

BEFORE THE UTAH FACILITY REVIEW BOARD

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IN RE: )  
 )  
 ) Docket No. 16-035-09  
ROCKY MOUNTAIN POWER'S )  
 )  
PETITION FOR HEARING ) HEARING  
 )

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July 14, 2016  
1:30 p.m. - 2:00 p.m.

Location: Utah Public Service Commission  
160 East 300 South, 4th Floor  
Salt Lake City, Utah

Job No. 321529

Reporter: Melinda J. Andersen  
Certified Shorthand Reporter and Notary Public

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A P P E A R A N C E S

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1 P R O C E E D I N G S

2 JULY 14, 2016, 1:30 p.m.

3 MR. LEVAR: Good afternoon. This is the Utah  
4 Utility Facility Review Board. We're here in Docket Number  
5 16-035-09 in the matter of Rocky Mountain Power's petition  
6 for review to the Utah Utility Facility Review Board. And  
7 we're here today on Wasatch County's motion to stay the  
8 order of June 3, 2016.

9 Why don't we start with appearances. We'll  
10 start with Wasatch County.

11 MR. BERG: Tyler Berg for Wasatch County.

12 MR. LEVAR: Okay. For Rocky Mountain Power.

13 MR. MOSCON: Matt Moscon and Heidi Gordon for  
14 Rocky Mountain Power.

15 MR. LEVAR: Thank you. We received the motion  
16 from Wasatch County and we received a response from Rocky  
17 Mountain Power. I'm assuming there is nothing else that  
18 has been filed on this motion. Am I correct?

19 MR. BERG: That's correct. With the deadline  
20 being yesterday at 12:00 there wasn't going to be any type  
21 of time to file or reply, and so we figured -- Wasatch  
22 County figured we'll just do oral arguments here.

23 MR. LEVAR: Okay. Why don't we start with you  
24 then, Mr. Berg. If you would like to take just a few  
25 minutes and just verbally address your motion and then

1 we'll go to Mr. Moscon and Ms. Gordon.

2 MR. BERG: Thank you. As we look at this in  
3 the motion, which I understand was very brief, and the  
4 reason for that is simply because there are two code  
5 sections that we could look at to decide whether -- for the  
6 board to decide whether or not they could stay their order.  
7 The first code section is 54-14-307. Subsection 1, of  
8 course, says that simply asking for a review of a judicial  
9 review does not stay or suspend the effectiveness of a  
10 written decision by the board. And then subsection 2  
11 addresses any party seeking to stay the effectiveness of a  
12 decision needs to seek that stay under code section  
13 63G-4-405.

14 And then as we go to that code section, under  
15 subsection 1 it states, unless precluded by another statute  
16 the agency may grant a stay of its order or other temporary  
17 remedy during the pendency of judicial review according to  
18 the agency's rules.

19 Well, as it was pointed out in Rocky Mountain  
20 Power's reply brief or opposition to the motion, the board  
21 doesn't have any set of rules saying whether or not, when  
22 they will or will not stay an order. That puts the county  
23 in a difficult situation because when as we were looking at  
24 this, well, what evidence is it that we need to bring  
25 before the board to say we need this action or the order

1 stayed.

2           As we look more into the same section 405, even  
3 starting with subsection 2 and down, it doesn't really  
4 apply to the board anymore. At that point it starts  
5 talking about what the Court of Appeals or the Supreme  
6 Court, whoever the review is by, would do if the board  
7 decided not to issue a stay.

8           So we're kind of left with really a little bit  
9 of -- I guess legal floundering isn't the right word, but  
10 kind of wondering exactly what the board would require for  
11 a stay. Of course, at this point the statutes require  
12 Wasatch County to issue the conditional use permit within  
13 60 days of June 3rd.

14           And so the county has already appealed to the  
15 Court of Appeals. The docketing statement was filed  
16 yesterday as well. We're trying to move this forward as  
17 quickly as possible. There is no way that a meaningful  
18 review can happen within that 60 day time period.

19           And so what are we looking at if the Court of  
20 Appeals hears the case, of course that's going to take some  
21 time. We'll have probably 30 days to get our brief in.  
22 Rocky Mountain Power will have time to reply or an  
23 opposition will have time to reply. We're probably looking  
24 sometime late fall before we would even have oral arguments  
25 on it. And then we're waiting for the decision to come

1 from the Court of Appeals at that point.

2           If the order is not stayed then the conditional  
3 use permit is issued and construction could begin and then  
4 if the Court of Appeals were to say, wait, you didn't quite  
5 get it right. They could send it back to the board saying,  
6 hey, this is our interpretation of the code and this is  
7 what we want you to rule on. It could change things. It  
8 could cause problems and even additional delays and  
9 additional expenses for Rocky Mountain Power if they have  
10 already started to put the utility in the easement. If  
11 they have started to upgrade that 138 kV line, then all of  
12 a sudden they could incur additional expenses in trying to  
13 move it.

14           Now we can't say for sure that's going to  
15 happen, but the requirements that are listed in 405,  
16 specifically in subsection 4, that's not what is before the  
17 board in deciding whether or not they should stay their  
18 order. That's what would be with the Court of Appeals  
19 deciding whether or not to overturn a decision not to stay  
20 an order. So we're kind of in a difficult situation right  
21 here and the county acknowledges that.

22           Right now, and I apologize I didn't speak with  
23 Mr. Moscon ahead of time -- did you get that yesterday?

24           MR. MOSCON: We may have. I don't know. I  
25 don't mind if you pass it out.

1 MR. BERG: And I didn't even have this to pass  
2 out. It's just the docketing statement that was filed  
3 yesterday and sent via e-mail to all the parties at the  
4 Court of Appeals level.

5 Really the only issue that Wasatch County is  
6 looking at right now is was the Utility Facility Review  
7 Board's interpretation of Utah Code 54-14-303 correct.  
8 We're not saying that the standard for a stay is that you  
9 have to feel that you got it wrong. We're simply saying  
10 the standard for a stay is allow the Court of Appeals to  
11 look at this.

12 The Court of Appeals has never had any judicial  
13 review of these code sections. There is nothing in the  
14 statute to show that this has ever been looked at. That's  
15 part of the question that Wasatch County has had from the  
16 beginning is what exactly is the statutory language of  
17 this. We're just seeking some additional advice from the  
18 Court of Appeals so not only in this case, but in future  
19 cases, the board would have the benefit of knowing exactly  
20 what one of the higher courts has ruled on it.

21 I will conclude at that. I'm open to any  
22 questions, whatever order you want to proceed in. If you  
23 would like Rocky Mountain Power to present their arguments  
24 and then do questions, Wasatch County is open however you  
25 want to proceed at this point.

1 MR. LEVAR: I think I may have a question or  
2 two and other board members may also. I'll go ahead and  
3 start with one. With the statute that provides on one hand  
4 that an order from this board to issue a CUP has a 60 day  
5 time frame, and a presumption that an appellant review  
6 takes longer than that, and in statutory language also that  
7 an appeal isn't an automatic stay, that tends to lead me to  
8 the conclusion that the statute at least points to this  
9 board at least not granting a stay for the sole purpose  
10 that a matter is being appealed and that would be an issue  
11 for the Court of Appeals then to consider any stay request.  
12 At least as I read the statute that's the direction it  
13 seems to point me. Do you have any response to that?

14 MR. BERG: Well, the county's response would be  
15 as I had stated, and I know I didn't have any of that  
16 additional information in my motion, part of that was  
17 waiting to see what Rocky Mountain Power's position was on  
18 some different things as well. But there is not a lot of  
19 direction. So we're looking at the possibility of if the  
20 Court of Appeals were to overturn or even just request some  
21 amendment or say, hey, you almost got it right but we want  
22 to change this a little bit, anything from the court of  
23 appeal could directly affect the order. And where this is  
24 the construction of a facility, 138 kV power line, that  
25 could be a really big event. They could have already



1 started construction on that, moving forward with that, and  
2 now suddenly the Court of Appeals is saying, hey, we have  
3 an interpretation of the statute slightly different. So  
4 that would be the reason that Wasatch County is requesting  
5 the stay, just to make sure we have had the chance to have  
6 the appellant review of mainly the statute, the  
7 interpretation of the statute, before any type of  
8 construction starts.

9 MR. LEVAR: Okay. Thank you. That's the only  
10 question I had. Mr. Clark, do you have any questions?

11 MR. CLARK: No, I don't have a question.

12 MR. LEVAR: Ms. Holbrook, any questions?

13 MS. HOLBROOK: I do not.

14 MR. LEVAR: Mr. White?

15 MR. WHITE: I don't have any questions.

16 MR. LEVAR: Okay. Thank you. Why don't we go  
17 to Mr. Moscon and Ms. Gordon.

18 MR. MOSCON: Thank you. I'll be brief. I know  
19 that the board has apparently read the materials that we  
20 have submitted. I won't duplicate the arguments that we  
21 filed. I'll simply note in response to the oral argument  
22 that was presented, which is essentially, hey, this is a  
23 large electric utility facility that is being built and  
24 what happens if the Court of Appeals gives some direction,  
25 therefore we should stay it.

1 I will just note that every single matter that  
2 comes before this board, whether it's brought by my client  
3 or otherwise, involves a large utility facility. That's  
4 the only kind of construction that this board hears. So  
5 that argument about, hey, they're going to start building a  
6 large facility exists in every case that this board would  
7 have jurisdiction over, which means if the legislature  
8 thought, hey, we should make sure we've got -- let's stay  
9 that, that's grounds for a stay, they certainly would not  
10 have drafted the language which is in the enabling act of  
11 this board that says an appeal does not stay automatically  
12 a ruling by this board because the logic that has been  
13 presented is that every single ruling by this board would  
14 necessarily have to be stayed.

15 The other thing that I will just touch on, and  
16 is in our papers already, is the absolute disbalance  
17 between a public policy where this line, which has already  
18 been delayed by this process, is at a critical juncture of  
19 meeting. We attached to our papers, something was already  
20 in the record from Heber Power & Light in which they  
21 pointed out, hey, we need this, we need it by, and they  
22 wrote it several years ago, within two years. And the  
23 requested stay is of indefinite duration. It's we want to  
24 take it up on appeal, we don't know how long it's going to  
25 last, but they just want it held on to. And the company

1 out of concern for its customers, and including customers  
2 of other power companies who filed papers, that is just  
3 absolutely something that cannot happen. That would be a  
4 disaster for the public policy because we are already in a  
5 position of -- the circumstance of their reliability that  
6 is of great concern to the company's customers. So the  
7 power company is very concerned that the delay of any time  
8 would really put in jeopardy this project and the customers  
9 it serves.

10           If you have questions I'm happy to answer them,  
11 but I agree with what I think I heard from the Chair, that  
12 if this is something that the Court of Appeals wants to go  
13 through the issues and say we find it likely that we're  
14 going to overturn this, that is something that can be  
15 raised. But at this point, whether it's jurisdictional,  
16 weighing the public policy, the county has put forward no  
17 argument to say, here is why we think the Court of Appeals  
18 will overturn your decision, here is what your decision got  
19 wrong, here is why we think in weighing it you're likely to  
20 conclude that this is going to get reversed on appeal. And  
21 without that this board is simply not in a position to  
22 grant the stay. Thank you.

23           MR. LEVAR: Thank you. Mr. Clark, do you have  
24 any questions for Mr. Moscon?

25           MR. CLARK: No questions.

1 MR. LEVAR: Ms. Holbrook?

2 MS. HOLBROOK: No questions.

3 MR. LEVAR: Mr. White?

4 MR. WHITE: No questions. Thanks.

5 MR. LEVAR: Okay. Well, I guess we're to the  
6 point of deliberation or action on the motion.

7 MR. WHITE: I guess in the initial matter, I  
8 mean, harkening back to the initial decision of the board,  
9 at least from my perspective, it was based upon the need  
10 and the timing that was tied to reliability. I guess I  
11 still stand by that. I still haven't heard any argument  
12 that otherwise refutes the testimony provided by the  
13 experts with respect to the need and the project schedule,  
14 et cetera, and the potential impacts to the economy, the  
15 area, safety, et cetera. So I guess from my perspective at  
16 least I'm not really convinced. If nothing else, I haven't  
17 heard any argument that's not still the case, but it would  
18 really warrant us to I guess for lack of a better word  
19 second guess the board's original decision on that. So if  
20 I were to vote right now I guess my vote would be to deny  
21 the motion for a stay.

22 MR. LEVAR: Any other discussion?

23 MR. CLARK: Just to provide a more complete  
24 record I'll also include a couple of thoughts. I want to  
25 be clear. I don't begrudge in any way the county's

1 availing itself of its legal right to seek review of the  
2 board's decision. I don't think the board begrudges it  
3 either. But I'm very confident that the board reached the  
4 right conclusion initially and I don't find in the county's  
5 positions any reason to have any doubt about that, nor do I  
6 find in the county's arguments any grounds upon which I  
7 would feel a stay would be appropriate. And then I'll add  
8 to that the evidence of need and the evidence of  
9 criticality and even urgency for completing the project,  
10 that for me closes the door really on the issue. So I  
11 would also vote to deny the motion for stay. And if we  
12 need a motion to act on that I'll make it, or Chair LeVar  
13 you can just count my vote now as being against the motion  
14 to stay our order.

15 MR. LEVAR: Any other discussion from the board  
16 members?

17 MS. HOLBROOK: I would like to. Thank you,  
18 Mr. Chairman. So I simply want to put my position on the  
19 record as well. Given this situation in terms of not only  
20 the primary utility, Rocky Mountain Power, but also Heber  
21 City Light & Power, they're two entities that are separate  
22 but in the same industry and they're looking at this from a  
23 perspective of how can I close the gap and make sure that  
24 I'm serving my customers in a way that's going to be  
25 beneficial long term. My feeling also is we made the right

1 decision in terms of proceeding for Rocky Mountain Power.

2 So I would say I would deny the motion as well. Thank you.

3 MR. LEVAR: Thank you. In the interest of  
4 developing our record and the transcript so we have a basis  
5 for whatever ultimate order I'll make a few comments myself  
6 too. Like Mr. Clark, I don't begrudge the motion. I  
7 recognize that a motion to this board for a stay is a  
8 prerequisite to a motion to a court for a stay and it's an  
9 exhaustion issue that has to be done. And I also recognize  
10 that both in the statute and in the lack of board rule  
11 there is a lack of the level of clarity that does exist in  
12 some places on a motion for stay.

13 However, I come back to a couple of issues.  
14 One, I feel like if the board granted a stay for the sole  
15 reason that an appeal takes longer than 60 days, the  
16 statute says you have to issue a CUP within 60 days  
17 following the board order, to me that would contravene that  
18 60 day provision in the statute combined with the appeal  
19 language that says it's not an automatic stay. I think  
20 granting it here would almost set precedence that it does  
21 become an automatic stay.

22 And then getting to the public interest issues.  
23 Presuming that since we don't have rules on this, one legal  
24 default could be to go to the rules that a court would  
25 consider on a stay. Just like the substantive decision

1 that this board made on a case where you have a utility  
2 choosing between one option that could result in litigation  
3 with Promontory, one option that could result in litigation  
4 with Black Rock and Wasatch County, we made a decision that  
5 they made a reasonable decision in that case.

6 In this case granting a stay or not granting a  
7 stay could potentially harm residents of Black Rock or  
8 residents of Wasatch County, granting a stay could  
9 potentially harm a pretty large group of rate payers.

10 So those are the reasons that lead me to the  
11 same place as my colleagues. So unless there is further  
12 discussion, does anyone want to make a motion?

13 MR. WHITE: I would be happy to or if someone  
14 else wants to.

15 MR. CLARK: Chair LeVar, I'll move that we deny  
16 the motion for stay.

17 MS. HOLBROOK: I'll second it.

18 MR. CLARK: A stay of our June 3rd order just  
19 to be complete.

20 MS. HOLBROOK: Thank you. My apologies. I'll  
21 second.

22 MR. LEVAR: And could I suggest amending the  
23 motion to also have a direct Public Service Commission  
24 staff who is assisting this board to draft an order  
25 consistent with the record and the discussion and the

1 hearing today?

2 MR. CLARK: That's fine with me. I was hoping  
3 you would assign me to write it.

4 MR. LEVAR: Yes. Any more discussion of the  
5 motion? We have a motion and it is seconded. We'll vote.  
6 Alphabetically seems to be working fine. Mr. Clark.

7 MR. CLARK: I vote yes on the motion.

8 MR. LEVAR: Ms. Holbrook.

9 MS. HOLBROOK: Yes.

10 MR. LEVAR: I vote yes on the motion.  
11 Mr. White.

12 MR. WHITE: Just to clarify, yes on Wasatch  
13 County's motion?

14 MR. LEVAR: The motion to deny the motion.

15 MR. WHITE: So yes that the motion is -- okay.  
16 Yes. I understand now. Sorry. I was thinking of  
17 Mr. Berg's motion, but now I'm --

18 MR. LEVAR: We're voting on Mr. Clark's motion.

19 MR. WHITE: Yes.

20 MR. LEVAR: It's four to zero. Wasatch  
21 County's motion to stay the order of June 3, 2016 is  
22 denied. A written order we will issue following this  
23 decision. I don't believe there is any other business.  
24 Mr. Berg?

25 MR. BERG: This is just kind of a technicality.



1 In looking at 63G-4-405 in subsection 3, the second line  
2 says the agency's order of denial shall be mailed to all  
3 parties and shall specify the reasons why the stay or other  
4 temporary remedy was not granted. It seems strange, but I  
5 know whenever I get everything from the board it's via  
6 e-mail, and that works great, but the statute says you have  
7 to mail it. So Wasatch County would just request that a  
8 copy be mailed as well just so we can be following what the  
9 statute says we have to do.

10 MR. LEVAR: Thank you for that clarification.  
11 Anything else?

12 MR. MOSCON: I don't know if this is a motion  
13 or if I'm asking for a clarification. Just because we're  
14 now a couple of weeks away from when this board ordered the  
15 county to issue a CUP and if we have the county, which I  
16 assume is contemplating further action, I'm slightly  
17 nervous on behalf of my client that August 2nd rolls  
18 around, there is no order from this board or the court  
19 staying anything, and yet the county has not actually  
20 issued the conditional use permit and to what limbo it  
21 finds itself in. I'm just wondering if this board finds  
22 that it is within its purview to include in its order  
23 anything along if it has not received a stay from the Court  
24 of Appeals and yet still fails to meet and issue the CUP,  
25 is the power company allowed to proceed with construction

1 of the line I suppose is the question I'm asking.

2 MR. BERG: To clarify, I spoke with our county  
3 manager yesterday on this exact issue letting him know that  
4 if it was not stayed today my legal opinion was that the  
5 county would be obligated to issue the CUP within the 60  
6 day time frame. Even if the decision is made at a later  
7 date to go to the Court of Appeals on the issue of the  
8 stay, the CUP would be issued within the 60 days. That's  
9 my understanding right now. I have no problem putting that  
10 on the record. I think if we were to go to the Court of  
11 Appeals we could of course request that the stay happen at  
12 that point. If that happens that will happen as quickly as  
13 possible.

14 MR. LEVAR: I'm going to make a motion for the  
15 sake of duplicity and I'll just say in my opinion lack of  
16 action by this board means there is no stay granted.  
17 That's the way I would view things. But in the sake of  
18 clarity I'm going to make a motion that the board issue  
19 quickly a notice of bench ruling, which would be a very  
20 short notice just giving written notice that was the  
21 decision of the board to be followed by an opinion that  
22 lays out the findings and conclusions that are the basis  
23 for the order. So that's my motion. If anyone wants to  
24 discuss it or consider seconding it. Again, I'm not sure  
25 it's necessary, but just for the sake of clarification and

1 redundancy.

2 MR. WHITE: I'll second it.

3 MR. LEVAR: Any discussion? Mr. Clark.

4 MR. CLARK: I'm in favor of the motion.

5 MR. LEVAR: Ms. Holbrook.

6 MS. HOLBROOK: Yes.

7 MR. LEVAR: I'll vote yes. Mr. White.

8 MR. WHITE: Yes.

9 MR. LEVAR: Thank you. Any other business for  
10 the board today?

11 MR. CLARK: I just want to say I appreciate  
12 Mr. Berg's clarification of the county's position. It  
13 makes our path forward more clear. Thank you.

14 MR. BERG: You're welcome. Nothing further  
15 from Wasatch County.

16 MR. LEVAR: Anything further from Rocky  
17 Mountain Power?

18 MS. GORDON: No. Thank you.

19 MR. LEVAR: Thank you. We're adjourned.

20 (The hearing concluded at 2:00 p.m.)

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C E R T I F I C A T E

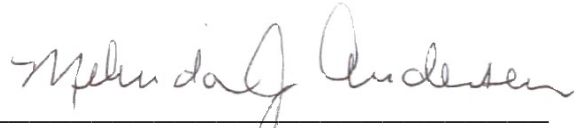
STATE OF UTAH )  
:  
COUNTY OF SALT LAKE )

I, Melinda J. Andersen, Certified Shorthand Reporter and Notary Public in and for the County of Salt Lake and State of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place herein set forth, and were taken down by me in shorthand and thereafter transcribed into typewritten under my direction and supervision:

That the foregoing 20 pages contain a true and correct transcription of my shorthand notes so taken.

WITNESS MY HAND and official seal at Salt Lake City, Utah this 18th day of July, 2016.



Melinda J. Andersen, C.S.R.

My Commission Expires:  
February 10, 2018

1	<b>63G-4-405</b> 4:13	10:16,17,19 11:4	<b>assuming</b> 3:17	5:4,6,10 6:5,17 7:19 8:2,4,9 9:19 10:2,4,6, 11,12,13 11:21 12:8 13:2,3,15
1 4:7,15 12:00 3:20 138 6:11 8:24 14 3:2 16-035-09 3:5 1:30 3:2	<b>A</b>	<b>also</b> 8:2,6 12:24 13:11, 20,25	<b>attached</b> 10:19 <b>automatic</b> 8:7 <b>automatically</b> 10:11	<b>board's</b> 7:7 12:19 13:2
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