Heidi Gordon (#11655) (hgordon@fabianvancott.com)
FABIAN VANCOTT
215 S. State Street, Suite 1200
Salt Lake City, Utah 84111
Telephone: 801-531-8900

Bret Reich (#9542) (bret.reich@pacificorp.com)
PACIFICORP, d/b/a ROCKY MOUNTAIN POWER
1407 W. North Temple, Suite 320
Salt Lake City, Utah 84116

Attorneys for Petitioner Rocky Mountain Power

BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

PACIFICORP, doing business as ROCKY MOUNTAIN POWER, Petitioner vs. MIDWAY CITY, Respondent	**ROCKY MOUNTAIN POWER'S RESPONSE TO MIDWAY CITY'S COUNTER-PETITION FOR REVIEW** Docket No. 20-035-03

Rocky Mountain Power submits this response to Midway City's Counter-Petition for Review. The Counter-Petition for Review (the "Counter-Petition") does not state any cause for this Board's review. In the Counter-Petition, the City asks this Board to, essentially, save the City from its own agreement to pay the excess costs arising from the conditions it seeks to impose on the Project. Furthermore, some of its arguments are untrue on their face or now obsolete. As more fully set forth herein, the Counter-Petition should be dismissed with prejudice.

I. Rocky Mountain Power has Adequately and Appropriately Demonstrated the Need for this Project.

The City argued Rocky Mountain Power has not shown an "immediate need" for the line. While Rocky Mountain Power has no obligation to prove an "immediate need" to Midway City,

the company provided more than enough information demonstrating the necessity of completing the transmission line project. The project provides safe, reliable, and adequate service to its customers, including Heber Light & Power, which is a wholesale customer through its membership in Utah Associated Municipal Power System (UAMPS) and is also the direct distribution provider to Midway City customers.

The Project is designed, in part, to address Rocky Mountain Power's system reliability risk in the event of an outage in the affected load area, including Midway City. This was conveyed to the City in public meetings, and will be further shown in testimony to be offered by Rocky Mountain Power's transmission planner; until the Project is complete, the system serving the Heber Valley is at continued risk for prolonged, widespread outages. To the extent Rocky Mountain Power's need for the Project is subject to review, it is within this Board's province, not Midway City's. Since that review is inherent in this matter initiated by Rocky Mountain Power's Petition for Review, Point I of the Counter-Petition is redundant and should be dismissed.

Midway City formally acknowledged the need for this key Project. *See* Decision, p. 1, points C and D ("The proposal will create a second point of power access that will benefit residents of the entire valley" and "[t]he proposal will allow more power to enter the valley that will benefit the entire valley and meet present and future community needs.") In fact, Midway City has, in part, driven the need for this Project by approving extensive new developments that require increasingly more electrical energy.

Furthermore, the City has known this Project was in the works since at least 2012, when Heber Light & Power first began discussing its need to rebuild its "south line" (the existing 46 kV transmission line that is slated to be rebuilt at part of the Project) in its Board meetings.[1]

[1] Midway City, as a member entity of Heber Light & Power, holds a seat on the Board of Directors. Copies of relevant Board minutes will be provided with direct testimony to be offered.

Meetings among the City, Heber Light & Power and Rocky Mountain Power, to discuss the Project as it specifically relates to Midway City, were held beginning in at least 2017. The companies even agreed to place a hold on filing any land use applications with Midway City specifically so Midway could enact an ordinance regulating the Project – a process that took a year for the City to complete, and resulted in an ordinance that mandated review by both the Midway City Planning Commission and the City Council.

Following adoption of the ordinance, the companies submitted a conditional use permit application and participated in five different hearings before two different public bodies over a period exceeding eight months. These requirements were violations of Rocky Mountain Power's rights, including the vested right to proceed under the City's ordinances in effect at the time the Project proponents formally brought the Project to the City and were assured that no conditional use permit was required,[2] as well as the City's obligation—which it knowingly violated[3]—to make a final decision on the application within sixty days after it was filed, under Utah Code § 54-14-303(1)(e).[4] Nevertheless, the companies continued to cooperate with the City through the lengthy approval process the City chose to enact, in the hopes it would be more efficient to work with the City rather than fighting or appealing the City's attempts to restrict the Project. To now claim that Rocky Mountain Power is artificially rushing construction misstates the history and defies the information the City has had for at least eight years.

---

[2] *See* Western Land Equities, Inc., v. City of Logan, 617 P.2d 388 (Utah 1980) ("[A]n applicant is entitled to a building permit or subdivision approval if his proposed development meets the zoning requirements in existence at the time of his application and if he proceeds with reasonable diligence, absent a compelling, countervailing public interest. Furthermore, if a city or county has initiated proceedings to amend its zoning ordinances, a landowner who subsequently makes application for a permit is not entitled to rely on the original zoning classification.")

[3] If the City disputes this fact, it should be compelled to produce transcripts of Midway City public meetings wherein it was discussed that the City had an obligation to decide the matter within the sixty-day statutory deadline.

[4] The Utility Facility Review Board Act, Utah Code Title 54, Chapter 14, is referred to herein as the "Act."

Rocky Mountain Power more than adequately demonstrated a need for the Project, and will provide further evidence as part of these proceedings. Therefore, Point I of the Counter-Petition should be dismissed.

II. The Cost to Acquire Rights-of-Way Cannot be Ascertained through Bids.

The City argues that Rocky Mountain Power is required to obtain actual bids for acquiring any necessary rights-of-way. Given the nature of easements, it would be impossible for Rocky Mountain Power—or anyone else—to obtain *bids* for right-of-way acquisition. The value of an easement is based on fair market value of the land and any impacts to the remaining property.[5] This type of valuation is determined by a series of calculations and estimates based on comparable properties. Those types of analyses are done by qualified appraisers, especially where, as the City is claiming, severance damages could be relevant. *See, e.g.,* City of Hildale v. Cooke, 2001 UT 56, 28 P.3d 697 (holding that testimony as to "highest and best use" of property for determining severance damages must come from a properly qualified expert).

Rocky Mountain Power is having a team of qualified appraisers study the properties that will be physically crossed by the power line to determine the value of any easements that may need to be acquired. The City's demand that Rocky Mountain Power obtain bids for rights-of-way is nonsensical, and Point II of the Counter-Petition should be dismissed.

III. Rocky Mountain Power has Obtained Bids to Construct the Project Underground, and has Provided them to Midway City.

The City accuses Rocky Mountain Power of "wrongfully refusing to obtain competitive bids" and "demanding prepayment," neither of which is true. Rocky Mountain Power sought competitive bids for four different construction options, as requested by the City in the Decision. The company did ask that the City make a payment toward the excess costs that would be

[5] Utah Code § 78B-6-511.

incurred in securing the bids, but certainly did not "demand" prepayment, which is clearly evidenced by the fact that the company went ahead with obtaining the bids in spite of the City's refusal to pay for all excess costs before work begins as required by Utah Code § 54-14-204. Since excess costs are the difference between "the cost of any overhead line constructed in accordance with the public utility's normal practices" and the actual cost of the facility (Utah Code §§ 54-14-103(9)(b) and (1)(b), 54-14-203(2)), and it is not part of Rocky Mountain Power's normal practices to obtain bids for constructing a transmission line *underground* when the project is planned to be an *overhead* line, the bid costs are excess costs payable by the City.

Despite the clear mandate that *all* excess costs must be paid "within 30 days before the date construction of the facility should commence" (which includes project design and ordering of materials) (id. §§ 54-14-103 and 54-14-204), Rocky Mountain Power very conservatively only asked for a small portion of the costs, just $25,000 of the estimated millions of dollars in excess costs. When Midway City refused to put its money where its conditions were, Rocky Mountain Power went ahead with obtaining the bids in order to meet its obligations and move the Project forward. Since Point III is untrue on its face, it should be dismissed.

IV. Allocating Costs to Rocky Mountain Power is Not Warranted.

Finally, the City suggests that this Board should allocate a "substantial portion" of the excess costs to Rocky Mountain Power under Sections 54-14-201 and 54-14-303 of the Act. This claim has been waived by the City, and furthermore would be counter to Rocky Mountain Power's regulations and not in the interests of its customers statewide.

The City has waived its right to request that any portion of the costs be borne by Rocky Mountain Power by approving the conditional use permit and expressly agreeing to pay the excess costs. This very point was raised by Rocky Mountain Power in its Petition – that it was

unclear whether the City had entered into an express agreement to pay the excess costs as required by Utah Code § 54-14-303(1)(a) (*see* Petition, point 2). Rather than appeal to the Board when facing the prospect of excess costs, the City granted the conditional use permit, through which "[t]he City … *clearly manifested its assent* to pay for the actual costs," [6] a fact that was affirmed at least a dozen times in the City's Response.[7] Having unequivocally agreed to pay those excess costs, the City cannot now appeal to this Board to save it from that agreement.

Even if the City hadn't waived its right to seek apportionment of the excess costs, there are no orders, rules or regulations of the Public Service Commission that would require Rocky Mountain Power to pay those costs under Utah Code § 54-14-201(2)(a), and it would be contrary to the interests of every customer in Rocky Mountain Power's entire system[8] to bear the burden of millions of dollars in costs that Midway City is trying to thrust on them so one mile of transmission line—in the same location where a transmission line has existed for decades—can

---

[6] Respondent's Counter-Petition, p. 8.

[7] Respondent's Counter-Petition, pp. 2-3 ("*[T]he Decision requires the City to pay for those excess costs*, once determined, as required by the Utility Facility Review Board Act: '*The City will pay the difference between the standard cost* (which includes engineering cost, the cost to install the line, all easement costs, all severance damages that RMP would have been required to pay had the line gone above ground) *and actual cost* of the buried line.") (quoting "Report of Action of the Midway City Council" dated 17 December 2019 (referred to in this proceeding as the "Decision"), p. 4, bullet point hand-numbered as 4; emphasis added); id. p. 3 ("The Decision then describes in detail how *Midway will pay for the actual excess costs*…" and "the Decision plainly states that *the City is required to pay the actual excess costs*….") (citing to Decision pp. 2-3, bullets 3-4; emphasis added.); id. p.5 ("Midway hereby affirms that *the Decision was a final action* on RMP's request for a conditional use permit as of December 17, 2019, when it was passed by the Midway City Council" and "the Decision is final and binding") (emphasis added); id. p. 6 ("It is clear that a city must pay the actual excess cost of the conditional construction") (citing Utah Code § 54-14-201(2)); id. p. 7 ("[T]he City is only *required to pay* the 'actual excess cost" and "The City considered the information, and on December 17, 2019, issued its Decision granting the permit based on various conditions and finding: '*The City will pay the difference* between the standard cost (which includes engineering cost, the cost to install the line, all easement costs, all severance damages that RMP would have been required to pay had the line gone above ground) and the actual cost of the buried line.") (quoting Decision p. 4, point 15; emphasis added; internal emphasis omitted); id. pp. 7-8 ("The Decision then describes in detail how *Midway will pay* for the actual excess costs…") (citing Decision pp. 2-3, points 3-4; emphasis added); id. p. 8 ("The Decision plainly states that *the City must pay for the actual excess costs* of RMP fulfills the conditions, which include securing competitive bids"; and "That the agreement to pay here includes conditions precedent is neither unusual nor fatal to the validity of the agreement.") (emphasis added); and id. p. 10 ("Midway has agreed to pay the actual excess cost….").

[8] *See* Utah Code § 54-14-305(3)(b) ("The public utility is entitled to recover from its ratepayers any actual excess costs apportioned to it under Subsection (2)(b)(iv).").

be constructed underground at the behest of Midway City. In addition to being patently unfair to the vast majority of Rocky Mountain Power's customer who would never benefit from the line being constructed underground, such a decision would be contrary to the spirit of Rocky Mountain Power's regulations, which require that a party (including a governmental entity) requesting a *distribution* line to be buried pay those costs. *See* Rocky Mountain Power Electric Service Regulation 12, § 6(b) and (c). If excess costs are fairly attributable to the party requesting that *distribution* lines be buried rather than being borne by customers statewide, then the same is exponentially more true of more expensive *transmission* lines.

Further, in the City's discussion on this point, it completely fails to acknowledge that, in addition to providing broader system benefits, this Project is and always has been intended to directly benefit Midway City and the surrounding areas – a fact the City has previously expressly acknowledged. *See* Decision, p. 1, points C and D ("The proposal will create a second point of power access that *will benefit residents of the entire valley*" and "[t]he proposal will allow more power to enter the valley that *will benefit the entire valley and meet present and future community needs*" (emphasis added)). In its Counter-Petition, the City mischaracterizes the Project as a "through-county" line that has no benefit to Midway City or the Heber Valley. This is simply not true, and is in direct opposition to findings publicly made by the City Council.

But even if it *were* true that this Project provides no direct benefit to Midway City, the very purpose of the Act is to address the *statewide* concern of siting and constructing public utility facilities. *See* Utah Code § 54-14-102(1)(a) and (b) ("[T]he construction of facilities by public utilities under this title is a matter of statewide concern" and "[t]he construction of these facilities may affect the safety, reliability, adequacy, and efficiency of service to customers in areas within the jurisdiction of more than a single local government.")

The City asserts without any foundation whatsoever that "it appears that the *primary* purpose for RMP's transmission line is to wheel power to whole customers in other jurisdictions, not for the benefit of Midway and its citizens." (Counter-Petition p. 20; emphasis added.) Even if the *primary* purpose of the line were to wheel power outside Midway City, that does not constitute a reason to apportion the costs to Rocky Mountain Power and its customers. Indeed, review may only be sought if the proposed facility is "to serve customers *exclusively* outside the jurisdiction of the local government." (Utah Code § 54-14-303(1)(f).) Since the Project will directly benefit Midway City by providing much-needed additional reliability and capacity, as more fully discussed in Point I above (which the City has already acknowledged), and since doing so would be unjust and contrary to Rocky Mountain Power's regulations, apportionment of any costs to Rocky Mountain Power and its customers is not appropriate.

CONCLUSION

For the reasons set forth above, Midway City's Counter-Petition should be dismissed with prejudice.

DATED this 16th day of March, 2020.

FABIAN VANCOTT

/s/ Heidi K. Gordon
Attorneys for Petitioner Rocky Mountain Power

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2020, a true and correct copy of the foregoing ROCKY MOUNTAIN POWER'S RESPONSE TO MIDWAY CITY'S COUNTER-PETITION FOR REVIEW was served as follows:

via email and first-class mail to the following:

Corbin B. Gordon
Midway City Attorney
322 E. Gateway Drive, Suite 201
Heber City, UT 84032
Email: cgordon@gordonlawgrouputah.com

Scott Sweat
Jon Woodard
Wasatch County Attorney's Office
805 West 100 South
Heber City, UT 84032
Email: attorney@wasatch.utah.gov

Adam S. Long
Smith Hartvigsen
Attorney for Heber Light & Power
257 East 200 South, Suite 500
Salt Lake City, UT 84111
Email: along@shutah.law

Mark O. Morris
Elizabeth M. Brereton
Snell & Wilmer
Attorneys for VOLT
15 West South Temple, Suite 1200
Salt Lake City, UT 84101
Email: mmorris@swlaw.com
lbrereton@swlaw.com

via first-class mail to the following:

Utah Attorney General
Heber M. Wells Building
160 East 300 South, Suite 500
Salt Lake City, UT 84111

Division of Public Utilities
Heber M. Wells Building
160 East 300 South, 4th Floor
Salt Lake City, UT 84111

Office of Consumer Services
Heber M. Wells Building
160 East 300 South, 2nd Floor
Salt Lake City, UT 84111

/s/ Heidi K. Gordon