D. Matthew Moscon (#6947)
Richard R. Hall (#9856)
STOEL RIVES LLP
201 South Main Street, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 328-3131

R. Jeff Richards (#7294)
Heidi Gordon (#11655)
ROCKY POWER MOUNTAIN
1407 W. North Temple, Suite 320
Salt Lake City, Utah 84116
Telephone: (801) 220-4734

Attorneys for Petitioner
Rocky Mountain Power

BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER, Petitioner, vs. WASATCH COUNTY, Respondent.	**REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR REVIEW** **Docket No. 16-035-09**

Petitioner, Rocky Mountain Power (the "Company") hereby submits its reply to the Memorandum in Opposition to Petition for Review (the "Opposition Memo") filed by Respondent, Wasatch County (the "County") on April 22, 2016.

INTRODUCTION

This is a very simple case. Wasatch County has denied Rocky Mountain Power a permit to construct a facility that both parties acknowledge is needed to provide safe, reliable, adequate and efficient service to Rocky Mountain Power's customers. Since the only issue to be decided

by the Utility Facility Review Board (the "Board")—whether the facility is needed—is not in dispute, the Board's mandate is clear: it must direct the County to issue a conditional use permit to Rocky Mountain Power for the Wasatch Segment, subject to the County's right to impose reasonable conditions that do not impair the delivery of safe, reliable, adequate and efficient power, and provided that if those conditions increase the cost to construct the facilities over the Company's standard costs, the County is obligated to pay the excess costs.

SUMMARY

On January 21, 2016, Wasatch County denied the Company's conditional use permit (the "Permit") for the Wasatch Segment, the small segment of the Railroad-Silver Creek 138 kV transmission line upgrade project (the "Project") proposed to be located within Wasatch County. The need for the Project is undisputed. The County denied the Permit for the Wasatch Segment largely on the basis of alleged impacts to property values and viewshed. (*See* Direct Testimony of Donald T. Watts, pgs. 22-24). However, recognizing that matters relating to aesthetics and property values are outside of the Board's scope of review, the County now argues that the Board's jurisdiction only arises in the extremely rare instances where it is "impossible" for the Company to site its facility in more than one location. The County would now have the Board believe that "[f]or 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 customers without the Wasatch [S]egment." *See* Opposition Memo, pg. 3. The County's extraordinarily narrow view of the Board's jurisdiction lacks any basis in law or in practice.

The Company has presented substantial, unrefuted evidence, consisting of data and testimony, demonstrating the need for the Project, including the Wasatch Segment, to provide safe, reliable, adequate and efficient service to the Company's customers. The County has failed

to present any evidence or persuasive argument to the contrary. The Board, therefore, should issue a ruling allowing the Company to locate the transmission line within the Company's proposed transmission corridor within the Wasatch Segment.

ARGUMENT

A. The Board's Authority in this Case is to Determine the Need for the "Facility."

In actions that arise from a local government prohibiting construction of a facility, the scope of the Board's authority, as established by the Utah Facility Review Board Act (the "Act") and stated by the Board in a previous order, is to determine if "the facility is needed to provide safe, reliable, adequate and efficient service to utility customers, and if so, that it should be constructed." See *RMP v. Tooele County*, 2010 Utah PUC LEXIS 160, *14 (the "Tooele Order"). The Act defines "Facility" as the physical infrastructure, not the *location* of the facility. *See* Utah Code Ann. § 54-14-103(5) ("'Facility' means a transmission line, a substation, a gas pipeline, a tap, a measuring device, or a treatment device.").

Accordingly, the Board's duty in this case is to determine whether the facilities required by the Company are needed to provide safe, reliable, adequate and efficient service to its customers. Once the Board has made a determination as to the need for the facility and orders the local government to issue any required permits, the local government may impose conditions that do not impair the delivery of safe, reliable, adequate and efficient power. *Id*. at § 305(5). If those conditions increase the project costs, the governmental entity is obligated to pay the excess costs. *Id. at* § 203(1).

In the current matter before the Board, the need for the Project is not in question. Rather, the only issue raised by the County relates to the proposed *location* for the Project facilities. Therefore, the only action to be taken by the Board is to issue an order directing the County to

issue the Permit. *Id*. at § 306(2). To the extent the County opposes the proposed alignment within the Wasatch Segment, it may impose reasonable conditions on the Project under the Permit, so long as such conditions do not impact the safety, reliability, adequacy or efficiency of the Project, and the County agrees to pay any excess costs. *Id. at* § 203(1).

In short, the only question before the Board is the issue of the need for the Project, which has not been disputed by the County.

B. The Board has Jurisdiction over the Company's Petition.

As noted above, Wasatch County has not questioned, and does not question, the need for the Project or the additional reliability and capacity it will provide to Wasatch County, Summit County, and surrounding communities. Rather, the County opposed the Project based on the alignment selected for the Wasatch Segment, and the alleged impacts on property values and viewshed. This Board, however, has made clear that it "cannot consider issues such as property values, viewshed . . . as it makes its decision" regarding the need for a utility facility. *See* Tooele Order at *14. Rather, the scope of the Board's authority, as discussed above, "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." *Id*.

Faced with the Board's clear statutory mandate, the County now argues that the Board has no jurisdiction by asserting that "[f]or the Board to have jurisdiction over the Petition it must be impossible[1] for RMP to upgrade the Project and provide safe, reliable, adequate and efficient

[1] The core of the County's argument is based on the simplistic view that the Board's jurisdiction hangs on the "plain language definition" of the word "needed," as defined in Merriam-Webster's dictionary. The County asserts that "[t]he word needed, defined as an adjective is: 'impossible to do without.'" *See* Opposition Memo, pg. 3. Based on this "definition," the County asserts that unless it is "impossible" for the Company to locate the Project in another alignment, the Project is not "needed" and the Board has no jurisdiction. Since the County's argument is wholly reliant on the equating the word "needed" with "impossible to do without," the Company feels compelled to point out that the Merriam-Webster dictionary (including *Merriam-Webster.com*) does not define "needed" as "impossible to do without." Rather, Merriam-Webster thesaurus lists "impossible to do without" as a synonym of

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service to its customers without the Wasatch Segment." *See* Opposition Memo, pg. 3. The County would have the Board believe that the Board's jurisdiction is limited exclusively to those virtually nonexistent instances where a utility facility can only be situated in one particular location and, in the County's words, it is "impossible" to locate the facility in any other location. The County's argument is without basis in law, and defies logic and the realities of siting a utility facility.

The Act makes clear that the Company is to plan its utility facilities according to "the public utility's normal practices," taking into account the Company's obligation to provide safe, reliable adequate and efficient service to its customers. *See* Utah Code Ann. § 54-14-103(9)(a). Not surprisingly, as part of the Company's normal practices, it evaluates numerous alternative alignments and locations for proposed transmission lines. Nor is it surprising that, as part of the siting process, the Company typically identifies more than one feasible location for a project. Next, the Company selects, from the list of feasible alternatives identified in the siting process, a preferred alignment that allows the Company to meet its statutory obligation to provide safe, reliable, adequate and efficient service to its customers. That process was implemented by the Company in selecting the alignment for the Project, including the Wasatch Segment.

While one would expect the Company to identify several alternative alignments in the process of siting any transmission facility, including the Project, Wasatch County now argues that the existence of any other possible alignments eliminates the "need" for the Project within the Wasatch Segment, and precludes the Company from seeking review by this Board. The

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"needed," not the definition. "Needed." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Apr. 2016. The definition of "need," as it appears in the Merriam-Webster dictionary (the word "needed" is not defined in the Merriam-Webster dictionary) denotes "requisite, desirable or useful," but does not include "impossible to do without." "Need." *Merriam-Webster.com*. Merriam-Webster, n.d. Web. 27 Apr. 2016.

County's position is strained, at best, and would render the Act meaningless, as a local government could avoid Board oversight by simply demonstrating that other locations are potentially available for the utility facilities. Furthermore, the County's interpretation would encourage a utility to not evaluate more than a single potential project location in an attempt to preserve its right to appeal to this Board if a permit is denied. The County's narrow interpretation of the Act (or specifically, one word of the Act) is not supported by the Act's language or the Board's practice,[2] and is directly at odds with the purpose of the Act.

The fatal flaw in the County's position is equating "needed" to "impossible to do without." On this issue, case law from condemnation cases is instructive. Although this is clearly not a condemnation matter, these cases demonstrate that a utility has discretion in siting its facilities, and the utility can meet the "necessity" test even if other possible locations for the facilities exist.

In the condemnation context, property owners have questioned whether the taking of their property is "necessary," as required by the statute. *See* Utah Code Ann. § 78B-6-504(1)(b). Courts have widely recognized the discretion afforded public utilities in siting utility facilities, and made clear that "needed" does not denote "impossible to do without." This point has been directly addressed by the Utah Supreme Court:

> It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work. The necessity is shown to exist when it appears that it is necessary to take the land by condemnation proceedings in order to effectuate the purposes of

[2] Note that in the previous matter before the Board in 2010, *Rocky Mountain Power v. Tooele County*, more than 450 miles of alternative transmission routes were evaluated by the Company and presented as possible alternative alignments for consideration by both Tooele County and the Board. The Board acknowledged and heard testimony regarding the alternative alignments, and its Order discussed many of the alternative routes, ultimately concluding that the Company's proposed route was "needed for the Company to provide safe, reliable, adequate and efficient service to its customers state-wide" even though there were clearly other routes where the line feasibly *could* have been built. *RMP v. Tooele County*, 2010 Utah PUC LEXIS 160, *43.

> the corporation. The respondent [condemnor] has the right to determine when and where its telegraph line shall be built. It may be said to be a general rule that, unless a corporation exercising the power of eminent domain acts in bad faith or is guilty of oppression, its discretion in the selection of land will not be interfered with.

Postal Tel. Cable Co. of Utah v. Oregon S.L.R. Co., 23 Utah 474, 65 P. 735, 739 (1901) (emphasis added; citations omitted).

This rule was expressly upheld by the Court in *Williams v. Hyrum Gibbons & Sons*, 602 P.2d 684, 688 (Utah 1979). In the *Williams* case, the Court explained that "[n]ecessity does not signify impossibility of constructing the improvement for which the power has been granted without taking the land in question; it merely requires the land be reasonably suitable and useful for the improvement." *Id.* at 687. The Court also quoted decisions from other jurisdictions upholding the same principle:

> that the condemnor must show necessity for the property taken did not mean that it must be indispensable to the proposed project. The word 'necessity' as used in the statute connoted that the particular property taken was reasonably requisite and proper for the accomplishment of the purpose for which it was sought under the peculiar circumstances of each case.

Id. at 687-88. Furthermore:

> once the condemnor has presented sufficient evidence to support a finding that a particular taking is "reasonably requisite" for the effectuation of the authorized public purpose for which it is sought, particular questions as to route, location, or amount of property to be taken are to be left to the sound discretion of the condemning authority absent a showing by the clear and convincing evidence that such determinations are the product of fraud, caprice or arbitrariness.

Id.

Other jurisdictions evaluating this question have consistently decided the issue in the same manner as Utah. *See, e.g., Duke Power Co. v. Ribet*, 25 N.C. App. 87, 88-89 (N.C. Ct. App. 1975) ("Where an agency has the power of condemnation, the choice of route is primarily in its discretion and will not be reviewed on the ground that another route may have been more

appropriately chosen, unless it appears that there has been an abuse of discretion."); *Piedmont Cotton Mills v. Georgia R. & E. Co.*, 131 Ga. 129, 133-135 (Ga. 1908) ("A large discretion is vested in a party having the right to condemn, in the selection of the particular property to be condemned; and such selection should not be interfered with or controlled by the courts, unless made in bad faith, or capriciously or wantonly injurious, or in some respect beyond the privilege conferred by statute or its charter.").

While the cases cited above arise from condemnation proceedings, not proceedings before this Board, the underlying question is identical: What does the public utility need in order to construct the required utility facilities? It would be incongruous that the interpretation of "need" in the context of a public utility project would differ depending on whether the underlying land owner opposed a project—as in the case of a condemnation proceeding, or cooperated with the public utility in siting the facilities—as in the case of Promontory and the Wasatch Segment.

Wasatch County does not contest the need for the Project or the additional reliability and capacity it will provide. The County does not, and cannot, deny that the proposed alignment for the Wasatch Segment was selected by the Company in its "normal practice" and in the exercise of its reasonable siting discretion, or that the Project is needed to provide safe, reliable, adequate and efficient service to the Company's customers in Wasatch and Summit Counties. Ultimately, that is the measuring stick to be used by this Board. Wasatch County's objection to the Wasatch Segment is based on the alleged impacts to property values and viewshed, factors the Board cannot consider in rendering its decision. Unable to contest the need for the Project, the County now challenges that Board's underlying jurisdiction. That argument, however, is without basis and should be rejected by the Board.

C The Terms of the Company's Agreement with Promontory and the Validity of the Company's Centerline Easements are Irrelevant to this Proceeding.

The County posits that terms of the Construction Agreement for Relocation Work between the Company and Promontory signal that the Wasatch Segment is not "needed." This argument falls flat for the reasons explained above. Just because the agreement would put Promontory and the Company back at square one – in the historic easement – if the Company is unable to obtain the necessary permits does not prove that the Wasatch Segment is not "needed" by the Company, since the term "needed" in this context does not actually mean "impossible to do without."

Likewise, the County's argument that the Wasatch Segment is the "preferred choice of a developer" is an oversimplification, and is of no relevance to this proceeding. It is true, as the County states, that the Company worked with Promontory to site the Wasatch Segment. As noted in the direct testimony of Chad Ambrose, the Company worked with the property owner to find a mutually-agreeable location for the transmission line, in accordance with the Company's tariff and standard practice, and Promontory agreed to pay the cost differential. (*See* Direct Testimony of Chad B. Ambrose, pgs. 6-7). As noted in the Company's initial memorandum, Promontory had contested the sufficiency of the existing centerline easement to accommodate the upgraded, double-circuit line along the historic easement pathway. (*See* Company's Memo in Support, pg. 16). The prospect of lengthy and expensive litigation to interpret and enforce the Company's easement rights, and the fact that Promontory offered to provide a suitable alternative alignment and pay the incremental costs to relocate the transmission line in harmony with the Company's tariff and standard practices, led the Company to conclude, in its reasonable discretion, that it was in the best interest of the Company's ratepayers to locate the upgraded line along the Wasatch Segment. (*See* Rebuttal Testimony of Chad B. Ambrose, pgs. 6-7). The

Company's use of a cooperative siting process, and the decision it reached based on the best interests of its ratepayers, does not give the County a basis for denying the Permit, and does not render this Board without jurisdiction to resolve this dispute.

Wasatch County also attempts to make something of the fact that the Company's outside counsel asserts in a December 14, 2015, letter to the Summit County Council that the historic single pole transmission easements along the Project alignment within Summit County "remain valid and provide sufficient rights for the Company to rebuild this line." *See* Opposition Memo, pg. 6. Although the Company maintains that those easements are valid, that issue is not before this Board. Furthermore, the question of whether the historic easement on the Promontory land is sufficient is also a red herring. As noted above, the existence of any other available alignments simply has no bearing on the question that *is* before this Board: whether the Project, including the Wasatch Segment, is needed by the Company to provide safe, reliable, adequate and efficient energy to its customers.

The question of whether the line could feasibly be located anywhere else is irrelevant, and any discussion regarding the terms of the construction agreement or the adequacy of the historic Promontory easement would be purely academic and should have no bearing on the Board's determination.

D. The Summit Wasatch Electrical Plan is an Advisory Document that has no Bearing on the Board's Determination of the Need for the Project.

As an alternative to its jurisdictional argument, the County alleges that locating the Project within Wasatch County "goes against RMP's published objectives fully outlined in "Powering Our Future: Summit Wasatch Electrical Plan Local Planning Handbook" (the "Electrical Plan"). (*See* Opposition Memo, pgs. 5-6.) While the Company's siting of the Project, including the location of the Wasatch Segment, is consistent with the guidance in the Electrical

Plan, the Electrical Plan is an advisory document that has no bearing on the Board's determination regarding the need for the Project.

As outlined in the affirmative and rebuttal testimony of Chad Ambrose, the Company was one of several participants in the Summit Wasatch Electrical Plan Task Force. (*See* Ambrose Rebuttal, pg. 2). While the plan is not a legally binding document, it assists local governments, business and the Company in facilitating utility siting within Wasatch and Summit Counties. Much of the Project was planned prior to completion of the Electrical Plan, but the principles and criteria contained in the Electrical Plan are consistent with the Company's planning process for the Project, and the location of the Wasatch Segment is in harmony with the Electrical Plan. (*See* Ambrose Rebuttal, pg. 6). However, the content of the Electrical Plan and the Company's adherence to the plan are not factors for consideration by the Board. As stated in the Tooele Order, "the scope of Board authority is to determine if a local government has prohibited construction of a facility needed to provided safe, reliable, adequate and efficient services to utility customers, and if so, that it should be constructed." *See* Tooele Order at *14.

The County's claims regarding the Company's adherence to the Electrical Plan are inaccurate, and are irrelevant to the current proceeding and the question of the "need" for the Project. Accordingly, while the Company utilizes the Electrical Plan as a tool in siting infrastructure within Wasatch and Summit Counties, including the Project as a whole and the Wasatch Segment in particular, the plan has no bearing on the proceeding before this Board.

E. The Board Should Not Be Persuaded by Public Clamor or Attempts By the County to Remove Needed Facilities for Aesthetic Reasons.

The County's decision to deny the Company's Permit was not based on factual findings supported by substantial evidence, but rather opposition by a vocal minority and the County's preference that the Project be located somewhere else. This is a classic case of "public clamor"

and what is often referred to as "not in my backyard" or "NIMBY" arguments from a vocal group of residents and community leaders.

Although consideration of public comments is important, those comments cannot be the basis of a decision unless they provide actual evidence for the decision made, especially when there exists uncontradicted, credible evidence to the contrary. Utah courts have long recognized that adverse public comment alone is insufficient to provide a legal basis for denial of a conditional use permit. *Ralph L. Wadsworth Construction, Inc. v. West Jordan City*, 999 P.2d 1240, 1243 (Utah App. 2000). "[W]hile there is no impropriety in the solicitation of or reliance on the advice of neighboring landowners, the consent of neighboring landowners may not be made a criterion for the issuance or denial of a conditional use permit." Davis County v. Clearfield City, 756 P.2d 704, 712 (Utah Ct. App. 1988). A local government may not rely on mere emotion, unsubstantiated allegations, or public opposition or expressions of concern for property values, public safety and welfare. Id. A local government must instead rely on facts and base its decision objectively on the applicable criteria for approving conditional use permits, even in the face of public opposition and difficult political decisions. *Id*.

The County asks the Board to sanction its conduct of refusing to permit a project that it recognizes is needed, and recognizes will benefit County residents, solely on grounds that the Project *could* be located elsewhere. Such an argument has no basis in law and is the quintessential reason this Board was created. The Board should order the Permit to be issued as the need for the Project is unquestioned.

CONCLUSION

There is no dispute about the need for the Company to construct the Project, nor does Wasatch County contest the need for the reliability and additional capacity the Project will

provide to the County, Summit County, and surrounding communities. Likewise, the County has not even successfully refuted the need for the Company to site the Project along the Wasatch Segment. In opposition to the Wasatch Segment, the County has simply asserted that the Project should and could be located outside of the County, and claimed the Board therefore lacks jurisdiction to consider this matter. The County, however, has failed to present any evidence whatsoever or any persuasive argument that the Project, including Wasatch Segment, is not needed to provide safe, reliable, adequate and efficient service to the Company's customers.

Since Wasatch County has provided no evidence to refute that the Wasatch Segment is needed to provide safe, reliable adequate and efficient service to the Company's customers in Wasatch and Summit Counties, the Board should issue a ruling finding that the Project is needed to provide safe, reliable adequate and efficient service to the Company's customers and locating the transmission line within the Company's proposed transmission corridor within the Wasatch Segment as specified as Option 1 in Exhibit DTW 14 of Mr. Donald Watt's testimony.

DATED this 2nd day of May, 2016.

STOEL RIVES LLP

/s/ D. Matthew Moscon
D. Matthew Moscon
Richard R. Hall
Attorneys for Petitioner
Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2016, I caused to be sent a true and correct copy of the foregoing **REPLY TO RESPONDENT'S MEMORANDUM IN OPPOSITION TO THE PETITION FOR REVIEW**, to the following:

By Electronic-Mail:

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

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

Heidi Gordon (heidi.gordon@pacificorp.com)
R. Jeff Richards (robert.richards@pacificorp.com)
Rocky Mountain Power

Scott Sweat (ssweat@wasatch.utah.gov)
Tyler Berg (tberg@wasatch.utah.gov)
Wasatch County

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

By U.S. Mail:

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/ D. Matthew Moscon