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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER, Petitioner, vs. WASATCH COUNTY, Respondent.	**ROCKY MOUNTAIN POWER'S MEMORANDUM IN OPPOSITION TO WASATCH COUNTY'S MOTION TO STAY ORDER OF JUNE 3, 2016** **Docket No. 16-035-09**

Petitioner, Rocky Mountain Power (the "Company") hereby submits this Memorandum in Opposition to the Motion to Stay Order of June 3, 2016 brought by Wasatch County (the "County") on June 29, 2016 (the "Motion").

INTRODUCTION

The County asks this Board to stay its June 3, 2016 Order (the "Order") while it prosecutes an appeal before the Utah Court of Appeals. The Motion fails to argue why a stay is warranted, implying that the mere fact it is appealing this Board's decision is grounds enough.

Yet the Utility Facility Review Board Act expressly states that a petition for review of an order by the Board "*does not stay* or suspend the effectiveness of a written decision of the Board. . ." Utah Code Ann. §54-14-307 (emphasis added). Hence, the County has put forward no recognized reason for a stay, and the Company is left to oppose a motion without a supporting argument. The Board's Order was proper, and is fully supported by unrefuted evidence and Utah law. Accordingly, the Board should deny the County's Motion.

ARGUMENT

I. A Stay Would Pose a Substantial Threat to the Public Health, Safety and Welfare.

Among the primary reasons for denying the requested stay is that it would be contrary to public interest. Appellate reviews can take years, even when an appeal lacks merit. Meanwhile, demand on the Company's system continues to increase while the configuration of its current system no longer provides sufficient reliability for the Company's customers. The facts demonstrating the urgent need for the project were presented by the written and live testimony of Kenneth M. Shortt and remain unrefuted on the record. The County presented no evidence to contradict that testimony at the hearing nor with its present Motion. Hence, the Company's unrefuted testimony leaves little question of the substantial risks to public health, safety and welfare if the needed upgrades are not completed at this time. Protecting the public's interest, and in particular the interest of Wasatch, Summit, Box Elder and Salt Lake Counties' residents, requires the Board to compel the County to issue all permits to allow for construction of the transmission project, as it did in its Order.

As described in the accompanying declarations of Benjamin Clegg and Kenneth M. Shortt, specific risks to the Company's customers are significant. As described by Mr. Shortt, without the project, an outage occurring in radial configuration in the Wasatch-Summit County

area would impact between 14,000-27,000 customers. Radial operation has increased nearly 70% per year during the past decade as load growth far outpaces system capacity. The risks posed by these outages range from impaired traffic signals, loss of commercial opportunities, impacts to local ski areas, impacts to farms and ranches, and the like. Finally, Mr. Clegg describes how a delay of just *one* year would likely cost nearly one million dollars in increased construction costs. And, of course, there is no guarantee that the appeal would be resolved within one year, or that once resolved, the construction window would immediately align with resolution of the appeal. In other words, a relatively simple appeal could easily delay construction of this much needed facility for two years or more. This added delay creates an unacceptable risk to the Company's ability to provide safe, reliable, adequate and efficient service.

This issue is of utmost importance to the Company's customers, who will bear the brunt of negative effects in the event of an outage. The Company asks this Board to deny the stay in order to protect the public health, safety and welfare of the residents of Wasatch, Summit, Box Elder and Salt Lake Counties.[1]

II. This Board Lacks Statutory Authority to Grant the Stay Requested.

In addition to risking public welfare, this Board may lack the authority to order a stay under the Utah Administrative Procedures Act ("UAPA").

[1] Pursuant to Utah Code Ann. §63G-4-405(4), if this Board denies a requested stay "in order to protect the public health, safety or welfare against a substantial threat" and the movant then asks a court to enter the stay, then the movant will be required to demonstrate that the public threat relied upon by the agency "is not sufficiently strong to justify the agency's action under the circumstances." *Id*. at §405(4)(iv). Accordingly, to protect the public from the outages and resulting harm that will occur if the Order is stayed indefinitely, the Company requests that this Board's order on the Motion expressly find that the threat of a compromised electric service infrastructure is a significant risk to overall public health, safety or welfare as described in the testimony of Mr. Shortt and Mr. Clegg.

Utah Code Ann. §63G-4-405(1) states that an agency "may grant a stay of its order… during the pendency of judicial review, *according to the agency's rules.*" (Emphasis added.) That is, UAPA doesn't itself provide the Board authority to grant a stay, it simply allows an agency to follow its own rules to the extent *those* rules provide for a stay. This Board has no rules providing for a stay. Accordingly, this Board should deny the Motion on grounds that the County has failed to identify the legal basis on which a stay could be granted.

While this may seem like a technicality, it actually is a logical-necessity. As described in the sections below, typically to grant a stay pending appeal, the reviewing body must decide that the appellant is likely to prevail on the merits of its claim. In other words, to grant the stay, the Board would have to rule that its *own* decision is incorrect and likely to be overturned. But, if the Board was of that mind, it would simply reverse its Order – not stay it based on an assumption it will be overturned by an appellate court. While there may be reasons why an agency would want to promulgate rules to stay its decision in some circumstances, the only ground put forward by the County (that the Order is being appealed) does not afford the Board either a statutory or a logical basis for granting the request. The County has not shown that there are circumstances in which a stay would be beneficial to the public, the Board or the parties.

Accordingly, the Board should deny the County's request for a stay on grounds that it is procedurally impermissible.

III. Wasatch County Doesn't Meet the Standards for a Stay.

As argued above, because this Board has never promulgated a rule that would describe the circumstances or standards under which a stay would be appropriate, there is no procedural avenue by which this Board should stay its own order. This Board's enabling Act requires a party seeking a stay to do so under section 63G-4-405 of the UAPA. Utah Code §54-14-307.

However, that section does not describe circumstances in which this agency can stay its own orders (as discussed in Section II above), but prohibits a *court* from granting a stay after an agency has denied a requested stay (presumably under its own rules) out of concern for public welfare and safety unless the requesting party can satisfy four elements:

> [T]he court ***may not*** grant a stay or other temporary remedy ***unless*** it finds that:
>
> (i) the party seeking judicial review is likely to prevail on the merits when the court finally disposes of the matter;
> (ii) the party seeking judicial review will suffer irreparable injury without immediate relief;
> (iii) granting relief to the party seeking review will not substantially harm other parties to the proceedings; ***and***
> (iv) the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's actions under the circumstances.

Utah Code Ann. §63G-4-405(4)(b) (emphasis added).

The fact that this directive is addressed to reviewing courts, and not the agencies themselves, is further evidence that a stay by the Board of its own Order is not contemplated under section 63G-4-405. Nevertheless, assuming the threshold that must be met for a court to stay a final agency action is applicable to the Board, or even provides guidance for this Board, the County's Motion fails. In its Motion, the County does not even attempt to outline what its burden would be, much less marshal evidence describing how it meets that burden. Rather, the County simply requests the Order be stayed because the County brings an appeal, ignoring the Act's language stating that appeals do *not* stay orders, and ignoring the substantial threat further delay poses to the Company, its customers and the citizens of Wasatch, Summit, Box Elder and Salt Lake Counties. Nevertheless, in order to assist the Board, assuming for argument sake only that the elements set forth in section 63G-4-405 would provide an avenue or guidelines for a

stay, the Company demonstrates below that the County cannot satisfy those elements and therefore the County's Motion must be denied.

A. Wasatch County Has Not Alleged, Much Less Demonstrated, a Likelihood of Success on the Merits.

Wasatch County has not met its burden of demonstrating that it is likely to prevail on the merits of its appeal. In fact, the County has not given the Board a single sentence to describe what legal error it claims the Board made in issuing the Order.

Because the County has failed to even argue that the Board erred in its decision, asking the Board to overturn its own decision, without presenting any evidence or argument as to why the Order was incorrect, is nonsensical. The record demonstrates that the Board carefully considered its statutory mandate and determined—based on undisputed evidence and concessions from the County—that there is an immediate need for the Company to construct the transmission project in order to provide safe, reliable, adequate and efficient service to its customers in Wasatch, Summit, Box Elder and Salt Lake Counties.

The County has given the Board no grounds upon which the Board could possibly find that its own Order is likely to be overturned on appeal and, accordingly, the Motion should be denied.

B. Wasatch County Has Failed to Identify Any Irreparable Harm it Will Suffer Absent a Stay.

In addition to demonstrating a likelihood of success on the merits, which the County does not and cannot show, in order to obtain a stay a party must prove that it will suffer irreparable harm absent a stay. The County, however, identifies ***no*** specific harm that will result from the issuance of the conditional use permit as required by the Order. Speculative harm, unsupported by any evidence, is insufficient. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1267 (10th Cir.

2005). "To constitute irreparable harm, an injury must be certain, great, actual and not theoretical." *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1189 (10th Cir. 2003) (internal quotation omitted). The County has put forth no evidence to demonstrate that the project will cause "certain, great, actual, and not theoretical" damage. Indeed, the County has not even identified ***any*** harm upon which it bases its request for a stay. Accordingly the Motion must be denied.

C. The Company and its Customers Will Suffer Substantial Harm if a Stay is Granted.

As described in part above, the Company and its customers will suffer substantial harm if the Board stays its Order. As outlined in the Company's Memorandum in Support of Petition for Review, together with the Direct Testimony of Kenneth M. Shortt, and as supplemented by his declaration filed concurrently herewith, the need for the additional reliability and capacity provided by the transmission project, in the short term, is critical. In fact, the County has repeatedly conceded this point to the Board, on the record. The record also contains a letter from Heber Light & Power, which is a transmission customer of the Company that provides service to thousands of customers in the Heber Valley, demonstrating its need for the project (the letter is attached hereto again for convenience).

Through its testimony and exhibits, the Company has made clear that the project must be permitted and constructed as soon as practicable or customers within Wasatch, Summit, Box Elder and Salt Lake Counties will be subject to outages and continued loss of reliability, particularly during winter peaking months. *See, e.g.*, Direct Testimony of Kenneth M. Shortt, pg. 4. This risk continues to increase as customer demand increases over time, and has already reached unacceptable levels. Significantly, the requested stay is of indefinite duration. No testimony filed or proffered by any party during the Board proceedings, or subsequently,

contradicts the testimony of Mr. Shortt that this upgrade is needed now. Delaying a project that the County concedes is needed will harm the Company and its customers, including Wasatch County's own citizens.

On the record before the Board, the only reasonable conclusion is that further delays will substantially harm the Company and its customers. This finding alone precludes the requested stay.

D. The Requested Stay is Contrary to the Public Interest.

The language of section 63G-4-405(4) implies that when considering any requested stay, this Board will consider impacts to the public by the stay would impose:

> "If the agency has denied a stay. . .to protect the public health, safety, or welfare against substantial threat, the court may not grant a stay. . .unless it finds that. . .the threat to the public health, safety, or welfare relied upon by the agency is not sufficiently serious to justify the agency's action under the circumstances."

This Board should weigh the public interest in the project against the County's desire for a stay. As described at length in the Company's application, prefiled testimony, live testimony, and the papers filed in response to the various requests for a stay this Board has reviewed, the project at issue is needed and is needed now. This point has been repeatedly conceded on the record. Accordingly, a stay of the Board's Order, which would delay completion of the project for an indefinite period likely exceeding one year, would pose serious risks to the citizens of Wasatch, Summit, Box Elder and Salt Lake Counties, at a minimum.

In contrast, there is no public interest in delaying the project. The County has conceded on the record that the project is needed; it just prefers the facilities to be in another location, outside of the County's borders. This does not amount to a significant public interest, and the County has not even alleged as much. Therefore, the stay must be denied.

IV. Wasatch County Should be Required to Bond for a Stay if it is Issued.

Although the Company maintains that the County is not entitled to a stay of the Order, if the Board entertains the County's Motion, irreparable harm would occur to the Company and its customers unless the County posts a bond to offset the damages that will result if this project is delayed. The Company concedes the statute is silent as to whether the Board could order the County to post a bond, which further demonstrates why issuing a stay could only harm the Company and its customers in the load area described in this docket.

Rule 17 of the Utah Rules of Appellate Procedure states that a court "may condition relief under this rule upon the filing of a bond or other appropriate security." Utah R. App. P. 17 (2016). The County seeks this stay in order to prosecute an appeal under the appellate rules. If a party were bringing this Motion before the Court of Appeals, seeking a stay of the Board's final action, the Company would be allowed to put on evidence about the size of the bond needed. The County should not be permitted to circumvent the bond process by filing its Motion in front of this Board instead of the Court of Appeals.

The likelihood of significant damages from a delay is great, as described in part in the Declaration of Benjamin Clegg filed concurrently herewith. In addition to increased construction costs imposed by general inflation, the Company and its customers would be subject to potentially years of outages and reliability concerns. The Company may lose the ability to add new customers, which would be contrary to its mandate to serve all customers within its service territory. If the Board determines that it has no authority to require the County to post a bond, it certainly should not stay its Order. That would place the Company and many of its customers at risk of significant harm with little hope of recourse.

CONCLUSION

For the reasons stated above, the Company respectfully requests that the Board deny the Motion.

DATED this 13th day of July, 2016.

STOEL RIVES LLP

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2016, I caused to be sent a true and correct copy of the foregoing **ROCKY MOUNTAIN POWER'S MEMORANDUM IN OPPOSITION TO WASATCH COUNTY'S MOTION TO STAY ORDER OF JUNE 3, 2016**, to the following:

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