

Corbin B. Gordon, #9194
Joshua D. Jewkes, #15497
GORDON LAW GROUP, P.C.
322 East Gateway Dr., Suite 201
Heber City, UT 84032
Phone: 435-657-0984
Fax: 435-657-0984
cgordon@gordonlawgroup.utah.com
jjewkes@gordonlawgroup.utah.com

Counsel for Respondent Midway City

BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER Petitioner	RESPONDENT MIDWAY CITY'S REQUEST FOR FORMAL ADJUDICATIVE PROCEEDING AND ADOPTION OF DISCOVERY SCHEDULE
vs.	
MIDWAY CITY Respondent	Docket Number 20-035-03

Respondent Midway City, by and through counsel of record and pursuant to Utah Code § 54-13-304, submits this Request for Formal Adjudicative Proceeding and Adoption of Discovery Schedule.

At the initial hearing to be held on February 25, 2020, this Board will be required to determine: a) how the review of the Petition and Counter-Petition will occur; b) whether the review will be “conducted as a formal or informal adjudicative proceeding”; and c) the schedule for the review proceeding. Utah Code § 54-13-304. The phrase “formal or informal adjudicative proceeding” is an express reference to Part 2 of the Utah Administrative Procedures Act (“APA”), *id.* §§ 63G-4-201 *et seq.*, and, therefore, Midway City requests that this review be

designated and conducted as a “formal adjudicative proceeding”. *Id.* § 63G-4-202(1); Utah Code § 54-13-304(2).¹

I. This Board Should Limit Its Review to the Evidence Provided to Midway During the Application Process.

Because RMP’s Petition for Review attacks the propriety of and the conditional use permit (“CUP”) Midway issued to RMP on December 18, 2019, the scope of this Board’s review will focus on that issue. There is no argument that Midway wrongfully denied RMP’s application for CUP; rather, RMP contends that portions of the CUP should be invalidated and that RMP should be permitted to proceed *despite* the conditions imposed by Midway.

Section 304(3) requires the Board to hold a “hearing on the merits” within sixty days of February 25, 2020, or April 25, 2020 at the latest. Utah Code § 54-13-304(3). That suggests the parties also must, within sixty days, compile the entire record, conduct all fact discovery and complete all expert discovery—a process afforded *at least 246 days* in the least complex district court cases (336 days in larger matters). Given the extent and nature of the claims RMP must prove, not to mention the issues raised in the Counter-Petition, there is no way to fairly hold this review within the sixty days required by the statute *unless* the record is limited to what RMP provided to Midway during the application process.

For example, RMP challenges the conditions in the CUP as impeding RMP’s ability to “provide safe, reliable, adequate, and efficient service to its customers.” RMP warns that the new line is “urgently needed” and that the failure to act now “could result in an array of negative

¹ Arguably, the review *must* be conducted formally because Utah Code § 54-13-304 does not specifically designate it as one or the other. *Id.* §§ 63G-4-202(2) (“[A]ll agency adjudicative proceedings not specifically designated as informal proceedings by the agency’s rules shall be conducted formally in accordance with the requirements of this chapter.”). Moreover, the issues at play in this dispute are important and sizeable enough to warrant judicial review, if necessary. *Id.* § 54-13-308.

system outcomes” and “outages lasting days or weeks....” (Pet. at 3.) RMP has not provided evidence to substantiate these dire warnings, and the evidence Midway has seen contradicts those claims. The parties will be required to present, and the Board will have to hear and evaluate, expert opinions and fact testimony on whether the line is “*necessary* to provide safe, reliable, adequate, and efficient service to its customers” under the circumstances. Utah Code § 54-14-201(1) (emphasis added).

Under the statute, it is RMP’s burden of proof to show each one of these requirements individually, meaning that if they can only show the line is, for example, safe, adequate, and efficient, but cannot show that the line is a requirement for reliable power, RMP fails its burden and cannot proceed. Further, RMP, by its own claims, must also show that failure to install the line by the end of 2020—ten months from now— will result in electrical blackouts. The evidence necessary to establish these claims will require a small army of experts, which will simply not be possible within 60 days. To add to the complexity, Midway is informed and believes that there may be third parties who have a stake in the outcome of this review and that wish to be involved. *See* Utah Code § 63G-2-207 (allowing interested third parties to intervene in administrative reviews).

There is no question that this Board is acting in an administrative review capacity and is, therefore, subject to the APA.² *Id.* § 63G-4-102(1). And, the APA preserves the parties’ respective right to “present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.” *Id.* § 63G-4-206(1)(d). As such, the only reasonable way to observe due process, to comply with the 60-day mandate in Section 304(3) and to preserve the parties right to

² This Board’s actions are not excepted from the APA under Utah Code § 63G-4-102(2.)

present evidence is to limit the review to evidence actually provided to Midway through the application process.³ Limiting the review in this manner also makes logical sense, as this was the universe of evidence Midway relied upon in considering, conditioning and issuing the CUP. Allowing the parties to generate new evidence now would seem to unnecessarily expand the scope of this review.

As such, Midway moves this Board, when determining how the review will proceed, to limit its review to that evidence already given to Midway and nothing more. Midway formally objects to any evidence being presented to this Board that was not provided to Midway as unfair, prejudicial and a violation of the obligation to “afford all parties reasonable opportunity to present their positions.” *Id.* § 63G-2-206(1)(a).

II. In the Alternative, The Board Should Designate This as A Formal Adjudicative Proceeding and Afford the Parties Sufficient Time to Develop the Record.

As explained above, the record should be limited to the evidence submitted to Midway during the application process. Should the Board decide that further discovery is warranted, however, then Midway requests that the Board adopt a schedule that allows all parties to conduct discovery so their respective right to “present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence” is preserved.

This review should be designated and conducted as a formal adjudicative proceeding under the APA. Utah Code §§ 54-13-304(2), 63G-4-202(1). The Board should set also a fair

³ A review of the record before Midway at the time it granted the CUP will show that while there has been much lip service given to the need for the line, little to no evidence has actually been submitted that establishes the line is “necessary” for RMP to continue to provide service to its customers, or that the timeframe of the end of 2020 imposed by RMP will actually result in the “rolling black out Armageddon” suggested by RMP in its Petition. While having the line may provide RMP with a security blanket, this does not rise to the level of “necessary”, especially where a municipality is asking for reasonable time to raise the money to bury the line through its boundaries.

schedule that contemplates fact and expert discovery in accordance with the Utah Rules of Civil Procedure, as required by the APA.⁴ Utah Code § 63G-4-205(1) (“In formal adjudicative proceedings, the agency may, by rule, prescribe means of discovery adequate to permit the parties to obtain all relevant information necessary to support their claims or defenses. If the agency does not enact rules under this section, the parties may conduct discovery according to the Utah Rules of Civil Procedure.”).

Midway cautions against cramming pretrial discovery and a trial on the merits into a mere sixty days. It is questionable whether the sixty-day time limit in Utah Code § 54-13-304(3) is constitutional in a complex case such as this. While certain disputes could be resolved within sixty days, especially where primarily issues of law or statutory construction are at issue, where factual disputes exist and the need for expert evidence is apparent, a sixty-day pre-trial procedure is patently unfair. The APA certainly suggests, strongly, that more is required by its invocation of the rules of civil procedure. *Id.* § 63G-4-205(1). Indeed, Rule 26 contemplates a process of disclosing and responding to expert opinions that, alone, lasts longer than sixty days. Utah R. Civ. P. 26(b)(7).

The language of Section 304 and our Constitution are in accord. Section 304 refers to a “hearing on the merits”. Utah Code § 54-13-304(3). That phrase “is a term of art that means that a judgment is rendered only after a court has *evaluated the relevant evidence* and the parties’ substantive arguments.” *Miller v. USAA Cas. Ins. Co.*, 2002 UT 6, ¶ 42 & n.6, 44 P.3d 663 (emphasis added). Due process is the foundation of our judicial system, and it “requires that

⁴ Midway is unaware of any rules promulgated by this Board governing discovery that might displace the Rules of Civil Procedure.

notice be given to the person whose rights are to be affected. It hears before it condemns, proceeds upon inquiry, and renders judgment only after trial.” *Pangea Techs., Inc. v. Internet Promotions, Inc.*, 2004 UT 40, ¶ 8, 94 P.3d 257 (citation omitted). Our Supreme Court has made clear that the due process and open courts provisions of our State Constitution require judicial bodies to “resolve doubts in favor of permitting parties to have their day in court on the merits of a controversy.”⁵ *Miller*, 2002 UT 6, ¶ 41 (citation omitted).

As such, Midway objects to any proceeding that does not provide it with the full opportunity to receive and respond to expert reports in the time frames outlined in the Rules of Civil Procedure, so that Midway has the opportunity to review testimony, prepare cross-examination and prepare its own expert witnesses to counter RMP’s claims. Anything less will prejudice Midway’s rights to a fair (a) opportunity to contest the Petition and (b) review of its claims in the Counter-Petition.

Accordingly, to the extent the Board is not inclined to limit its review to the evidence presented to Midway during the application process, the Court should set a fair and reasonable discovery schedule—beyond the sixty days in Section 304(3)—that will afford each party the right to “present evidence, argue, respond, conduct cross-examination, and submit rebuttal evidence.” Utah Code § 63G-4-206(1)(d).

⁵ It is clear that due process and fundamental fairness apply to this body when it conducts an administrative review. *E.g., Joseph v. Salt Lake City Civil Serv. Com’n*, 2002 UT App 254, ¶ 10, 53 P.3d 11 452 (due process and rules of discovery apply to administrative reviews).

CONCLUSION

For the foregoing reasons, this Court should limit the scope of this review to the evidence provided to Midway in the application process, or set a reasonable schedule that allows the parties sufficient time to conduct discovery and prepare for trial.

DATED this 24th day of February 2020.

/s/ Corbin B. Gordon
Corbin B. Gordon
Counsel for Respondent
Midway City

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of February 2020, I filed a copy of the above-captioned document with the Clerk of the Court via the Court's electronic filing system, which delivered an electronic copy to the following:

Counsel for Rocky Mountain Power
Heidi K. Gordon hgordon@fabianvancott.com
Bret Reich bret.reich@pacificorp.com

Council for Wasatch County
Scott Sweat ssweat@wasatch.utah.gov
Jon Woodward JWoodard@wasatch.utah.gov

Counsel for Heber Light & Power
Adam Long along@shutah.law

Assistant Utah Attorneys General
Patricia Schmid pschmid@agutah.gov
Justin Jetter jjetter@agutah.gov
Robert Moore rmoore@agutah.gov
Victor Copeland vcopeland@agutah.gov

Division of Public Utilities
Madison Galt mgalt@utah.gov

Officer of Consumer Services
Cheryl Murray cmurray@utah.gov

/s/ Corbin B. Gordon