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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	Response of the Utah Division of Public Utilities to 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, the Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity, and Supplemental Filing Docket No. 08-2490-01

Consistent with the procedural schedule issued in this docket, the Division of Public Utilities (Division) responds to the Application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC (jointly Milford) for Certificates of Convenience and Necessity (Application) and to Milford's Motion to Dismiss the Application for a Certificate (Motion). Milford has requested an expedited schedule.

INTRODUCTION

This is the first opportunity for the Utah Public Service Commission (Commission) to determine if an exclusively wholesale electric provider

constructing a generating plant and transmission facilities in the state is an electric corporation under Utah Code Ann. § 54-2-1(7) and, if so, which Commission regulations are applicable. Traditionally, only public utilities or Inter Local Cooperative Agencies have requested certificates to build generating plants and transmission lines in the state. Traditionally, the generating plants and transmission facilities built were to serve customers in the state. Milford is asking the Commission to determine if it has any regulatory authority over a 300 MW generating plant and a significant transmission line in Utah where all of the power is being sold not only on a wholesale basis but also outside of the state of Utah. In addition to Milford asking the Commission to grant the certificates, it also has asked the Commission to determine contemporaneously that Milford is not an electric corporation and is not subject to Commission jurisdiction and, therefore, no certificate is required. Milford supplemented its filing on March 21, 2008 by filing a Notice of Governor signing Senate Bill 202 and Request for Dismissal. In that filing Milford claims that amendments to Title 54 that were made in Senate Bill 202 make it clear that Milford is an independent energy producer and is specifically exempt from Commission regulation (Supplemental Filing). This response will address the Motion to Dismiss, the Certificate Application, and the Supplemental Filing.

The Division believes that a reasonable reading of Utah Code Ann. §§ 54-2-1(7), 54-2-1(13), 54-2-1(14), 54-2-1(16)(D), and 54-4-25 allows the Commission to exercise jurisdiction over a portion of a project such as Milford. As a result the Division believes that the Commission should issue a certificate to

Milford subject to limited regulatory oversight. Attached to this Response is a Memorandum from the Division outlining its analysis of Milford and the scope of any regulatory oversight the Commission should exercise.

A COMPANY BUILDING A GENERATING PLANT AND TRANSMISSION FACILITIES IN THE STATE FOR WHOLESALE SALE CAN BE AN ELECTRIC CORPORATION UNDER UTAH CODE ANN. § 54-2-1(7)

A generating plant and transmission facilities, where the product is to be sold wholesale for use outside of Utah, can be subject to Commission jurisdiction. Utah Code Ann. § 54-2-1-(7) states:

> "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, except independent energy producers, and except where electricity is generated on or distributed by the producer solely for the producer's own use, or the use of the producer's tenants, or for the use of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally. (Emphasis added)

Utah Code Ann. § 54-2-1(8) states:

> "Electric plant" includes 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, or power, and all 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.

Reading the plain words of Utah Code Ann. § 54-2-1(7) reveals that an electrical corporation need not make a sale of electricity to "public service" to be

defined as an electrical corporation. The act of "owning, controlling, operating, or managing any electric plant" in itself defines an electrical corporation under the Utah statute. The act of selling electricity to the public is not required to bring an electrical corporation under the Commission's jurisdiction. Similarly, note that there is no public sale component found in the definition of electric plant. Milford in its Motion "concedes that the plain language of the act" arguably is ambiguous and therefore the purpose and intent of the act should be considered. Motion p. 8. When Milford looks at the purpose and intent of the act it concludes that the plain language of the act is inapplicable. However, in this case, the statute is not ambiguous. There is no need to look at legislative history as Milford suggests. General principals of statutory construction promote examining the plain language of the statute in a situation such as this and a finding that a generating plant and transmission facilities that sell wholesale electricity are subject to Commission regulation.

Milford argues that the revisions to SB 202 make it clear that Milford is not subject to Commission regulation and therefore the Commission should dismiss the Application. The Division believes that a reasonable reading of the amendments to Title 54 in SB 202 may permit an exemption from the certificate requirements for a generating facility using renewable energy sources defined in 54-2-1(14). However, the Division does not believe that a generating facility such as coal, nuclear, or gas plant that is a wholesale provider is exempt from the definition of an electric corporation with these amendments, and, therefore, must still obtain a certificate from the Commission. In addition the Division does not

believe the amendments in SB 202 exempted the transmission facilities that Milford intends to build.

An Independent Energy Producer is one who owns, operates, manages or controls an Independent Power Production Facility. Utah Code Ann. § 54-2-1(13). An Independent Power Production Facility is one that produces electric energy solely by the use of "a renewable resource." Utah Code Ann. § 54-2-1(14). It is important to note that transmission or distribution of energy is not mentioned. The relevance of not including transmission and distribution in the definition of an independent energy facility becomes clear when the exemptions from regulation in Utah Code Ann. § 54-2-1(16)(d) are reviewed. An exemption for the delivery of energy appears only to apply under Utah Code Ann. § 54-2-1(16)(d)(i). Facilities to deliver the power (i.e. transmission or distribution lines) are only exempt if the power is delivered to a state owned facility or a facility exempt under subsection (7). The exemptions provided under (ii) that Milford refers to in its March 21, 2008 filing does not refer to the distribution of the energy.[1] The legislature appears to exempt the delivery of the power only to an Independent Energy Producer who delivers it to a state owned facility or its delivery is limited to its private property. Milford's transmission line does not fit either.

[1] Subsection (7) exempts one from the definition of an electric corporation when the sale is for the use of the producer's tenants or for the use of a condominium. The applicability of this exemption was interpreted in Cottonwood Mall Shopping Center, Inc. v. Public Service Commission 358 P. 2d 1331 (Utah 1977). The court found that in order to obtain this exemption the electricity must be generated and distributed entirely within private property and not property dedicated to a public use. Here the transmission line is not on Milford's private property but instead is on property dedicated to public use.

UTAH CODE ANN. § 54-4-25 REQUIRES MILFORD TO SEEK A CERTIFICATE

If any of Milford's facilities are not exempt from Commission regulation, Utah Code Ann. § 54-4-25 addresses in detail the requirements applicable to an electrical corporation to obtain a certificate of convenience and necessity. Of note, the statute begins,

> (1) Except as provided in Section 11-13-304, a gas corporation, electric corporation, telephone corporation, telegraph 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.

Furthermore, the statute continues to apply requirements based upon the characteristics of the provider, such as being a public utility and/or an applicant and/or a supplier of electricity.

It is a reasonable interpretation of Utah Code Ann. § 54-4-25 that the statute contemplates the filing of certificate applications by those who may not be a public utility and who are not otherwise exempt and who are building either a generating plant or transmission facilities. In State v. Holm, 137 P.3d 726 (Utah 2006), cert. denied, 127 S. Ct 1371 (2007) (Holm), addressing issues involving bigamy and a related offense, the Utah Supreme Court recently provided guidance on statutory construction stating:

> To determine whether the "purports to marry" provision of Utah's bigamy statute is properly applicable to Holm, we must interpret that provision within its context in the Utah Code. "[O]ur primary goal in interpreting statutes is to give effect to the

> legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Foutz v. City of S. Jordan,* 2004 UT 75, ¶ 11, 100 P.3d 1171 (internal quotation marks omitted). "We presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning." *C.T. v. Johnson,* 1999 UT 35, ¶ 9, 977 P.2d 479 (internal quotation marks omitted). Furthermore, "[w]e read the plain language of the statute as a whole, and interpret its provisions in harmony with other statutes in the same chapter and related chapters." *Miller v. Weaver,* 2003 UT 12, ¶ 17, 66 P.3d 592. Only when we find that a statute is ambiguous do we look to other interpretive tools such as legislative history. *See Adams v. Swensen,* 2005 UT 8, ¶ 8, 108 P.3d 725.

See Holm at 733.

RATIONAL PUBLIC INTEREST SUPPORTS REVIEW OF THE CONSTRUCTION OF GENERATING PLANTS AND TRANSMISSION LINES WITHIN UTAH

There is a rational public interest reason to review the construction of generating plants and transmission lines built in the state even if the power is not sold to the public and is delivered out of state. Utah and its residents have an interest in public safety and health matters, and thus have an interest in seeing that an electrical plant which includes both the generating plant and the transmission facilities are properly cited, permitted and does not "conflict with or adversely affect the operations of any certificated fixed existing public utility…." Utah Code Ann. § 54-4-25-4(a) and (b). These sections of the statute confer upon the Commission the power to ensure that a generating plant and transmission line built in the state by one who is only selling the product wholesale builds the plant in such a way to protect the public interest and to ensure that such plant is not adversely affecting any public utility in the state.

Although the Milford generating plant may not need a certificate, the rationale for reading the amendments to SB 202 supports the need for a certificate for the transmission plant Milford intends to build. In addition, while the Milford Wind facilities (both transmission and generation) do not appear to implicate public health and safety in this case, it is important for the Commission to assert jurisdiction over electrical plants and transmission facilities that, while perhaps not used to sell power within the state, may, by their size, location, technology, or environmental impact, adversely affect Utah.

In Utah Associated Municipal Power Systems v. Public Service Commission, 789 P.2d 298 (Utah 1990) (UAMPS), the court determined that there was a legitimate state interest in the Commission issuing certificates for a major transmission line being built by an Inter Local Cooperative Agency. The court determined that, where UAMPS was building a line that paralleled a line UP&L was asking the Commission for permission to build, the UAMPS' line could affect an existing public utility and the public both economically and environmentally. As a result the court found "little difficulty that the construction of this line by UAMPS is 'sufficiently infused with a state, as opposed to an exclusively local'" interest to avoid a constitutional challenge to Commission regulation. UAMPS at 302-303. These public interest considerations are equally applicable to the 300 MW generating plant and transmission line being built by Milford. Those facilities could adversely interfere with the operating of a public utility in the state and could otherwise affect the public generally. Unless clearly

exempted under Title 54, including the amendments in SB 202, the Commission should require a certificate from Milford.

THE COMMISSION CAN DETERMINE HOW TO EXERCISE ITS REGULATION FOR THESE UNIQUE CIRCUMSTANCES

Reviewing the construction of these facilities does not necessarily subject Milford to heavy regulation. The Division memo attached suggests what type of oversight is needed if the Commission chooses to exercise jurisdiction. Utah Code Ann. § 54-5-25 permits a certificate to be conditioned. Those conditions could include the type of regulation needed in each individual case. Those conditions could include the limited regulatory oversight suggested by the Division in the attached memorandum. This level of regulation would not be burdensome on Milford but would ensure that the public's interest in being considered in projects like Milford. If the Commission exercises authority over Milford, it might consider opening a rulemaking docket to explore issues related to non-traditional certificate applications.

THE MOTION'S ARGUMENTS ARE UNPERSUASIVE

Each argument raised by the Motion fails. These arguments do not overcome the statutory requirements applicable to Milford. Thus, the Commission is within its authority to require Milford to request a certificate, as it has done, and to determine whether and under what circumstances such a certificate may be issued and the degree of regulation to be exercised.

The Motion's argument that the Commission's power is limited to those powers specifically mentioned does not apply because a careful reading of the statutes quoted above demonstrates that an electrical corporation with

transmission facilities such as Milford must apply for a certificate. The cases cited in the Motion support the Commission exercising jurisdiction in this instance. The Motion's statement that the "delivery of utility services or commodities to the public" is the "sina qua non" of the Commission's granted authority is likewise without merit. While at first blush, this may be an attractive argument, upon further inspection and contemplation it becomes clear that the Commission's interests and duties extend beyond this as mandated by the statutes explained above.

The amendments to Title 54 included in SB 202 at best exempt only generating facilities using renewable sources of energy and do not exempt extensive transmission lines being build across the state. By the legislature feeling the need to exempt a generating plant using renewable sources of energy, one could argue that it makes it even clearer that a generating plant using coal, gas, or nuclear are required to get certificates under the SB 202 amendments.

The certificate statute, Utah Code Ann. § 54-4-25, appears to contemplate non-public utilities obtaining certificates. See Utah Code Ann. § 54-4-25(4). This section ensures that the construction will be properly permitted and will not interfere with the public interest and other public utility operations.

Milord's arguments that obtaining a certificate "would likely constitute an impermissible restriction on interstate commerce" are likewise flawed. Under the Pike test cited by Milford, the burden upon Milford is not so great as to be

impermissible. Certainly a well-planned project should not find scrutiny by the Commission untoward or unduly burdensome.

CONCLUSION

In conclusion, the Division believes that a reasonable reading of the statute allows the Commission to exercise jurisdiction to review the construction of at least a portion of the Milford project. Such a project, including the transmission lines, could affect public utility operations in the state and could be adverse to the public interest. The Commission has the authority to design the type of regulation required by the circumstances required by each application. In this case very limited regulation is suggested that in no way interferes with either of these projects being built.

Respectfully filed this ___ day of March, 2008.

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the Response of the Utah Division of Public Utilities to 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, the Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity, and Supplemental Filing was sent by electronic mail or mailed by U.S. Mail, postage prepaid, to the following on March __, 2008:

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