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BEFORE THE UTAH UTILITY FACILITY REVIEW BOARD

ROCKY MOUNTAIN POWER Petitioner vs. MIDWAY CITY Respondent	**RESPONDENT MIDWAY CITY'S EMERGENCY PETITION FOR RECONSIDERATION/REHEARING AND STAY PENDING APPEAL OF THE MAY 7, 2020 ORDER** Docket Number 20-035-03

Respondent Midway City, by and through counsel of record and pursuant to Utah Code §§ 54-13-307, 63G-4-405, submits this Emergency Petition for Reconsideration/Rehearing and Stay Pending Appeal of the May 7, 2020 Order (the "Order").

FACTUAL AND PROCEDURAL BACKGROUND

After a hearing on the merits, this Board entered a written Order on May 7, 2020 granting, in large part, Rocky Mountain Power's ("RMP") Petition for Review. As the Board is aware, the Petition which arose from RMP's application to Midway for a conditional use permit to construct, together with Heber Light & Power ("HLP"), a double-circuit 46kV and 138kV transmission line (one each for HLP and RMP) through a residential area of Midway City. The

CUP was granted by Midway on December 18, 2019 with numerous conditions, including a process aimed at constructing the line underground.[1]

In its Order, the Board found that "the Project, including its Midway Segment, is needed for RMP to provide safe, reliable, adequate, and efficient service to its customers." (05.07.20 Order at 5.) The Board further held that the "actual excess costs" under Section 54-14-103(1) of the Utility Facility Review Board Act (the "Act") to construct the line underground must include the costs of any easements, which the Board valued at $691,344.00 based on estimates provided by RMP. (*Id*. at 6-7.)

Despite undisputed evidence that the bids obtained by RMP to arrive at the actual excess costs—which Midway would be forced to pay upfront—were incorrect and drastically inflated, the Board declined to address this discrepancy. The Board also refused to examine the specifications demanded by RMP for the Project, even though substantial evidence showed that those specifications were overly conservative and unnecessary by industry standards. (*Id*. at 7.)

Finally, the Board held that "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." (*Id*. at 9 (original emphasis).) The Board concluded that Midway would be required to follow the requirements of the Act and CUP, which means that Midway must elect its preferred length of the line within 15 days of its Order (May 22, 2020) and must enter into a written agreement to pay the actual excess costs (as determined by the Board) within 20 days of its Order (May 27, 2020).

[1] The full factual background in this case has been the subject of several filings with the Board and will not be repeated here.

These time frames make it critical that Midway obtain a stay of the Board's Order before the triggering dates pass, otherwise the Order is ***effectively unreviewable***, as any appeal would become moot. After a deliberation, due notice and a public hearing held just last night, the Midway City council directed counsel to seek a stay of the Board's Order. Given the timelines at play in the Order and Act, however, a stay must be granted ***immediately***, if at all.

Unfortunately, if the Board is unable to grant the stay ***by close of business on May 21, 2020***, Midway City will be forced to seek review and a stay from the Court of Appeals, which has jurisdiction to review the Order. Utah Code § 54-13-308.

I. The Board Should Reconsider its May 7, 2020 Order.

Pursuant to Utah Code § UCA 54-7-15 and Utah Admin R746-1-801, this Board has authority to reconsider or rehear the Order. The Board should reconsider the Order based on the following significant issues, which may likely the subject of Midway's appeal:

A. More than Mere Estimates of Easements Are Required to Establish Actual Excess Costs.

The Board, respectfully, erred when it held that RMP had satisfied its burden of providing the actual excess costs when the only evidence RMP provided of the value of the easements and rights-of-way required for overhead construction were general estimates conducted without any individualized analysis. (Order at 6.) The Board likewise erred in relying on that evidence in arriving at the actual excess cost. (*Id*.)

The Act requires RMP to include the actual cost of "any right-of-way" in establishing the "actual excess costs" of the underground line. Utah Code § 54-14-103(1). The CUP requires the same thing. (CUP at 4, bullet 15.) Running the lines overhead through homeowners' yards will require easements. Unlike the actual construction costs, where competitive bids (as opposed to

estimates) are required, the statute does not explain how "actual" easement costs are to be determined. As such, the plain meaning of those words—"the actual cost … of any right-of-way"—must be used. *E.g.*, *Garfield Cnty. v. United States*, 2017 UT 41, ¶ 15, 424 P.3d 46 (the plain meaning of statutory language must be used to interpret a statute). The phrase "actual cost" in ordinary parlance means more than conjecture or even a mere estimate. It must be a precise calculation of the market costs of acquiring the easements.

The Board held, however, that RMP may "rely on appraisals or other appropriate expert opinions" to determine actual excess costs. (Order at 6.) The Board also held that "exactitude" was "impossible" and not required. (*Id*. at 6-7.) While condemning or obtaining the easements through final judgment may not be required, it does not follow that conjecture and mere estimates is sufficient. And, yet, it is undisputed that RMP submitted nothing more than that. RMP's expert (Benjamin LeFevre) admitted that he made no attempt at an individualized analysis, and that his estimates were based on unknown, unidentified other owners and transactions having no relationship to the actual properties on which the easements must encroach. Mr. LeFevre ***rejected*** RMP's own ridiculous estimate of $20,000.00 but did not provide any reliable estimate of his own. In fact, he testified that he did ***not*** intend to provide an actual estimated value of the easements and was not hired for that purpose.

By contrast, the City's expert, Gerry Webber, did an extensive and particularized analysis of the ***actual properties*** affected by the line. His well-supported conclusion was that the total costs of the easements is likely to be more than $2 million.

In its Order, the Board rejected both experts and created a hybrid of sorts methodology that arrived at a figure of $691,344.00 as the value of the easements in calculating actual excess costs.

The error is not in the number. Rather, the error lies in the methodology and the requirements of the Act. The statute creates a conundrum. The Board must determine the "actual cost" of the line and the "actual cost" of the easements. The Act does not specify the method to do so, but if the Act allowed mere estimates, then it would have said so, just as it did in the case of the estimated costs. The fact that the Act uses the term "actual" rather than "estimated" in the context of actual excess costs compels the conclusion that mere estimates are not sufficient.[2]

RMP's evidence of actual excess costs was also deficient because it did not include severance damages resulting from the easements RMP must obtain. The CUP requires severance damages to be included in the actual costs. (CUP at 4, bullet 15.) Utah law requires the same. *Utah Dep't of Transp. v. Target Corp.*, 2020 UT 10, 459 P.3d 1017; Utah Code § 78B-6-511(1)(b).

Finally, RMP's calculation of severance, and the Board's adoption of that evidence, was also erroneous because it did not include portions of common areas within PUDs as required by Utah Code Ann. § 78B-6-511(1)(c). This means that the supposed actual costs of the easements were not actual costs, they were erroneous estimates.

Accordingly, the calculation of the actual costs of easements was in error and should be reconsidered and corrected.

[2] Under Section 54-14-202, the Board had the right to request more accurate information from RMP relating to the value of the estimates, and to suspend the issuance of its decision "for 30 days after the day on which the public utility provides the information requested …".

B. The Board's Calculation of the Standard Costs was Erroneous Because it Did Not Include RMP's Management Fee.

The testimony at trial was ***undisputed*** that RMP always charges a management "surcharge" or fee in connection with all its facilities construction, including overhead transmission lines. Darrin Meyers testified on behalf of RMP that RMP would exact a surcharge or overhead construction in this case amounting to approximately 7.5% of the total cost and that the $269.00 per linear foot estimate of the standard costs, adopted by the Board, did ***not*** include the surcharge (or the cost of easements, for that matter). This standard fee increases the standard cost of construction somewhere in the neighborhood of $100,000.00, which would reduce the actual excess cost that Midway City would be forced to raise and pay up front.[3] Yet, the Board declined to include it in the calculation of standard costs and actual excess costs. This is arbitrary and capricious.

C. The Board Abdicated its Review Responsibility in Refusing to Review the Merits of the Specifications and the Bids.

The Act gives the Board jurisdiction to review the specifications employed by a utility in calculating actual excess costs and to review the bids obtained by the utility for the same purpose. Utah Code § 54-14-305(2)(b). The Act also allows the Board to resolve disputes regarding specifications and bids. Utah Code § 54-14-203. It was on this basis that Midway expressly invoked the jurisdiction of the Court and asked for a review of these issues. (Midway Tr. Br. at 3.)

[3] It is not sufficient to posit that this is harmless error due to the "true up" provision in the CUP because Midway must raise sufficient funds through its citizenry, and on this politically charged issue, every dollar counts. If Midway is unable to successfully raise the actual excess costs on the front end, the true up provision does not matter.

In its Order, however, the Board refused to do either, holding instead that a utility is entitled to rely on its "standard specifications and policies" no matter how objectively unreasonable those specifications, policies and practices may be. (Order at 7.) The Board also refused to examine, or even mention, the bids even though the ***undisputed*** evidence was that two of the three bids were significantly inflated, and RMP knew or should have known about this but did nothing. Darrin Meyers, the individual at RMP who generated the Request for Proposals and was responsible for the bids, admitted that the bids were wrong and that the contractors must have "misunderstood" the specifications, which immediately calls into question the validity of RMP's specifications. This, too, is arbitrary and capricious and contrary to law.

C. The Board Ignored Undisputed Evidence of Erroneous Bids and Improperly Relied on That Evidence.

Similarly, the Board ignored undisputed evidence that the bids were inflated yet relied on those bids in calculating the actual excess costs of underground construction, forcing Midway to unnecessarily raise and pay those incorrect amounts. (Order at 7-8.) This is an error of fact and law that should be corrected.

II. Regardless of Whether it Intends to Reconsider the Order, the Board Should Immediately Stay the Order Pending Appeal.

Under the Administrative Procedures Act, this Board is granted the power to stay its own decision while on review. Utah Code § 63G-4-405(1). The standard for granting a stay appears to be "good cause." *In re Rocky Mtn. Power's Pet. for Review to the Utah Facility Review Bd.*, 2016 WL 4126154, at *3 (July 29, 2016).

Good cause exists here because if a stay is not granted, the appeal will become almost immediately moot, robbing Midway of its statutory and constitutional right to an appeal and

review of an administrative order.[4] Under the Board's Order, Midway must elect its preferred route for the line within 15 days (May 22, 2020) and must enter into a written agreement to pay the actual excess costs (as determined by the Board) within 20 days (May 27, 2020). The deadlines are literally around the corner, and there is no possible way for Midway to obtain legitimate reconsideration or review by either this Board or the Court of Appeals without a stay.

This exact scenario played out in the last case this Board decided, also coincidentally involving RMP. In that case, Wasatch County appealed a June 2016 decision of the Board holding that the County had improperly denied RMP's application for a CUP for the construction of a transmission line and ordering the County to issue the CUP ***within 60 days***. The County asked this Board for a stay pending appeal, which the Board summarily denied. *In re Rocky Mtn. Power's Pet. for Review to the Utah Facility Review Bd.*, 2016 WL 4126154 (July 29, 2016). The County appealed, and in January 2018, the Court of appeals ***reversed*** the opinion of this Board, holding that the County had the discretion to deny the CUP where the negative impacts of the line could not be mitigated. *Wasatch Cnty. v. Utility Facility Review Bd.*, 2018 UT App 1, ¶ 13, 414 P.3d 958. The Court set aside the Board's order and directed the Board to conduct further proceedings consistent with the Court's opinion.

In the meantime, the County had been obliged to issue a CUP within 60 days to RMP under the terms of the Board's order, which had not been stayed. This Board then petitioned the Court of Appeals for rehearing. Not surprisingly, in October 2018, the Court of Appeals

[4] Filing a notice or petition for appeal does not stay or prevent the Board's order from becoming effective. Utah Code § 54-14-307(1).

withdrew its prior decision, holding that the dispute had become moot in the interceding 18 months:

> [A]bundant case law supports the proposition that once construction (of, for instance, buildings or power lines) has commenced, ***an appellant must avail itself of all avenues of preserving the pre-construction status quo or risk the construction rendering the appeal moot***. Here, Rocky Mountain sought a conditional use permit so that it could construct the new transmission lines and towers. The Board issued the permit, and Wasatch County did not even seek, much less obtain, a stay from this court. As a result, the construction is complete and the presence of the completed power lines, coupled with Wasatch County's failure to seek a stay, has rendered this proceeding for judicial review moot.

Wasatch Cnty. v. Utility Facility Review Bd., 2018 UT App 191, ¶ 19, 437 P.3d 406 (emphasis added).

Unless a stay is immediately granted here, the same scenario will play out, depriving the non-utility party, once again, of its right to appellate review. In fact, the need here is even more immediate, as the issue may become moot within only a week, not sixty days.

As such, this Board should immediately grant a stay of its May 7, 2020 Order, regardless of whether it reconsiders or rehears the Order. Midway City has acted as quickly as possible, filing this Petition as soon as the action was approved by the City Council after public hearing and two weeks before the 30-day time limit expired.

CONCLUSION

For the foregoing reasons, this Court should grant a stay of its May 7, 2020 Order pending appeal and reconsider the merits of the Order to correct the errors identified herein.

DATED this 20th day of May 2020.

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

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of May 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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