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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER Petitioner vs. MIDWAY CITY Respondent	**RESPONDENT MIDWAY CITY'S DUE PROCESS OBJECTIONS** Docket Number 20-035-03

Defendant Midway City, by and through the above counsel, hereby objects that the Utility Facility Review Board Act, Utah Code §§ 54-14-101 *et seq*. (the "Act"), as applied in this case, and these proceedings, collectively, deprive Midway City of its constitutional right to fair and due process.

INTRODUCTION AND BACKGROUND

This case arises from RMP's request for a conditional use permit ("CUP") to construct a double circuit 46kV and 138kV transmission line (one each for Heber Light & Power ["HL&P"] and RMP) through a quiet, residential area of Midway City. On December 19, 2019, the Midway City Council approved RMP's application on several conditions, including that the lines be buried

and that RMP provide competitive bids for the work. Consistent with statute, the CUP also requires the City to pay the actual excess costs of burying the lines.

On January 15, 2020, RMP petitioned the Board for review of the City's decision under the Act. On February 25, 2020, this Board held an initial hearing as required by Section 304(1) of the Act. During the hearing, the Board designated this proceeding as a formal adjudicative proceeding under Part 2 of the Utah Administrative Procedures Act ("APA"), Utah Code §§ 63G-4-201 *et seq*. Section 304(3) of the Act requires the Board to hold a "hearing on the merits" ***within sixty days*** of the initial hearing, and so, the Board scheduled a trial on the merits beginning on April 20, 2020. The Board also set various deadlines for compiling the entire record, conducting all fact discovery and completing all expert discovery within those sixty days.

Midway has done its utmost to comply with draconian deadlines imposed by a statute that plainly benefits—and was directly influenced, if not written by—utilities like RMP and their lobbyists. The circumstances of this case, and the Act as applied to Midway, have shown not only that the Act is unfair, but that it has deprived Midway of due process of law. While Midway understands that this Board has limited jurisdiction by virtue of the Act, Midway is compelled to lodge this objection and to preserve its rights.

ARGUMENT AND AUTHORITIES

The Fifth Amendment to the United States Constitution forbids the federal government from depriving any person "of life, liberty, or property, without due process of law." U.S. Const. amend. V. The Due Process Clause of the Fourteenth Amendment similarly prohibits a State from "depriv[ing] any person of life, liberty, or property, without due process of law." *Id*. amend. XIV,

§ 1. Similarly, Article I, Section 7 of the Utah Constitution states, "No person shall be deprived of life, liberty or property, without due process of law." Utah Const. art. I, § 7.

This analysis examines whether the complaining party was deprived of a protected interest and whether the plaintiff was afforded an appropriate level of process. *Kuchcinski v. Box Elder Cnty.*, 2019 UT 21, ¶ 42, 450 P.3d 1056; *Martin Marietta Mat., Inc. v. Kan. Dep't of Transp.*, 810 F.3d 1161, 1172 (10th Cir. 2016). "If the deprivation at issue was not justified by sufficient due process, then the due process rights of the person who suffered the deprivation have been violated." *Kuchcinski*, 2019 UT 21, ¶ 42; *see also Nelson v. City of Orem*, 2013 UT 53, ¶ 28, 309 P.3d 237. The level of process required varies depending "on the nature of, and the circumstances surrounding, the deprivation." *Kuchcinski*, 2019 UT 21, ¶ 44.

In this case, Midway City plainly has a protected property interest in its funds and in the citizens and property within its jurisdiction.[1] During these proceedings, Midway City has unfortunately and unfairly been deprived of its protected interests without fair process in several ways.

The sixty-day time limit imposed by the statute has made it all but impossible for Midway to adequately ferret out the facts and defend its position against the claims of a utility seeking to construct massive power lines through the front yards of its citizens. These power lines will be exceptionally intrusive and ***permanent***, lasting decades if not centuries, which warrants a higher

[1] A protectible interest includes liberty and property. The United States Supreme Court has defined a property interest broadly "as a 'legitimate claim of entitlement' to some benefit." *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)). For example, a cause of action and a party's ability to defend itself are protectible property interests. *Flowell Elec. Ass'n, Inc. v. Rhodes Pump, LLC*, 2015 UT 87, ¶ 20, 361 P.3d 917.

level of process and fairness. Instead, Midway is left with a fraction of the protections and time that would be available in a balanced court proceeding.

The facts of this case, in particular, place Midway at a distinct disadvantage. The crux of the dispute—determining the "actual excess costs" that Midway may be forced to pay—is a complex calculation involving intricate construction, bids and easements that cannot reasonably be established within 60 days. Utah Code § 54-13-201. Under the Act, the actual excess costs are derived almost solely from bids obtained by RMP, which are themselves based on specifications unilaterally created by RMP and given to only those contractors who are "approved" by RMP. *Id*. § 54-13-203. Once the bids are obtained, the Act grants RMP near unilateral discretion to select the bid RMP prefers and impose those costs on Midway and its citizens. *Id*. This unfair process, created by the public utility lobby, leaves almost no room for Midway to challenge bid amounts for which Midway may be forced to pay millions of dollars.

This prejudice is made worse by the specific circumstances of this dispute. Midway received RMP's bids on March 26, 2020, a mere three weeks before trial. The bids are complicated, call for truncated timeframes, involve two separate transmission lines and price out three different potential routes. There is no reasonable way for Midway to adequately analyze and respond to these bids within the timeframe given. RMP is a legal monopoly. It issued the bid specs to eighteen companies, and only three replied. Midway has been told by companies who are licensed in Utah that they will not submit a bid because they rely on RMP for their livelihood. This forced Midway to look to out-of-state companies, but these companies are not licensed in the state of Utah and have indicated an unwillingness to prepare a bid on a project they suspect they have no chance of obtaining.

This problem could have been solved with time, but there is no time granted under the Act. Thus, Midway City has no capacity to get a reliable third-party bid(s) before the hearing on the merits. Instead, Midway is left with cost estimates and weak attempts to punch holes in bids that the Act seemingly allows RMP to unilaterally select in any event.

In the case of small municipalities in particular, like Midway, the Act is grossly unfair. When faced with the prospect of community-altering power lines, a municipality has two choices under the Act: (1) surrender to the utility and allow it to build unsightly overhead lines, as those are deemed "standard cost" under the Act; or (2) pay for the "excess cost" based on sums that are almost impossible to challenge. The problem with Choice #2 is that the municipality is required to pay the "excess cost" on demand, and municipalities—with limited budgets—are constrained by the Local Government Bonding Act in raising funds. Utah Code § 54-13-204. As this Board surely knows, bonds can only be approved in elections, which occur but once per year. *Id*. § 11-14-201. So, unless the utility happens to be building power lines in November, the municipality is forced into Choice #1 because it cannot practically raise the funds. There is no consideration in this one-sided Act to allow a municipality to legally raise funds necessary to pay excess costs in the event the municipality does not have a $10 million budget surplus on hand.

To be clear, Midway City does not object to the performance of this Board. It has done an admirable job under the restricted authority granted it. Midway is grateful for the time and attention of the members of this Board. But this Board is restricted by the jurisdiction granted it under the Act. Despite the Board's best efforts, Midway has been placed in circumstances that deprive it of fundamental fairness.

CONCLUSION

For the foregoing reasons, Respondent Midway City has been deprived of due process in this proceeding, and it requests that this Board take all available measures to protect Midway City.

DATED this 17th day of April 2020.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of April 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:

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