

BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER,)
) DOCKET NO. 10-035-39
)
 Petitioner,)
)
vs.)
)
WASATCH COUNTY,)
)
)
 Respondent.)
)

IN THE MATTER OF ROCKY MOUNTAIN POWER'S PETITION FOR
REVIEW TO THE UTAH UTILITY FACILITY REVIEW BOARD

Utah Public Service Commission
160 East 300 South, Fourth Floor
Salt Lake City, Utah 84111

Thursday, April 14, 2016 * 9:00-10:14 a.m.

Reported by: Jennifer E. Garner, RPR
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1 PROCEEDINGS

2

3 MR. LEVAR: Okay. Good morning. It looks
4 like we're ready to begin.

5 This is the time and place for the hearing
6 of the Utah Utility Facility Review Board, Docket
7 16-035-09, and this is a hearing to address several
8 motions.

9 We have four of the Board members present
10 here physically in the room today: Ms. Beth
11 Holbrook, Mr. Jordan White, myself, and David Clark.
12 I believe we have one Board member on the telephone,
13 Mr. Wilson; is that correct?

14 MR. WILSON: That is correct, sir.

15 MR. LEVAR: Okay. And since we have him
16 and one other party participating by phone, I'll just
17 note, those of you on the phone, when you speak, for
18 the purposes of the court reporter, please state your
19 name before you start speaking. And for those of us
20 in the room, as we discovered last time, the people
21 on the phone can hear better if you almost swallow
22 the microphone when you talk. And so that's not very
23 comfortable to do, but we'll all try to do that today
24 so those of you on the phone can hear. If you cannot
25 hear on the phone, please let us know.

1 So I think we'll move to appearances now.
2 For Rocky Mountain Power?

3 MR. MOSCON: Matt Moscon and Heidi Gordon
4 for Rocky Mountain Power.

5 MR. LEVAR: Okay. Thank you.
6 For Wasatch County?

7 MR. BERG: Tyler Berg from Wasatch County.

8 MR. LEVAR: Okay. Thank you.
9 From the Black Rock Intervention Group?

10 MR. REUTZEL: Jeremy Reutzel and Ryan
11 Merriman.

12 MR. LEVAR: Okay. Thank you.
13 Do we have anyone here from the Promontory
14 Intervention Group?

15 MR. BUDGE: Yes. Wade Budge and Jordan
16 Lee are both here on behalf of Promontory.

17 MR. LEVAR: Okay. Thank you. Wait. I'm
18 sorry. What was the first name you said?

19 MR. BUDGE: Wade. Wade Budge.

20 MR. LEVAR: Okay. Any other appearances?

21 I know that the Division of Public
22 Utilities and the Office of Consumer Services are
23 sitting comfortably in the audience observing today.
24 So I hope you find your observations valuable.

25 Is that all for appearances?

1 Okay. We have several motions to consider
2 today; obviously, the first of which is Rocky
3 Mountain Power's Motion for Reconsideration on the
4 Intervention of the -- I'll just refer to it as the
5 Black Rock Intervention Group. I think that's the
6 easiest way to refer to it today.

7 Probably what makes sense in terms of
8 procedure, unless anyone feels differently, is to go
9 to you first, Mr. Moscon, since it's your motion.
10 You can take a few minutes to highlight any points.
11 Obviously, we've had all the briefings on all sides
12 of it. But if you want to make a few highlights, and
13 then I think we might just do Board questions for you
14 before we move on from that point.

15 MR. MOSCON: Sure.

16 Mr. Chairman, is it preferable that I stay
17 seated while I address the Board? Is that okay?

18 MR. LEVAR: Yes, that is fine with me.

19

20

STATEMENT

21 BY MR. MOSCON:

22 First, I'd like to express on behalf of my
23 client gratitude and appreciation for the Board
24 taking this time. We recognize that the Board
25 members all have day jobs in addition to this. And

1 it certainly is not our intent to make this Facility
2 Review Board proceeding overly contentious, but we --
3 and we are mindful of the time that it is consuming.

4 We -- there is a good note to report.
5 Mr. Berg is on the line. We have been able to work
6 with the county, Wasatch County, to go through two
7 rounds of discovery without any concerns that has not
8 had to take up time of the Board. I say that only
9 because I don't want the Board to believe that it's
10 the intention of Rocky Mountain Power to necessarily
11 blockade all efforts of all parties to ask questions
12 or to get any clarification of materials that have
13 been filed.

14 I also want to note that it's not our
15 position that the Black Rock Intervention Group, that
16 they are bad people that are conspiring to create
17 problems. That is not our belief or certainly is not
18 an argument that we want to make. But what I think
19 happens is this comes down simply to a difference of
20 opinion as to what the purpose of this Board is, what
21 the role of this proceeding is, and that -- and what
22 the role of a partied opponent is. And that also
23 ties into the discovery disputes that we have.

24 So, Chairman LeVar, to your point about
25 just highlighting points, if I might approach, I have

1 a little handout, which, by the way, is already -- it
2 is in information that was already filed in the
3 record. This is nothing new. But I think rather
4 than making people flip to 20 different pages, if I
5 could just hand this to you, if I might.

6 MR. LEVAR: Sure. Any objection?

7 MR. REUTZEL: We don't know what it is.

8 MR. LEVAR: Okay. Why don't you give him
9 a copy.

10 MR. MOSCON: Absolutely.

11 MR. LEVAR: Yes. I believe this is
12 something we already have several copies of, for the
13 record.

14 MR. MOSCON: Yes. I think I said I don't
15 intend to make this a new part of the record or an
16 exhibit. This is actually several pages from the
17 record that has already been filed that I thought
18 might be easier to highlight the points that I'll
19 make.

20 The front page, as you will see, is from
21 the Board's previous order. This is not an entire
22 copy of the order. I only wanted to highlight a
23 couple of things.

24 The first page into the handout that I've
25 given where it's highlighted in green and entitled

1 "Scope of Board Review," this, coming from this
2 Board's most recent ruling, identifies the very
3 situation we're in. In that dispute that involves
4 Tooele County and the Company, the Board noted that
5 because this involved a denial of a CUP rather than
6 CUP conditions and associated costs, that the Board
7 turns to 303(d), and it lays out what the statute
8 says. And the point I want to make is at the very
9 end, "Accordingly, the scope of the Board's inquiry
10 is to find whether there is substantial, credible,
11 competent evidence the Transmission Project is needed
12 to provide safe, reliable, adequate, and efficient
13 utility service."

14 My point is, that is the position of the
15 Power Company and I believe of the Board of -- in
16 this type of a dispute where the county has
17 prohibited a CUP, that is what is relevant.

18 If you turn a page in to my handout, this
19 is part of the same order, you will see we have
20 skipped some pages. On pages 10 and 11 in that
21 previous order, the Board indicated, well, let's talk
22 about what that means, and they highlighted things
23 that they would not consider. And as I've
24 highlighted, as the Board indicated, "Therefore, the
25 following objections used as a basis by the County to

1 deny the CUP are not properly considered here." One
2 of those is viewsheds and another is loss in property
3 value.

4 So this Board has previously in its
5 opinions taken the position that it is not relevant
6 to the Board, and the Board will not take up and
7 consider such things as complaints about views or
8 what is going to happen to neighboring property
9 values by virtue of the facility that is subject to
10 the dispute.

11 If you turn in my handout, the next thing
12 that we see is the Petition to Intervene by the Black
13 Rock Group. And one page in, which begins on page
14 three of their filing, here is where Black Rock
15 addresses what they think this dispute is. There
16 they say, "Rocky Mountain Power's petition fails to
17 clearly address the issue before this Board. This
18 proceeding is not about Rocky Mountain Power's
19 ability to construct facilities needed to provide
20 safe, reliable, adequate and efficient electric
21 service to its customers. Rather, the issue here is
22 whether Rocky Mountain Power should be allowed to
23 move a transmission line from a route that has
24 existed for nearly a century into Wasatch County."

25 So here the Intervention Group is actually

1 saying, hey, it's not that question that 303(d) says.
2 We want to talk about something else. We want to
3 talk about whether you can move a line from somewhere
4 it already is, not what 303(d) says. And this is one
5 of the fundamental problems that we're having in
6 terms of the intervention and the role of Black Rock
7 as a party.

8 If you continue in the handout that I have
9 where we get to the reply of Black Rock when Rocky
10 Mountain Power has filed their papers to say, hey,
11 you really don't have a legal interest; you don't
12 have a standing argument under the UAPA guidelines,
13 on page four, here is how they respond. So here this
14 is in the reply. We've already made our argument
15 about you don't have a legal interest. And the
16 response is that there is no dispute that they will
17 be substantially affected. Rocky Mountain Power is
18 seeking to construct a massive transmission line
19 parallel to their property over the mountaintop.
20 This will create noise and safety and impact economic
21 interests that will require Black Rock to spend
22 substantial sums and importantly it will harm their
23 property values and their ability to market their
24 respective properties.

25 So, again, the Board has already indicated

1 in its order, we're not looking at arguments about
2 whether this impacts your view, and we are not going
3 to consider arguments that this has had an impact on
4 your property value.

5 When we turn to what Black Rock intends to
6 do as a party, they have made clear, we're not here
7 to talk about the safe, reliable, dependable,
8 adequate delivery of power to Rocky Mountain Power's
9 customers. We want to talk about the economic impact
10 to our property values and the fact that the ridge-
11 line ordinance that protects our view is going to be
12 violated -- things that the Board has already said
13 that they are not going to consider.

14 That fundamental dispute about what the
15 role of the Board proceeding is, is what is
16 precipitating the friction between the parties that
17 then extends into discovery. Because, as we have
18 seen, immediately following the intervention, Black
19 Rock issued subpoenas, requests for admissions,
20 interrogatories, deposition notices on a host of
21 topics that, if their interpretation is correct, that
22 what is at issue is the impact to their value --
23 can't we put this line in Summit County; won't that
24 line in Summit County be just as safe, just as
25 reliable, just as efficient? If that was a relevant

1 issue for the Board to consider, then that --
2 those -- it makes sense that they would think that
3 those are relevant areas of inquiry for discovery.

4 On the other hand, if the issue is limited
5 to what we believe the Board has identified, simply
6 whether this facility is needed, then all of those
7 issues about, well, couldn't you build it somewhere
8 else and wouldn't it be just as efficient over there,
9 those are not applicable.

10 So I guess I -- maybe I'll just keep this
11 brief and let the Board indicate what questions it
12 has of me. I would point out -- and I'll address the
13 specifics and which deposition topic is proper or
14 not, I guess, when asked for it by the Board. I
15 simply want to indicate to the Board that Utah law is
16 clear that private parties are not allowed to dictate
17 where utility facilities are constructed.

18 In some of our previous hearings, and I
19 know in the one where the Board was courteous enough
20 to allow me to appear by telephone, one of the
21 arguments that I alluded to that the Board had a
22 question about was that I indicated that there were
23 cases in the condemnation context in which the law of
24 Utah had been established that it's the utility, not
25 the Public Service Commission, it's not the property

1 owners, but the utility that picks the location for
2 its facilities, and then the chips fall where they
3 may. There may be costs, there may be impacts, but
4 the utility is able to do that and there was some
5 question about it.

6 So I cite the Board to the case of
7 Williams and Hyrum Gibbons vs. Northern Utah TV. And
8 I concede this is not a power line case; it was a
9 telegraph line question. But the Utah Supreme Court
10 expressly stated: "It is not a question whether
11 there is other land to be had that is equally
12 available. But the question is whether the land
13 sought is needed for the construction of the public
14 work. The necessity is shown to exist simply when it
15 appears that it is necessary to take the land by
16 condemnation in order to effectuate the purposes of
17 the corporation."

18 And here is the important part: "The
19 Respondent has the right to determine when and where
20 its telegraph line shall be built. It may be said to
21 be the general rule that unless the corporation
22 exercises the power of eminent domain in bad faith
23 or is guilty of oppression, its discretion in the
24 selection of land will not be interfered with."

25 So the law of Utah, certainly in that

1 condemnation context, is we're not going to be in the
2 business of dictating where utilities should put
3 their facilities unless there is some demonstration
4 of bad faith that this is done for an improper
5 purpose or for oppression.

6 Here, I recognize there is not a
7 condemnation and the reason is because the property
8 owner acquiesced. It would be very unusual if the
9 rule of law was if Promontory had not agreed to give
10 Rocky Mountain Power the easement and Rocky Mountain
11 Power had to condemn it, that then there could not be
12 a dispute about the location, but since the parties
13 were able to mutually, cooperatively work out an
14 alignment, that now all of the sudden Utah law
15 changes and other parties get to appear and make
16 arguments about where the line should or should not
17 be.

18 I know that the Board has reviewed our
19 materials that we've supplied about why we think that
20 this Board proceeding is really a dispute between the
21 county and the utility. And I'm happy to answer any
22 other questions or move into the specifics of
23 discovery at the Board's discretion.

24 MR. LEVAR: I think it probably makes
25 sense to have Board questions of you at this point on

1 the --

2 MR. MOSCON: Sure.

3 MR. LEVAR: -- solely on the intervention
4 issue.

5 MR. MOSCON: Okay.

6 MR. LEVAR: And if there's no objection, I
7 have a couple of questions I'd like to jump into
8 first just to get your viewpoint on this legal issue.

9 It seems to me there is at least an
10 argument that the intervention statutory standard is
11 a different standard than what would apply to either
12 relevance at the hearing or relevance with respect to
13 discovery. You know, we have the legal interest that
14 could be substantially affected by the proceeding.
15 The legislature could have used language raised to
16 either relevance or jurisdiction in that phrase, but
17 they used the phrase, "a legal interest that could be
18 substantially affected by the result."

19 So isn't it possible that a party could
20 have no -- hypothetically, no input that would be
21 relevant in either discovery or the hearing but still
22 have a right to intervene because their interest
23 might be affected by the outcome?

24 MR. MOSCON: I do not agree with that
25 proposition for the following reasons: The statute

1 that you talked about didn't simply say that you have
2 an interest. It said two things: You have to have a
3 legal interest that will be substantially affected.
4 And one of the arguments that we've made is that
5 every citizen in the county may have an interest.
6 They may all say, hey, I care about the views and I
7 care about what's going on here, and I'm interested
8 in what happens, and I'd like to speak up. But that
9 is not a legal interest. To have a legal interest,
10 you have to have a vested right; a vested right that
11 is now subject to being taken away.

12 One of the things that we put in our
13 petition for reconsideration is noting that one
14 landowner does not have a vested right in what their
15 neighbor does or doesn't do on their neighbors'
16 property. Now, the local government might -- the
17 city, the county, the state -- they can get involved
18 with that and say -- you know, talk about what is or
19 is not available. But Black Rock does not have a
20 vested legal right to never have views of
21 transmission lines. That is not a legal interest
22 that they have. Therefore, just because they have an
23 interest, I would say that they still do not have
24 automatically a legal interest that could be
25 substantially impacted by the decision. So I would

1 still dispute that they have intervention rights
2 under the statute.

3 MR. LEVAR: Would you mind then comparing
4 the alleged legal interest that the Black Rock Group
5 has? They're claiming a legal interest and potential
6 impact on their property values, depending on the
7 outcome of this. How would that compare against the
8 legal interests in Rocky Mountain Power general rate
9 cases of parties like Utah Clean Energy, Sierra Club,
10 Western Resources Advocates, who regularly intervene
11 unopposed in those cases?

12 MR. MOSCON: Sure. The difference there
13 is -- this is my understanding. The reason virtually
14 anyone is allowed to intervene in a rate case
15 proceeding is anyone is a rate payer or is a direct
16 customer. And so they would say if you grant their
17 petition to raise rates, personally, my rates go up,
18 and I am a customer and they are asking you
19 permission to charge me more money. Whether that's
20 an individual or a group of industrial customers or
21 what have you, they have direct interest in that
22 proceeding.

23 Here, we are not -- if we were on the land
24 of Black Rock where they said, hey, this is my land
25 that you are -- that you are literally putting it on

1 my land, that would perhaps be a different
2 argument -- I'm not even sure if necessarily in this
3 forum is proper. And, again, it might be like a
4 civil matter, in a condemnation, or an inverse
5 condemnation situation. But at least they would have
6 that kind of a legal interest.

7 So I think that the analogy is not
8 complete, the one that you posed about a rate payer,
9 because they do have that direct interest.

10 The Millard case that the parties cited I
11 think extends from that point. This is what they had
12 cited for grounds. In that case, it was over an
13 argument about who can have a seat at the table about
14 taxes and what happens to tax funds. And there the
15 court ruled, well, certainly the county, Millard
16 County, you have -- you get to spend some of those;
17 you get some of those taxes. So you have a right to
18 be here because you have a claim to that tax money.

19 But here we don't have a legal claim, a
20 legal right, by Black Rock. And that's highlighted
21 by the fact that this comes up from a permit
22 application at which they were not a party. And I
23 think it's belied by the Board's own ruling that
24 says, look, we are not here to consider property
25 values or views or anything else.

1 If it really was a proper party and that
2 was a legal interest, then I think the Board would be
3 considering those things because the Board would say
4 that's a legal interest; we need to consider it. But
5 if -- they are not and the Board doesn't consider
6 them.

7 MR. LEVAR: Okay. Thank you. If the
8 Board would indulge me one more question then.

9 This is an issue that in your brief you
10 raised on the second part of the test, which is the
11 four-part -- the four factors that would affect
12 whether it would substantially impair the conduct of
13 the proceeding -- I'm not sure if I have the words
14 right -- but the problem that relates to
15 participation below. And you mentioned that the
16 Black Rock Group had participated as -- in providing
17 public comment. In their response, they point out
18 that that was the only option available to them in
19 that proceeding; there was no intervention option
20 there. Do you have any verbal response to the
21 position they took on that issue?

22 MR. MOSCON: Yes. It -- as it should be
23 below, it should be here. That is the point.
24 Whether an entity -- whether it's a person, a
25 homeowner, a corporation, a utility -- can do

1 something -- in a city, a county, a subdivision of
2 the state -- is between the government and the
3 applicant. They're happy to take input or hear the
4 voices of the citizens, but the only parties
5 necessary are the governing authority and the
6 applicant. So they don't need to be a party below
7 because it's really -- they don't have legal
8 standing.

9 And so the county did not let them
10 participate as a party in the CUP application for the
11 same reason that this Board shouldn't. We're happy
12 to hear what you have to say. We're going to provide
13 you a forum to get your thoughts, and we'll take
14 those into consideration, but you are not a party to
15 the proceeding. This is really an applicant asking
16 us for permission. Those are the only two parties.

17 Just like in this Board proceeding, the
18 statute is clear, this Board was organized by the
19 legislature to govern disputes between two parties:
20 Utilities and local governments.

21 As you pointed out, wouldn't the
22 legislature have clarified this in the UAPA
23 intervention rules? Clearly, if the legislature had
24 intended private parties to be parties in the
25 Facility Review Board proceedings, in the Enabling

1 Act, it would have said this Board is to resolve
2 disputes between utilities, local governments, and
3 impacted parties. But they did not. They limited it
4 to utilities and local governments.

5 MR. LEVAR: Thank you. That's all the
6 questions I have. I'll go to the rest of the Board.
7 Mr. Clark, do you have questions for Mr. Moscon at
8 this point?

9 MR. CLARK: I do have a question. Let me
10 get to where I can swallow the mic. I'll follow your
11 instructions.

12 Mr. Moscon, I wonder if you would please
13 address the Sevier Citizens vs. DEQ case and, in
14 particular, the language that the associations cite
15 in their opposition to your Motion for
16 Reconsideration, citing the reasons that
17 intervention -- the denial of intervention in that
18 case was sustained by the court because the Sevier
19 Citizens failed to identify a specific impact that,
20 in this case, the power plant's operation is likely
21 to have on any member's recognized legal interests
22 such as a negative impact on livelihood or property
23 values or diminution in a particular member's health
24 or recreational enjoyment.

25 MR. MOSCON: Just to make sure I get the

1 right one, can you tell me what page of that? I'm on
2 the right brief.

3 MR. CLARK: I'm on page seven --

4 MR. MOSCON: Okay. Thank you.

5 MR. CLARK: And I -- let me give you a
6 minute to get there. I want to understand the
7 Company's views on the extent to which and how this
8 language should influence our thinking about the
9 intervention petition before us.

10 MR. MOSCON: Absolutely. And, by the way,
11 I obviously turned to the wrong brief. I was on page
12 seven of their Opposition for Protective Order. I
13 take it it's --

14 MR. CLARK: Opposition to Petitioner's
15 Motion for Reconsideration.

16 MR. MOSCON: Sorry for the -- okay.

17 MR. CLARK: So it's there in the upper...

18 MR. MOSCON: Yeah, okay. Yes.

19 MR. CLARK: You want to just take a moment
20 and...

21 MR. MOSCON: This -- I apologize. I'm
22 going through so many briefs here to find the right
23 one.

24 I think I'm going to have to just answer
25 based on what I understood you to say because, I

1 apologize, I'm not finding the right page in the
2 right brief. But what I understand the question to
3 be is: If there is a case that indicates that one of
4 the things that would give parties an interest is
5 diminution in property value, impact on value, et
6 cetera. If that -- whether or not that gives someone
7 a legal interest that would qualify under UAPA; is
8 that fair?

9 MR. CLARK: Right. Right. In the Sevier
10 case, at least as represented by the associations,
11 intervention was denied but the interests that were
12 not established included the list of things that I
13 mentioned, which are a negative impact on livelihood
14 or property values or diminution in a particular
15 member's health or recreational enjoyment.

16 MR. MOSCON: Sure. And I guess the way I
17 would respond -- and this came up at our previous
18 hearing -- and I'll again draw an analogy from the
19 condemnation rule where utilities are putting
20 facilities where property owners don't like them.

21 The Admiral Beverage case stands for,
22 among other things, a proposition that if a condemnor
23 builds a facility somewhere, a property owner whose
24 property is impacted gets the damage and the rest of
25 their property, even if it's not condemned, they can

1 get severance damage on the basis that that remaining
2 property has had some diminution in value or has an
3 impact. Even though he didn't put a power pole on it
4 or he didn't put a substation or a water pump there,
5 that the rest of your property is impacted along the
6 lines you described.

7 But the case clarifies and says but if you
8 are the next-door neighbor, you don't get those
9 damages. These damages and the parties that can seek
10 those kinds of compensations are limited to the
11 owners of the property that has the direct impact on
12 it. And the reason, the rationale that that court
13 says is otherwise we would not be able to draw the
14 line. Because if you put a transmission pole on this
15 lot, the next-door neighbor can see it and they could
16 argue an impact. And the person next to them could
17 see it and argue an impact. And down the road and
18 down the road. And it may gradually diminish but how
19 and where do we stop it?

20 And so to have orderly rule of law, under
21 Utah law, the only parties that can claim an impact
22 for diminution to the value of their property or to
23 have some kind of severance damage is the owner of
24 the specific lot on which the road, the power line,
25 or whatever was built. And neighbors do not get that

1 value; they do not get that claim.

2 I would say that that is the answer to the
3 question that the Board has raised. That, in the
4 case that is cited, we would agree that if they had
5 the -- if they had a direct -- their -- literally,
6 there was a pole on their property, that would be a
7 legal interest; they have a vested right in what
8 happens to their property. But they do not have a
9 vested right in what happens next door.

10 If -- and I'll put it another way. Let's
11 say that the county granted the CUP application that
12 Rocky Mountain Power requested. Under that analogy,
13 they would say we've had an impact to our property,
14 and we had no forum, we had no voice. And they would
15 have, therefore, been required to have been a party
16 at the CUP application. And, in fact, every CUP
17 application process would necessarily have to allow
18 all of the neighboring parties to be involved.
19 Because, again, if Wasatch County granted us the
20 application, we would not be here and the
21 intervention group would not be able to initiate this
22 process and say, hey, wait a minute; they granted the
23 application and they're moving forward, but we think
24 it impacts our property. They would not be able to
25 start this proceeding. And I think that that is the

1 answer.

2 It applies when you actually have your
3 vested property right, not because you are a
4 neighbor, even if you can articulate that. That
5 would throw on its head the ruling of the -- that I
6 quoted at the beginning of this where the Board
7 already said in the Tooele case, this Board does not
8 consider view; this board does not consider property
9 value. So what would be the point of allowing a
10 party to intervene to argue that they have an impact
11 in their property value if the Board is already
12 taking the position, we don't consider property
13 value?

14 MR. CLARK: Thank you. That is my only
15 question.

16 MR. LEVAR: Okay. Ms. Holbrook, do you
17 have any questions?

18 MS. HOLBROOK: Not at this time.

19 MR. LEVAR: Mr. White, do you have any
20 questions?

21 MR. WHITE: Let me ask you a question. I
22 mean, the Sevier case, I'll go back to that, was of
23 interest to me. It sets a pretty low bar. You know,
24 frankly, a little bit -- it raised my eyebrows, I
25 guess, in terms of the potential low bar for

1 intervening at least in an administrative proceeding
2 under UAPA. You said something interesting or you
3 noted something interesting in one of your motion
4 papers that -- you said something, assuming for
5 argument's sake that UAPA applies. Is that -- is it
6 the Company's position that UAPA may or may not apply
7 to this proceeding?

8 MR. MOSCON: What was referenced there was
9 the following point: The statute, the Facility
10 Review Board Act, I believe does two things: It
11 says, number one, we are here to have disputes
12 between utilities and local governments. There is
13 another provision where they say an impacted property
14 owner can be a participant in this circumstance. And
15 it describes a circumstance where the governing
16 authority is going to do something, and they direct
17 the utility to study and, you know, basically say to
18 the utility, hey, we think we want to make -- zone
19 this area our -- you know, where we are going to put
20 utilities and a property owner is in that area.

21 And so because the Facility Review Board
22 Act I believe directly indicates here is when it's
23 between a utility and a local government, and here is
24 when another party can intervene, I don't think you
25 necessarily go to the default UAPA rules. Those are

1 referred to if and only if the more specific act
2 doesn't answer the question. It's kind of like the
3 catchall thing. And I would take the position that
4 the Facility Review Board Act on its face already
5 answers the question at hand.

6 So, number one, to answer your question, I
7 think that the controlling act is this Board's own
8 governing act and it identifies when private parties
9 are allowed. And so I don't think you have to go to
10 UAPA's general catchall.

11 To the extent the Board disagrees with
12 that and goes to UAPA's general catchall, I still
13 take the position that it, and all of the cases that
14 have interpreted that, still state you have to have a
15 legal interest, not just you are going to have an
16 impact or you have an opinion or anything else. You
17 have to have a legal interest which is a vested right
18 at stake, and I still think that is not satisfied in
19 this case.

20 MR. WHITE: So, under that theory, is it
21 the Company's position that the only parties --
22 potential parties that would have some type of right
23 to intervention, whether under UAPA or some other
24 civil case law theory, would be the Company, the
25 County, and then the property owner on which the

1 facility is proposed? Are there any other parties
2 that could potentially...

3 MR. MOSCON: As I sit here, I can't think
4 of any. Is there some -- I mean, you are right; I
5 think that is what was intended by the legislature.
6 If there is some very unusual circumstance I'm not
7 thinking of, I'd hate to speak in definitive terms.
8 But I believe that that is what was intended by the
9 legislature. That is my understanding of Utah law,
10 that you have to have a vested legal right in order
11 to have any tribunals offer you protection. You
12 don't get a tribunal to offer you protection under
13 two categories: Number one, if you don't have a
14 vested right and, number two, if it would be a
15 nullity.

16 If the Board's ruling is that we don't
17 consider property value and we don't consider views,
18 then allowing them to intervene certainly would go
19 back and violate the UAPA rule that says, well, it
20 would frustrate the process and be a waste of time.
21 Because if their interest is just property value and
22 views, and if this Board is taking the position we
23 don't consider property values and views, then having
24 them intervene would necessarily and by definition be
25 a distraction to the core purpose of the Board and a

1 waste of time.

2 MR. WHITE: Thank you. That's all I've
3 got, Mr. Chair.

4 MR. LEVAR: Okay. Mr. Wilson, can you
5 hear on the phone?

6 MR. WILSON: Yes. I can hear.

7 MR. LEVAR: Do you have any questions for
8 Mr. Moscon?

9 MR. WILSON: I guess just a follow-up
10 question. So is it his position that a private party
11 would never have rights of intervention; it would
12 just be between a local government entity and the
13 utility? Am I understanding that correctly?

14 MR. MOSCON: My interpretation is -- and
15 this is not just what I'm suggesting is a good
16 philosophy or idea -- the Facility Review Board
17 Enabling Act -- and I can grab it and cite the
18 statutes if that makes it easier. It calls out two
19 scenarios for which this Board was created and given
20 legislative authority. And I'm looking at 54-14-301
21 first and that is the one that says, "The Board has
22 jurisdiction to resolve disputes between local
23 governments and public utilities."

24 And so, for that, I would say those are
25 the only two parties. There is another section of

1 the Board -- or excuse me -- of the act that allows
2 impacted landowners to intervene, and it provides you
3 a definition and it refers you to a different statute
4 to say what we mean by "impacted landowner." And
5 when you go back to that statute -- and we'll keep
6 flipping the pages -- it is identified specifically
7 as someone owning the land.

8 And so, for the record, I'm looking at
9 54-14-303 and Sub (2) Sub (a), and that says if an
10 action is filed by a local government seeking
11 modification to a target study area, then an affected
12 landowner, as defined in this other statute, can be a
13 party.

14 So, yes, there are some instances when an
15 affected landowner can be a party, but those
16 instances are governed by statute and it is only in
17 an instance when the local government is seeking to
18 modify a target study area.

19 MR. WILSON: Okay. Thank you.

20 MR. LEVAR: Are those all your questions,
21 Mr. Wilson?

22 MR. WILSON: Yes, sir.

23 MR. LEVAR: I'd like to ask one follow-up
24 question following up to Mr. Clark's question and
25 some of the comments you made. And I guess this

1 question assumes that the intervention right and the
2 Facility Review Board Statute is not exclusionary.
3 And you're taking the position that it is
4 exclusionary. Assuming it's not and we are back to
5 UAPA, it seems to me you are making the argument that
6 "legal interest" is synonymous with "vested right."
7 And as I look at -- I think Mr. Clark already asked
8 this, but as I look at the Sevier Citizens case and
9 it says, "A legal interest involves more than a mere
10 expression of concern and must amount to a
11 sufficiently particularized injury to livelihood,
12 health, and property values," that language doesn't
13 seem to me to be synonymous with "vested right."
14 "Vested right" seems to me to be a higher standard,
15 but tell me if I am -- if you have a different
16 perspective on that.

17 MR. MOSCON: I do because, again, it's the
18 impact to livelihood or property of what? Again, if
19 it was anything other than your actual property that
20 is being taken or that is the subject of the lawsuit,
21 then, literally, all the citizens of an entire
22 subdivision of a community would have intervention
23 rights and would be able to intervene. And, in
24 condemnation proceedings, entire subdivisions would
25 be able to get severance damages and these parties

1 would say, hey, my property value has gone down; I
2 have been impacted. But Utah law has clarified and
3 said there is no way to draw that line.

4 So in the language in Sevier, when they
5 say we are not talking about just your -- you have an
6 opinion, but you have to have livelihood or property
7 at stake, I believe that is not inconsistent with
8 what I'm talking about.

9 You have to -- it has to be, we're putting
10 the power pole in the middle of your plant, your
11 farm, your business, your property. That's how you
12 have the livelihood or the property interest at
13 stake. It does not apply to private parties down the
14 road, across the street, somewhere else that say, you
15 know what? I know you are not taking my property, I
16 know you are putting this here, but I think I'm going
17 to have a harder time marketing. I think I'm going
18 to have a harder time selling. That is not what I
19 believe Sevier stands for. Those are not vested
20 property rights. That is not the damage that is at
21 issue in that case.

22 MR. LEVAR: Okay. Thank you. That's all
23 the follow-up questions I have. Does any other Board
24 member have additional follow-up questions?
25 Mr. Clark?

1 MR. CLARK: No questions.

2 MR. LEVAR: Ms. Holbrook?

3 MS. HOLBROOK: No questions.

4 MR. LEVAR: Mr. White?

5 MR. WHITE: No questions.

6 MR. LEVAR: Mr. Wilson?

7 MR. WILSON: No. Thank you.

8 MR. LEVAR: Okay. Thank you.

9 I think I want to go next to the
10 Promontory Group. You've made a motion to intervene
11 that is contingent on what we decide with respect to
12 the Motion for Reconsideration. You've also weighed
13 in, to some extent, on Black Rock Group's
14 Intervention Motion. So I think I'll go to you next,
15 if you want to comment any further verbally on the
16 Black Rock Intervention Motion.

17

18 STATEMENT

19 BY MR. BUDGE:

20 Thank you, Chair. And thank you, Board.

21 We echo what has been said by Mr. Moscon.

22 We agree with his point that in this case we are
23 dealing with an act that describes both a remedy and
24 a process, and neither the remedy nor the process
25 accommodates the type of arguments and the type of

1 discovery and the type of positions that are being
2 advanced by Black Rock.

3 In the statute, the statute that
4 Mr. Moscon just referenced, it's very clear that
5 Promontory itself is an identified party. It states
6 that an affected landowner, as defined in 54-18-102,
7 may intervene.

8 The reason we've done a conditional
9 intervention is we don't believe we need to be a
10 party if Black Rock is not a party. And that's
11 because we believe that the statute, as Mr. Moscon
12 indicated, is really described and defined and set up
13 to handle a dispute between the county -- in this
14 case it's the land use authority -- and the regulated
15 utility.

16 But if Black Rock is going to be allowed
17 to intervene, then we would want to be allowed to
18 intervene as well because our substantial interest in
19 this could be affected by their arguments.

20 We don't believe the statute is going to
21 allow the kind of relief that Black Rock is wanting
22 to seek. Because, as Mr. Moscon indicated, the
23 statute always speaks in terms of analyzing whether
24 the proposed route is going to lead to a safe,
25 reliable, and efficient way to provide power. We

1 believe that those standards will be clearly met by
2 the Utility. And -- but we are concerned by some of
3 the arguments and some of the requests that have been
4 made by Black Rock, which have gone into areas which
5 are very broad and well outside of the scope
6 contemplated by this act.

7 We also wanted to add that with respect to
8 the issue about vested rights, I think in the case of
9 Sevier County and these other cases, LUDMA cases,
10 where I often run into them, you're dealing with a
11 situation where the regulated authority has power to
12 grant relief. In the case of the DEQ, the DEQ has
13 authority to grant relief that might impact or result
14 in a remedy to the parties seeking intervention in
15 that case.

16 In this case, what Black Rock is seeking
17 is to create a right out of thin air. They do not
18 have a viewshed easement over Promontory's property.
19 They do not have a solar easement over our property.
20 They do not have any other property interests in our
21 property. And we are the ones that have negotiated a
22 right of way with Rocky Mountain Power that is
23 contained completely on our property. It does not
24 touch in any way the Black Rock properties.

25 And so what they are trying to obtain is

1 an interest that they have not obtained at law, and
2 they are trying to create a remedy that is not
3 provided for them by the statute. And given all that
4 backdrop and given the fact that this statute has
5 already identified the narrow circumstances in which
6 it would be appropriate for someone to intervene, I
7 think that it is proper to reconsider the prior order
8 and to reject the effort by Black Rock to be an
9 intervener.

10 I'll just add to that this fact and that
11 is, this is intended to be a very expedited
12 proceeding. And, as we know from the statute, it
13 talks about a 50-day time line and a 60-day and then
14 a 75-day. We're talking about a procedure here which
15 is very expedited. It doesn't simply allow for the
16 kind of multiparty discovery into facts and
17 circumstances dating ten years or even farther back
18 than that that are -- that Black Rock is seeking to
19 introduce into this matter.

20 And, for all those reasons, we would
21 suggest that it would be proper in this circumstance
22 to conclude that while UAPA may, in other statutes
23 and in other acts, grant broad intervention rights,
24 in this case, when we are dealing with this act and
25 having this Board administer this act, it's

1 appropriate to read the provision down in (2)(b) as
2 identifying those that can properly intervene. And
3 we're happy to not be a party to this proceeding if
4 Black Rock is not allowed to be a party. Thank you.

5 MR. LEVAR: Okay. Thank you.

6 Mr. Clark, do you have any questions for
7 Promontory?

8 MR. CLARK: No questions.

9 MR. LEVAR: Ms. Holbrook?

10 MS. HOLBROOK: No questions.

11 MR. LEVAR: Mr. White?

12 MR. WHITE: No questions.

13 MR. LEVAR: Mr. Wilson?

14 MR. WILSON: No questions.

15 MR. LEVAR: And I don't at this point.

16 Thank you.

17 MR. BUDGE: Thank you.

18 MR. LEVAR: So we'll go to Mr. Reutzel.

19 If you want to hit a few high points, we've all
20 obviously had a chance to read your briefing.

21

22 STATEMENT

23 BY MR. REUTZEL:

24 Thank you. I'll try to just address the
25 arguments that were made today and not reiterate my

1 brief.

2 As a preliminary matter, a Motion to
3 Reconsider is really only proper when there has been
4 some new evidence or some new case or some new law
5 that's come out. And here there has not been. So I
6 don't think a Motion to Reconsider is even proper to
7 be considered at this point.

8 And then as another preliminary matter,
9 this is now the second time that we have shown up to
10 a hearing to hear new arguments from Rocky Mountain
11 Power that have not been put in their briefs. So,
12 for example, today they talked about a case, Williams
13 vs. Hyrum Gibbons, and suggest that that case is
14 somehow applicable. And this is in the imminent
15 domain context.

16 At the last hearing they said there's some
17 imminent domain cases that will shed light on this,
18 and they didn't put that in their brief. So we show
19 up here today, they cite this case. And we pulled
20 this case up quickly and what it says is the Supreme
21 Court rejected the argument that the availability of
22 an alternate route is relevant to determining whether
23 condemning authority is using imminent domain for a
24 public use.

25 That has nothing to do with the

1 intervention statute or the legal interest analysis
2 that we are talking about today.

3 Then they pull a snippet out of our
4 petition where we say the issue here is not the
5 necessity of this line. That was a rhetorical device
6 to say there really is no issue that this is not
7 necessary. They have an alternate route. It was not
8 meant to say that is not the issue.

9 And then they conflate the two arguments.
10 Yes, the reason we're allowed to intervene is because
11 it affects our property interests. That is the
12 reason we're allowed to intervene. That's not the
13 issue before this Board. I've said that before and
14 I'll say it again. We are not arguing that this
15 Board has any right to adjudicate our property rights
16 or to give us some sort of remedy. But because this
17 proceeding affects our property rights, we have a
18 right to intervene under UAPA. We have a right to
19 advocate the standard, which is whether or not this
20 Wasatch County segment is necessary, and it's our
21 position it's not.

22 Now, if you look at our discovery -- and I
23 hope you've actually read our discovery, including
24 the definitions in there -- we're not conducting
25 discovery on property values. We're not conducting

1 discovery on any of these issues related to our
2 affected interests. We are conducting discovery on
3 whether or not the Wasatch County segment is
4 necessary. That is what we are conducting discovery
5 on, and it's limited for the most part to the
6 Promontory land. And I hope you will read -- and we
7 talked about discovery motions. I hope you will read
8 our definitions. They are not nearly as broad as
9 what has been represented.

10 I want to move on to the argument that
11 UAPA does not apply. 64G-4-102 says UAPA applies to
12 every agency of the state. UAPA then lists the
13 number of proceedings exempted from UAPA but this is
14 not one of them.

15 While the Utah Facilities -- while the
16 Board's act here provides an automatic intervention
17 right for landowners, it only provides that automatic
18 intervention right in proceedings instigated by the
19 county. This is not a proceeding instigated by the
20 county. That automatic intervention right does not
21 apply despite what Promontory's just said. It's the
22 plain language. So the fact that there may be some
23 automatic intervention right in some other proceeding
24 does not negate UAPA's applicability in this
25 proceeding.

1 Now, in fact, the legislature has actually
2 gone to great effort in some proceedings to point out
3 where certain administrative proceedings are not
4 subject to certain UAPA provisions. Again, it has
5 not done that here. UAPA is applicable to all
6 agencies of the state, and there is nothing that says
7 it doesn't apply here.

8 If UAPA applies, then we look at whether
9 or not we have a legal interest, and there has been a
10 lot of discussion about a vested legal right. I've
11 not seen vested legal right in any of the statutes or
12 any of the cases. That is a standard that does not
13 exist.

14 If the Board allows Promontory and Rocky
15 Mountain Power to move this transmission line, it
16 will undoubtedly affect my client's property. We've
17 submitted letters from bankers saying that. We've
18 submitted all sorts of evidence demonstrating that.
19 I don't think it's really even disputed. The Board
20 does not have to have the right to adjudicate the
21 value of that or to even discuss the value of those
22 property values for us to have a legal interest in
23 the outcome of these proceedings. And there's not
24 been a single legal argument that -- or legal
25 authority that has been set forth to support that

1 proposition.

2 I want to talk about the Millard County
3 case. Rocky Mountain Power said, well, the Millard
4 County case is different because in Millard County,
5 if -- you know, if they are not allowed to
6 participate, it will affect the taxes that they are
7 allowed to recover, and that is partially true. But
8 the reality of what happened there is the taxes that
9 were going to be assessed or settled as a result of
10 that proceedings were state taxes, not taxes that
11 were going to Millard County. Now, Millard County is
12 entitled to impose a local tax depending on how much
13 of the state tax is collected.

14 So there was not a direct right into the
15 proceedings. There was not -- the tax commission
16 there was not awarding Millard County any money. It
17 was just an indirect effect that it may have on their
18 ability to collect money; just like it's an indirect
19 effect on my client's property values.

20 And then I want to talk about the Sevier
21 County case. As we've talked about that already, it
22 says if it affects your property that you are -- that
23 you have a legal interest. It doesn't say if it
24 affects the property by constructing an improvement
25 directly on your property. And, in fact, the parties

1 there were people that were all over the community.
2 And the court said, hey, if they would have actually
3 identified a specific harm to one of these people,
4 they would have been allowed to intervene, but they
5 didn't. We have. We've identified the harm to our
6 property.

7 Now, I understand the slippery slope
8 argument. I get it and I understand that this Board
9 would be very concerned about having a whole bunch of
10 people come in here. But you have to understand that
11 the court in the Millard County case said agencies
12 have an obligation to not nullify intervention rights
13 because of administrative burdens, but rather they
14 should create procedures that allow the agencies to
15 have those intervention rights and make it
16 manageable. And that's what we've done here. We
17 have several associations with hundreds of members
18 represented by one firm and making the same arguments
19 with the same interests. We don't have hundreds of
20 people here. We have two attorneys.

21 And then we have Promontory that may or
22 may not intervene. The deadline to intervene has
23 passed. This is the parties that we are dealing
24 with. So factually, that's not a real issue.

25 I also want to address quickly our

1 participation below in Wasatch County. They
2 indicated that we didn't participate as interveners.
3 That's because there are no parties in those
4 proceedings. There is no intervention -- there is no
5 intervention provision there. We were allowed to
6 participate in every hearing that happened, just like
7 we're asking to participate in every hearing that
8 happens here.

9 It's also important to note that the
10 standards are different in Wasatch County, and so the
11 procedures were different. It was talking about a
12 conditional use standard. Here we're talking about
13 the necessity of constructing the Wasatch line.
14 That's what we want to talk about. And I just want
15 to be clear. That is the issue I intend to litigate,
16 and that is the issue that we've conducted discovery
17 on. And I think if you'll read our discovery
18 requests, you'll see that that's really the issue
19 that we're after here.

20 I think that's all I have. I'd be happy
21 to answer any questions.

22 MR. LEVAR: Thank you. I just have one
23 quick question. It's about paragraph 10 of the
24 Sevier Citizens case, and it's a narrow question
25 but -- I'll give you a moment to...

1 MR. REUTZEL: Thank you. I'm there.

2 MR. LEVAR: So near the bottom of that
3 paragraph it says, "A legal interest involves more
4 than a mere expression or concern. Instead, it must
5 amount to a sufficiently particularized injury to
6 livelihood, health, and property values."

7 Would you comment on the use of "and"
8 before the word "property values" as opposed to "or"?

9 MR. REUTZEL: Let me take a moment to look
10 at that.

11 Yeah, I'm not sure that as you pulled that
12 quote out that it means that you have to have all of
13 those, but I do believe that we have all of those
14 here as we've indicated in our brief. We have an
15 injury to our livelihood and being able to market the
16 property. We have an injury to our health in terms
17 of safety related to locating a power line next to
18 residential units, and we have an injury to our
19 property in the form of decreased property values.

20 MR. LEVAR: Okay. Thank you. That's all
21 the questions I have. Mr. Clark?

22 MR. CLARK: No. No questions.

23 MR. LEVAR: Ms. Holbrook?

24 MS. HOLBROOK: No questions.

25 MR. LEVAR: Mr. White?

1 MR. WHITE: I think there was some
2 discussion between the Chair and Mr. Moscon in terms
3 of, you know, potential relevance and the difference
4 between relevance and the standards under the Sevier
5 case and under UAPA generally. I mean, is it your
6 contention that you can -- and, again, we have not
7 gotten to those issues yet because there is pending
8 discovery motions before the Board that we'll get to,
9 I guess, at some point.

10 But is it your contention that you can
11 divorce those two issues? There was relevance and
12 the right to intervention. Are you saying that
13 ultimately you have some colorable, legal interest
14 that UAPA allows intervention under the Sevier case,
15 I guess?

16 MR. REUTZEL: That's what we're saying.
17 Now, we're not saying that because it provides us a
18 right to intervene that those are the issues that
19 need to be litigated. Today we're talking about
20 whether we have a legal interest. At the final
21 hearing, we're going to be talking about whether or
22 not it's a necessity to construct the Wasatch County
23 segment. There are different standards for different
24 procedures.

25 MR. WHITE: That's all I have, Chair.

1 MR. LEVAR: Okay. Mr. Wilson, do you have
2 any questions for Mr. Reutzel?

3 MR. WILSON: I have no questions. Thank
4 you.

5 MR. LEVAR: Okay. Thank you.

6 Mr. Berg, if you are still on the line,
7 you have not filed anything with respect to any
8 motions, but I'll give you the opportunity if you
9 want to make any comment with respect to them since
10 you are a party to this proceeding.

11 MR. BERG: Thank you. This is Mr. Berg.
12 We've not filed any motions on either the
13 intervention or the discovery issues. This --
14 Wasatch County does not have any objection to Black
15 Rock Ridge intervening nor to Promontory intervening
16 at this point.

17 MR. LEVAR: Okay. Thank you, Mr. Berg.

18 If any Board member has questions for
19 Mr. Berg, let me know. I assume there's none.

20 I think we'll move to Board discussion
21 then.

22 (BOARD DISCUSSION)

23 MR. LEVAR: We have a motion to reconsider
24 our previous action granting intervention to the
25 Black Rock Intervention Group. I'll just clarify for

1 the Board that under the Administrative Procedures
2 Act, we can -- we can either act on that motion --
3 grant the motion or deny the motion. But also under
4 the Utah Administrative Procedures Act, if this Board
5 does not act on that motion and takes no action with
6 respect to it, after 20 days it's denied by statute.
7 And I think 20 days expires in the middle of next
8 week. So no action results in a denial of the
9 motion, but we also could take affirmative action
10 today with respect to the motion.

11 With that background, I'll open it up to
12 Board discussion.

13 Don't all speak at once.

14 MR. WHITE: This is -- for the record,
15 this is Jordan White. You know, again, as I
16 mentioned earlier, the -- I'm struggling a bit here
17 because it's a -- on the one hand, in terms of a
18 policy consideration, I will reiterate my concerns I
19 voiced on the initial petition arguments a few weeks
20 ago, which is I recognize that the petition deadline
21 is over, and I respect Mr. Reutzel's contentions
22 that, you know -- that these are, you know, tailored
23 specifically to get to the issues he believes are
24 pertinent to this Board, et cetera. But, again, I --
25 knowing the time lines that we have, what we've been

1 tasked to do, I am a little bit concerned about
2 opening this up.

3 But, again, under the Sevier case, it
4 seems like a pretty low bar. I mean, I read that and
5 I thought, hum, well, you know, if you are an
6 environmental group, would you have potential
7 standing to intervene, for example, if you could
8 argue that, hey, this upgraded line might potentially
9 flow or facilitate additional fossil fuel electrons?

10 And, again, you addressed the slippery
11 slope argument. But, you know, from a policy
12 standpoint and from this Board's precedent going
13 forward, that does give me concern of when that would
14 end. Is it a contiguous property owner that could
15 claim a potential, you know, infliction to their
16 property value? Is it half a mile away? Et cetera.

17 With that being said, again, I was -- from
18 the UAPA and the interpretation of the Utah Court of
19 Appeals on that case, that seemed to set a pretty low
20 bar.

21 And so, again, I'm trying to grapple with
22 those. I'm not sure if I would change my decision.
23 But, again, that's based upon more of what I believe
24 this Board is mandated to do, you know, the
25 administration of what I see as a pretty narrow focus

1 in a short time line. But that's just -- I guess I'm
2 just thinking out loud.

3 MR. CLARK: For those on the phone, this
4 is David Clark. To be succinct, having read the
5 papers and reviewed the act and in particular
6 considered the prior order of the Board in the 2010
7 case as it relates to what the act asks this Board to
8 do, the narrow question that we would address here,
9 the expedited time frames, it seems unworkable to me
10 to apply the kind of test that is in the Sevier case
11 as broadly as the associations interpret it.

12 So my inclination is to reconsider my own
13 vote and to deny the petition for intervention.

14 MR. LEVAR: This is Thad LeVar. As I look
15 at the issues in front of us on intervention, I think
16 there is a different standard that applies to that as
17 opposed to potential discovery issues or relevance
18 issues in the hearing. And just to be straight-
19 forward, as I look at the language in the Sevier
20 Citizens case, I don't think it does any parties to
21 this proceeding any good if any potential appeal of
22 an ultimate decision by this Board hinges on an
23 intervention motion under the standard that the Court
24 of Appeals has established.

25 I think in the event that the intervention

1 previously granted is not disturbed by this Board, we
2 would then be forced to make a decision on what the
3 scope of this proceeding is for the purposes of the
4 discovery motions. And whether the scope of this
5 proceeding extends to considering any alternate route
6 other than the proposed route would then be a ripe
7 question that we would then have to jump into.

8 But as I look at the specific standard, it
9 seems to me that the UAPA standard is met. It's my
10 personal opinion that the Facility Review Board
11 language is not exclusionary. And with respect to
12 the slippery slope argument, to me, that's what the
13 second part of the UAPA test is in terms of orderly
14 conduct of the proceedings, and that would go to how
15 we handle both discovery issues and any objections at
16 the hearing.

17 So that's where I'm still leaning right
18 now. And I guess we'll entertain continued
19 discussion or any motion from any board member.

20 MS. HOLBROOK: This is Beth Holbrook. And
21 I come at this from a slightly different perspective.
22 Having sat on a planning commission for seven years,
23 I think one of the challenges that I have found is
24 that inevitably an argument comes forward that
25 addresses specifically property values. And that's

1 where I always find it to be a challenge because, as
2 an individual on a commission or any of these other
3 entities, the scope is very clear that property
4 values cannot be a part of the discussion in relation
5 to land use issues, as well as any zoning or anything
6 that pertains to neighbors or a land use issue that
7 the city or entity has established overall.

8 And I am struggling with the challenge to
9 have this be an intervention that is going to be of
10 value without having any discussion about property
11 values. I don't think that it's pertinent here
12 because there is an established need for this
13 utility. So that's where I am struggling right now.

14 MR. WHITE: Chairman LeVar, would you mind
15 reviewing the potential options before the Board to
16 give us time and how we may or may not act on this
17 Petition for Reconsideration?

18 MR. LEVAR: Well, that's just my own
19 personal reading of the Administrative Procedures
20 Act, but my view of our options with respect to a
21 Motion to Reconsider are that we could act on that
22 motion and either deny the motion, which would leave
23 Black Rock Intervention Group's intervention intact;
24 we could grant the motion, which would open up
25 multiple options but considering the time line, you

1 know, the most likely result of granting that motion
2 would be to grant the motion, either accompanied by a
3 denial of the intervention or decide to conduct
4 further proceedings on it, but with our required
5 schedule, that could be difficult. And then if the
6 Board takes no action with respect to the motion, my
7 reading of the Administrative Procedures Act is that
8 it's denied by a matter of law after 20 days from
9 when it's filed. And I count that 20 days to end
10 around the middle of next week. And since we don't
11 have any Board meetings noticed up between now and
12 then, failure to act would be a denial of the motion,
13 which would mean Black Rock's intervention continues.

14 MR. WHITE: And just so I understand, when
15 you were -- previously when you were laying out kind
16 of the path for today, at least in terms of the
17 pending motions, if the Board's previous
18 determination stands, and the Board were next to turn
19 to the issues of the pending discovery issues, was I
20 hearing you correctly that at that time it would be
21 your position that the Board would need to address, I
22 guess, essentially the scope of the Board's, I
23 guess -- or the purview of their -- what they would
24 actually be determining under the act?

25 I mean, I know we got into this a little

1 bit earlier with Mr. Moscon with respect to, you
2 know, do we have, as the Board, the discretion under
3 the act to make a call of, you know, this alignment
4 is preferred over that alignment? Is that what you
5 are thinking if the decision stands or if it -- if
6 the Board were not to act, that that would be the
7 next, I guess, decision point for the Board?

8 MR. LEVAR: Tell me if I'm understanding
9 your question right, Mr. White. I mean, I think to
10 summarize my view of that issue, I think that if --
11 whatever action or inaction by this Board results in
12 Black Rock's continued intervention, then we have to
13 move on to both Promontory's motion to intervene,
14 which is unopposed, and then the discovery issues.
15 And, to me, my read of the Administrative Procedures
16 Act in the Sevier Citizens case and the Millard
17 County case are that while I don't see relevance as
18 necessarily controlling to intervention, relevance
19 and proportionality are the key factors with respect
20 to the discovery disputes that we have in front of us
21 today. And, to me, I don't know how we could move
22 forward on the discovery disputes without
23 affirmatively making the conclusion of law whether we
24 have the jurisdiction to consider any alternate
25 routes besides the one that's in front of us. I

1 think we would have to decide that before we decide
2 the discovery dispute. That's my personal opinion.

3 MR. WHITE: That is helpful. I appreciate
4 it.

5 MR. LEVAR: Further discussion or any
6 motion from any Board member?

7 (MOTION)

8 MR. CLARK: I'm going to move that we
9 reconsider our order granting intervention to the
10 association.

11 MR. LEVAR: For clarification, is your
12 motion that we reconsider and deny intervention or
13 that we reconsider and do something other than deny
14 intervention?

15 MR. CLARK: Thank you. That we reconsider
16 and deny intervention.

17 MR. LEVAR: Okay. Discussion on the
18 motion or a second?

19 MS. HOLBROOK: Mr. Chair, I'd like to have
20 some discussion about the motion. This is Beth
21 Holbrook.

22 (DISCUSSION ON THE MOTION)

23 I want to make sure that I'm understanding
24 the definition in terms of what you are relating,
25 Mr. LeVar, about how we would have to make a decision

1 on -- based upon the -- not only the location, but
2 also whether to grant discovery. How -- how would
3 that -- would that be a decision that would
4 ultimately be made if we allow intervention to
5 continue with Black Rock?

6 MR. LEVAR: Well, you're asking my
7 personal opinion on this. But obviously if
8 Mr. Clark's motion passes, then the discovery issues
9 become moot. If his motion does not pass, then we
10 have a discovery dispute. And, to me at least, the
11 key issues on discovery are relevance to the
12 proceeding and the proportionality to the proceeding,
13 but probably more important is relevance. And to
14 decide whether any of their requested discovery is
15 relevant to this proceeding, I think we would have to
16 decide whether we have jurisdiction to consider any
17 alternate route besides the one that was rejected by
18 Wasatch County.

19 And obviously we have language from the
20 Board in the Tooele County case going to that issue,
21 but I think, personally, deciding that jurisdictional
22 issue is prerequisite to deciding whether -- whether
23 the discovery is relevant.

24 And so I think that is somewhat germane to
25 the motion that we're talking about, but it's not

1 entirely germane because that would be the next step
2 if Mr. Clark's motion fails.

3 (MOTION SECONDED)

4 MR. WILSON: So there was not -- this is
5 David Wilson. There was not a second but I will
6 second that motion if there wasn't one.

7 MR. LEVAR: Thank you. We have a motion
8 and a second. Any further discussion?

9 MR. WHITE: Can I just say one thing?
10 My -- you know, my vote would not change from where I
11 originally stood for the same reasons I've iterated
12 today.

13 I guess one thing I wanted to explore
14 before we take the final vote is, again, that option
15 of a no vote and let me tell you why. In other
16 words, no action. I still stand by the same
17 rationale for why I'm not sure if intervention is
18 right for this Black Rock Group. I guess my concern
19 is the one you previewed earlier, which is I'm not
20 sure what -- under the Sevier Power case, although
21 it's a very attenuated interest that they've
22 outlined, there is still some type of colorable
23 argument for parties to make. And I guess I just
24 have a little bit of concern about what that does for
25 the purposes of going forward if a party like Black

1 Rock, for example, appeals. You know, maybe that
2 shouldn't be a consideration, but I guess I'm just
3 thinking out loud. That's all I have.

4 MR. LEVAR: Okay. We have a motion and a
5 second. Any further decision before we put the
6 motion to a vote?

7 Does any Board member want a moment to
8 decide if you want further discussion before we put
9 the motion to a vote?

10 MR. WHITE: Are you asking --

11 MR. LEVAR: Okay. Well, I'm asking if any
12 Board member wants more time to think about whether
13 they want more discussion before I put it to a vote.
14 It's doubling the question, but it seems to me we are
15 about ready to put it to a vote unless any one of the
16 five of us says otherwise.

17 Okay. In the last hearing we voted
18 alphabetically. That seems to make sense to me. So
19 the motion is to reconsider our action and deny
20 intervention to the Black Rock Intervention Group.

21 (VOTE ON THE MOTION)

22 Mr. Clark?

23 MR. CLARK: I vote yes.

24 MR. LEVAR: Ms. Holbrook?

25 MS. HOLBROOK: I vote yes.

1 MR. LEVAR: I vote no.

2 Mr. White?

3 MR. WHITE: I vote yes.

4 MR. LEVAR: Mr. Wilson?

5 MR. WILSON: I vote yes.

6 (MOTION PASSES)

7 MR. LEVAR: Okay. The motion passes with
8 a four to one vote.

9 It appears we may not have any further
10 business for the Board today. Does anyone have a
11 position to the contrary?

12 Promontory indicated that you will be
13 withdrawing your intervention motion?

14 MR. BUDGE: It's withdrawn. Thank you.

15 MR. LEVAR: And the discovery issues are
16 moot at this point. This decision will be
17 memorialized in a written decision that will issue at
18 some point. I don't think we can commit to a time
19 frame for that.

20 This hearing is adjourned.

21 (THE MEETING WAS ADJOURNED AT 10:14 A.M.)

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REPORTER'S HEARING CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF SUMMIT)

I, Jennifer E. Garner, Registered Professional Reporter and Notary Public in and for the State of Utah, do hereby certify:

That said proceeding was taken down by me in stenotype on April 14, 2016, at the place therein named, and was thereafter transcribed, and that a true and correct transcription of said testimony is set forth in the preceding pages;

I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.

WITNESS MY HAND AND OFFICIAL SEAL this 15th day of April, 2016.



Jennifer E. Garner, RPR
Notary Public
Residing in Summit County

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