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**BEFORE THE ELECTRICAL FACILITIES REVIEW BOARD**

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PACIFICORP, an Oregon corporation,	:	<b>RESPONSE TO PACIFICORP'S</b>
	:	<b>PETITION FOR REVIEW</b>
Petitioner,	:	
	:	
v.	:	
	:	Docket No. 05-999-08
THE CITY OF WEST JORDAN,	:	
	:	
Respondent.	:	

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Respondent City of West Jordan submits this response to PacifiCorp's Petition for Review pursuant to Utah Code Ann. §§ 54-14-101, et seq.

**INTRODUCTION**

There is generally no dispute between the parties as to the need for an additional electrical substation somewhere within the City of West Jordan to service the needs of PacifiCorp's customers in that area, though not necessarily limited to PacifiCorp's identified "target area." Nor, despite the characterizations in the petition, has the City denied PacifiCorp permission to build a substation within the City. What is at issue here is whether PacifiCorp's unilateral choice of a site for the substation preempts the City's land use authority to review applications for development approval, including evaluating sites and conditions for such facilities. The language of the Electrical Facility Review Board Act (the "Act") establishes that where the only real issue is that of economics, *i.e.*, costs of locating a facility at a particular site, the City retains discretion to determine which site is appropriate under traditional land use standards. Any exercise of jurisdiction by the Board beyond this issue to mandate a particular site for PacifiCorp's substation impermissibly infringes on the City's performance of traditional municipal functions in making and implementing land use policies in violation of Article VI, section 28 of the Constitution of Utah.

The question presented to the Board is not whether the City has "prohibited the construction of electric facilities which are needed to provide safe, reliable, adequate, and efficient service" or whether "the City has imposed requirements on the construction of facilities that will result in estimated excess costs without entering into an agreement with PacifiCorp for the actual excess costs." (Petition p. 2.) The record generated so far in this matter supports neither of these conclusory allegations.

The real question is whether the 70th South site is the only site within West Jordan which can provide safe, reliable, adequate and efficient service (the "Criteria") to PacifiCorp's customers. Only then would this Board's jurisdiction be appropriate under the Act. During the dealings between the parties, PacifiCorp has continuously given the impression that alternative sites would be technically feasible and would satisfy the Criteria. The City was never presented with evidence that

the 70th South site was the only site which would satisfy the Criteria. Therefore, under its conditional use permit standards and land use authority, the City evaluated only whether the 70th South site was an appropriate site for the substation. While it is the City's responsibility to accommodate necessary electrical facilities, it is not the City's responsibility to abdicate its land use authority in favor of approving an "ideal" or least expensive site. Finding that the facility was not appropriate to the selected site, the City suggested alternatives, one of which, the Jordan Landing site, PacifiCorp has recognized as technically feasible. PacifiCorp has rejected the consideration of such alternatives, apparently based solely on the fact that it already owns the 70th South site. In doing so, it ignores the City's broad land use authority, the Constitutional limitations on the PSC and the Board and the limited statutory authority of the Board with respect to the City's land use decisions.

#### **SCOPE OF THE BOARD'S JURISDICTION**

The core legal issue in this matter is whether the Board has authority to dictate to a municipality the siting of an electrical facility and to override the City's exercise of its land use authority to determine appropriateness of the site for the facility. The Act was passed by the legislature to address historical problems associated with the increased costs imposed by municipal requirements upon construction of electrical facilities at a given, already approved site. The legislature, recognizing that municipalities have authority to impose such regulations as burying cables or site mitigation, provided by the Act for a mechanism to allocate costs of compliance to the municipal entities. This case, however, presents an issue which goes well beyond that scenario to permit a non-legislative body to mandate fundamental land use decisions where a public utility is involved. If the Act is interpreted to permit that scope of authority, it is unconstitutional.

The Legislature shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or

otherwise, to levy taxes, to select a capitol site, or to perform any municipal functions.

Article VI, section 28, Constitution of Utah (emphasis added). The Utah Supreme Court has held that the PSC is a “special commission” within purview of Article VI, section 28. Utah Associated Municipal Power Systems v. PSC of Utah, 789 P.2d 298, 301 (Utah 1990). It follows logically that the Board would also be a “special commission” under this constitutional provision. Legislative and administrative land use decisions have long been recognized as uniquely local municipal functions governed by local needs and concerns and have been afforded broad judicial deference in their application and scope.

To the extent that the Act is read to permit the Board to “trump” a local land use decision, it clearly violates the unambiguous language of Article VI, section 28. The only reasonable conclusion, therefore, is that the Board’s jurisdiction is limited to consideration of issues related to the Criteria or to the economic impact of particular governmental regulations. The Board may not exercise jurisdiction to overrule the City’s land use decision on the appropriateness of a conditional use at a specific site.

#### **THE DISTRICT COURT LITIGATION**

PacifiCorp’s petition contains a footnote referencing pending litigation challenging the City’s land use decision which deserves more clarification. The trial court ruled in favor of the City on the conditional use permit issue, finding the City’s decision not to be arbitrary, capricious or illegal. That decision is currently on appeal before the Utah Court of Appeals, Case No. 20050698-CA, and is also the subject of a motion for expedited treatment and scheduling.

The trial court’s decision confirms the City’s broad discretion in land use matters. The broad statutory authority limits this discretion only where “expressly prohibited by law.” Utah Code Ann.

§ 10-9-102 (1992).<sup>1</sup> Nothing in the Electrical Facility Review Board Act expressly prohibits the City's exercise of this discretion to deny a conditional use permit for an electrical facility. Nor does the Act provide a means for the Board to contravene the decision of the district court.

More significantly, PacifiCorp voluntarily chose to pursue the district court review of the City's decision, addressing specifically the issue of whether the substation must be permitted at the 70th South site. The Act is permissive, allowing PacifiCorp to either seek review by the Board or proceed with the litigation. Having made their choice to pursue the lawsuit, that deprives this Board of jurisdiction. The relief claimed in that action was an order that the City permit the site. That claim has been decided and acts as *res judicata* in this administrative action seeking the same remedy. While PacifiCorp correctly states that the issues before the trial court are different from the issues here, the claim for relief is identical, an order that the facility be built at the 70th South site, giving rise to claim preclusion with the only appropriate relief to PacifiCorp being reversal of the district court decision by the Court of Appeals.

#### ISSUES ON REVIEW

The focal point of the Board's inquiry in this matter is the Criteria identified in the Act. Jurisdiction in this particular matter is appropriate only if the City ". . . has prohibited construction of a facility which is needed to provide safe, reliable, adequate, and efficient service to the customers of the public utility." Utah Code Ann. § 54-14-303(4). PacifiCorp has alleged that such a prohibition was effected by the City's denial of its conditional use permit application for the 70th South site. PacifiCorp has confused the term "prohibit," *i.e.*, to ban entirely, with the term "regulate," in this case a determination of the appropriate site. There is no question that the City has denied an application for a conditional use permit for the 70th South site for a substation. Nor is

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<sup>1</sup>Currently codified as § 10-9a-102(2) (2005).

there any doubt that the City did not act in any way to ban the substation from West Jordan. It simply exercised its discretion with respect to which sites might be most appropriate for the substation. It is therefore questionable, at least, whether this matter is appropriately before the Board.

There is nothing in the Act, or any other Utah statute, which gives a public utility unilateral discretion with respect to site selection which preempts a municipality's authority on the issue of appropriateness of land uses. It is significant that the Act contemplates limited authority for the Board to address such siting issues. The Board's decision may specify whether a facility should be constructed, but not where, so long as the conditions imposed by the local government do not affect the Criteria. Utah Code Ann. § 54-14-305(1)(a). Where a facility has been prohibited, the Board may only specify a "general location" for the facility. Utah Code Ann. § 54-14-305(3). The Board's decision "shall leave to the local government" issues which do not affect the Criteria or involve estimated excess costs. Utah Code Ann. § 54-14-305(4). Where the Criteria can be satisfied and the only issue is estimated excess costs. "the written decision shall leave each siting issue to the local government . . ." Utah Code Ann. § 54-14-305(5). In other words, if the Criteria can be met by an alternative site, the City retains its discretion with respect to deciding the appropriateness of a site.

While PacifiCorp cites the magic words composing the Criteria, it is apparent that its primary concerns are economic. In its petition, for example, it states that the City's instruction to select a site in a commercial area "will result in significant excess costs and considerable delays . . ." (Petition, p. 1.) This concern with costs is consistent with PacifiCorp's stance before the City. PacifiCorp representative Carol Hunter represented to the City Planning Commission that the reasons it preferred the 70th South site included proximity to transmission and distribution lines and "[t]he existence of a willing seller and its overall cost effectiveness." (Transcript, February 2, 2005 Planning

Commission meeting, 25:1-6.) Ms. Hunter expressed PacifiCorp’s primary concern with the alternative Jordan Landing site as one of cost, based upon construction or replacement of 1.87 miles of transmission lines. (*Id.* 28:3 through 29:7.) Discussing the Jordan Landing site, Ms. Hunter acknowledged that PacifiCorp did not seriously seek a willing seller and that the “issue for us is to the extent of the transmission facilities that would need to be constructed there on 7800 South and the distribution facilities from 78th back to 70th on 3200 West. And given that extensive construction, we decided to bring forth an application for [the 70th South site].” (*Id.* 32:15-24.)

PacifiCorp has conceded that at least two alternative sites are technically feasible and could satisfy the criteria to “provide safe, reliable, adequate and efficient service.” Its determination that the 70th South site is “ideal” is simply one of convenience and economics, governed in part by the fact that it has already acquired the property. The question before the City was not whether the City should approve an “ideal” site, but whether it should determine the appropriateness of the site for the proposed use and whether another site, though not ideal, would more appropriately serve the same purpose. The issue for the Board is similar. Where alternative sites could satisfy the Criteria, albeit at additional cost, must the substation be located at the 70th South site? Given that the Board may only specify a “general location” and must “leave each siting issue to the local government,” the conclusion must be that construction of the substation at the 70th South site need not and cannot be mandated. The decision requested by PacifiCorp, that the Board mandate construction at the 70th South Site, is not only inconsistent with the statutory language, but runs afoul of Article VI, section 28.

#### **SPECIFICS OF THE REQUEST FOR REVIEW**

1. The City has not prohibited PacifiCorp from constructing a permanent substation which is necessary for the service area. It has simply denied an application for a conditional use permit at the 70th South site and recommended alternative locations as being more appropriate

for the use. PacifiCorp may build the substation; it is up to the City to decide where so long as the Criteria are not adversely affected.

2. The City’s denial of the conditional use at the 70th South site does not impair PacifiCorp’s ability to meet the Criteria.

3. The Board has statutory authority only to specify “general location parameters” and may not dictate that a specific site be used if other sites can also satisfy the Criteria. An order mandating construction at the 70th South site exceeds the Board’s statutory authority and is unconstitutional.

4. The City does not agree that the construction of the substation at another site involves the imposition of excess costs as a local benefit option under the Act.<sup>2</sup> Any additional costs arising from construction at a specific site are simply those associated with the site and are not additional site-related costs mandated by City regulation.

Because the City has not prohibited construction of the necessary substation within the City’s service area, there is nothing here for the Board to review. Moreover, PacifiCorp’s claims are barred by claim preclusion because the remedy they seek has already been denied by the district court. Even if the Board sees fit to issue a written decision, that decision is limited constitutionally and by statute to specifying a general location for the substation and does not include specifically ordering construction at the 70th South site.

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<sup>2</sup>The parties have agreed to bifurcate this issue, leaving the question of costs under the Act for later resolution.



DATED this \_\_\_\_\_ day of September, 2005.

WILLIAMS & HUNT

By \_\_\_\_\_  
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