for the Project to provide safe, reliable, adequate, and efficient service to the Company's customers. The County claims the Board should have considered factors such as views, impact on wildlife, aesthetics, and impact on property values. *See Memorandum in Support of Tooele County's Motion for Partial Stay, p.8*. It further claims the Board's Order nullifies the County's land use authority. The Board concludes there is little likelihood a reviewing court will validate the County's position.

The Board's consideration of the evidentiary record and its Order properly apply the correct statutory standard to this dispute between the County and the Company. As noted in the Order:

This Board, created by the Legislature, 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. "It needs no citation of 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); *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”). Therefore, the Board cannot consider such issues as property values, viewshed, and the cultural significance of man-made landmarks, as it makes a decision, as important as those issues might be to the County or local citizens. Rather, the scope of Board authority is to determine if a local government has prohibited construction of a facility needed to provide safe, reliable, adequate, and efficient services to utility customers, and if so, that it should be constructed.

Order, p. 9.

Had the Board based its decision on factors other than the subsection 303(1)(d) criteria relating to need for the facility, it would have contravened specific statutory direction: “The written decision [of the Board] shall 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 or that does not involve an estimated excess cost.” *UCA § 54-14-305(5)*.⁶

Other sections of the Act make equally clear the County’s aesthetic, property value, and other interests that do not affect the provision of safe, reliable, adequate and efficient utility service remain within the County’s purview. For example, the Act 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

⁶ As discussed more fully below, the issue of “excess cost” is not raised because the County has not imposed any alternative route or other conditions or requirements on the Project. Had the County done so and compliance required the Company to incur costs greater than its “standard costs” to construct the Project, the Board’s role would include resolving any dispute concerning the excess cost amount to be borne by the County.

(2) the local government pays for the actual excess cost resulting from the requirements or conditions . . .

*UCA § 54-14-201(1)(2).*⁷

The Act also specifically preserves this authority of local governments to set conditions and requirements where, as in this case, the Board has decided a facility should be constructed that the local government has prohibited: “(3) The local government may [nonetheless] impose requirements or conditions pursuant to its zoning, subdivision, or building code regulations...” *See UCA § 54-14-306(2)-(3)*. The County thus retains the power to address its aesthetic, property value and other land use concerns. Nothing in the Order impedes the County’s ability to take such action. Two statutory conditions apply, however. First, the local government’s requirements may not impair safe, reliable and adequate utility service. Second, the local government must, with certain exceptions, bear the actual “excess cost” to the utility of meeting the local government’s requirements. *Id.* In other words, the local government must bear the cost of the loss in utility service efficiency, so the financial consequence of a local interest is not transferred to utility customers throughout Utah. This objective is, indeed, a central reason the Board was created, as the following Legislative findings in the Act make clear:

- (a) The Legislature finds that the construction of facilities by public utilities under this title is a matter of statewide concern.
- (b) The construction of these 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.
- (c) Excess 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

⁷ The only exceptions apply to the recovery of “excess costs”, an issue which does not arise in this case.

government or the financial viability of the public utility, unless the local government pays for those excess costs.

UCA § 54-14-102(1).

Understandably, the County seeks to avoid the excess construction costs its land use conditions and requirements could produce. *See Transcript of Hearing, pp.386-387.* Presumably, this is the reason the County simply denied the CUP and urged the Board to consider land use issues and local concerns beyond its statutory authority. *See Memorandum in Support of Tooele County's Motion for Partial Stay of Order, p. 8.* Nevertheless, the bounds of the Board's authority are clear. It must resolve this dispute by determining whether the facility is needed to provide safe, reliable, adequate and efficient service to the customers of the public utility. Local land use interests that do not affect these service attributes appropriately remain with local government, as do the financial impacts of its conditions and requirements.⁸ The County's arguments ignore the plain statutory language that specifies the Board's decision criteria and reserves to local government substantial power to preserve local land use values. The County is unlikely to prevail on appeal.

The County Has Not Demonstrated It Will Suffer Irreparable Injury

The County presented no evidence during the Board's evidentiary hearings that it or its residents would suffer irreparable harm if the Board ordered the County to issue the CUP. As noted above, the County presented no witnesses at all. Consequently, there is no testimony before the Board on which to base a finding of irreparable harm.

⁸ The Board believes this is as it should be. Despite the County's pleas for the Board to examine all proposed alternative routes in light of the land use and aesthetic interests of County residents, the Board is ill-equipped to do so. It is the County and other local government entities, not this Board, that have staffs of land use professionals who work routinely with zoning, property valuation, and related matters.

In addition to the record developed through evidentiary hearings, the Order examines the twelve factors the Tooele County Planning Commission specified in denying the requested CUP, as set forth by the County in its Response to the Company's Petition for Review. *See Order, pp. 9-17.* The County now asserts several of these factors as the potential harms that support its motion for stay. *See Memorandum in Support of Tooele County's Motion for Partial Stay of Order, pp. 9-11.* As explained in the Order and above, the Board may only consider those concerns relevant to the question of the Company's need for the facility to provide safe, reliable, adequate and efficient service. On that basis, only four of the County's concerns possibly apply, in that they raise safety issues associated with potential environmental impacts. In each case, however, the record shows the County's concerns are unsubstantiated or the Company has committed to take mitigating action that will minimize the risk of harm. *See Order, pp. 12-17.*

Furthermore, as discussed in the Order, the Bureau of Land Management ("BLM") conducted a multi-year evaluation of the Project. The BLM served as the lead agency for the National Environmental Policy Act review process. The BLM (as well as the Company) evaluated more than 450 miles of alternative transmission routes, although the total length of the Project is only about 141 miles. Importantly, the BLM also examined the County's specific concerns about the Project's route within the County, including those related to environmental safety and concludes in its Final Environmental Impact Statement that the route the Company proposes for the Project is BLM's "Environmentally Preferred Alternative". *See Order, pp. 22-25.* Moreover, the Company acknowledges its requirement to follow BLM restrictions so that wildlife, water sources and other resources are not threatened. *See Affidavit of Brandon D.*

Smith, dated August 4, 2010, pp. 9-10. Consequently, the Board concludes the County has not established facts upon which it can claim irreparable harm.

The Board also reiterates that as to all twelve of the County's expressed concerns, it is within the County's power to place conditions and requirements upon its CUP that satisfactorily mitigate its concerns, pursuant to its zoning, subdivision, or building code regulations. *See UCA § 54-14-306(3).* The County's only restrictions in doing so are that it may not impair safe, reliable and adequate service, and that it pays any excess costs so utility service efficiency is not diminished. In light of these powers, expressly reserved to local government by statute, the County has significant opportunity, of which it has not yet availed itself, to avoid the harms it perceives. Finally, the harms claimed by the County can all be eliminated or mitigated financially. Since money can solve the claimed harms, they are not irreparable.

A Stay Would Risk Substantial Harm to Utility Customers and the Company

The threat to the public welfare of an inadequate and unreliable power supply, discussed above, presents a risk of substantial harm to utility customers in the Critical Load Area, were the Board to grant the County's request for stay. *See Testimony of Darrell T. Gerrard, Transcript of Hearing, May 10, 2010, pp. 49-58; Direct Testimony of Darrell T. Gerrard, p. 27-28.* The Board's decision is controlled by the statewide interest in safe, reliable, adequate and efficient utility service. The Company has also demonstrated such service will be imperiled if various site-specific Project construction activities are not completed before winter weather delays them. *Affidavit of Brandon D. Smith, dated August 4, 2010, pp. 5-7.* Such a delay

would prevent the necessary construction materials from being available until late summer 2011, leaving only one full construction season to complete the Limber-to-Oquirrh segment of the Project. The Company position is clear; the Project cannot be constructed in one season. *Id.*; *See also Transcript of Hearing, May 10, 2010, pp. 155-156.* These factors strongly militate against the requested stay.

The Company itself also would be harmed by its likely failure to meet national and regional reliability standards in 2013, if the Project is not completed. These standards include the North American Electric Reliability Corporation (NERC) Standards for Bulk Electric Systems, which are federal law, and the Western Electricity Coordinating Council (WECC) regional standards and criteria. *See Order, pp.19-22.* These standards dictate the minimum levels of transmission system reliability, redundancy, and performance required for the Company's system to interconnect to the larger western grid. 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.

As noted in the Order, the record demonstrates energy demand in the Critical Load Area is served largely by Company power plants located to the south in Carbon, Juab, and Emery Counties or by other facilities in the Desert Southwest. *See Order, pp. 20-21.* Energy generated in these locations must be transported on existing transmission lines to the Critical Load Area. The Company's municipal and other customers rely on these same lines to transport energy to meet their load growth needs in the northern part of the state. The existing lines are now fully subscribed. The Company expects they will be operating at or near design capacities in the near future. The Company predicts without the Project, by 2013 it will not be able to serve

its existing customers in the Critical load Area and specifically Tooele County. *Direct Testimony of Darrell T. Gerrard, p. 27-28.* It likewise will not be able to comply with its FERC transmission tariff and potentially with the above-described NERC reliability standards, nor with its transmission contract obligations, subjecting the Company to possible sanctions and fines. *See Direct Testimony of Darrell T. Gerrard, pp. 14-23; Affidavit of Darrell T. Gerrard, dated August 3, 2010, p. 4.* These potential harms further weigh against the requested partial stay.

ORDER

Based on the foregoing, the Board denies the County's motion for a partial stay of the Order.

Reconsideration and Appeal

Pursuant to Sections 63G-4-301 of the Utah Code, an aggrieved party may request agency review or rehearing of this Order by filing a written request with the Board within 30 days after the issuance of this Order. Responses to a request for agency review or rehearing must be filed within 15 days of the filing of the request for review or rehearing. Judicial review of the Board's final agency action may be obtained by filing a petition for review with the Utah Court of Appeals within 30 days after final agency action. Any petition for review must comply with the requirements of Sections 63G-4-401 and 63G-4-403 of the Utah Code and Utah Rules of Appellate Procedure.

DOCKET NO. 10-035-39

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DATED at Salt Lake City, Utah, this 18th day of August, 2010.

BY THE BOARD:

/s/ Ted Boyer

Chairman, Utah Public Service Commission

/s/ Ric Campbell

Commissioner, Utah Public Service Commission

/s/ Ron Allen

Commissioner, Utah Public Service Commission

/s/ Hon. Joe Johnson,

Mayor, Bountiful City

/s/ Monette Hurtado, Esq.

Deputy County Attorney, Weber County

Attest:

/s/ Julie Orchard

Secretary, Utah Public Service Commission

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