

- BEFORE THE UTAH FACILITY REVIEW BOARD -

ROCKY MOUNTAIN POWER, Petitioner	<u>DOCKET NO. 20-035-03</u>
vs.	<u>ORDER</u>
MIDWAY CITY, Respondent	

ISSUED: May 7, 2020

**I. Procedural History**

On January 15, 2020, Rocky Mountain Power (RMP) filed a Petition for Review (“Petition”) with the Utility Facility Review Board (“Board”) pursuant to Chapter 14 of Title 54 of the Utah Code (the “Act”).<sup>1</sup> The Petition concerns RMP’s efforts to construct a new double-circuit 46kV and 138kV transmission line (the “Project”), located in Midway City (the “City”), Heber City, and parts of unincorporated Wasatch County. The Petition is concerned with the approximately one-mile segment of the Project to be located in the City (“Midway Segment”).

The City filed a Response to the Petition and Counter-Petition for Review (“Counter-Petition”) on February 21, 2020.

On February 25, 2020, the Board held an initial hearing to set a schedule for the Petition’s adjudication. At the initial hearing, the Board designated the docket a formal adjudicative proceeding and set a schedule, including dates for submission of written testimony and a hearing on the merits beginning April 20, 2020.<sup>2</sup>

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<sup>1</sup> See Utah Code Ann. §§ 54-14-101, *et seq.*

<sup>2</sup> Scheduling Order and Notice of Hearing, issued February 27, 2020.

On March 13, 2020, Valley-Wide Opposition to Large Transmission Lines (VOLT) filed a Petition to Intervene. On March 16, 2020, RMP filed a Response to the Counter-Petition. On March 31, 2020, the Board conducted a telephonic hearing to consider the Petition to Intervene, during which it granted intervention as memorialized in the Board's April 9, 2020 Order Granting Petition to Intervene.

On April 17, 2020, RMP filed a Hearing Brief and Request for Summary Disposition. The City filed a Trial Memorandum the same date.

On April 20, 2020, the Board commenced a hearing on the merits, which continued through April 21 and 22, 2020. VOLT filed a Hearing Brief on the second day of hearing, April 21, 2020.

## **II. Findings of Fact and Conclusions of Law**

Based on the testimony and other evidence presented at hearing and in consideration of parties' arguments made there and in their written submissions, the Board makes the following findings of fact and conclusions of law.

1. On or about December 17, 2019, the City issued a conditional use permit ("CUP") to RMP to construct and operate the Project, a copy of which is attached as Exhibit A to the Petition.<sup>3</sup>
2. Citing an independent poll showing approximately 70 percent of respondents favored burying the Midway Segment, the CUP expressed the City's intention to require underground

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<sup>3</sup> Petition at 2; Counter-Petition at 5.

installation and acknowledged the City “is required by law to pay the difference between the cost of overhead lines and the cost of underground lines.”<sup>4</sup>

3. In the CUP, the City rejected an estimate of excess costs to bury the Midway Segment that RMP had provided and requested RMP obtain bids to determine Actual Excess Costs pursuant to Utah Code Ann. § 54-14-203.<sup>5</sup> The CUP directed RMP to obtain bids that included alternative scenarios for differing configurations and use of gas insulated lines.

4. The CUP directed RMP to submit bids to the City no later than February 15, 2020 and provided the “remedy for lateness ... is to adjust any other deadlines by an amount equal to the lateness of [the bids].”<sup>6</sup>

5. The CUP contained a “True-Up Provision,” providing “[o]nce construction is finished on the underground line, the actual costs will be trued-up and either [RMP] shall refund the overpayment to the City, or the City shall pay the difference to [RMP].”<sup>7</sup>

6. As the CUP directed, RMP prepared a request for proposals (RFP), consistent with its standard specifications for underground transmission lines, to solicit bids for burying the Midway Segment, asking contractors to provide bids for each of the alternative scenarios the City had requested.

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<sup>4</sup> CUP at 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 4.

7. RMP invited 18 contractors to bid on the RFP and ultimately received bids from three of them (collectively, the “Submitted Bids”).<sup>8</sup> Each of the three submitting contractors offered three separate bids to complete the Midway Segment corresponding to alternative scenarios the City requested in the CUP.

8. The City disputes the accuracy of RMP’s proposed Actual Excess Costs based on the Submitted Bids, arguing RMP’s bid specifications included unnecessary items and that RMP fails to account for the significant cost of obtaining easements associated with overhead construction.<sup>9</sup> The City also disputes RMP’s contention the Project must be completed by the end of 2020.<sup>10</sup>

9. The Board finds credible and compelling the testimony RMP offered from multiple witnesses detailing the significant risk to service reliability that exists for customers in the Heber Valley and Park City areas and the manner in which the Project will alleviate such risks.<sup>11</sup> The Board also notes this evidence is largely uncontroverted.<sup>12</sup>

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<sup>8</sup> *See, e.g.*, Written Direct Test. of D. Myers at 3:22-4:8.

<sup>9</sup> *See, e.g.*, City’s Trial Memorandum at 3.

<sup>10</sup> *Id.* at 5.

<sup>11</sup> *See generally* Written Direct Test. of J. Barker; Written Direct Test. of C. Michaelis.

<sup>12</sup> *See e.g.*, Written Direct Test. of J. Nelson at 5:100-101 (City’s expert witness testifying that in his “expert opinion and to a reasonable degree of scientific certainty, the transmission line proposed by RMP is necessary”); *see also* Counter-Petition at 16 (City declaring in pleading its position that “Midway recognizes that this project is important for the future needs of the valley ....”).

The Project is Necessary

10. Accordingly, the Board finds the Project, including its Midway Segment, is needed for RMP to provide safe, reliable, adequate, and efficient service to its customers. The Board addresses *infra* at ¶ 21 the date it finds construction must commence to avoid significant risk of impairment to safe, reliable, and adequate utility service.

Statutory Standard Costs Must Include Necessary Right-of-Way Costs

11. The Act repeatedly emphasizes that costs associated with acquiring “any necessary right-of-way” is a necessary component of both Standard Costs and Actual Excess Costs.<sup>13</sup>

12. The Board concludes the City erroneously interprets the Act in maintaining “the only way to determine, beyond a mere estimate, what the ‘actual cost’ of the easements are is to either negotiate them with the property owner or condemn them; there is no other way allowed by the statute.”<sup>14</sup> Rather, the Board concludes the easement component of Actual Excess Costs may rely on appraisals or other appropriate expert opinions. Requiring exactitude, as the City argues,

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<sup>13</sup> Utah Code Ann. §§ 54-14-103(1) (defining “actual excess cost” as difference between standard cost and “the actual cost ... including any necessary right-of-way”); 54-14-103(4) (defining “estimated excess cost” as difference between standard cost and costs to construct the facility in accordance with local government’s instructions, including any “necessary right-of-way”); 54-14-103(9) (defining “standard cost” as the estimated cost of a facility, “including any necessary right-of-way,” if constructed in accordance with utility’s normal practices).

<sup>14</sup> City’s Trial Memorandum at 12.

is impossible in practice and has unthinkable ramifications for affected landowners.<sup>15</sup> It would also largely defeat the purpose of the Act: ensuring disputes between local governments and utilities do not unnecessarily delay completion of projects that may be essential to safe and reliable utility service.<sup>16</sup>

13. With respect to the Actual Excess Costs the City must pay in advance of underground construction, the Board notes the CUP's True-Up Provision should rectify any divergence between the easement costs RMP ultimately incurs and the costs the City pays in advance.

14. With respect to Standard Costs, *i.e.* the estimated costs of overhead construction, the City provided credible evidence as to the costs associated with obtaining rights of way for overhead construction based on decreased land values. However, contrary to the City's testimony, the Board finds and concludes that such costs apply only to properties on which RMP acquires an easement, not to neighboring properties that remain unencumbered. Based on the testimony and exhibits of witnesses from the City and RMP, the Board finds and concludes overhead construction will require easements that cumulatively diminish the affected properties' value by

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<sup>15</sup> The City's position would require the utility to negotiate, presumably in earnest, with landowners or, worse still, to institute and litigate condemnation proceedings to a point where a court determines easements' values, even though the utility has no intention of finalizing the transactions unless the local government elects the course that requires the easements. From the perspective of the affected landowner, this would be unconscionable. For the utility and other affected stakeholders, the waste of resources and delay attendant to such a requirement seems boundless.

<sup>16</sup> The Act institutes conservative timelines to ensure the Board timely resolves disputes. For example, the Board must issue a written decision "expeditiously, and in any event, not later than 75 days following the initial hearing." Utah Code Ann. § 54-14-305. The City's interpretation, which would require extensive negotiation or litigation with potentially hundreds of affected landowners, defeats the very purpose of the Act.

\$691,344.00. The Board finds this estimated decrease provides the best available evidence of the right-of-way costs RMP would incur were it to proceed with overhead construction. Therefore, the Board concludes RMP shall, for purposes of calculating the Actual Excess Costs the City must pay to proceed with underground construction, revise its estimate of Standard Costs to reflect right-of-way costs totaling \$691,344.00.

RMP Relied on Its Standard Specifications and Policies in Soliciting Bids

15. The Board acknowledges the Act contemplates the Board may be required to resolve disputes regarding “specifications” for competitive bids.<sup>17</sup> Additionally, the Board recognizes that reasonable minds may disagree as to the necessary design elements of an RFP that a utility issues to ascertain Actual Excess Costs under the Act. However, the Board concludes that where a utility issues an RFP consistent with the utility’s standard specifications and policies pertaining to like projects, it is not for this Board to scrutinize or revise those standards. The party charged with paying excess costs may understandably prefer specifications that minimize costs, but nothing in the Act requires a utility to compromise the standards it ordinarily applies.

16. Based on RMP’s credible testimony, the Board finds RMP designed the RFP according to and consistent with RMP’s standard specifications for underground transmission lines.<sup>18</sup>

17. Therefore, the Board finds and concludes the Actual Excess Cost of the Midway Segment is the difference between the lowest of the Submitted Bids (for the option/scenario the City elects

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<sup>17</sup> Utah Code Ann. § 54-14-203 (“Any disputes regarding specifications, lowest acceptable bid, or administration and oversight expense shall be resolved by the board on an expedited basis.”).

<sup>18</sup> Written Rebuttal Test. of D. Myers at 2:7-3:16.

to pursue) that is acceptable to RMP and RMP's estimated Standard Costs after revising them to include the right-of-way costs as the Board directs in ¶ 14.<sup>19</sup>

The City Has Not Waived Its Right to Condition the Project Consistent with the Act, but Construction Must Commence within 195 Days to Avoid Significant Risk to Safe and Reliable Service

18. As we found *supra* at ¶ 10, the Project is necessary to ensure RMP is able to provide safe, reliable, efficient, and adequate service to customers in the area of Heber Valley and Park City.

19. Although the likelihood of the risk of an outage during any particular time is difficult to quantify, we find the evidence shows the risk the Project seeks to mitigate has existed for some time and that the longer the Project is delayed, the greater the likelihood customers will suffer impairment of service.

20. However, the Board concludes, in exercising its right to seek review from the Board as to disputed costs and other contested issues, the City has not waived its rights to require underground construction provided it pays the Actual Excess Costs consistent with the Act and with the terms of the CUP.

21. Endeavoring to balance the risks associated with further delay with the City's rights under the Act and the CUP, we find and conclude construction of the Project, including the

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<sup>19</sup> Section 54-14-203 provides "actual excess cost ... shall be the difference between the lowest bid acceptable to the public utility plus the public utility's contract administration and oversight expense and the standard cost of the facility."



Midway Segment, should commence by **Wednesday, November 18, 2020** in order to avoid a significant risk of impairment to safe, reliable, and adequate service.<sup>20</sup>

22. During its deliberation at hearing, the Board discussed certain conditions and associated deadlines that the CUP appears to impose on the City<sup>21</sup> (“Conditions”) after RMP provides bids. The Board clarifies that it does not, in this order, interpret or purport to enforce the CUP. Specifically, the Board recognizes the CUP appears to allow the City 15 days to fulfill the City’s Obligations after receipt of bids while the Act contemplates a local government will have 20 days, from the date of the Board’s written order, to enter an agreement to pay Actual Excess Costs. *See* Utah Code Ann. § 54-14-306. At hearing, the Board concluded the time for the City to fulfill the Conditions, apparently triggered by delivery of the bids, should not begin to run until the Board issues a decision resolving the parties’ dispute as to Actual Excess Costs. To conclude otherwise would have denied the City its right to seek review from the Board. The Board made no conclusion as to whether the deadlines associated with the CUP may affect statutory deadlines for the City to act.<sup>22</sup>

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<sup>20</sup> During its deliberations at hearing, the Board determined construction should commence no later than 180 days after the 15-day period the CUP contemplates for the City to fulfill certain conditions enumerated therein. Therefore, this written order establishes the construction commencement date 195 days after the order issues.

<sup>21</sup> The Conditions to which the Board refers are those the CUP enumerates on its fourth page, beginning “a) sufficient funding to pay for the project either through private donations or a vote by the HLP board ....”

<sup>22</sup> In the event the City fails to meet the deadlines in the CUP or the Act, the Board is unaware of any provision of the Act that would require RMP to seek Board approval before beginning construction on overhead lines.

**III. Order**

Based on and in accordance with the foregoing findings and conclusions, the Board orders as follows:

1. RMP shall, for purposes of calculating the Actual Excess Costs the City must pay to proceed with underground construction, revise its estimate of Standard Costs to reflect right-of-way costs totaling \$691,344.00.
2. Aside from the revision of Standard Costs in the preceding paragraph, the Actual Excess Costs that RMP has previously provided reflect the costs the City must pay to avoid waiving its right to require underground installation of the Midway Segment pursuant to Utah Code Ann. § 54-14-204.
3. Construction of the Project, including the Midway Segment, should commence by **Wednesday, November 18, 2020** in order to avoid a significant risk of impairment to safe, reliable, and adequate service.
4. The City has not waived its right to require RMP to install the Midway Segment underground, provided it timely agrees to pay and pays the associated Actual Excess Costs.

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DATED at Salt Lake City, Utah, May 7, 2020.

/s/ Thad LeVar, Chair

/s/ David R. Clark, Board Member

/s/ Troy Fitzgerald, Board Member

/s/ Jordan A. White, Board Member

/s/ Glenn Wright, Board Member

Attest:

/s/ Gary L. Widerburg

Board Secretary

DW#313544

Notice of Opportunity for Review

Pursuant to Utah Code Ann. § 63G-4-302, a party may seek agency reconsideration of this order by filing a request for reconsideration with the Board within 20 days after the issuance of the order. If the Board does not grant the request for reconsideration within 20 days after it is filed, the request is deemed denied. Pursuant to Utah Code Ann. § 54-14-308, judicial review of the Board's final agency action may be obtained by filing a Petition for Review with the Utah Court of Appeals. Any Petition for Review must comply with the requirements of Utah Code Ann. §§ 63G-4-401, 63G-4-403, and the Utah Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I CERTIFY that on May 7, 2020, a true and correct copy of the foregoing was delivered upon the following as indicated below:

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