

SCOTT H SWEAT, #6143
Wasatch County Attorney
TYLER J. BERG, #12031
Deputy Wasatch County Attorney
805 West 100 South
Heber City, UT 84032
Telephone: (435)654-2909
Fax: (435)654-2947

BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

In the Matter of Rocky Mountain Power's
Petition for Review to the Utah Utility Facility
Review Board

DOCKET NO. 16-035-09
MEMORANDUM IN OPPOSITION
TO THE PETITION FOR REVIEW

COMES NOW, Wasatch County, by and through Deputy Wasatch County Attorney Tyler J. Berg and submits their Memorandum in Opposition to the Petition for Review.

FACTS

1. On September 27, 1916 Rock Mountain Power (RMP) entered into an easement with the property owners of what is now the Promontory property. The easement grants to RMP "the right to erect, operate and maintain electric power transmission and telephone circuits and appurtenances, attached to a single line of towers". (See Exhibit A)
2. In 2010 RMP and Promontory Investments LLC (Promontory) negotiated moving the easement out of the 1916 easement with 5 possible alternatives. Promontory chose the 5th alternative. (See Exhibit B)

3. On December 30, 2010 RMP and Promontory entered into a Construction Agreement for Relocation Work. Section 1.4(b) of the agreement allows RMP to terminate the agreement if RMP cannot obtain necessary permits to allow for the lines relocation. (See Exhibit C)
4. On December 14, 2015 RMP submitted an appeal to the Summit County Council. In a letter accompanying the appeal RMP admits that a 1916 easement remains valid and provides sufficient rights for the 138kV transmission line upgrade. (See Exhibit D)

ARGUMENT

- I. ROCKY MOUNTAIN POWER’S PETITION SHOULD BE DENIED BECAUSE THE UTILITY FACILITY REVIEW BOARD DOES NOT HAVE JURISDICTION UNDER U.C.A. § 54-14-303 BECAUSE THE WASATCH COUNTY SEGMENT OF THE UPGRADED LINE IS NOT NEEDED.

“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. Bagely 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”). The Utility Facility Review Board (the Board) can only order a local government to issue a permit it has previously denied if the Board has been granted jurisdiction by the legislature over the dispute. In the current dispute before the Board, Rocky Mountain Power (RMP) claims the Board has jurisdiction under U.C.A. § 54-14-303(1)(d), which states, “A local government or public utility

my seek review by the board, if: a local government has prohibited construction of a facility which is needed to provide safe, reliable, adequate, and efficient service to the customers of the public utility;” (emphasis added) The Wasatch segment of the proposed upgraded Evanston-Silvercreek 138kV transmission line project (the Project) is not needed for RMP to provide safe, reliable, adequate, and efficient service to its customer therefore the Board does not have jurisdiction over the Petition.

A. THE BOARD’S JURISDICTION OVER THE CURRENT PETITION IS DETERMINED BY THE PLAIN LANGUAGE OF THE STATUTE.

“The plain language controls the interpretation of a statute, and only if there is ambiguity do we look beyond the plain language to legislative history or policy considerations.” Vigos v. Mountainland Builders, Inc., 2000 UT 2, ¶ 13, 993 P.2d 207 (Sup.Ct.) U.C.A. § 54-14-103 provides definitions related to the Utility Facility Review Board Act. The word ‘needed’ is not specifically defined by the legislature in § 54-14-103, therefore a plain language definition controls its interpretation. The word needed, defined as an adjective, is: “impossible to do without.” *Merriam-Webster.com*. (Merriam-Webster, n.d. Web. 19 Apr. 2016). For the Board to have jurisdiction over the Petition it must be impossible for RMP to upgrade the Project and provide safe, reliable, adequate, and efficient service to its customer without the Wasatch segment. Based on the analysis below, it is possible for RMP to upgrade the Project without the Wasatch segment so the Board does not have jurisdiction over this Petition.

B. THE WASATCH SEGMENT IS NOT NEEDED BECAUSE ROCKY MOUNTAIN POWER’S CONSTRUCTION AGREEMENT WITH PROMONTORY ALLOWS FOR THE LINE TO BE BUILT IN THE EXISTING EASEMENT WHEN NECESSARY PERMITS CANNOT BE OBTAINED TO MOVE IT.

On December 30, 2010 RMP and Promontory Development LLC, entered into a Construction Agreement for Relocation Work. (Exhibit CBA-4 to Direct Testimony of Chad B. Ambrose). Section 1.4(b) of the agreement states,

Rocky Mountain Power has entered into this Agreement without having completed the necessary environmental work and analysis to determine whether Rocky Mountain Power can obtain permits necessary to build the Relocated Facilities within the Alternative Alignment. Such environmental and permitting work will be conducted by Rocky Mountain Power using commercially reasonable efforts and at its expense prior to construction. In the event environmental issues or restrictions are discovered that preclude the construction of the Relocated Facilities within the Alternative Alignment, materially increase the Project costs, or cause a material delay to the Project, Rocky Mountain Power may at any time prior to commencement of construction terminate this Agreement by giving notice to Promontory and refunding the Initial Payment and Final Payment (to the extent such payments may have been already made by Promontory) and returning the unrecorded transmission line easement to Promontory or, if the easement has been recorded, recording the release of the transmission line easement provided by Promontory as required in Section 2.1 hereinbelow. (Emphasis added) (See Exhibit C)

For the Wasatch segment to be needed, it would have to be impossible for RMP to complete the Project without the Wasatch segment. The Construction Agreement between RMP and Promontory allows RMP to terminate the agreement if RMP cannot obtain the necessary permits to build the relocated facilities within the alternate alignment. The Wasatch County Board of Adjustment denied RMP's conditional use permit based on Wasatch County Code requirements after a careful analysis of what could and could not be mitigated under the code. (See Transcript of Board of Adjustments Exhibit R to Direct Testimony of Donald T. Watts, (Line 5, Pg. 58 – Line 4 Pg. 75 attached as Exhibit E)) The denial of the conditional use permit allows RMP to terminate the Construction Agreement which requires moving the alignment of the Project into Wasatch County. Because RMP can terminate the Construction Agreement with Promontory which requires RMP to relocate the Project it is possible for RMP to provide safe, reliable, adequate, and efficient service to the customers of the public utility without the Wasatch

segment. Because of this the Wasatch segment is not needed the Board does not have jurisdiction over the petition.

C. THE BOARD DOES NOT HAVE JURISDICTION OVER THE PETITION BECAUSE THE WASATCH COUNTY SEGMENT IS NOT NEEDED TO COMPLETE THE PROJECT BUT IS THE PREFERRED CHOICE OF A DEVELOPER.

Promontory's preference as to a route does not make it impossible for RMP to use a different route if the necessary permits are denied on the preferred route, therefore the Wasatch segment is not needed because it is possible for RMP to use the existing route. Because it is possible for RMP to complete the Project without the Wasatch segment the Board does not have jurisdiction over the Petition.

Five alternatives for the Project across Promontory's property were considered between RMP and Promontory with Promontory requesting that the line be placed on the eastern and southern area of its property. RMP evaluated the request and the alternate line, including the Wasatch segment, was integrated into the Project. (Direct Testimony of Chad B. Ambrose at pg. 6 line 21 – pg. 7 line 9). It is important to look at Exhibit CBA-3 to Direct Testimony of Chad B. Ambrose in order to have a better understanding of the five alternatives. There are three potential routes A, B and C with both B and C having two alternative pole types and costs. What is most important is that route A is RMP's preferred route and also the least expensive route. Route A would keep the Project in the existing right of way with the lowest construction cost. The Board does not have jurisdiction over the Petition because the construction agreement can be terminated when Promontory's preferred alternative route failed to get the necessary permits and RMP can complete the Project in their preferred route. (See Exhibit B)

D. THE BOARD DOES NOT HAVE JURISDICTION OVER THE PETITION BECAUSE THE WASATCH SEGMENT IS NOT NEEDED AS ROCKY MOUNTAIN POWER HAS ACKNOWLEDGED THAT A SINGLE POLE EASEMENT IS SUFFICIENT TO UPGRADE THE EXISTING POWER LINE.

In an a different section of the Project, RMP claims that the single pole easements recorded by RMP in 1916 for the Evanston-Silvercreek transmission line are sufficient to build the upgraded 138kV transmission line.

“Nevertheless, the Company does not need fixed-width easements nor any other kind of consent from these property owners because the 1916 easements remain valid and provide sufficient rights for the Company to rebuild this line. When the previous landowners granted these easements nearly a century ago they consented, expressly, for the alignment to be used as a ‘power transmission line’. The ongoing validity of these easements was confirmed during the application process, and is not in question.” (See Exhibit D pg. 4-5)

The current 1916 easement on the Promontory property is a similar easement (See Exhibit A) and as discussed above is RMP’s preferred route for the Project. The fact that RMP acknowledges that it can build the upgraded line in a single pole easement is further evidence that the Wasatch segment of the Project is not needed to provide safe, reliable, adequate, and efficient service to its customer therefore the Board does not have jurisdiction over the Petition.

II. IN THE ALTERNATIVE, IF THE BOARD FINDS THEY DO HAVE JURISDICTION THEN THE WASATCH SEGMENT OF THE PROJECT GOES AGAINST THE SUMMIT WASATCH ELECTRICAL PLAN LOCAL PLANNING HANDBOOK SEPTEMBER 2010, PUBLISHED BY RMP, AND THE PROJECT SHOULD BE KEPT IN THE 1916 EASEMENT.

As discussed above RMP has a 1916 easement across Promontory property that will already allow for the construction of the Project and allow for safe, reliable, adequate, and efficient service to its customers. Moving the Project into the Wasatch segment is not only unnecessary but it also goes against RMP’s published objectives fully outlined in “Powering Our

Future Summit Wasatch Electrical Plan Local Planning Handbook.” (Exhibit CBA-1 to Direct Testimony of Chad B. Ambrose).

On page 14 of “Powering Our Future Summit Wasatch Electrical Plan Local Planning Handbook” states,

Residential areas are the least desirable locations for new transmission lines due to impacts to the character of the neighborhood and important community viewsheds. Avoiding these areas will reduce community concern about perceived reduction of property values and health effects.

By moving the Project into the Wasatch segment RMP is ignoring its own handbook for the Summit and Wasatch County area base on the preference of a developer. The current 1916 easement on Promontory property is not next to a residential area but is an undeveloped area and an area that has had a transmission line on it for about 100 years.

On page 13 of “Powering Our Future Summit Wasatch Electrical Plan Local Planning Handbook” states,

Whenever possible, it is preferable to upgrade existing facilities rather than build new facilities. Voltage upgrades and/or addition of a second circuit will minimize land disturbance by reducing the total number of new corridors and also potentially reduce land acquisition and rights-of-way costs. Maximizing use of existing facilities may also produce fewer conflicts with nearby buildings, land uses and environmental issues. A community already accustomed to existing facilities may prefer an upgrade over building a new transmission line in another corridor.

Again, by moving the Project into the Wasatch segment RMP is ignoring its own handbook for the Summit and Wasatch County area base on the preference of a developer. RMP stated in 2010 that whenever possible facilities should be upgraded rather than building new facilities. In this case as discussed fully above it is very possible for RMP to upgrade the Project

in the 1916 easement on Promontory property rather than move the Project into the Wasatch segment.

From the beginning of the application process RMP has claimed that the Wasatch County ridgeline ordinance does not apply to power poles and that the Wasatch segment should not consider the power poles as a problem if they break a ridgeline. (See RMP Memorandum in Support of Petition for Review pg. 12 fn. 2) This claim also goes against “Powering Our Future Summit Wasatch Electrical Plan Local Planning Handbook” which states on page 12,

Viewsheds are an essential element of community character and scenery. It is important to consider impacts to the neighborhood as well as the view from surrounding areas. For example, ridge lines and undeveloped benches throughout Summit and Wasatch Counties should be avoided. It is also preferable to use topography to make transmission lines less visible and blend in with the surroundings.

Keeping the Project in the current 1916 easement is the best way for RMP to comply with its own “Powering Our Future Summit Wasatch Electrical Plan Local Planning Handbook.”

CONCLUSION

It is possible for RMP to complete the Project and provide safe, reliable, adequate, and efficient service to its customer without the Wasatch segment. Because the Wasatch segment is not needed as defined by the plain language of U.C.A. § 54-14-303(1)(d) the Board does not have jurisdiction to order Wasatch County to issue a conditional use permit that was properly denied under Wasatch County Code.

DATED this 22nd day of April, 2016.

/s/ Tyler J. Berg
TYLER J BERG
Deputy Wasatch County Attorney

CERTIFICATE OF SERVICE

I CERTIFY that on April 22, 2016, a true and correct copy of the foregoing was served upon the following as indicated below:

By Electronic-Mail:

Beth Holbrook (bholbrookinc@gmail.com)
Utah League of Cities and Towns

Data Request Response Center (datarequest@pacificorp.com)
PacifiCorp

Robert C. Lively (bob.lively@pacificorp.com)
Yvonne Hogle (yvonne.hogle@pacificorp.com)
Daniel Solander (daniel.solander@pacificorp.com)
Rocky Mountain Power

D. Matthew Moscon (matt.moscon@stoel.com)
Richard R. Hall (richard.hall@stoel.com)
Stoel Rives LLP

Patricia Schmid (pschmid@utah.gov)
Justin Jetter (jjetter@utah.gov)
Rex Olsen (rolsen@utah.gov)
Robert Moore (rmoore@utah.gov)
Assistant Utah Attorneys General

Jeremy C. Reutzel (jreutzel@btjd.com)
Bennett Tueller Johnson & Deere

Mark O. Morris (mmorris@swlaw.com)
Snell & Wilmer L.L.P.

By USPS:
Division of Public Utilities
160 East 300 South, 4th Floor
Salt Lake City, Utah 84111

Office of Consumer Services
160 East 300 South, 2nd Floor
Salt Lake City, Utah 84111

/s/ JoEll Rowley