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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER Petitioner vs. MIDWAY CITY Respondent	RESPONDENT MIDWAY CITY'S OBJECTIONS TO PETITIONER ROCKY MOUNTAIN POWER'S WRITTEN TESTIMONY Docket Number 20-035-03
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Defendant Midway City, by and through the above counsel, hereby responds to Petitioner Rocky Mountain Power's ("RMP") Written Testimony submitted to the Board in advance of the April 20, 2020 hearing.

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. RMP petitioned the Board for

review of the City's decision, and Midway counter-petitioned for review. The primary remaining issues are (1) whether RMP has demonstrated an immediate need for the transmission lines, as required by statute; and (2) the actual excess costs of the buried lines, which Midway is required to pay under the statute and CUP.

By order of this Board, a trial on the merits will commence on April 20, 2020. On March 20, 2020, RMP submitted written direct testimony for the following witnesses in advance of the trial: (1) Jake Barker; (2) Darin Myers; (3) Benjamin Clegg; (4) Benjamin LeFevre; (5) Jason Norlen; and (6) Craig Michaelis. The Board also ordered the parties to submit rebuttal testimony. As explained below, Midway objects to RMP's witness testimony on several grounds and asks that this Board sustain the objections and strike the defective testimony.

EVIDENTIARY OBJECTIONS

I. Objections to the Testimony of Benjamin LeFevre.

The testimony of Benjamin LeFevre should be stricken because it is unreliable, lacks foundation and is inadmissible pursuant to Utah Rule of Evidence 702. RMP offers Mr. LeFevre as an expert witness for purposes of establishing the value of easements and severance damages that will be incurred as a result of the construction of the transmission line. His is the only testimony offered by RMP on this subject. This testimony is important because RMP bears the burden of proving the costs of necessary rights-of-way as part of its computation of the "actual excess cost". Utah Code §§ 54-14-103(1), 103(9), 203.

Midway does not take issue with Mr. LeFevre's credentials or experience. He is a certified appraiser and appears generally competent to offer opinions in this case. The problem with Mr. LeFevre's opinions is their bases (or lack thereof).

Mr. LeFevre states that only an additional easement width of 1.5 to 2.0 feet will be necessary to accommodate the new overhead transmission line. This is a legal conclusion and an engineering conclusion, neither of which a real estate appraiser is qualified to offer. (LeFevre at p. 3, lines 3-8.) Likewise, Mr. LeFevre opines that there are no severance damages even if the line is constructed overhead. Again, this is a legal conclusion that appraiser LeFevre is in no way qualified to offer.¹ (*Id.* at p. 4, lines 17-26.)

Mr. LeFevre's opinions also lack foundation. They are based entirely on the appraisal report attached to his testimony. However, Mr. LeFevre admits in the same breadth that he was "minimally involved in the preparation of the report", which was created by others. (*Id.* at p. 2, lines 17-20.) Apart from discussing the report with its purported authors, there is no evidence that Mr. LeFevre has any personal knowledge of its contents, bases, methodology, assumptions, support or conclusions. Not only can Mr. LeFevre not testify, but the report itself is inadmissible because Mr. LeFevre cannot lay a proper foundation for it. Utah R. Evidence 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); 703 ("[I]f the facts or data [on which the expert relied] would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect."); 802 ("Hearsay is not admissible except as provided by law or by these rules.").

¹ It is clear that a landowner is entitled to compensation when a quasi-government actor physically takes or occupies the owner's property. *Am. W. Bank Members, L.C. v. State*, 2014 UT 49, ¶ 32, 342 P.3d 224. When only a portion of the property is taken, the compensation includes, in addition to the value of the portion taken, diminution in the value of the remaining portion of the landowner's property. *Utah Dep't of Transp. v. Target Corp.*, 2018 UT App 24, ¶ 15, 414 P.3d 1080. This is known as "severance damages."

Finally, expert testimony is only admissible “if there is a threshold showing that the principles or methods that are underlying in the testimony (1) are reliable, (2) are based on sufficient facts or data, and (3) have been reliably applied to the facts.” Utah R. Evidence 702(b). This Board, sitting as a court would, must act as a gatekeeper “to screen out unreliable expert testimony.” *State v. Lopez*, 2018 UT 5, ¶ 20, 417 P.3d 116 (quotation simplified). The court, “view[ing] proposed expert testimony with rational skepticism,” *id.* (quotation simplified), must determine whether the proponent has met the threshold showing that the method used is “‘generally accepted by the relevant expert community’ ” or that the “principles underlying [the expert’s] testimony are ‘reliable, based upon sufficient facts or data, and have been reliably applied to the facts,’ ” *id.* ¶ 22 (ellipses omitted) (quoting Utah R. Evid. 702).

Although Mr. LeFevre may be a certified appraiser, his direct testimony does not show that the principles or methods that are underlying in the testimony (1) are reliable, (2) are based on sufficient facts or data, and (3) have been reliably applied to the facts. In fact, the entirety of Mr. LeFevre’s testimony is based upon a report that he had essentially no hand in creating. Mr. LeFevre also admits to lacking foundation for his opinions.² His testimony gives little to no detail regarding how the opinions were formed. It refers to interviews with unidentified “buyers of easements”. There is no description of who these supposed buyers are or what easements were purchased. *See Cal. College Inc. v. UCN Inc.*, 2019 UT App 39, ¶¶ 24-25, 440 P.3d 825 (while an expert may rely on his own interpretation or summary of data, there must be a foundation in the evidence for the data and evidence showing its reliability). For the same reasons, the very report on which Mr. LeFevre relies is inadmissible because Mr. LeFevre cannot provide a foundation for

² The authors of the report, who would have such knowledge, are not presented as witnesses.

it. Allowing RMP to introduce the report under these circumstances would circumvent the rules of evidence and effectively preclude the City from challenging the report on cross-examination, because Mr. LeFevre admittedly has no personal knowledge of its bases and creation. Instead, the answer to most or all of the City's questions must be, "I don't know. You'd have to ask the authors." This would be unfair and unduly prejudicial. Therefore, both the report and Mr. LeFevre's testimony should be excluded.

II. Objections to the Testimony of Jason Norlen.

RMP offers testimony by Jason Norlen, an employee of HL&P, regarding HL&P's need for the transmission line for HL&P. In addition approving the RMP line, the City's December 19, 2019 CUP also approved a line for HL&P. As this Board is aware, however, HL&P has not appealed any issue to this Board and has also not intervened. As such, HL&P has no standing. More importantly, Mr. Norlen's testimony is irrelevant to the question of whether the separate RMP transmission line is "necessary", as required by statute. And, Mr. Norlen has no expertise, nor claims any expertise, regarding RMP's system. As such, any testimony he could offer is irrelevant and unsupported and should not be allowed. [NOTE: WE DISCLOSED NORLEN AS A WITNESS ON THE NEED FOR THE LINE]

III. Objections to the Testimony of Craig Michaelis.

RMP offers Craig Michaelis, an electrical engineer for Intermountain Consumer Professional Engineers, Inc., as an expert on the issues of load capacity within the HL&P system. Again, HL&P has not appealed the CUP issued by Midway City, and the Heber Light and Power Load Flow Study is not relevant to whether RMP needs its separate line. Therefore, the testimony of Mr. Michaelis should be stricken.

IV. Objections to the Testimony of Benjamin Clegg.

Mr. Clegg is an Operations Manager for Sigma Utility Solutions, LLC, which is the project manager for the RMP line. Mr. Clegg is not an engineer. Mr. Clegg is offered to testify regarding the CUP application process and communications with Midway City. This testimony is irrelevant to any material issue in dispute because the CUP was granted December 19, 2019, and the parties have proceeded under the CUP since then. While there are disputes regarding RMP's need for its separate line and the actual excess costs of the line, testimony regarding the application process is immaterial and wasteful. Mr. Clegg's testimony should be excluded.

V. Objections to the Testimony of Darin Myers.

Mr. Meyers is employed by RMP as the project manager for the RMP line through Midway. RMP proposes to have Mr. Meyers testify regarding the bids that RMP received and that the purported construction costs of burying the transmission line through Midway will range between \$12,272,986 on the low end, and \$27,498,144 on the high end. (Meyers at p. 4, lines 14-16.) This testimony is unreliable, lacks foundation, is based on hearsay and is speculative.

Mr. Meyers' conclusions do not identify any of the 18 solicited bidders, only 3 of which actually submitted bids. None of the bidders is identified as a witness to provide a foundation for the actual bids.

Mr. Meyers also provides no supporting detail for the composition or bases of the bids. The City is left with whole numbers in the millions, which makes it impossible to rebut. Additionally, the difference between the lowest and highest bid is more than 100%, an alarming number, and Mr. Meyers gives no reason for the difference, effectively depriving Midway of any ability to challenge it. This information is particularly important because the question of the

“actual excess costs” under Section 54-14-203 is squarely before this Board, and RMP’s interest lie in inflating the costs so that burial of the line becomes cost prohibitive.

It also appears that the bids on which Mr. Meyers’ relies are not even final. It is patently unfair to require the City to rebut testimony based upon incomplete and speculative data. It is well established that flawed data precludes expert testimony about the data. *Cal. College*, 2019 UT App 39, ¶¶ 24-25.

Finally, Mr. Meyers opines: “The estimated total cost difference to build the lowest cost option underground would be \$10,760,064.” (Meyers at p. 6, lines 2-3.) RMP has provided no foundation to show that this testimony (1) is reliable, (2) based on sufficient facts or data, or (3) reliably applied to the facts of this case, pursuant to Utah Rule of Evidence 702. Mr. Meyer’s figure (\$10,760,064) supposedly represents the actual excess cost of construction, i.e., the difference between building the line overhead versus underground. As described above, however, the alleged “underground” costs from RMP are based wholly on anonymous bids that are preliminary, at best, and inadequately supported in any event. As to costs of constructing the line overhead, RMP has still not provided evidence of that number. As a result, the City is left to guess about—and has no ability to meaningfully rebut—what the *actual* excess costs are. It appears RMP believes the City should just take it word for it—a proposition that is contrary to the purpose of this proceeding and every established principle of justice. Accordingly, this Board should reject Mr. Meyers’ testimony.

CONCLUSION

For the foregoing reasons, this Court should exclude and/or limit the written direct testimony proffered by RMP as described above.

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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