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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 Public Convenience and Necessity for Phase I and Phase II of the Milford Wind Power Project	**MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND NOTICE OF GOVERNOR'S SIGNING OF SENATE BILL 202 AND REQUEST FOR ORDER OF DISMISSAL** **Docket No. 08-2490-01**

Utah Associated Municipal Power Systems, a Utah interlocal entity and political subdivision of the State of Utah ("UAMPS"), by and through its undersigned counsel, respectfully submits this Memorandum in Opposition to Motion to Dismiss the Application of Milford I and Milford II for Certificates of Public Convenience and Necessity and Notice of Governor's Signing of Senate Bill 202 and Request for Order of Dismissal.

INTRODUCTION

Milford Wind Corridor Phase I, LLC ("Milford I" or "Phase I"), and Milford Wind Corridor Phase II, LLC ("Milford II" or "Phase II"), both Delaware limited liability companies

(collectively, the “Applicants” or "Milford"), seek to bypass the requirement of obtaining certificates of public convenience and necessity for two phases of a wind electric generation facility and associated transmission line they propose to build in Utah (the “Project”). Motion to Dismiss, p. 2, ¶ 2.

On February 20, 2008, the Applicants filed the Application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Convenience and Necessity for Phase I and Phase II of the Milford Wind Power Project (“Application”) along with the Motion to Dismiss the Application of Milford I and Milford II for Certificates of Public Convenience and Necessity (“Motion to Dismiss”). The Applicants argue that because all the power from Phase I and II will be sold to out-of-state purchasers, they are not required under the Public Utilities Act, Utah Code Ann. §§ 54-1-1, *et seq*. (the “Act”), to obtain a certificate of public convenience and necessity. Motion to Dismiss, p. 4. The Applicants also argue that it would be unconstitutional under the Commerce Clause of the United States Constitution to require the Applicants to obtain a certificate of public convenience and necessity. Motion to Dismiss, p. 11.

On March 21, 2008, subsequent to its filing of its Motion to Dismiss, the Applicants filed the Notice of Governor’s Signing of Senate Bill 202 and Request for Order of Dismissal (“Request for Order”). The Applicants state that “[c]ertain arguments made … in support of their Motion to Dismiss have been rendered moot by enactment of S.B. 202.” Request for Order, ¶ 5.

Phase I is being developed by the Applicants pursuant to a Request for Proposal ("RFP") issued by the Southern California Public Authority, a Joint Powers Agency created pursuant to the Joint Powers Act of Chapter 5, Division 7, of Title 1 of the Government Code of California ("SCPPA"). Exhibit A, p. 2. The City of Los Angeles Department of Water and Power ("LADWP") will act as the project manager of Phase I pursuant to an agency agreement it has with SCPPA. Exhibit B, §§ 5.1 and 7.0. Under that agreement, LADWP is charged with operating and maintaining Phase I, on and after the commencement of commercial operation of Phase I. *Id*.

Under the terms of the Power Purchase Agreement between Milford I and SCPPA, dated March 16, 2007, attached hereto as Exhibit C ("Power Purchase Agreement"), SCPPA is obligated to pay Milford I a guaranteed pre-paid amount of between $211,000,000.00 and $269,000,000.00, depending on the planned capacity for the subject units. Exhibit C, p. 24, § 3.1. As described in the Power Sales Agreement between SCPPA and LADWP, dated October 1, 2007, attached hereto as Exhibit D ("Power Sales Agreement"), SCPPA will finance the guaranteed pre-paid amount through issuance of tax-exempt revenue bonds. Exhibit D, p. 4, § 2.19. Under the Power Sales Agreement, LADWP, the City of Pasadena, California, and the City of Burbank, California, are obligated to pay SCPPA for their share of Phase I power (*i.e.*, LADWP (92.5%), Pasadena (2.5%), and Burbank (5%)). Exhibit A, pp. 2-3.

Phase I will be located entirely within Utah. Phase I's wind generation facilities will be located on over 13,000 acres of leased property located in Beaver and Millard Counties, Utah. Exhibit D, p. H-1, ¶ A. The initial term of the lease is forty years, with two renewal terms of ten

years. The lease and all improvements made to the land are fully assignable, without the consent of the landlord. Exhibit D, p. H-18, § 17. Additionally, Milford I, or any assignee of Milford I, has a right of first refusal to purchase the property. Exhibit D, p. H-23, § 21. In the event Milford I defaults on the Power Sales Agreement, Milford I's leasehold interest will inure to, and default to, the benefit of SCPPA via a First Deed of Trust held by SCPAA. Exhibit C, § 6.6. Phase I also involves construction and operation of a 345 kV alternating transmission line that originates at the Phase I wind farm substation and terminates at the existing substation at the Intermountain Power Project ("IPP") generating station north of Delta, Utah. Application, p. 4, ¶ 8. Under the Power Purchase Agreement, SCPPA has the option to buy Phase I from Milford I within ten years and has indicated it intends to exercise its option. Exhibit C, § 2.5(h); *see also*, Exhibit A, p. 4. When all of SCPPA's bonds are defeased, ownership of the Project will be held by LADWP, Burbank, and Pasadena. Exhibit A, p. 3.

The Applicants provide precious little information about Phase II, other than the anticipated generation capacity of Phase II will be 100 megawatts.[1] The Applicants acknowledge that Phase II power has not been sold, and that the Phase II transmission corridor has not been identified. Application, p. 7, ¶ 15. Nevertheless, the Applicants request that a certificate of public convenience and necessity be granted by the Commission by April 15, 2008. Application, p. 6, ¶ 13. The Applicants further request that the Commission decline to exercise jurisdiction over Phase II and dismiss its Application. Motion to Dismiss, p. 14.

[1] Much of the information described in this Opposition regarding SCPPA's and LADWP's involvement in Phase I was obtained from the Internet. This same information was apparently not provided as part of the subject Application to the Commission by the Applicants.

The Applicants' Motion to Dismiss should be denied because the Act, in effect at the time the Applicants filed the Application and Motion to Dismiss and as amended by Senate Bill 202, requires a certificate of public convenience and necessity. Additionally, Milford I should be required to obtain a certificate of public convenience and necessity pursuant to Section 11-13-304(1) of the Interlocal Cooperation Act, Utah Code Ann. §§ 11-13-101, *et seq*. (the "Interlocal Act"), because SCPPA is an "out-of-state public agency" that requested Phase I be built, will benefit from Phase I, and has a significant ownership interest in Phase I. Further, LADWP another "out-of-state public agency" will operate and maintain Phase I and will take 92% of the power generated from Phase I. Senate Bill 202, upon which the Applicants rely, raises serious constitutional questions under the Privileges and Immunities Clause of Article IV of the United States Constitution, because it has a discriminatory affect on Utah interlocal entities, and thus the citizens of each of their municipal members.

As to Phase II, the Commission should reserve ruling on the Applicants' Motion to Dismiss until the Applicants provide the Commission with more information as to whether it similarly will benefit and be subject to the ownership interests of an out-of-state public agency.

ARGUMENT

I. SENATE BILL 202

A. Senate Bill 202 Does Not Apply to the Application or the Motion to Dismiss

Under Utah law, legislative enactments do not apply retroactively unless the Legislature clearly expresses that intention. Utah Code Ann. § 63-3-3; *see also, e.g., Olsen v. McIntyre*

Investment Co., 956 P.2d 257, 261 (Utah 1998) (citations omitted) (holding, in part, that retroactive legislative amendments are not applied in pending cases except in a few narrow circumstances).[2]

The Applicants filed their Application and Motion to Dismiss on February 20, 2008. The Governor signed into law Senate Bill 202 on March 18, 2008. Section 23 of Senate Bill 202 clearly provides that if approved by two-thirds of all the members elected to each house, the bill takes effect upon approval of the Governor. Consistent with the rule of statutory construction that legislative amendments are not applied retroactively unless the Legislature expressly provides otherwise, the Commission should determine that Senate Bill 202 does not apply retroactively to the Application and Motion to Dismiss and apply the Act as was in effect when the Applicants filed its Application and Motion to Dismiss.[3]

Notably, Senate Bill 202 should be of concern to the Commission in light of its charge to protect Utah rate-payers. *See United States Smelting, Refining & M. Co., v. Utah Power & Light Co*., 197 P. 902, 905 (Utah 1921) (stating the purpose of the Act is "to prevent preferences and

[2] The Applicants state that S.B. 202 amends the definitions of "independent energy producer" and "independent power production facility" of the Act, and Phase I and Phase II fall within the definition of "independent energy producer[s]", as amended. *Id*. The Applicants apparently contend that they fall within the amended definitions because they will "produce electric energy solely by the use, as a primary energy source, of biomass, waste, a renewable energy resource, a geothermal resource, or any combination of the preceding sources." *Id*. The Applicants further suggest that because the definition of "electric corporation" excludes "independent energy producer[s]" and Section 54-4-25 of the Act requires "electric corporation[s]" to that obtain a certificate of public convenience and necessity before constructing an electric plant or transmission line, certificates are not required under Section 54-4-25 of the Act, as amended. *Id*.

[3] The Applicants appear to have been aware of the legislative progress and status of Senate Bill 202, so it is unclear why the Applicants did not submit their Application and Motion to Dismiss after the effective date of Senate Bill 202.

discriminations respecting the rates charged or received by public utilities for services rendered or received"). Senate Bill 202, as interpreted by the Applicants, would exempt certain activities by investor owned and other public utilities that would otherwise be subject to the Commission's jurisdiction. For example, a public utility could form a single purpose entity for the purpose of holding and owning an electric plant that uses renewable energy sources, which would, as postulated by the Applicants, exempt that entity from having to obtain a certificate of public convenience and necessity under Section 54-4-25, and would also exempt any other oversight by the Commission as to rates charged to Utah rate-payers. The Commission should question whether such a result was contemplated by the Legislature.

B. Senate Bill 202 and the Privileges and Immunities Clause of the United States Constitution

Senate Bill 202, as applied in some instances, raises serious constitutional questions under the Privileges and Immunities Clause of Article IV of the United States Constitution, which provides "[t]he Citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states." U.S. Const., art. IV. The Privileges and Immunities Clause was intended "'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" *Supreme Court of Virginia v. Friedman*, 487 U.S. 59, 63 (1988) (quoting *Paul v. Virginia*, 8 Wall. 168, 180 (1869)). The Clause therefore, "'establishes a norm of comity without specifying the particular subjects as to which citizens of one State coming within the jurisdiction of another are guaranteed equality of treatment.'" *Id*. at 64 (quoting *Austin v. New Hampshire*, 420 U.S. 656, 660 (1975)).

Senate Bill 202 amends the Act and exempts out-of-state entities (as well as in-state entities) that produce power solely by use of renewable energy sources, *i.e.*, "independent power production facilities," from having to obtain a certificate of public convenience and necessity. On its face, therefore, Senate Bill 202 appears to treat in-state and out-of-state entities equally. Senate Bill 202 however does not amend the Interlocal Act, which requires each Utah interlocal entity to obtain a certificate of public convenience and necessity before constructing an electrical generating plant or transmission line. Utah Code Ann. § 11-13-304(1). Interlocal entities, like UAMPS, are comprised of members which are governmental entities that represent and act for their citizens. If interlocal entities are required to obtain a certificate of public convenience and necessity under Section 11-13-304 before building any electrical generating plant – even one that would fall within the definition of "independent power production facility" – then the citizens of the interlocal entity's constituent members will not be afforded the same privileges as citizens served by in-state and out-of-state "independent power production facilities", which are not interlocal entities. That is, the privileges guaranteed to in-state and out-of-state utilities doing business in Utah as "independent power production facilities" are not similarly afforded to Utah interlocal entities. Senate Bill 202 therefore raises serious questions under the Privileges and Immunities Clause of the U.S. Constitution.

II. THE APPLICANTS SHOULD BE REQUIRED TO OBTAIN A CERTIFICATE PURSUANT TO SECTION 54-4-25 OF ACT

A. The Act In Effect Before the Enactment of Senate Bill 202 Requires the Applicants Obtain a Certificate of Public Convenience and Necessity

Section 54-4-25 of the Act,[4] in effect at the time that the Applicants filed their Application and Motion to Dismiss, requires "electric corporations" obtain a certificate of public convenience and necessity before constructing an electric plant within Utah. That Section provides, in relevant part:

> (1) Except as provided in Section 11-13-304, a[n] … **electric 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 (emphasis added). The Act defines "electric corporation," in relevant part, as including:

> every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning or 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).[5] Thus, under Section 54-4-25, the Commission is expressly vested with authority to require a certificate of public convenience and necessity as to the construction

[4] Cites in this Section II.A refer to Act, in effect on February 20, 2008 (the date the Applicants filed their Application and Motion to Dismiss), before the enactment of Senate Bill 202.

[5] An "electric plant" is defined as including "all real estate, fixtures, and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, power, and all

of a "route, plant, or system or any extension of a line, route, plant or system" by an "electric corporation." Utah Code Ann. §§ 54-4-25; 54-2-1(7).

The Commission should determine that the Applicants are "electric corporation[s]" within the meaning of the Act because the Applicants will "own[] or control[], operat[e], or manag[e] an[] electric plant, … within this state." Utah Code Ann. § 54-2-1(7); *Wilcox v. CSX Corp*., 70 P. 3d 85, 90 (Utah 2003) (citations omitted) (stating courts must first interpret a statute according to its plain language, and then if ambiguity is found, guidance is sought from legislative history and relevant policy considerations).[6]

Additionally, Milford I falls within the meaning of "electric corporation" because Phase I will produce and deliver the power to the California purchasers in Utah. Pursuant to the terms of the Power Sales Agreement, the energy generated at the wind farm site will be "delivered to the Project Participants to the Point of Delivery." *Id*. at § 9.1. The term "Point of Delivery" is defined as "[t]he point at which energy is delivered to the Project Participants pursuant to the Power Purchase Agreement." *Id*. at Appendix A, ¶ 60. The "Point of Delivery" is defined in the Power Purchase Agreement, as "the interconnection facilities of [Phase I] located at the point of interconnection between the [Project's] transmission line and the Intermountain Power Project Switchyard bus." *Id*. at p. 8. In other words, the power generated at the wind site in Beaver and Millard Counties will be transmitted via the Project's transmission line and sold to the

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conduits, ducts or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power." Utah Code Ann. § 54-2-1(8).

[6] The Applicants attempt to create ambiguity by looking to the legislative history, which according to the rules of statutory construction, is not proper. *See* Motion, p. 8.

Applicants' purchasers at IPP – all of which occur within Utah. The Applicants are therefore "furnishing electric power … to it consumers for domestic, commercial or industrial use, within this state." Utah Code Ann. § 54-2-1(17).

B. The Act In Effect After the Enactment of Senate Bill 202 Requires the Applicants Obtain a Certificate of Public Convenience and Necessity

Even if the Commission applies Senate Bill 202 retroactively to the Application and Motion to Dismiss, the Act requires the Applicants obtain a certificate of public convenience and necessity for the Project's transmission lines.

Phase I involves a wind generation facility and a transmission line originating at the wind generation facility and ending at the IPP switchyard. Phase II will also involve a transmission line, but the Applicants have provided no details concerning that particular transmission line. The Applicants suggest that the entire Project is exempted from the certificate of public convenience and necessity requirement under Section 54-4-25 of the Act because Phase I and Phase II constitute "independent power production facility[ies]" and thus are "independent energy producers", which are excluded from the definition of "electric corporation". But the Applicants construe the foregoing definitions far too broadly. The definitions of "independent energy producers" and "independent power production facility" refer to facilities that produce electricity by using renewable sources. Those definitions do not refer to transmission lines from such facilities, which, as is the case here, will extend some ninety-miles through private, state, and federal lands and may cross or interfere with existing transmission lines. Thus, the Act, as amended by Senate Bill 202, should be construed as follows:

- The Applicants are not "electric corporation[s]" as it relates to the wind generation facility (i.e., an "electric plant" owned by the Applicants within Utah), because the wind generation facility constitutes an "independent power production facility". Utah Code Ann. § 54-2-1(7), (13), and (14).
- The Applicants are "electric corporation[s]" as it relates to the transmission lines (i.e., an "electric plant" owned by the Applicants within Utah), because the transmission lines do not constitute "independent power production facility[ies]". *Id*.

The Commission should therefore determine that the exception for "independent energy producers", as defined under Senate Bill 202, only applies to the Project's wind generation facility and as result require a hearing for and certificate of public convenience and necessity for the Project's transmission lines if appropriate.

III. THE COMMISSION SHOULD REQUIRE A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY PURSUANT TO SECTION 11-13-304 OF THE INTERLOCAL COOPERATION ACT

Section 11-13-304 of the Interlocal Act, provides, in relevant part:

> (1) **Before proceeding with the construction of any electrical generating plant or transmission line**, each interlocal entity and **each out-of-state public agency shall** first **obtain** from the public service commission **a certificate, after hearing, that public convenience and necessity** requires such construction and in addition that such construction will in no way impair the public convenience and necessity of electrical consumers of the state of Utah at the present time or in the future.

Utah Code Ann. § 11-13-304 (1) (emphasis added). There is no question that SCPPA is an "out-of-state public agency" that is required to obtain a certificate of public convenience and necessity before constructing an electrical generating plant or transmission line.

Because SCPPA has an option to purchase Phase I, it has a real property ownership interest in Phase I and is therefore subject to Section 11-13-304. *See* Exhibit A, § 11.2; Exhibit C, § 2.5(h); *see also, Knight v. Chamberlain*, 315 P.2d 273, 275 (Utah 1957) (stating that "logic seems to impel the conclusion that a valid option to purchase is an interest in real estate which would … come within the statute of frauds"). That is, because SCPPA has a real property interest in Phase I, it is required, as an "out-of-state public agency" to obtain a certificate of public convenience and necessity before construction of Phase I commences. Utah Code Ann. § 11-13-304(1).

Furthermore, SCPPA's involvement in Phase I is so pervasive, and Milford I's involvement so minimal, that the Commission should, at a minimum, recognize Milford I for what it is – an agent of SCPPA – and, as such, require Milford I to obtain a certificate of public convenience and necessity pursuant to Section 11-13-304.[7] LADWP, also an out-of-state public agency, will operate and maintain Phase I, and will also take 92% of Phase I's power. In September 2007, LADWP submitted a letter to its Board of Water and Power Commissioners for

[7] Phase I is being built pursuant to an RFP issued by SCPPA. LADWP will operate and maintain Phase I pursuant to an agency agreement with SCPPA. SCPPA is making a guaranteed prepayment of at least $211,000,000.00 to Milford I. The lease for the 13,000 acres in Beaver and Millard Counties is fully assignable to SCPPA. In the event Milford I defaults on the Power Sales Agreement, Milford I's leasehold interest will inure/default to the benefit of SCPPA via a First Deed of Trust held by SCPPA. All the Phase I power has been sold to SCPPA, which it has sold to LADWP, Burbank, and Pasadena.

the purpose of gaining the approval for Phase I from the Board. That letter, attached hereto as Exhibit A, provides a clear explanation of the relationship among LADWP, SCPPA and the Applicants:

> SCPPA issued a Request for Proposal (RFP), a competitive selection process, for the purchase and/or acquisition of renewal energy resources. The LADWP jointly participated with multiple municipal utilities for the purpose of acquiring renewable energy resources …
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> The project proposed by UPC Wind Management LLC … [was submitted in response to the RFP] and the Participants requested that SCPPA obtain this energy from the Project. SCPPA and the Participants subsequently negotiated the Milford Agreement with UPC in which UPC's subsidiary would sell 200 megawatts (MW) of renewable wind energy to SCPPA from the Project's wind power generating facilities, located in Beaver and Millard Counties, Utah.
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> The Project capacity is 200 megawatts (MW) with participant shares as follows: LADWP (185 MW, 92.5%), City of Burbank (10 MW, %) and City of Pasadena (5 MW, 5.5%). The purchase of 185 MW of renewable energy output annually will enable LADWP to meet approximately 1.9% of the LADWP's resource requirements. The renewable energy will be delivered to LADWP at the Intermountain Power Project switching station in Delta, Utah.
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> … **SCPPA and its members have an interest in the ultimate ownership of renewable energy facilities**. This will ensure a stable priced long-term supply rather than power purchase contracts that must be periodically re-negotiated with uncertainty of future availability or price. **Accordingly, the provisions [of the Power Purchase Agreement] allow SCPPA to buy the project from the developer at the end of the tenth year of operation, or at the end of the twentieth year of operation**.

Exhibit A, pages 2 and 4 (emphasis added).

Phase I is being built, operated, financed and owned pursuant to SCPPA's and LADWP's request, design and plan. Milford I is merely the developer of Phase I. The Commission should

therefore require Milford I to obtain a certificate of public convenience and necessity because LADWP and SCPPA (both out-of-state public agencies) would be required to obtain a certificate of public convenience and necessity pursuant to Section 11-13-304, but for Milford I's involvement in the Phase I.[8] LADWP and SCPPA should not be able to avoid the reach of the Commission's jurisdiction merely because they are utilizing the development services of the Applicants to build and construct a project they intend to benefit from and ultimately own.

Furthermore, SCPPA is a Joint Powers Agency that was created pursuant to the Joint Powers Act of Chapter 5, Division 7, of Title 1 of the Government Code of California, which in form and operation is analogous to a Utah interlocal entity formed under the Interlocal Act. Milford I should, as the entity acting for SCPPA, be required to obtain a certificate of public convenience and necessity before constructing an electric plant or transmission line in Utah just as any Utah interlocal entity would be required.

IV. THE PURPOSE OF THE ACT IS SERVED IF THE APPLICANTS ARE REQUIRED TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Consistent with the purposes and policies of the Act, the Commission should require the Applicants obtain a certificate of public convenience and necessity before commencing construction of the Project.

[8] Because the Applicants have provided no information as to Phase II regarding the purchasers, location, the transmission lines, or financing of the Phase II, the Commission should not rule on Phase II until such information is known.

The Commission is "charged with discharging the duties and exercising the legislative, adjudicative, and rule-making powers committed to it by law." Utah Code Ann. § 54-1-1. As such, the Legislature has charged the Commission with filling in any gaps, or interpreting ambiguity of terms within the Act. *See Chevron v. Natural Resources Defense Counsel*, 467 U.S. 837, 843-844 (1984) (enunciating the principle that when a legislative body delegates power to an administrative agency to administer a statute, the legislative body gives the administrative agency the power to "elucidate a specific provision of the statute" and that "considerable weight should be accorded to [the] department's construction of a statutory scheme it is entrusted to administer").[9] In resolving ambiguous terms, the Commission should do so in a manner that is consistent with the purposes and policies of the Act. *See Paul v. Bethenargy Mines, Inc.*, 501 U.S. 680 (1991) (stating that *Chevron* illustrates that resolution of ambiguities in a statute is often more a question of policy than of law); *Bluffdale Mountain Homes, L.C. v. Bluffdale City*, 167 P.3d 1016, 1035 (Utah 2007) (interpreting a statute consistent with legislative intent).

[9] The Applicants rely on a *Public Serv. Comm'n v. Formal Complaint of WWZ Co.*, 641 P.2d 183 (Wyo. 1982) in support of the proposition that the Commission should decline jurisdiction if it has any doubt about whether jurisdiction exists. Motion to Dismiss, P. 5, ¶ 2. *WWZ* is distinguishable. In that case, the Wyoming Supreme Court overturned a decision of a district court that determined that the Wyoming public service commission had jurisdiction over sewerage disposal even though the commission's enabling statute spoke only to water distribution systems with no mention of sewerage. This case is nothing like *WWZ*. The Applicants seek to have the Commission decline jurisdiction even though it is clear they fall within the Act's definition of "electric corporation", in effect on February 20, 2008. Also, the Commission is expressly vested with and charged with authority to interpret and apply the definition of "electric corporation" and is not being asked to read into the statute a wholly new term like in the *WWZ* case.

The purpose of the Act is "to prevent preferences and discriminations respecting the rates charged or received by public utilities for services rendered or received." *United States Smelting*, 197 P. at 905. Stated another way, the purpose of the Act is to "protect[] the welfare of the Utah rate-paying public." Motion to Dismiss, p. 5 (citing *Utah Light & Traction Co. v. Pub. Serv. Comm'n*, 118 p.2d 683 (Utah 1941)).[10]

Milford I proposes to build a wind-generation facility in Utah using over 13,000 acres of Utah land that has been identified as ideal for harvesting wind. *See* Exhibit D, p. H-1, ¶ A. Milford I further proposes constructing a transmission line to deliver power to IPP using right-of-ways and easements through private, state, and federal lands.[11] Motion to Dismiss, pp. 4-5, ¶¶ 8-9. Milford will use the IPP switching station and what are in effect IPP transmission lines to deliver power to California. *Id*., p. 10, ¶ 10. Finally, SCPPA intends to exercise its option to complete its outright ownership of Phase I in as little as ten years. *See* Exhibit A, p. 4. In short, Phase I takes precious Utah resources to benefit California rate-payers and utilities, with no regard for Phase I's potential adverse effects on Utah citizens.

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[10] The Applicants rely on *State v. Nelson*, 65 P. 237 (Utah 1925) for the proposition that where there is no public service, there is no jurisdiction. Motion, p. 6, ¶ 2. The *Nelson* case is distinguishable. Unlike this proceeding, *Nelson* involved a common carrier in the early twentieth century and did not involve the construction of an electric generation facility with a footprint of over 13,000 acres; a transmission line extending some 90 miles through state, federal and private lands; or involve the question of whether a project, such as the one proposed by the Applicants, would have an impact on Utah rate-payers. *Nelson* is simply not on point.

[11] If the Applicants are not considered "electric corporation[s]", then the transmission corridors they propose to construct would not be considered "public utility easements", which are nonexclusive and can be used by more than one public utility. Utah Code Ann. § 54-4-27. The transmission corridors therefore may not be available for use by utilities serving Utah rate-payers, which is a further use of Utah resources without consideration given to Utah rate-payers.

The Applicants' Motion to Dismiss is not consistent with the purpose of the Act, nor is it consistent with the Commission's charge under Section 54-1-10 of the Act to engage in "long-range planning regarding public utility regulatory policy in order to facilitate the well-planned development and conservation of utility resources." *See, e.g., In re PacifiCorp for a Certificate of Public Convenience and Necessity Authorizing Construction of the Lake Side Power Project*, Docket No. 04-035-30 (Nov. 12, 2004) (citing Docket No. 90-2035-01, September 3, 1991, Order on Draft Standards and Guidelines, pages 5-6) (stating with regard to the Commission's mandate under Section 54-1-10 that "efforts in long-range planning are a requirement to insure that energy services will be available to the consuming public, now and in the future, at just and reasonable rates, and that scarce energy resources will be conserved"). Section 54-1-10 of the Act is in harmony with the Utah Constitution, which requires that all lands of the State "be held in trust for the people." Utah Const., art. XX, § 1. To the extent the Project involves State property and resources, the Commission should have jurisdiction to safeguard Utah's energy resources for the people of Utah.

Moreover, requiring the Applicants to obtain a certificate of public convenience and necessity serves the purpose of the Act because the Applicants' activities may adversely affect the intra and interstate grid that serves Utah rate-payers. For example, Milford I intends to use the IPP switching station to convert alternating current transmitted from the wind farm site into direct current, which could result in power disruptions. Once the power is converted to direct current, Milford I proposes delivering that power to California via the IPP Southern

Transmission System. Milford I has submitted no studies as to whether there would be any adverse affect on Utah's power grid through the use of IPP facilities.

The Applicants have provided no study to the Commission as to Phase I's impact on IPP. UAMPS, however, is aware of the "Milford Valley Wind Project Interconnection at Intermountain" Impact Study (the "Study"). The Study's methodology, when examined carefully as to its impacts on IPP operations/generation with the addition of generation attributable to the Project are revealing. The Study suggests "no problem" for normal system conditions with the addition of Milford I and/or Milford II. This result is "guaranteed" by ensuring that no net generation will be added as to the subject lines. With no net generation contemplated, no line overload would be "expected." The three cases presented by the Study assume that if, and when, 200 megawatts of Milford generation are added to the subject line, (interconnected at the IPP site) IPP generation will be backed down by 200 megawatts. In the case where 400 megawatts of Milford generation are loaded on the subject line (interconnected at the IPP site), IPP generation will be backed down by 400 megawatts. As a result, no effect as to the line overloading would be expected. The Applicants' Study is only valid if IPP is "backed down" in order to guarantee no line overloading. Milford I and Milford II will have a direct impact on IPP operations. This reality alone leaves precious little question that the Commission should exercise jurisdiction over the Project.

V. THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION IS NOT VIOLATED BY REQUIRING THE APPLICANTS TO OBTAIN A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Under the United States Constitution, the United States Congress is empowered to regulate commerce among the several States, *i.e.*, the Commerce Clause. U.S. Const., art. I, § 8. Although the Commerce Clause speaks in terms of powers bestowed upon Congress, the United States Supreme Court long has recognized that it also limits the power of the States to erect barriers against interstate trade. *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citations omitted).

In *Taylor,* the Supreme Court set forth the analysis to be used in addressing Commerce Clause claims:

> This Court has distinguished between state statutes that burden interstate transactions only incidentally, and those that affirmatively discriminate against such transactions. While statutes in the first group violate the *Commerce Clause* only if the burdens they impose on interstate trade are "clearly excessive in relation to the putative local benefits," statutes in the second group are subject to more demanding scrutiny. . . . Once a state law is shown to discriminate against interstate commerce "either on its face or in practical effect," the burden falls on the State to demonstrate both that the statute "serves a legitimate local purpose," and that this purpose could not be served as well by available nondiscriminatory means.

Id. at 137.

The Commerce Clause is not implicated as to the construction of the wind generation facilities and the transmission corridor, or the delivery of the Project's power to the IPP switching station, because all those activities occur within the State of Utah.

As to the transmission of power from the IPP switching station across state lines, there is no violation of the Commerce Clause. If the Applicants are able to construct the Project without having to obtain a certificate of public convenience and necessity, the Applicants will be

obtaining an unfair advantage over public utilities serving Utah customers. By requiring the Applicants to obtain a certificate of public convenience and necessity, the Commission is not requiring the Applicants to do anything more than any other Utah utility or interlocal entity is required to do under Sections 54-4-25, and 11-13-304. But if the Commission does not require the Applicants to obtain a certificate of public convenience and necessity, the result would be uneven and discriminatory as to Utah utilities and interlocal entities, not the Applicants. Thus, the assertion of jurisdiction by the Commission does not implicate the Commerce Clause because there is no burden being placed on the Applicants.[12]

And even if the Commerce Clause is implicated by the assertion of jurisdiction of the Commission, requiring a certificate of public convenience and necessity serves a legitimate public purpose – the protection of the integrity of Utah's natural resources. "As long as a [Utah] does not needlessly obstruct interstate trade or attempt to 'place itself in a position of economic isolation' … **it retains broad regulatory authority to protect the health and safety of its citizens and the integrity of its natural resources**." *Id*. at 151 (emphasis added). By requiring the Applicants to obtain a certificate of public convenience and necessity, the Commission is not placing Utah in a place of economic isolation – it is merely trying to even the playing field by requiring the Applicants to abide by the same rules which apply to Utah utilities.

Finally, the Applicants assert that it will be "virtually impossible" for it to obtain a certificate of public convenience and necessity. Motion to Dismiss, p. 12, ¶ 2. The Commission

[12] The cases the Applicants cite in support of their Commerce Clause argument are not on point and are distinguishable. The cases do not address a situation like this one where the burden is on in-state entities rather than on out-of-state entities.

has yet to decide whether the Applicants' Application is sufficient, so their argument is premature. That said, the Applicants' Application contains statements and assertions which appear to address each of the requirements of a certificate of public convenience and necessity as enumerated in Section 54-4-25 of the Act. *See* Application, pp. 9, ¶¶ 21, 22, 23, and 24.

VI. CONCLUSION

For the foregoing reasons, UAMPS respectfully requests that the Commission deny the Applicants Motion to Dismiss and Request for Order and require the Applicants to obtain a certificate of public convenience and necessity before construction and operation of the Project.

DATED this 28th day of March, 2008.

VANCOTT, BAGLEY, CORNWALL & McCARTHY, P.C.

By: _____
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CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing **MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND GOVERNOR'S SIGNING OF SENATE BILL 202 AND REQUEST FOR ORDER OF DISMISSAL** regarding Docket No. 08-2490-01 to be e-mailed and mailed by first class mail, postage prepaid, this 28th day of March 2008 to the following:

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