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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Convenience and Necessity for the Milford Phase I and Phase II Wind Power Project	**MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF CONVENIENCE AND NECESSITY** Docket No. _____

Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC ("Milford I" and "Milford II," respectively, or collectively "Milford I and II"), by and through their undersigned counsel and pursuant to Rule R746-100-3(H) of the Utah Administrative Code, hereby respectfully jointly submit the following Motion to Dismiss their Application for Certificate of Convenience and Necessity ("Motion"), on the grounds that a certificate is not required for Milford to construct and operate its planned facilities. Milford I and II further request that the Commission consider this Motion on an expedited schedule. The grounds for this Motion are more fully set forth below.

INTRODUCTION

1. Milford I and II were formed to develop, construct, own and operate a wind-powered electric generation facility in southern Utah.[1] These companies are wholly owned subsidiaries of Milford Wind Corridor, LLC, which is a limited liability company, the majority of which is owned by UPC Wind Partners, LLC ("UPC Wind"). UPC Wind is an American, privately-owned company with its principal place of business in Delaware and with office locations in Massachusetts, New York, Maine, Vermont, California, Oregon, Canada, and Hawaii. UPC Wind is an independent power producer which through its subsidiaries develops, owns and operates wind energy facilities for the production of electricity for sale to wholesale customers through power purchase agreements ("PPAs") or other similar arrangements.

2. The project will consist of two primary components, a wind farm and a transmission line (the "Project"). These facilities will be located on federal, state and private land in Beaver and Millard Counties, Utah.

3. When the Project is completed, the wind farm will generate approximately 300 megawatts ("MW") of power (nameplate capacity) from a mix of wind turbines ranging from 1.5 to 2.5 MW each. Milford I will own and operate the initial 200 MW wind farm facility and the Project transmission line ("Phase I"). Milford II will own and operate the approximately 100 MW expansion of the initial wind farm facility ("Phase II").

4. Phase I of the Project includes a proposed 345 kV alternating current transmission line that will originate at the Phase I wind farm and terminate at the existing substation at the Intermountain Power Project ("IPP") generating station north of Delta, Utah. The route will be

[1] Additional information regarding the project is contained in Milford's Application, filed concurrently herewith. The factual material in the Application is incorporated herein by this reference.

located primarily on federal land managed by the Bureau of Land Management of the United States Department of the Interior ("BLM"), primarily within a BLM-designated utility corridor. The precise route will be determined following an environmental review process currently being conducted by the BLM under the National Environmental Policy Act ("NEPA"), which includes input by the public, resource agencies and the affected counties.

5. At the IPP substation, the power from Phase I of the Project will be converted from alternating current to direct current and transmitted by SCPPA to southern California over the existing 500 kV DC transmission line that carries power from the IPP generating station to southern California.

6. All of the power from Phase I of the Project will be sold wholesale by Milford I to the Southern California Public Power Authority ("SCPPA") pursuant to a PPA that has been executed, approved, and is in full force and effect. The power will be delivered by SCPPA to three of its member cities, Burbank, Pasadena, and Los Angeles. Under the PPA, the Phase I facilities must be placed in service no later than March 31, 2009.

7. Milford II will own and operate the Phase II facilities. There is currently no definitive agreement for the sale of the power from the Phase II facilities. However, Milford Wind is in discussions with several wholesale power purchasers for the sale of the output from Phase II. All Phase II sales by Milford Wind will be wholesale transactions, and based on current negotiations it is expected that the transactions will be with out-of-state purchasers.

8. It is anticipated that none of the power generated from the facility during Phase I or Phase II of the Project will be sold to Utah-based public utilities, and that none will be available to Utah consumers.[2]

9. Because Milford I and II will provide power only to wholesale purchasers they do not believe they are required to obtain certificates of convenience and necessity to proceed with construction of the Project. However, because time is of the essence with respect to proceeding with the Project, and because it is not absolutely clear that a certificate is not required by Utah's Public Utilities Act under these circumstances, Milford I and II have, together with this Motion, filed a joint Application for Certificates of Convenience and Necessity ("Application"). Milford I and II, therefore, respectfully request that the Commission, being fully informed, declare that a certificate is not necessary and expeditiously dismiss their Application.

ARGUMENT

Although Milford I and II are planning to construct facilities in Utah, all of the power generated by or carried by the facilities is or will be committed to wholesale purchasers, for sale to consumers outside of Utah. Because Milford's facilities will not be used for public service in Utah, and because Milford does not furnish electric power to Utah customers, the purposes of the Utah Public Utilities Act, Utah Code Ann. § 54-1-1 *et* seq. ("Act") are not served by regulating it, and the Commission therefore should decline to exercise jurisdiction over Milford.

For the same reason, Milford cannot be deemed an "electrical corporation" within the meaning of the Act. Since the requirement to obtain a certificate of convenience and necessity is only imposed on entities that meet the definition of "electrical corporations," Milford should not

[2] As noted in the Application, it is possible that potential future phases of the Project could supply power to public utilities for public service in Utah.

be required to obtain a certificate. To interpret the Act in a way that requires wholesale generators transmitting power outside of Utah to obtain a certificate would be to extend the Commission's jurisdiction beyond the Act's grant of authority to "supervise and regulate every public utility in this state." Utah Code Ann. § 54-4-1.

Finally, to interpret the Act as requiring Milford to obtain a certificate of convenience and necessity would likely amount to an impermissible burden on interstate commerce and would, therefore, be an unconstitutional application of the Act.

A. The Public Utilities Act and the Authority of the Commission is to Regulate Entities that Provide Utility Services or Commodities to the Utah Public.

The purpose of the Act is to regulate monopoly providers of utility services and commodities for the purpose of protecting the welfare of the Utah rate-paying public. *See, e.g.*, *Utah Light & Traction Co. v. Pub. Serv. Comm'n*, 118 P.2d 683 (Utah 1941).

In considering whether the Commission may exercise authority over a matter, the Utah Supreme Court has limited power to manifest purposes of the Act. The Court has stated that "where a 'specific power is conferred by statute upon a tribunal, board or commission with limited powers, the powers are limited to such as are specifically mentioned.'" *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 50 (Utah 1988) (quoting *Union Pac. R.R. Co. v. Public Serv. Comm'n*, 134 P.2d 469, 474 (Utah 1943) (citation omitted). "The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." *Williams*, 754 P.2d at 50. If there is "any reasonable doubt of the existence of any power," it "must be resolved against the exercise thereof." *Id.* (quoting *Public Serv. Comm'n v. Formal Complaint of WWZ Co.*, 641 P.2d 183, 186 (Wyo. 1982). The authority of the Commission, therefore, should not be

exercised unless the purposes of the Act in protecting consumers of utility services and commodities are clearly served.

The Act sets out the jurisdiction of the Commission as follows:

> The commission is hereby vested with power and jurisdiction *to supervise and regulate every public utility in this state,* and to supervise all of the business of every public utility in this state, and to do all things, whether herein specifically designated or in addiction thereto, which are necessary to convenient in the exercise of such power and jurisdiction …

Utah Code Ann. § 54-4-1. The Commission is granted jurisdiction over *public utilities*. A public utility "includes every … electrical corporation … where the *service is performed for or the commodity delivered to, the public generally ... or to any member or consumers within the state* for domestic, commercial or industrial use." Utah Code Ann. § 54-2-1(14) (emphasis added). Electric public utilities are comprised of certain "electrical corporations" that own or operate electric facilities or deliver electric power for *public service* within the state. Utah Code Ann. § 54-2-1(7) (emphasis added). The Commission is also granted jurisdiction over improvement districts that provide electric service to retail customers, Utah Code Ann. § 17B-2a-406, and over the construction of generation capacity by inter-local entities for providing electric services and facilities to the public. Utah Code Ann. § 11-13-102, -304; 54-9-1 et seq.

In every instance of authority granted to the Commission, the *sina qua non* of that authority is the delivery of utility services or commodities to the public. *State v. Nelson*, 238 P. 237 (Utah 1925) ("If the business or concern is not a public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission"). Where there is no public service, there is no jurisdiction. Utah Code Ann. § 54-2-1(7); 54-2-1(15). Consistent with the

purposes of the Act to protect the public in matters of public utility service, the jurisdiction of the Commission extends only to regulating entities that provide services or commodities to the public generally.

Milford I and II are not such entities. Although they will have generation and transmission facilities located within the state, power from the facilities will be sold on a wholesale basis only, and not be used for public service within the state. For that reason, the Commission should decline to regulate their activities[3]. For the same reason, as explained below, Milford I and II cannot be deemed "electrical corporations" and thus should not be required to obtain a certificate of convenience and necessity to construct their facilities.

B. Milford I and II are Not an "Electrical Corporations" Within the Meaning of the Public Utilities Act.

Under the Act, the requirement of obtaining a certificate of convenience and necessity is imposed only on "electrical corporations." Utah Code Ann. § 54-4-25(1). Milford I and II do not fall within the definition.

The Act defines "electrical corporation" as follows:

> "Electrical corporation" includes every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power *for public service* or to its consumers or members for domestic, commercial, or industrial use, *within this state* . . . .

Utah Code Ann. § 54-2-1(7) (emphasis added). In Utah, "when a court interprets a statute, its primary goal is to give effect to the legislative intent, as evidenced by the *plain language*, in light

[3] Even if Milford I or II, or potential future phases of the Project, were to sell power to a Utah public utility for resale to Utah ratepayers, the Commission would have authority to approve the PPA or other transaction through its authority over the utility's rates. Thus, the Commission could fulfill its statutorily authorized purpose by means other than requiring Milford I or II to obtain a certificate for construction of the facilities.

of the purpose the statute was meant to achieve." *Utah State Tax Comm'n, v. Stevenson*, 150 P.3d 521, 535 (Utah 2006) (emphasis added). When a statute is ambiguous, the Commission must determine the Legislature's intent by looking to the language, the Legislative history and the purpose of the statute as a whole. *Bluffdale Mountain Homes, L.C. v. Bluffdale City*, 167 P.3d 1016, 1035 (Utah 2007).

Milford I and II concede that the plain language of the Act, with respect to the definition of an electrical corporation, is arguably ambiguous and therefore the purpose and intent of the legislature is not absolutely clear from the language alone. As originally written, electrical corporations were defined as owners of electric plant or providers of electric power "for public service within this state." 1917 Utah Laws 136. That version of the definition was clear and unambiguous. Through a series of unrelated amendments, an ambiguity developed that could be read to suggest that any owner of electric plant located "within this state" is an electrical corporation. That would potentially bring Milford I and II within the definition. Alternatively, the current provision could (and should) be read to mean that only owners of electric plant and providers of power for "public service … within this state" are electrical corporations. That would exclude Milford, which provides no public service in Utah.

To determine which interpretation should obtain, the Commission must look at the history of the language and the purpose of the Act as a whole. The history of the amendments indicates that the division of the words "for public service" from the words "within this state" was a consequence of bringing into the jurisdiction of the Commission cooperative associations providing service to residents in the state. There is nothing to suggest that the legislature intended to extend the reach of the statute and the Commission's jurisdiction to entities that do not serve the public. Appendix 1 hereto, which is incorporated herein by reference, reviews the

history of the amendments to Section 54.2.1(7). Nothing in that history indicates that the legislature intended to expand the Commission's jurisdiction to an entities that own or operate an electric plant that is merely located within the state.

As discussed in the first section of this Motion, the purpose of the Act, and the authority of the Commission, is to protect the public welfare by regulating entities who are exclusive providers of utility services to the public. When considered in light of the Act's purpose, it is clear that the Legislature always intended the term "electrical corporation" to apply only entities providing "public service within the state." Because the Milford Project will not offer to sell power to the public in the state, Milford I and II do not fall within the definition of electrical corporation and the purposes of the Act are not served by requiring them to obtain certificates in order to construct their facilities.

C. Milford Should Not Be Required to Obtain a Certificate of Convenience and Necessity.

The provision requiring a certificate of convenience and necessity states in relevant part:

> Except as provided in Section 11-13-304, a gas corporation, *electric corporation*, telephone corporation, heat corporation, water corporation, or sewerage corporation *may not establish, or begin construction* or operation of a line, route, plant, or system or of any extension of a line, route, plant, or system, *without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.*

Utah Code Ann. § 54-4-25(1) (emphasis added). The statute requires that an applicant for a certificate must show that "that present or future public convenience and necessity does or will require the construction" of any proposed "line, route, plant or system." *Id*. Because "convenience" is broader than "necessity," the statute has been construed to mean "reasonably necessary and not absolutely imperative." *Mulcahy v. Public Serv. Comm'n*, 117 P.2d 298 300

(Utah 1941). Nevertheless, "convenience and necessity" means "a definite need of the general public for such service where no reasonably adequate service exists, … look[ing] to the future as well as the present." *Id*.

When the public need for additional utility service is established, the Commission has authority to see that the public need is met in a way that results in not only adequate service, but also reasonable rates. Utah Code Ann. § 54.3.1. To that end, the Commission may oversee a public utility's selection of the type of resource, the bidding process, the review of other possible least cost alternatives, and the ultimate cost and timing of the construction. Close supervision protects the ratepayers from an otherwise unsupervised monopoly constructing facilities that may not be necessary, convenient or cost effective for the public.

When an electric facility is not constructed for public service, however, that inquiry is not necessary. Because the public will not pay for the construction or receive services from the facilities, the Commission's role to ensure that the construction is necessary or that service is provided at just and reasonable rates simply does not come into play. In the present case, the public interest is not advanced by determining whether the planned wind capacity is truly "required" to serve the native load, whether the wind farm would be the least cost resource to Utah ratepayers, or whether it is located in the exclusive retail service area of a retail provider. When the output of an independent generator is entirely committed to the wholesale market, the ratepayers are not at risk and there is no purpose served by requiring the independent generator to show that the proposed construction is convenient or necessary.

The requirement that electrical corporations obtain a certificate presumes that those entities are proposing to build plant for public service within this state. *Id*. at § 54-2-1(7); 54.4.25(1). Milford I and II are not among those entities for the reasons stated above. More

importantly, the purposes of the Act are not served by requiring it to obtain a certificate. For those reasons, Milford I and II request that the Commission dismiss the Application and declare that Milford I and II are not required to obtain certificates of convenience and necessity.

D. Requiring Milford I and II to Obtain Certificates of Convenience and Necessity Would Likely Constitute an Impermissible Restriction on Interstate Commerce.

If the Commission were to determine that Milford I and II were obligated to obtain certificates of convenience and necessity as a precondition to construction and operation of the Project, the result would likely be an unconstitutional intrusion of the state into interstate commerce. Under the United States Constitution, states cannot regulate in any manner that is unduly burdensome or discriminatory to interstate commerce. *See, e.g.*, ACLU v. Johnson, 194 F.3d 1149, 1160 (10th Cir. 1999); *Quick Payday, Inc. v. Stork*, 509 F. Supp. 2d 974, 977 (D. Kan. 2007). Whether or not a particular regulatory act or scheme promulgated by a state constitutes an unreasonable and undue burden on interstate commerce is subject to scrutiny under the "Pike balancing test." *Id.* at 978. The United States Supreme Court has stated:

> Where the statute regulates evenhandedly *to effectuate a legitimate local public interest*, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) (emphasis added). All of the sales of power from the Project will be wholesale transactions in interstate commerce. Thus, the Commission must balance the interest of the State of Utah in requiring a certificate of convenience and

necessity against the burden that such regulatory action would place on the ability of Milford to engage in its interstate sales and transmission of power.

Because Milford I and II will not provide services or electric power for public service within the state, the service that Utah residents receive and the rates they pay for electric power will not be affected by the Project. Likewise, the Project will not impact the facilities or service of any Utah provider, or infringe on the exclusivity granted to any local utility. Although the Project will be located in Utah, the electric power will not be consumed by Utah rate payers. Thus, the state does not have a legitimate local public interest in ensuring that the "public convenience and necessity" requires the Project's construction.

To be weighed against the state's interest in regulating Milford I and II is the burden imposed upon interstate commerce by requiring them to show that the public convenience and necessity requires construction of the Project facilities. For a wholesale power generator that provides no utility services or commodities to the Utah public, such a requirement would be virtually impossible to meet. While the Project will have significant public benefits, including in Utah (see Application at Para. 18-20), they are not the kind of benefits that are traditionally contemplated in determining whether the Utah public convenience and necessity would require the construction of an electric generation facility. *See Mulcahy v. Pub. Serv. Comm'n,* 117 P.2d 298 (1941) (the convenience and necessity of the public in receiving utility services is paramount in making a determination of whether to issue a certificate). Were Milford unable to establish that the public convenience and necessity *required* the Project, the resulting denial of a certificate would be an unfair, unnecessary and unconstitutional restraint on interstate commerce. *See New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982) (state commission restrictions on out-of-state sale of hydroelectric power held to be a violation of Commerce

Clause). Moreover, merely requiring Milford and others similarly situated to undergo proceedings where its Application is subject to potential delay and expense due to the possibility of interveners would create an unnecessary barrier to all wholesale generators supplying power in interstate commerce.

The *Pike* test requires that the state consider whether the local public interest could be promoted with a lesser impact on interstate activities. Because there is no legitimate local interest in requiring Milford to show that the public convenience and necessity requires construction of the Project, and because the state's legitimate local public interest is protected by other state and local agencies, the burden of requiring a certificate would be clearly excessive in relation to the putative local benefits. The Commission, therefore, should conclude that no certificate is necessary for the Milford Project and should dismiss Milford's Application.

CONCLUSION

Milford I and II are not subject to the Commission's jurisdiction because they are wholesale generators who will not provide services or electric power for public service within the state and, therefore, are not "electrical corporations" under the Act. According to both the language and the purpose of the Act, only entities providing public service within this state are required to obtain certificates. Moreover, for independent producers that seek an interstate, wholesale market for their power, it is virtually impossible to make a showing that the public convenience and necessity requires the construction of their facilities under the traditional interpretation and application of that concept. To impose such a requirement on them is likely an unconstitutional application of the Act because it serves no legitimate local public interest and it results in a substantial barrier to the interstate commerce.

For the reasons set forth above, Milford I and II respectfully request that the Commission expeditiously dismiss their Application for a Certificate of Convenience and Necessity and declare that such a certificate is not required. Because Milford I and II are required to place Phase I into service by March 31, 2009, they request that, if the Commission declines to request this Motion, it expeditiously consider the Application filed concurrently herewith.

DATED this _20TH____ day of February, 2008.

/S/ WILLIAM J. EVANS

_____

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APPENDIX 1

A review of the amendments to Utah Code Section 54-2-1(7) indicates that the Legislature intended the electrical corporation definition to apply only to those entities that own electric plant or provide electric power *for public service within the state*.

In 1917, the original language of the statute stated:

> The term '*electrical corporation,*' when used in this Act, includes every corporation or person . . . owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power**,** *for public use within this state . . . .*

1917 Utah Laws 136 (emphasis added). In 1959, the phrase was changed slightly to "in anywise furnishing electric power, *for public service within this state*. . . ." 1959 Utah Laws 190 (emphasis added). From its enactment in 1917, the operative words, "for public service within the state" appeared as one phrase separated from the initial clauses by a comma. The phrase thus modified the two initial clauses, meaning that a company would be considered an electrical corporation if it was operating electric plant for public service within the state, or if it was furnishing electric power for public service within the state. *See, Southern Utah Wilderness Alliance v. Board of State Lands and Forestry,* 830 P.2d 233 (Utah 1992) (modifier after comma modifies both preceding clauses).

In the 1965 version of the definition, the language was amended as follows:

> The term "electrical corporation" ~~when used in this Act,~~ includes every corporation or person . . . owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power**,** for public service or to its consumers or members for domestic, commercial or industrial use within this state . . .

Utah Code Ann. § 54-2-1(20) (1965) (rendered in legislative format compared to 1959 version). The additional clause was obviously intended to bring inter-local associations or co-operatives

into the definition of electrical corporation, a change which was fully consistent with the Legislature's policy of granting the Commission jurisdiction over entities providing electrical service to the Utah public. But, by separating the words "for public service" from "within this state," the amendment also created an ambiguity as to whether the phrase "within this state" applied only to the term "its consumers or members for domestic, commercial or industrial use," or whether it also applied to the term "for public service." There is nothing to indicate that the Legislature intended to alter the previously clear meaning, which included only electric plant furnishing "public service within the state" within the definition. But, the plain language was muddied by a needed insertion that was difficult to place elsewhere in the single-sentence statute.

Probably aware of the ambiguity, the Legislature again amended the electrical corporation definition to add a comma after the words "industrial use," before the words "within this state." The 1969 version states:

> The term "electrical corporation" includes every corporation or person . . . owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service or to its customers or members for domestic, commercial or industrial use, within this state . . . .

Utah Code Ann. § 52-2-1(20) (1969) (rendered in legislative format compared to 1965 version). The insertion of the comma allowed the words "within this state" to modify the entire preceding phrase, namely "for public service or to its consumers or members for domestic, commercial or industrial use." But, it also allowed the possibility that the words "within this state" could be read to modify "any electric plant." Thus, the language is now ambiguous as to whether electrical corporations include owners of electric plant merely located within "within this state."

The relevant language in the current version of the statute is identical to the 1969 version in all aspects relevant to the present Motion. Utah Code Ann. § 52-2-1(7) (2007).

The unfortunate by-product of the amendments to the definition of electrical corporation is that they obscured the intention that was originally expressed by the words "for public service within this state" appearing together. The ambiguity is resolved by looking to the purpose of the Act, which is to regulate only entities providing service to the public. There is no suggestion that by displacing the words "for public service" and adding a comma, the Legislature intended to abandon the requirement of public service, which would have been a fundamental shift in policy at odds with the remainder of the Act and with the traditionally defined role of the Commission.[4]

Given the evolution of the language, the only meaning that can reasonably be ascribed to the current statute is that the definition of electrical corporation was meant to encompass both entities owning or operating "any electric plant … for public service within the state," and entities "furnishing electric power for public service … within this state." It cannot be reasonably construed to encompass entities constructing electric plant merely *located* within this state.

[4] Issues of punctuation alone are not controlling when interpreting the construction of a statutory provision. *Union Refrigerator Transit Co. v. Lynch*, 55 P. 639 (Utah 1898); *Richardson v. Treasure Hill Mining Co.*, 65 P. 74 (Utah 1901) ("A comma cannot be permitted to control the evident meaning and intent of the framers of the Constitution (Utah)").

CERTIFICATE OF SERVICE

I hereby certify that on this __20TH___ day of February, 2008, I caused to be sent by electronic mail and/or mailed, first class, postage prepaid, a true and correct copy of the foregoing **MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF CONVENIENCE AND NECESSITY** to the following:

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