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**BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD**

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In the Matter of the Rocky Mountain Power's  
Petition for Review and Midway City's  
Counter Petition to Review.

Docket No. 20-035-03

**HEARING BRIEF**

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On behalf of Valley-Wide Opposition to Large Transmission Lines ("VOLT"), the undersigned counsel hereby submits this hearing brief to summarize evidence, exhibits, testimony, and points of law to be presented by VOLT at the hearing in this matter scheduled for Monday, April 19th through Thursday, April 23rd, 2020.

**SUMMARY**

This Board should deny Rocky Mountain Power's ("RMP") Petition. Without providing standard cost estimates for overhead construction and without identifying any estimated cost for underground transmission line construction, RMP demands that this Board issue an order finding that Midway City failed to pay for some unspecified and purportedly excess cost. RMP effectively claims the burden lies with Midway to defend itself against the visual assault RMP threatens. That is not the law. Worse, RMP suggests that its demands for resolution are reason enough for this Board to issue a decision pursuant to §54-14-305, the Utah Utility Facility Review Board Act. The Board cannot resolve disputes regarding standard costs or estimated excess costs under the Act before RMP has in fact presented these claimed costs to Midway City.

This Board should reject RMP's claims that its assurances and assumptions regarding average underground construction costs should be considered as "excess costs" as defined under the Act. Without pointing to a single point of law or demonstrable fact, RMP argues also that its standard costs of overhead construction are calculated in compliance with the Act. RMP claims that it will cost a mere \$25,473 to obtain necessary rights-of-way for overhead construction of its 138 kV double circuit transmission line through the heart of Midway City. The evidence will show instead that RMP woefully underestimated easement costs, which in fact will be, at minimum, somewhere between \$2.5 and \$4.7 million. The effect of this, of course, will substantially lower the economic burden RMP seeks to impose upon Midway to preserve its aesthetic and historic beauty.

This Board should issue a decision very simply finding that RMP has not provided stranded cost estimates to Midway City that include the real costs of obtaining necessary rights of way for its overhead transmission facilities. This Board should also find that RMP's estimates for standard costs of overhead construction do not include all costs of acquiring necessary rights of way. This Board should issue a decision finding that Midway City's obligation to pay for excess costs under §54-14-203 must be offset by standard costs that include costs of obtaining rights of way.

#### **STATEMENT OF JURISDICTION**

Utah Code §§ 54-14-303(2)(a) and 54-14-305(2)(b)(i) and (iv) provide that this Board may hear disputes regard estimated excess cost or standard costs of a facilities and issue a written decision that resolving those disputes and apportioning actual excess costs of the facility between the local government and the public utility. VOLT requests that this Board issue a decision finding RMP's "standard costs" must include costs of obtaining rights-of-way (ROW) costs and that excess costs apportioned to the City must be reduced by these costs.

**BRIEF STATEMENT OF UNDISPUTED FACTS**

The Heber-Midway Line<sup>1</sup> is the last segment in Rocky Mountain Power’s (“RMP’s”) Jordanelle-Midway Project<sup>2</sup> undertaken with Heber Light and Power Company (“HLP”). RMP plans to construct line as an overhead double circuit 138 kV power line sited through the heart of Midway City. Testimony and briefing submitted by RMP, Midway City, and VOLT (collectively “Parties”) in this matter establish that the parties agree to or do not dispute the following facts:

1. RMP does not have recorded easements for the line’s route in Midway City.
2. HLP operates and maintains 12.5 kV and 46 kV distribution lines in Midway City to provide electric service within Midway City, Heber City, Charleston, and certain areas of Wasatch County.
3. HLP claims that its lines are within prescriptive easements across along the path identified in VOLT-010.
4. HLP and RMP propose to site the Heber-Midway Line within HLP’s existing prescriptive easements for HLP’s 46 kV distribution lines.
5. After construction HLP will continue to own and operate facilities in these easements to provide electric service to Midway City and its residents.
6. After construction RMP will own and operate overhead 138 kV transmission lines in addition to and on top of HLP’s distribution facilities.
7. Rocky Mountain Power’s 138 kV transmission line is subject to NERC Reliability Standards.

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<sup>1</sup> “‘Heber-Midway Line’ means the Transmission Structures, the RMP Circuits, the HLP Circuits and Property Rights within Sections 110, 130, 140A, 150, 160A, 160B, 170A, 170B and 180 of the Jordanelle-Midway Line as shown on *Exhibits A and B*, but does not include the Tie Line (Section 140B) or Additional Facilities.” CONSTRUCTION AGREEMENT FOR THE HEBER-MIDWAY LINE BETWEEN HEBER LIGHT & POWER COMPANY AND ROCKY MOUNTAIN POWER COMPANY, dated April 3, 2017 (hereinafter, “Construction Agreement”), Sec. 1.19.

<sup>2</sup> “‘Jordanelle-Midway Line’ means the Highway 40 Line, the Heber-Midway Line, the Section 120 Line, the Tow Line, and Additional Facilities.” Construction Agreement, Sec. 1.38. Jordanelle-Midway Line Project Map.

8. RMP's 138 kV double circuit transmission lines require necessary rights-of-way that are between 55' and 60' wide, or between 28' and 30' from centerline on private property.
9. HLP does not currently have recorded rights of way for any lines over 46 kV, and thus cannot convey them to RMP.

### **ARGUMENT**

Neither VOLT nor Midway City claim that RMP must pay for excess costs of underground transmission line construction. Midway City and VOLT acknowledge that actual excess costs should be paid by Midway City residents. Midway City cannot agree, however, to pay estimated excess costs that do not meet the requirements of the Utah Utility Facility Review Board Act ("Act"). Under the Act, a local government must pay for actual excess cost resulting from construction requirements it imposes on a public utility's facility.<sup>3</sup> Before a local government can impose such a requirement, the local government and the public utility must agree to the amount of estimated excess costs to be paid for by the local government. To that end, the public utility is required to provide the "the estimated standard cost of the facility; [and] the estimated cost of the facility if constructed in accordance with local government requirements or conditions."<sup>4</sup> The Act defines "standard costs" as "the estimated cost of a facility, including any necessary right-of-way if constructed in accordance with the public utility's normal practices."<sup>5</sup> "Standard costs" for transmission line construction are further defined as "the cost of any overhead line constructed in accordance with the public utility's normal practice."<sup>6</sup> A local government is required to pay "actual excess costs," the difference

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<sup>3</sup> Utah Code Ann. § 54-14-201(2).

<sup>4</sup> Utah Code Ann §54-14-202(b)(i).

<sup>5</sup> Utah Code Ann. § 54-14-103(9)(a).

<sup>6</sup> *Id.* at (9)(b).

between the public utility's "standard cost" and "estimated costs of construction meeting [the local government's] conditions."

Here, RMP failed to provide any credible estimate of standard costs that include costs of obtaining rights-of way over private property sited on the line. RMP claims that the cost of obtaining necessary rights of way from ten private property owners will cost a total of \$25,743. RMP arrives at this estimate based on a number of assumptions that are not supported by the facts of this case and are, for the most part, unlawful. Ultimately RMP estimates that it is required to obtain easements over an area of 14,952 s.f. at an estimated cost approximately \$1.73/s.f.

VOLT joins Midway City in asking this Board to issue a decision that rejects RMP's calculation of excess costs and denies RMP's demands for immediate payment of such costs by Midway City.<sup>7</sup> The following summarizes evidence and testimony on the record that demonstrate (a) RMP's standard costs do not include necessary rights-of-way; (b) RMP must obtain these rights-of-way at a cost that reimburses property owners for severance damages; and, (c) an accurate accounting standard costs include between \$2-\$4 million dollars in costs of obtaining rights of way on all private property sited on the transmission line path.<sup>8</sup>

**I. OVERHEAD CONSTRUCTION OF THE RMP'S TRANSMISSION LINE REQUIRES THAT RMP ACQUIRE 60'-WIDE RIGHTS-OF-WAY FROM PRIVATE PROPERTY OWNERS.**

RMP's proposed 138 kV double circuit transmission line is sited on thirty-five privately owned properties, as well as on private property owned by the Soldier Hollow Home Owners Association ("HOA").<sup>9,10</sup> RMP claims it is not required to obtain new easements over these

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<sup>7</sup> Direct Written Testimony of RMP Witness, Benjamin Clegg, at 9:30-31.

<sup>8</sup> See VOLT ROW Cost Summary attached hereto as "Attachment 1" and VOLT Summary of All property impacts, attached hereto as "Attachment 2."

<sup>9</sup> See VOLT ROW Cost Summary attached hereto as "Attachment 1."

<sup>10</sup> VOLT-010.

properties because RMP plans to site its 138 kV transmission lines within existing prescriptive easements held by HLP for operation and maintenance of HLP's 12.5 kV-46 kV distribution line. RMP assumes that HLP's easements are between 27' at centerline, or 58' to 60' across.<sup>11</sup> And it is only an assumption. RMP's standard costs for overhead construction, therefore, only include costs of expanding these easements by 2' to 3' on ten properties.<sup>12</sup> RMP estimates that it must expand HLP's existing easements by 14,952 s.f. and compensate property owners \$1.76/s.f. In total, RMP estimates that building transmission lines through the heart of Midway City across multimillion dollar developments will cost approximately \$25,473.<sup>13</sup>

RMP cannot simply piggy-back new Bulk Power System ("BPS") transmission facilities on HLP's distribution lines to avoid acquiring necessary rights-of-way ("ROW"). RMP's transmission facilities impose new burdens and new restrictions on property sited in the 138 kV transmission path. In terms of footage, RMP's transmission lines require easements on private property that are an additional 17' to 20' wide. HLP's existing prescriptive easements for its transmission facilities are only 10' wide. This will require RMP to expand HLP's existing easements on private property by roughly 274,560 s.f. Rather than ten, there are at least thirty-five (35) owners with property directly impacted by RMP's transmission line.

A. **HLP does not maintain any prescriptive easements on private property that are more than 10' wide at centerline.**

RMP proposes that overhead transmission facilities including a double circuit 138 kV transmission line with underbuilt 46 kV lines and communications facilities fit within the footprint of HLP's existing prescriptive easements used for local electric service and power distribution facilities. RMP's cost estimates assume that HLP's existing prescriptive easements

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<sup>11</sup> VOLT-012, RMP Route Map Overhead.

<sup>12</sup> Rebuttal Testimony of Benjamin Clegg on behalf of RMP at page 3:26-28.

<sup>13</sup> VOLT-011, RMP Easement Cost Estimates.

extend 27' from the centerline of HLP's existing facilities onto private property.<sup>14</sup> RMP never stated a basis for this assumption.

There is no possible measure justifying RMP's claims that HLP maintains 54' wide prescriptive easements. Generally, absent a recorded instrument, the metes and bounds of prescriptive easements are defined by the easement's historic use during the prescriptive period.<sup>15</sup> But, to the extent that historic use does not evidence clear easement boundaries, the area of an easement is defined by what is reasonably necessary given applicable building codes, industry standards, local ordinances, other legal requirements.<sup>16</sup>

Recorded Notices of Easement and supporting affidavits filed by HLP in 2005 for portions of its 46 kV line state that the easement is "described by the as-built construction of the existing power line."<sup>17</sup> As it stands today, HLP's distribution line consist of a single 46 kV circuit, with 12.5 kV conduit and communications lines attached as underbuilds on nineteen (19) wooden poles that vary in height between 35' and 45' above the ground.<sup>18</sup> The route is about one mile in length. The path of the line begins on 970 South, then proceeding north it follows a private, unpaved, gated lane until it reaches Stringtown Road. It then runs about an eighth-mile stretch along Stringtown Road. At the intersection of Stringtown Road and Wards Lane, the line turns onto Wards until it turns west and reaches Midway City's boundary.<sup>19</sup>

VOLT does not dispute that HLP maintains prescriptive easements along the length of HLP's existing distribution line. Affidavits provided by HLP lineman, Troy Klungervik, that are

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<sup>14</sup> Direct Testimony of RMP Witness, Benjamin LeFevre, at 3:4-8; and see also VOLT-012

<sup>15</sup> *Valcarce v Fitzgerald*, 961 P.2d 306, 312 (Utah 1997).

<sup>16</sup> *See Lunt v. Lance*, 2008 UT App 192, ¶¶25-33, 186 P.3d 978 (Wherein, absent evidence of visible usage over time, the court determined that the width of an easement for a driveway "would be inferred in connection with other facts from the standard width of a driveway" as defined under Heber City ordinance that required a standard width of 20-feet across).

<sup>17</sup> RMP Initial Disclosures in Docket No. 20-035-03.

<sup>18</sup> RMP's estimates pole height to be 45' to 55' feet based on the pole's length, including the portion of the pole that is buried underground.

<sup>19</sup> VOLT-004.

recorded with HLP Notices, establish that HLP's historic use of the easement has been for the sole purpose of maintaining and operating the existing overhead distribution facilities. Klungervik swears to the fact that he "personally inspected said facilities and verified through Company records that said facilities have existed in their present location, unchanged, for over 20 years."<sup>20</sup> Klungervik also swears that the existing facilities "have remained in their present location...undisturbed."<sup>21</sup>

Neither the Notices nor the affidavits, however, establish the width of HLP's existing prescriptive easement. Historically, easement widths for electric lines include line clearances that vary depending on the voltage of the line, pole heights, support structures and facilities sited in the same area. Looking to the historic use of the easement, pictures of HLP's existing distribution lines presented by HLP staff during HLP's Board meeting on May 25, 2018 show mature trees, vegetation, and structures within HLP's easements, just a few feet away from HLP's distribution lines. This suggests that HLP, at least historically, has not strictly maintained line clearances and enforced its right to remove vegetation and structures contained therein. Thus, the width of these prescriptive easements is relatively narrow.

Absent clear boundaries established by historic use, the width of HLP's easements are defined by what is "reasonably necessary" as defined by common practice or applicable requirements imposed by state or federal regulations. Here, neither Wasatch County nor Midway City have ordinances that mandate line clearances for electric distribution lines. HLP, itself, requires a 10' clearance from either side of its centerline and maintains the right to remove encroaching structures and vegetation within this area. Arguably, HLP may claim that an easement that accommodates a 10 foot line-clearance on either side of its lines is reasonably necessary for HLP to safely operate facilities within its prescriptive easement. The width of the

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



easement is therefore based on what is “reasonably necessary” to accommodate HLP’s existing distribution facilities. Any such claim is belied by years of practice.

Although HLP may be able to *claim* prescriptive rights through 10’ from the centerline, there is no evidence that establishes any historic use necessitating a 27’ wide easement for HLP’s distribution facilities. In fact, a 10’ wide clearance is tenuous. Although HLP’s publishes a 10’ clearance requirement, HLP does not maintain 10’ clearances on private property. There are structures, including homes sited within less than 15’ of HLP’s existing distribution lines. VOLT witness Bengt Jonsson has provided written testimony and evidence demonstrating that HLP currently maintains 8’ to 10’ line clearance on his property. A picture of his property is included here for illustration purpose.<sup>22</sup> The picture shows a line of 100-year old elm trees at about 10’ from the HLP’s line. Mr. Jonsson’s front door is exactly 27’ from the centerline of HLP’s facilities. Mr. Jonsson’s neighbors’ front door is within 13’ of HLP’s centerline. Along other portions of the line, there are structures located immediately beneath HLP’s line.

HLP’s historic use of private property to maintain and operate its 46 kV distribution line clearly establishes that HLP’s prescriptive easement includes an area that runs the length of the existing 46 kV line at 10’ from centerline of HLP’s distribution facilities.

**B. HLP Existing Prescriptive Easements do not Accommodate RMP’s 138 kV transmission lines.**

RMP failed to show the impact of its proposed overhead lines is minimal. “A prescriptive easement does not result in ownership, but allows only use of the property belonging to another for a limited purpose.”<sup>23</sup> The right to use a prescriptive easement cannot be expanded to place a greater burden or servitude on the property.<sup>24</sup> An easement is limited to the “uses for which, or by which it was acquired, and to the person who acquired it, or for the benefit of the

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<sup>22</sup> VOLT-009.

<sup>23</sup> *Nyman v. Anchor Development L.L.C.*, 2003 UT 27, ¶18, 73 P.3d 357.

<sup>24</sup> *Id.*

property for which it was acquired.”<sup>25</sup> Changes and improvements may be made to the easement, insofar as they are reasonably necessary for the convenient enjoyment of the easement.<sup>26</sup> Reasonably necessary uses always include the right to gain access to the easement area and to maintain and repair the easement.<sup>27</sup> Uses that are outside the scope of the easement’s purpose or that impose materially greater burdens on the servient estate are considered a *trespass*.<sup>28</sup>

Here, HLP’s prescriptive easement is limited to HLP (“the person who acquired it”), for the use of electric service to HLP’s customers (“uses for which it was acquired”), or for the benefit of the HLP’s 46 kV distribution lines<sup>29</sup> (“for the benefit of the property for which it was acquired”). Whereas HLP’s 46 kV line, by itself, requires a 10’ wide easement onto private property, the RMP’s Heber-Midway Line, by comparison, will require an easement width of between 27’ and 30’ feet on private property. This leaves a 20’ wide gap between HLP’s existing easement and the boundary of a new 30’ wide ROW from the centerline of RMP’s facilities onto private property. Changing physical dimensions of an easement to include more of the servient estate is generally considered to be a use that imposes materially greater burdens on the servient estate.<sup>30</sup> Below is an illustration showing what the evidence will establish.

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<sup>25</sup> *Valcare*, 961 P.2d at 312.

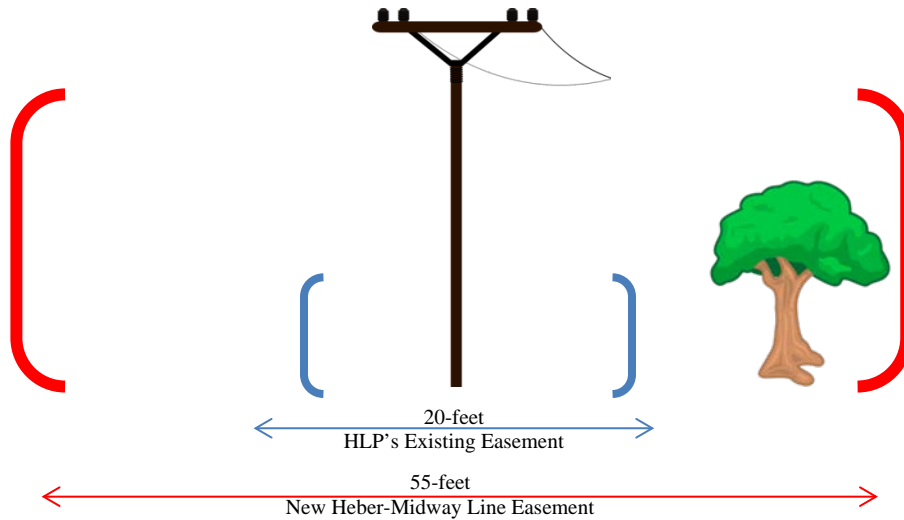
<sup>26</sup> Third Restatement of the Law-Property Servitudes, Section 4.10

<sup>27</sup> *Id.* at Section(c)

<sup>28</sup> *See Big Cottonwood Tanner Ditch Co. v. Moyle*, 159 P.2d 596, 598-599 (Utah 1945).

<sup>29</sup> The distinction between distribution lines and BES or high-voltage lines is based on the definition of Bulk Electric System (“BES”) facilities used by FERC that generally defines BES facilities as being 100 kV or above.

<sup>30</sup> *See Harvey v. Hights Bench Irr. Co.*, 318 P.2d 343 (Utah 1957).



Overhead construction of the Heber-Midway Line cannot be considered an “improvement” that is “reasonably necessary” for the easement holder’s use. Expansion of the easement for RMP’s transmission facilities is not, in any way, necessary for HPL’s existing use of the easement. Construction of the Heber-Midway Line will not change HPL’s use of the easement. RMP will build new 138 kV high-voltage power lines, conductors, and facilities *on top* of HPL’s existing lines. After construction, RMP will exclusively own and operate the high-voltage facilities sited above HPL’s existing distribution facilities. HPL’s facilities are to be separately constructed at HPL’s cost. HPL will have no ownership in the new high-voltage facilities within the easement, nor will HPL have any right to transmission capacity controlled by RMP. RMP’s high voltage transmission facilities are only necessary for RMP to effect an entirely *new use* in addition to and on top of HPL’s existing use of the easement area. High-voltage transmission construction is not necessary to HPL’s use of the easement and will have no impact on HPL’s current operations within the easement.

Even if high voltage transmission facilities were considered “reasonably necessary” for HPL’s system, a necessary use may not impose materially greater burdens on the servient estate without adequate and fair compensation, which must be included in any cost estimates for the greater burden. Under Utah law, uses that impose materially greater burdens on the servient

estate require a user to seek a new easement or risk a trespass action from the servient estate. To determine if such a use imposes a material burden, a comparison must be made with the use by which the easement was created with respect to physical character and the relative burden caused by easements upon the servient tenement.<sup>31</sup>

Changing physical dimensions of an easement to include more of the servient estate is generally considered to be a use that imposes materially greater burdens on the servient estate. But even a change in physical character may also include improvements that do *not* expand the boundaries of the easement area.<sup>32</sup> Changes that require new infrastructure, vegetation removal; or changes that create additional hazards change the physical character of the easement. Although such changes may be made, a company must make payment or be liable for damages for trespass.

HLP's existing distribution facilities require 20-foot wide easements with 10-foot wide line clearances. HLP maintains the right to remove trees and other structures within its easements, yet HLP has not historically enforced these clearances. Pictures of HLP's existing distribution lines presented by HLP staff during HLP's Board meeting on May 25, 2018 show mature trees, vegetation, and structures within HLP's claimed easements. It is likely that HLP, like many local power distributors, assess encroachments on a case-by-case basis. Based on the specific line segment and easement encroachments, HLP may exercise its discretion not to remove structures and trees within its easement, or within 10-feet of its lines.

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<sup>31</sup> *Big Cottonwood Tanner Ditch Co*, 159 P.2d at 598-599 .

<sup>32</sup> In *Harvey v. Hights Bench Irr. Co.*, an irrigation company maintained a prescriptive easement for an earthen irrigation ditch through the plaintiff's property. Historically, the ditch "was wide, with shallow banks, and a wide, flat bottom." After the prescriptive period had run, the company "improved" the ditch with a "very narrow bottom-14 inches- with high, steep, smooth, hard sides-36 inches- and a width on top of seven feet." The company removed old-growth trees and vegetation along the ditch's banks. Even though the cemented ditch was actually narrower in some places than the original ditch, the court held that the irrigation company's "improvement" was a trespass upon the servient estate. The Court held that "it requires no expert to delineate the disadvantages thus imposed on the plaintiffs." 318 P.2d 343.

RMP has no such discretion, because at present it owns nothing. RMP's high-voltage BES transmission facilities will be controlled and owned by RMP as part of its BES system. Under the 2006 Energy Policy Act, high-voltage transmission facilities are subject to Electric Reliability Standards adopted by the Federal Energy Regulatory Commission ("FERC") and enforced by regional reliability organizations.<sup>33</sup> These standards impose certain maintenance and testing requirements that must be performed by all BES operators and owners for BES facilities. Failure to maintain and test BES facilities in a manner that complies with these standards may result in fines of up to \$1,000,000.00/day to a BES facility owner or operator. Facing penalties from state and federal regulators, RMP is generally more aggressive in maintaining line clearances than local electric service providers, like HLP, are. Existing vegetation beneath or within HLP's easements are likely to be removed. Additionally, RMP will have the right to remove mature vegetation, landscaping and structures owned by landowners within a 55-foot area to accommodate RMP's 138 kV facilities. Property owners will lose any right to install structures and plant vegetation that could intrude upon the easement within this area or that could be deemed to pose a reliability risk to RMP's system.

Beyond increasing the easement area, the burden RMP seeks to impose on property owners by the Heber-Midway Line is significantly, and materially, greater than the current burden imposed by HLP's distribution line. RMP's lines are taller and wider than HLP's existing lines. Property-owners must contend with hazards and noise that come with BES transmission line. After construction, property owners will be required to provide HLP *and* RMP with access to operate and maintain their respective facilities. Testing and maintenance requirements for HLP's distribution facilities are largely determined by HLP managers and performed by HLP staff. RMP's poles and double 138 kV circuit, however, are BES facilities and will require RMP staff to perform BES facility maintenance and testing at regular intervals required under NERC

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<sup>33</sup> National Energy Regulatory Corporation ("NERC") Reliability Requirements, FAC-003-4.

reliability standards. Servient estate owners will be required to provide access to RMP staff at regular intervals across private property.

In sum, RMP's use of HLP's existing easements, under any standard, does not relieve RMP of its obligation to acquire and pay for rights of way necessary for overhead construction of 138 kV transmission facilities. The physical dimensions of 60' easements pose materially greater burdens on servient properties subject to HLP's 20' easement. RMP's standard costs for overhead construction must, therefore, include costs of obtaining rights of way that are 40' wider than even the widest of HLP's existing prescriptive easements.

**II. RMP'S STANDARD COSTS OF OVERHEAD CONSTRUCTION MUST INCLUDE SEVERANCE DAMAGES PAID TO ALL IMPACTED PROPERTY OWNERS.**

RMP's claims as to HLP's existing easement widths define the properties that are "impacted" and the costs of obtaining ROWs including costs of paying severance damages. Without citing to any legal authority, RMP states that:

*"the value of the easements for overhead 138kV transmission lines would be between 25% and 75% of underlying fee land value. Specifically, for the reconstruction project this would only be applicable for impacted properties within the expanded easement area. It is understood that the additional area needed would be 1.5 feet from center line (increase from 27 feet from centerline to 28.5 feet from centerline) for Option A. It is understood that the additional area needed would be 2.0 feet from center line (increase from 27 feet from centerline to 29 feet from centerline) for Option B."<sup>34</sup>*

RMP's cost estimates assume that HLP's existing easements are 27' wide from centerline. RMP concludes that the impacts of easements 30' from centerline are no more burdensome than those already imposed by HLP's easements that are 10' from centerline. RMP concludes that for this reason, it is not required to pay severance damages. Thus, RMP's estimated right of way costs

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<sup>34</sup> Direct Testimony of Benjamin LeFevre, page 3:1-8.

require payment of **\$25,743** to only ten (10) impacted property owners based on the underlying value of **14,592 sq. ft.** taken into “existing easements.”<sup>35</sup> This equates to roughly **\$1.76/s.f.**

Purported facts and legal conclusions supporting RMPs estimated costs of \$25,743 are preposterous. Given HLP’s existing easements, RMP must expand existing prescriptive ROWs by roughly 274,560 s.f.<sup>36</sup> (an area eighteen times larger than RMP’s estimated 14,592 s.f.). RMP standard costs for overhead construction must therefore include:

1. Compensation to an additional 25 property owners-on which HLP’s easements are expanded from 20’ to 56’.
2. Severance damages to 35 property owners as compensation for impacts of RMP’s transmission line on property values.

Based on property value information provided by RMP, RMP’s standard costs for acquiring necessary rights of way in Midway City will be between \$630,303 and \$1,890,909.<sup>37</sup> Additionally, RMP must also include between \$3.1 million<sup>38</sup> and \$3.5 million<sup>39</sup> in standard cost estimates for severance damages that must be paid to property owners.

A. **RMP Failed to, but Must Include Costs of Obtaining ROWs on 35 Impacted Properties.**

Incredibly, RMP identified eleven properties that are impacted by overhead transmission line construction in Midway City. Just as incredibly, RMP identified the majority of properties on the line as “not impacted” by a high-voltage transmission corridor being built in their front yards.<sup>40</sup> One of the reasons why RMP does not identify these additional 25 properties is because

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<sup>35</sup> VOLT-011.

<sup>36</sup> VOLT Easement Estimate, Sheet 3 attached hereto as “Attachment 3.” This estimate does not include new easements on properties located on 970 South where RMP may be required to obtain new easements to accommodate future road expansion.

<sup>37</sup> VOLT ROW COST SUMMARY, Sheet 1 attached hereto as “Attachment 1.”

<sup>38</sup> VOLT ROW COST SUMMARY, Sheet 2 attached here as “Attachment 2.”

<sup>39</sup> VOLT ROW COST SUMMARY, Sheet 3 attached hereto as “Attachment 1.”

<sup>40</sup> VOLT-012, Slides for Midway City, RMP Route Map Overhead, Presentation to Midway City Council on November 19, 2020.

it defines “impacted” property as property where it must pay for expanding HLP’s 54’-wide easements. Taking land is only half the equation.

In its presentation to Midway City Council on November 19, 2020, RMP presented slides of its overhead route that purportedly identify “impacted property” and “not impacted property.”<sup>41</sup> But RMP determined that properties where HLP maintained 27’ easements were “not impacted” by its transmission line. For example, the property identified by VOLT as property No. 69 is located on the east corner of the intersection of Stringtown Roads and Wards Lane, at 880 Stringtown Road.<sup>42</sup> Here, RMP determined that impacts of HLP’s 10’ easement on the property compared to impacts of a 30’ easement “does not impact” or poses no greater burden on Property 69.

*Figure 1 RMP Midway Right-of-Way Map, Slide 41*



Currently, HLP’s existing distribution line runs along the length of the west side of the property. RMP’s overhead map assumes that HLP maintains a 27’ easement from centerline on the property. But HLP does not appear to maintain even 10’ clearances on this portion of its line. As

<sup>41</sup> *Id.*

<sup>42</sup> VOLT-010, MASTER IMPACT MAP.



shown in the picture below, there are structures, a treehouse, and vegetation within HLP's 10' wide prescriptive easement.



With the addition of RMP's transmission line, these structures and vegetation must be removed. A new easement 30' wide from center line, instead of 10' wide, will extend twenty feet deeper into the home's backyard. Existing poles that are up to 45' feet in height will be replaced with 75' to 80' poles. Yet RMP has determined that No. 69 is "not impacted." RMP's standard cost estimate does not include costs of RMP tripling the existing 10' easement, tearing out old growth trees, and constructing a 138 kV double circuit transmission line through old-grown trees and a backyard treehouse.

RMP also identified private property owned by homeowners' associations ("HOAs") that are part of two planned unit developments ("PUD") as "not impacted." Again, RMP conveniently assumed that it does not need to expand HLP's 10' wide prescriptive easements. But in evaluating property in PUDs, RMP also assumed that RMP is not required to pay for

rights-of-way across private property identified as “common area” owned by HOAs or private property sited within PUDs.

Utah Code Ann. §78B-6-511(1)(c) provides that compensation for damage to property consistent of different parcels must be calculated based on “the value of each parcel and of each estate or interest in each shall be separately assessed.” Utah law requires damage is measured and paid for even where private property is part of a larger development or held by an association.

Subsection 511(1)(c) requires that RMP pay for damages to individual property interest within the parcel. In this case, RMP plans to install up to four transmission poles on the frontage of the property. RMP also plans on siting its transmission line through Cascade at Soldier Hollow property located on Wards Lane. At Soldier Hollow, RMP plans to construct at least five transmission poles and one steel transmission tower on private property held by the PUD. RMP’s 60’ easement will include “common spaces” as well as individual parcels with single family homes. To that end, RMP must pay for impacts to all property interests in the Saddle Creek Ranch PUD and Soldier Hollow PUD, including impacts to single home properties and common areas. This includes twenty-five (25) impacted properties not including impacts to “common areas” owned by PUDs.

RMP claims that it is not required to pay for rights of way in these PUDs because RMP’s facilities will be sited within easements maintained by Midway City for underground sewer and water lines. RMP does not maintain any franchise agreement with Midway City. Midway City has not conveyed any license to RMP to site overhead transmission facilities within easements reserved for municipal services. Overhead high-voltage transmission lines operated by an electric company are beyond the scope of 10’ to 20’ wide easements set aside for the City’s underground infrastructure. RMP’s facilities require 60’ wide easements. Additional width of the easements and the construction of high-voltage power lines including steel transmission towers place

additional burdens on private property owned by individuals or by associations through a homeowner's association. RMP's facilities bring no benefit to any private property interest in these areas.

RMP must therefore include costs of obtaining rights of way over twenty-five (25) properties in Saddle Creek and Soldier Hollow PUDs.<sup>43</sup> These impacted properties must be compensated for damages whether or not damages are born individually or collectively throughout the development. Adding these costs will, of course, lower Midway's actual excess cost of going underground.

**B. RMP's Standard Costs for Overhead Construction Include Costs of Obtaining Rights of way and Severance Damages Paid to 45 Property Owners.**

RMP's bogus cost estimate defies basic principles of arithmetic and fundamental tenets of property law in this state. Utah Code §78B-6-511(1)(b) unambiguously requires RMP to compensate property owners in an amount that includes severance damage to remaining property. Specifically, Subsection 511(1)(b) requires that "if the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff." In a decision published on February 28, 2020, the Utah Supreme Court set out a clear standard to be applied in all eminent domain cases going forward. In *Utah Department of transportation v. Target Corporation*, the court held that "our clarified standard allows for severance damages caused by a proposed improvement to the condition of land that (1) is to be completed at or near the time of the taking and (2) serves the same purpose for which the severed property was taken—*i.e.*, damages caused by the "construction of the improvement in the manner proposed."<sup>44</sup>

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<sup>43</sup> See VOLT-007.

<sup>44</sup> 2020 UT 10, ¶ 459 P.3d 1017.

Further, the court in that case provided that severance damages are not limited to takings on a specific piece of property. When part of a structure is built on severed property “the owner is presumptively entitled to severance damages caused by the entire view-impairing structure including damages caused by offsite components of the structure.”<sup>45</sup>

RMP claims, without citing to any legal authority or any study, that “Severance damages only occur in a case where the land value of the larger parcel after the easement is decreased as compared to the land value before the easement. We have found that the market does not generally recognize a decrease in land value of the larger parcel due to similar utility easements along the property perimeter.” RMP, therefore, estimates that it is only required to compensate property owners for a percentage of the value of property included within expanded easements.

RMP cannot assume that a 60’ wide easement for RMP’s transmission lines including 138 kv double circuit and steel towers that are 8’ in diameter pose no greater burden than HLP’s 20’ easements for local distribution lines on wooden poles. RMP’s high voltage transmission line imposes new impacts that, in some cases, severely reduce the value of the property. For example, RMP identifies property No. 15 as being “impacted.” RMP estimates that it will have to expand HLP’s existing easement by 8’ across the frontage of the property. RMP’s estimate for this property does not, however, consider the impacts to the property after RMP constructs an 85’-115’ tall steel transmission tower with a diameter of 7’ in the property’s front yard.

Utah Code Ann. §78B-6-511(2) requires severance damages to be calculated based on “the market value of the property before the taking and the market value of the property at the taking.” But this provision of code also provides that the calculation may also “consider everything a willing buyer and willing seller would consider in determining the market value of the property.” *Id.* at (2)(a). VOLT engaged Jerry Webber, a private licensed appraiser, to determine the impact of RMP’s proposed overhead transmission line on property values. In

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<sup>45</sup> *Id.* at ¶ 51.

contrast to RMP's witnesses, Mr. Webber actually visited specific, affected properties and provided a current appraisal that considered property values with HLP's existing distribution line. Mr. Webber looked to comparable sales, but also looked at actual sales in Midway City of property on the line transacted before and after RMP submitted its CUP application. Mr. Webber determined that RMP's transmission line construction has a separate, measurable impact on property values in Midway City. Mr. Webber estimated that RMP's overhead transmission line will impact property values between -5% and -20%. In aggregate, Mr. Webber estimates that property values on RMP's line will decrease between \$2.5 million and \$4.7. Recent sales in the area support Mr. Webber's estimates and suggest that they may even be too conservative. Specifically, the evidence from Ron Lowery's direct testimony shows the unfortunate impact even the threat of these overhead lines had was in the many tens of thousands of dollars. That was only one property.

This is not the first time that RMP has attempted to undersell its obligations to provide compensation to property owners based on fair market value estimates. Only a few years ago RMP tried to force SITLA to accept \$70,080 as an estimated property value impact determined by RMP's initial appraisal. RMP initiated eminent domain proceedings in Salt Lake District Court by filing its Complaint against SITLA and Motion for Immediate occupancy on May 10, 2012. The matter was eventually settled and RMP paid SITLA \$2.5 million for the easement and in severance damages, representing a 3,500% increase from RMP's initial, appraised valuation of \$70,080.

### **REQUEST FOR RELIEF**

For all of the reasons VOLT and Midway have advanced, this Board should deny RMP's Petition and instead issue a decision that requires RMP to provide valid standard cost estimates of overhead construction that include costs of obtaining all necessary rights of way across all private property. The Board should also issue a decision that requires RMP to provide revised

excess cost estimates that consider all overhead construction costs, including severance damages paid to at least 45 property owners who are directly impacted by RMP's 60' wide easements.

DATED this 20<sup>th</sup> day of April, 2020.

SNELL AND WILMER L.L.P.

*/s/ Mark O. Morris* \_\_\_\_\_

Mark O. Morris, Esq.

Elizabeth M. Brereton, Esq.

*Counsel for VOLT*

**CERTIFICATE OF SERVICE**

I CERTIFY that on April 20th, 2020, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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