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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	**REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF CONVENIENCE AND NECESSITY** **AND** **RESPONSE TO THE ACTION REQUEST RESPONSE OF THE DIVISION OF PUBLIC UTILITIES** Docket No. 08-2490-01

Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC (collectively "Milford"), by and through their undersigned counsel and pursuant to Rule R746-100-3(H) of the Utah Administrative Code, hereby respectfully submit the following Reply Memorandum in Support of Motion to Dismiss their Application for Certificate of Convenience and Necessity, and Response to the Action Request Response of the Division of Public Utilities.

INTRODUCTION

In this reply to the Response[1] of the Division of Public Utilities ("Division" or "DPU"), and the Opposition[2] of Utah Associated Municipal Power Systems ("UAMPS"), Milford demonstrates it is not subject to the requirement of obtaining a certificate of public convenience and necessity. For the reasons stated in its initial Motion to Dismiss, the Commission lacks jurisdiction over the proposed wind farm and interconnection lines (collectively the "Project"). Those facilities do not furnish electric power for use within the state, and the purposes of the Act are not served by the Commission imposing any regulatory requirements on Milford.

In addition to the reasons stated in the initial Motion to Dismiss, recently enacted Senate Bill 202 expressly provides that independent energy producers like Milford proposing to construct independent power production facilities like the Project are exempt from Commission jurisdiction and regulation. The interests of the State of Utah as expressed in the recent legislation, as well as the long-standing policies of Commission regulation of public utilities under Title 54 (the "Public Utilities Act" or "Act") are not advanced by requiring a certificate of convenience and necessity to construct any of the proposed facilities. In light of the private wholesale nature of Milford's business, and the extent of the Commission's jurisdiction as set forth in the provisions of the Act both before and after Senate Bill 202, the Application should be dismissed on the grounds that a certificate of convenience and necessity is not required.

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[1] The Division's Response is captioned: 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 Public 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 (hereinafter "Response").

[2] UAMPS Opposition is captioned: 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 (hereinafter "Opposition").

ARGUMENT

I. SENATE BILL 202

On March 18, 2008, Governor Huntsman signed into law Senate Bill 202, the "Energy Resource and Carbon Emission Reduction Initiative." As discussed in Section II.B, below, Senate Bill 202 made certain changes to Title 54 that result in exempting Milford from the Commission's jurisdiction and regulation. On March 21, 2008, by a Notice of Governor's Signing, Milford provided Notice to the Commission that the amendments had taken effect, and noted that certain arguments made in Milford's Motion to Dismiss had been rendered moot by the new version of the statutes which are now applicable in this docket.

A. Senate Bill 202 Applies to the Current Matter Before the Commission.

UAMPS argues in its Opposition that Senate Bill 202 should not be applied retroactively. It contends that because Milford's Application was filed before the date of enactment and because the Legislature did not clearly express an intention that Senate Bill 202 should be applied retroactively, the new law does not apply to this case. Opposition at 5-7.

The case cited by UAMPS holds that, although a change in the law usually may be applied only prospectively, it may be applied retroactively when there is no specific legislative intent regarding prospective or retroactive application stated in the statute, and when the change is procedural in nature. Olsen v. McIntyre Investment Co., 956 P.2d 257, 261 (Utah 1998); see also State v. Jacoby, 975 P.2d 939 (Ut. Ct. App. 1999) (retroactive application of new statute of limitations was procedural in nature). Substantive changes in the law are those that create, define or regulate "the rights and duties of the parties which may give rise to a cause of action." Olsen, 968 P2d at 261. The question of whether a court, or in this case the Commission, has

jurisdiction to consider the subject matter before it is an issue of procedure, not the substantive rights of the parties. In the seminal opinion in Landgraf v. USI Film Products , 511 U.S. 244, 114 S.Ct. 1483 (1994), the United States Supreme Court discussed the presumption against retroactive legislation, noting: "Since the early days of this Court, we have declined to give retroactive effect to statutes burdening private rights unless Congress had made clear its intent." 114 S.Ct. at 1499. On the other hand, "[w]e have regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." Id . at 1501. The Landgraf Court cited with approval Bruner v. United States, 343 U.S. 112, 116-17 (1952), which stated: "This rule -- that, when a law conferring jurisdiction is repealed without any reservation as to pending cases, all cases fall with the law -- has been adhered to consistently by this Court." See also, Federal Rules of Civil Procedure 12(h) (if at any time court determines that it lacks subject matter jurisdiction, the court must dismiss the action).

The portion of Senate Bill 202 relevant to this case affects the Commission's jurisdiction with respect to certain providers and/or activities. The Utah court, consistent with the Landgraf opinion, has retroactively applied changes in law that affect the Commission's jurisdiction to grant certificates of convenience and necessity. In Williams v. Public Service Commission, 754 P.2d 41 (Utah 1988), Page America had filed an application with the Utah Public Service Commission to operate one-way paging services. At the time of filing, the Federal Communications Commission ("FCC") had recently deregulated certain radio frequencies. Id. at 44. After hearings on Page America's application, the Utah Public Service Commission determined "it had no jurisdiction over one-way paging services, effectively deregulating the

market." Id. The Commission thus declined to issue a certificate to Page America. Although the FCC's order was not applied retroactively to Page America because it preceded Page America's filing, the Commission, at the same time, also cancelled previously-issued certificates of two other providers. Id. The FCC's order, which effectively withdrew the Commission's jurisdiction, was applied retroactively to cancel those certificates because the activity which had been authorized by them had been de-regulated.

It does not amount to an impermissible retroactive application of Senate Bill 202 for the Commission to determine that in no longer has jurisdiction and that the law no longer requires Milford to obtain a certificate to construct its facility. The Commission has not been asked to adjudicate rights or obligations among parties. Instead, Milford has requested authorization to undertake an activity that no longer requires authorization. As UAMPS suggests, Milford could have waited until the day after the enactment to file its Application (and a motion to dismiss) and thus avoided the issue altogether. Opposition at 6, n.3. By the same token, Milford could now withdraw the Application and motion and re-file it the following day to take advantage of the new law. That is because no substantive rights have been affected by the statute, and because when the authority to regulate is withdrawn, like it was in the Williams case, even existing certificates must be cancelled. As discussed more fully below, to the extent Senate Bill 202 deregulates the construction of renewable generation facilities, the Commission no longer has authority to either grant or deny a certificate, regardless of when the Application was filed. The new statute may and must be applied to Milford's existing Application.

B. Senate Bill 202 Does Not Violate the Privileges and Immunities Clause of the United States Constitution.

UAMPS claims that Senate Bill 202 "raises serious questions under the Privileges and Immunities Clause of Article IV the U.S. Constitution" because Senate Bill 202's exemption for independent power production facilities may not apply to Utah interlocal entities. According to UAMPS, this would mean that "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," which is the basis of the alleged "serious constitutional question." Opposition at 7–8.

Of course, even if the Commission were to adopt the interpretation of Senate Bill 202 posited by UAMPS – that a Utah interlocal would be required to obtain a certificate from the Commission for construction of a facility meeting the definition of "an independent power production facility," while an out-of-state (or in-state) utility would not[3] – the Privileges and Immunities Clause would not be implicated. That is because the Privileges and Immunity Clause applies to discrimination by a state against the citizens of other states, not its own, and only with regard to certain "basic" or "fundamental" rights such as earning a livelihood, owning property, or freely traveling. See, e.g., Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 383 (1978)("When the Privileges and Immunities Clause has been applied to specific cases, it has been interpreted to prevent a State from imposing unreasonable burdens on citizens of other States . . ."); Hague v. Committee for Industrial Organization, 307 U.S. 496, 511 (1939)(italics

[3] Whether the exemption for an independent energy production facility applies to Utah interlocals like UAMPS is an interesting question of statutory interpretation, but it is not properly before the Commission at this time and may never be. In the event that UAMPS or another Utah interlocal proposes such a facility in the future, and the applicable statutory provisions remain the same, it is possible that the question could become ripe for Commission consideration. But it clearly is not a question that is properly before the Commission at this time.

added)("it has come to be the settled view that Article IV, Section 2, does not import that a citizen of one state carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the state first mentioned, but, on the contrary, that in any state every citizen of any other state is to have the same privileges and immunities which the citizens of that state enjoy. *The section, in effect, prevents a state from discriminating against citizens of other states in favor of its own*.")

Because UAMPS is not a citizen of another state, and because it does not even allege that there is a constitutionally protected "fundamental right" that would be burdened by a potential requirement for it to obtain a certificate from the Commission for a wholesale renewable energy facility, it has not and cannot properly allege a Privileges and Immunities claim. Accordingly, the Commission should not countenance this argument.[4]

II. NEITHER THE NEW OR THE OLD VERSION OF THE PUBLIC UTILITIES ACT REQUIRES APPLICANTS TO OBTAIN A CERTIFICATE OF CONVENIENCE AND NECESSITY

Milford's Motion to Dismiss, filed before Senate Bill 202, demonstrated that a certificate of convenience and necessity is not required because (1) the Commission's authority under the Act does not extend to Milford or the planned facilities; (2) Milford is not an electrical corporation under the Act as it existed at the time the Application was filed; (3) the purposes of the Act are not served by requiring a certificate, none should be required; and (4) to require a certificate would impermissibly burden interstate commerce. All of these grounds still apply following the effective date of Senate Bill 202. In addition, the amendment to the definition of

[4] Even if UAMPS had alleged a legitimate claim that Senate Bill 202 was unconstitutional, the Commission would not have authority to decide that issue. See Nebeker v. Utah State Tax Commission, 34 P.2d 180 (Utah 2001) (administrative agencies do not have authority to decide constitutionality of their governing statues).

an "independent energy producer" in Senate Bill 202 had the effect of exempting Milford from the jurisdiction and regulations of the Commission with respect to all of the planned facilities. Utah Code Ann. § 54-2-1(13), (14); id. at 54-2-1(16)(d). Under either version of the Act, the purposes of Act are not served by requiring Milford to obtain a certificate for construction of any of the planned facilities.

A. Milford is Not an Electrical Corporation under the Either Version of the Act.

UAMPS and the Division of Public Utilities contend that, even under the new version of that Act, Milford needs a certificate because, at least with respect to part of its facilities, it is an "electrical corporation." This argument should be rejected because to designate any part of the facilities an "electrical corporation" would require an interpretation of the statute that is both unreasonable and inconsistent with the scope of the Commission's jurisdiction and the purposes of the Act.

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* except independent energy producers.

Utah Code Ann. § 54-2-1(7) (emphasis added). As explained in Milford's Motion to Dismiss, the definition of "electric corporation" is ambiguous and must be interpreted as . . . applying to facilities "*for public service . . .within this state.*" See Memo in Support at 5-7, 9-11 and Appendix 1; Utah Code Ann. § 54-2-1(7).

The Division and UAMPS take the position that Milford is an "electric corporation"

simply because the proposed facilities will be located within the state. Response at 4; Opposition at 10. Declaring the clause "unambiguous,"[5] neither UAMPS nor the DPU bothers to address the argument that the definition of "electrical corporation" only applies to entities owning electric plant or furnishing electric power "for *public service* within this state." See Memo in Support at 10, Utah Code Ann. §§ 54-2-1(7) (emphasis added). Both fail to respond to Milford's argument that the meaning of "public service within the state" pertains to facilities or services the cost of which ultimately can be reflected in the rates of Utah residents. They assert without any reasoning or citation to authority that the mere presence of facilities in the state is sufficient to make Milford an electrical corporation. Compare Response at 4; Opposition at 10 with Memo in Support at 5-7 and Appendix 1.

UAMPS also contends that Milford is an electrical corporation because the power from the wind farm will be "delivered" in Utah. Opposition at 10-11. Citing selected portions of the Power Sales Agreement between Milford and SCPPA, UAMPS notes that the "Point of Delivery" of the power is at the "interconnection facilities . . . located at the point of interconnection between the [Project's] transmission line and the Intermountain Power Project Switchyard bus." Opposition at 10 (quoting Power Sales Agreement at 8).[6] UAMPS concludes that because the delivery is within Utah, the power from the Milford facility is furnished to

[5] Ironically, UAMPS and the DPU deny that an ambiguity exists and then rely on their interpretations of the very clause that Milford identifies as ambiguous to argue the opposite conclusion, thus demonstrating the ambiguity is present. See Response at 4; Opposition at 10. The clause is ambiguous, of course, because it cannot be determined from the plain language whether the words "within this state" refer to the location of the facilities, or to the "public service" that is provided through those facilities.

[6] UAMPS' Opposition states a number of supposedly factual assertions about the Project, and attaches documents that it contends support its assertions. To the extent the documents submitted are complete and genuine, Milford does not deny their content. But, Milford denies UAMPS' characterization of them and its conclusions about their effect.

"consumers for domestic, commercial or industrial use, within this state." Id.

UAMPS' argument fails for several reasons. It does not allege that the power is *used* within the state—only that it is "delivered" at the interconnection point within Utah. Power "delivered" within the state does not bring Milford within the definition of "electrical corporation" which refers to power for "use, within this state." Utah Code Ann. § 54-2-1(7). In addition, because the sale at IPP is a wholesale sale, and because the power is destined for consumption in California, the movement of this wholesale power, if regulated at all, is under the Federal Energy Regulatory Commission's ("FERC") jurisdiction. 16 U.S.C.A. § 824(a). Even though the wholesale sale is to take place at the point of interconnection, the power is in interstate commerce until it reaches California where it is to be consumed. See 16 U.S.C.A. § 824(c) ("electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof"). Without any reference to authority to support the notion, UAMPS proposes that the Commission should find Milford is an electrical corporation based upon the location of a wholesale sale on a private connection to a California purchaser. It would be absurd to conclude in this situation that the power has been "furnished to consumers" or furnished for "domestic, commercial or industrial use, within the state."

For the reasons stated above and in Milford's Memorandum in Support, the Commission should decline to interpret the definition of "electrical corporation" in a way that applies it to Milford. Milford is not an electrical corporation, and it should not be required to obtain a certificate under the law as it existed before or after the effective date of Senate Bill 202.

B. The Version of the Act in Effect After Senate Bill 202 Exempts Milford's Entire Project from the Jurisdiction and Regulation of the Public Service Commission.

Milford filed its Motion to Dismiss on February 20, 2008. Senate Bill 202 was amended to include changes to the definitions of "independent energy producer" and "independent power production facility" on February 25, 2008.[7] It was passed on March 4, and signed by the Governor on March 18, 2008. Because Milford's Motion to Dismiss was filed before the revised definitions were even introduced as part of the bill, this Reply Brief is Milford's first comment to the Commission on the effect of Senate Bill 202.

In its Motion to Dismiss, Milford called the line between the wind farm and the interconnection point a "Transmission Line" or "Transmission Facility." In hindsight, that was an unfortunate choice of words because it evidently led the parties to offer irrelevant arguments in the debate about the effect of Senate Bill 202. The basis of the Motion to Dismiss was that none of the facilities would be used "for public service within the state," and so the terminology used to label those facilities was designed to describe their base function (physical transmission of electricity), not to characterize their legal status. As a matter of law, the wires and poles are not "transmission" lines of an electrical corporation used for "public service," but private interconnection lines to the point of a wholesale sale. The effect of Senate Bill 202 is to focus the debate not only on "public service," but also on which physical facilities can be considered "independent power production facilities" under the amended definition of an "independent energy producer." Utah Code Ann. § 54-2-1(13), (14). In that context, the lines clearly are

[7] Senate Bill 202, 1st Substitute (Green), approved for filing (Feb. 25, 2008); text found at: http://le.utah.gov/~2008/bills/sbillint/sb0202s01.pdf

interconnection lines, and thus part of the generation facility, not "transmission lines . . . for public service within the state".

1. Milford is Exempt from the Jurisdiction and Regulation of the Commission as an Independent Energy Producer.

The revised definitions in Chapter 2 of Title 54 state as follows:

> "Independent power production facility" means a facility that: (a) produces energy solely by the use, as a primary energy source, of biomass, waste, a renewable resource, a geothermal resource, or any combination of the preceding sources; or (b) is a qualifying power production facility.

Utah Code Ann. § 54-2-1(14) (2008). Senate Bill 202 also amended the corresponding definition of "independent energy producer" to provide that such person is one that owns, operates or manages an independent power production facility. Id. § 54-2-1(13). Because the Project is a "renewable resource," it is an "independent power production facility" and Milford, is an "independent energy producer." The definition of "electrical corporation" was not amended by Senate Bill 202. It provides now, as it did before, that an "electrical corporation" expressly excludes "independent energy producers." Id. § 54-2-1(7).

Senate Bill 202 also amended the relevant portion of former Section 54-2-15(d) to provide as follows:

> An independent energy producer is exempt from the jurisdiction and regulations of the commission with respect to an independent power production facility if it meets the requirements of Subsection (16)(d)(i), (ii) or (iii), or any combination of these: (i) . . .; (ii) the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser. . . .

Utah Code Ann. § 54-2-1(16)(d) (2008). Because Milford's energy is sold to a wholesale purchaser, Milford is exempt from the jurisdiction and regulation the Commission with respect to its independent power production facilities.

2. The Interconnection Line is Part of the Independent Power Production Facility.

The Division and UAMPS agree that the effect of Senate Bill 202 is to exempt Milford from the requirement to obtain a certificate of public convenience and necessity to construct its wind turbine facilities. But, they contend a certificate is needed for the interconnection line. UAMPS Opposition at 11-12;[8] DPU Response at 5, 10;[9] Division's Action Request Response at 3. The Division argues that because only renewable "generation" resources, and not "transmission" facilities, are mentioned in Section 54-2-1(16)(d), Milford must obtain the certificate for the line. DPU Response at 4-5. Likewise, UAMPS concedes that Milford is exempt as to "*facilities* that *produce* electricity by using renewable resources," but contends that Milford is an electrical corporation as it relates to the "transmission" facility. Opposition at 11.

Under the Utah statute, an "independent power production facility" is a "facility that produces energy." Utah Code Ann. § 54-23-1(7). Implicit within the meaning of "facility that produces energy" are all of the items of "electric plant" associated with the production of energy, including not only the generating device (in this case, wind turbines), but also the real property on which the wind turbines will be situated, the lines interconnecting the turbines to each other,

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[8] UAMPS states that Senate Bill 202 should be construed to mean that Milford is not an "electrical corporation[s]" as it relates to the wind generation facility," which it concedes is an "independent power production facility," but contends that a certificate should be required for "the Project's transmission lines *if appropriate*." Opposition at 12 (emphasis added).

[9] The Division believes that "a reasonable reading of the amendments to Title 54 in Senate Bill 202 may permit an exemption from the certificate requirements for a generating facility using renewable energy sources defined in 54-2-1(14)," but does not believe that the amendments exempt "transmission facilities." Response at 5.

the transformer, and other "electric plant" used to produce energy. See id. § 54-2-1(8) (2008) (definition of electric plant). There is nothing in the statute that confines the definition of a "power production facility" to the wind farm as UAMPS and the Division would urge.

One type of "independent power production facility" is clearly meant to include interconnecting lines. The statute defines a "qualifying power production facility" as one that meets the requirements of federal law for designation as a "qualifying small power production facility." Utah Code Ann. § 54-2-1(14); 54-2-1(19). Under the corresponding federal law, a "qualifying small power production facility" includes the "*transmission lines* and other equipment used for interconnection purposes (including transformers and switchyard equipment)." 18 C.F.R. § 292.101(b)(1)(i) (2007) (emphasis added).[10] The Utah statute thus contemplates that the interconnection line of an independent power production facility is part of the generation plant.

Although Milford's facility will not be a federal qualifying small power production facility (because it will produce more power than allowed), it will meet the federal definition of an "eligible facility," because it will be used for "the generation of electricity exclusively for sale at wholesale." See 42 U.S.C § 16451 (designating certain entities that own or operate eligible facilities as "exempt wholesale generators").[11] Under the federal regulations applicable to

[10] The federal definition of a "small power production facility" is a "generating facility whose primary energy source is renewable (hydro, wind, solar, etc.), biomass, waste, or geothermal resources, and that meets certain requirements of 18 C.F.R. §§ 292.203(a), 292.203(c) and 292.204."

[11] Under the Energy Policy Act of 2005 and the Public Utilities Holding Company Act of 2005, an "exempt wholesale generator" is "any person . . . engaged directly or indirectly . . . and exclusively in the business of owning or operating .. one or more eligible facilities and selling electric energy at wholesale." 42 U.S.C.A. § 16451 (*incorporating* 15 U.S.C.A. § 79z-5a (a) as that section existed on the day before the effective date of the Public Utilities Holding Company Act of 2005). With certain exceptions not applicable here, an "eligible facility" is one "used for the generation of electricity exclusively for sale at wholesale." Id. at § 79z-5a (b).

exempt wholesale generators, the facility used for the generation of electric energy "includes *interconnecting transmission facilities* necessary to effect a sale of electric energy at wholesale." 15 U.S.C.A. § 79z-5a (a)(B) (emphasis added). As with a federal qualifying facility, the generation facilities of an exempt wholesale generator include the interconnecting line and facilities between the generation device and the transmission system. 18 C.F.R. § 292.101(b)(1)(i); 15 U.S.C.A. § 79z-5a (a)(B).

Many private firms in Utah own independent power production facilities that are connected either to a public utility's distribution system or to a transmission provider. The facilities on the customer's side of the interconnection point, are considered to be the "generator." See e.g., proposed Oregon Admin. R. § 860-082-0010 (38) (defining generator to include interconnection equipment).[12] Likewise a public utility's interconnection lines are generation assets, not part of transmission; and a municipality's generation facilities include the lines and equipment up to the point of interconnection. Milford's Project is an independent wholesale *generator*, interconnecting its *generation* facilities at IPP. The Commission, consistent with every other convention, should recognize that interconnecting transmission facilities are part of

[12] The Oregon proposed rule on the Interconnection of Small Generator Facilities to the Electric Transmission and Distribution System of an Electric Distribution Company is currently under consideration by the Utah Commission in PSC Docket No. 07-999-07. While the proposed rule is not applicable to the present case, it is instructive in how it defines "small generator facility." Oregon's Proposed Rule provides as follows:

> "Small Generator Facility" means the equipment used by an Applicant or an Interconnection Customer to generate, or store, electricity that operates in Parallel with the T&D System. For the purposes of OAR 860-082-0015 through 860-082-0080, a Small Generator Facility has an Electric Nameplate Capacity rating of 10 MW or less and may include a PV array or a prime mover and electric generator *and the Interconnection Equipment required to safely interconnect with the T&D System.*

O.A.R. § 860-082-0010 (38) (emphasis added).

generation plant and conclude that all of Milford's Project is exempt as an independent power production facility under Section 54-2-1(16)(d)(ii).

C. The Purposes of the Utah Act are not Served by Requiring a Certificate of Convenience and Necessity.

In its Motion to Dismiss, Milford explained that the purposes of the Utah Act are not served by requiring a certificate of convenience and necessity. Milford should not subject to the Commission's jurisdiction because it is a wholesale generator who will not provide services or electric power for public service within the state. The construction and operation of the Project will not affect the rates paid by, or the services available to Utah consumers. According to both the language and the purpose of the Act, the only kind of entity required to obtain a certificate is one that provides public service within this state.

UAMPS asserts that requiring a certificate "serves the purpose of the Act because the Applicants' activities may adversely affect the intra and interstate grid that serves Utah ratepayers." Opposition at 18.[13] UAMPS also complains about Milford's plans to interconnect at the IPP switchyard without providing to the Utah Commission a transmission or interconnection study to show" whether there would be any adverse effect on Utah's power grid through the use of those facilities." Id. at 18-19. It contends that the interconnection impact study shows that IPP's coal generation must be "backed down" when Milford's wind generation is "loaded on the subject line (interconnected at the IPP site)," to avoid line overloading. Id. at 19. It concludes that the Commission should exercise jurisdiction over the Project to avoid an adverse impact on IPP's operations and the Utah grid.

[13] UAMPS does not say that Utah ratepayers would be affected, only that the "grid" might be.

The issues that UAMPS raises about the effect of the transmission of electric power over the interconnection line even if they are correctly described by UAMPS, are all outside of the authority of the Utah Commission to resolve. If the Commission were to determine (incorrectly) that Milford's interconnecting line is not part of the generation plant, then, to the extent the transmission and sale of energy over that line is subject to regulation at all,[14] it would be subject to FERC regulation, not that of the Utah Commission. See 16 U.S.C.A. § 824(a) (FERC has jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce"); id. at 824(b) (FERC has "jurisdiction over all facilities for such transmission or sale of electric energy"). The "adverse effects" that UAMPS contends are reason for the Commission to exercise jurisdiction are not within the purview of the Commission. See 16 U.S.C.A § 824j(b) (FERC authority to ensure that reliability standards and guidelines are met in the transmission of electric energy).

UAMPS also complains that Milford has not submitted the "Interconnection Impact Study" to the Commission, and alleges that the interconnection of the Milford line would create problems for IPP's operation. Opposition at 19. Milford's interconnection agreement with IPA is an agreement between two non-jurisdictional entities. Because all of the facilities of Milford and IPA are private facilities not for public use, neither the Commission nor the FERC need to approve the interconnection agreement. If UAMPS believed that the interconnection would affect its own ability to operate, the forum for UAMPS to complain is not before the Commission, especially in the present proceeding. See 16 U.S.C.A § 824k (granting authority

[14] Milford does not concede that the FERC will have jurisdiction over the Project when it is completed. However, Milford acknowledges that to the extent there are regulations applicable to the interconnecting line, requests of third parties to access capacity on the line, or adverse effects on the operation of the transmission grid, it would be the federal regulations, not state regulations, that apply.

to order and approve interconnection agreements); id. at § 2621(d)(15) (authority to implement of interconnection standards).

Finally, UAMPS argues that the Commission should exercise jurisdiction to protect Utah's resources. It contends that Phase I of the Project uses "precious resources to the benefit of California rate-payers and utilities," in disregard of "long range planning regarding public utility regulatory policy." Opposition at 17-18. UAMPS notes that the wind farm will be situated over a wide area, and concludes that the Commission "should have jurisdiction to safeguard Utah's energy resources for the people of Utah." Id.

The Commission's resource planning responsibility is confined to "public utility regulatory policy," and must be construed in light of its general jurisdiction to regulate "public utilities." Utah Code Ann. § 54-1-10; § 54-4-1. It is not the purpose of the Act to "safeguard" a wind resource, which UAMPS concedes will be developed by an "independent power production facility," exempt from Commission jurisdiction or regulation when there is no consequence for Utah retail customers. Opposition at 11-12 (citing Utah Code Ann. § 54-2-1(7), (13) and (14)). By that logic, Utahan's would never get Washington or Wyoming wind power, which those states would be required to hoard for their residents. UAMPS' position also runs directly afoul of the Commerce Clause, which the Supreme Court has emphatically interpreted to prohibit such resource hoarding by states. See Hicklin v. Orbeck, 437 U.S. 518, 532-33 (1978).[15]

[15] In Hicklin, the Court summarized some of its jurisprudence on the "hoarding" issue as follows: "West v. Kansas Natural Gas, 221 U. S. 229 (1911), struck down an Oklahoma statutory scheme that completely prohibited the out-of-state shipment of natural gas found within the State. The Court reasoned that, if a State could so prefer its own economic wellbeing to that of the Nation as a whole, 'Pennsylvania might keep its coal, the Northwest its timber, [and] the mining States their minerals,' so that 'embargo may be retaliated by embargo' with the result that 'commerce [would] be halted at state lines.' Id. at 221 U. S. 255. West was held to be controlling in Pennsylvania v. West Virginia, 262 U. S. 553 (1923), where a West Virginia statute that effectively required natural gas companies within the State to satisfy all fuel needs of West Virginia residents before transporting any natural gas out of the

None of the reasons that UAMPS offers for requiring a certificate implicate the Act or the Commission's authority under the Act. Indeed, it appears that UAMPS is complaining about the effect of Milford's presence in the competitive market for wholesale power. Milford and UAMPS are competitors for access to interconnection facilities, transmission capacity, and possibly suitable siting for wind generation. It is not the purpose of the Utah Act to protect UAMPS from competition by independent power developers, but to ensure that Utah ratepayers receive adequate service at reasonable rates. If there are "adverse effects" on the public transmission grid from the placement of Milford's line, or because it occupies interconnection facilities at IPP, it is federal law, not the Utah Act, that prescribes the remedy.

D. A Certificate is Not Required to Ensure Compliance with State Siting Requirements.

Under the Utah Act, as one of the requirements of obtaining a certificate of public convenience and necessity, an applicant must show that "it has received or is in the process of obtaining the required consent, franchise, or permit of the proper county, city, municipal, or other public authority." Utah Code Ann. § 54-4-25(4)(a)(1)(i).[16] If an applicant is in the process of obtaining such permits, the Commission may grant a certificate conditioned upon the Applicant's receipt of the permits and upon filing evidence of such receipt with the Commission. Id. § 54-4-25(4)(a)(1)(ii). Milford acknowledges that the state, county and local authorities may require such permits to be obtained ("siting" requirements). These siting requirements, however, are neither imposed nor enforced by the Commission and, as discussed below, they do not

State was held to violate the Commerce Clause. West and Pennsylvania v. West Virginia thus established that the location in a given State of a resource bound for interstate commerce is an insufficient basis for preserving the benefits of the resource exclusively or even principally for that State's residents."

[16] Although FERC has exclusive authority over the transmission and sale of energy in interstate commerce, it does not have exclusive jurisdiction over the construction of electric transmission or distribution lines. 16 U.S.C.A. § 824p; Pacific Power & Light v. Federal Power Comm'n, 184 F.2d 272 (D.C. Ct. App. 1950).

provide an independent basis for the Commission to exercise jurisdiction over Milford or its facilities.

1. State, County and Local Authorities Have Responsibility for "Siting" Requirements.

In its Response, the Division argues that there is a "rational public interest" in requiring Commission review of generation and transmission plant built in the state, even if the power is not sold to the public. Response at 7. It cites "public health and safety concerns," and the state's interest in ensuring that the facilities do not "conflict with or adversely affect the operations of any certificated fixed existing public utility." Id. (quoting Utah Code Ann. §54-4-25(a) and (b)). While the Division concedes that the interconnection line does not implicate health and safety issues, it believes that the state has an interest in seeing that the interconnection line, by is "size, location, technology or environmental impact" does not adversely affect Utah. Id. at 8.

The "interest" of the state is not a basis for Commission jurisdiction.[17] While Section 54-4-25 authorizes the Commission to require evidence that these permits have been applied for or are in place, the Commission does not have authority to grant or deny the permits. Instead, the necessary permits are issued and enforced by the state, county and local authorities that are directly affected by the placement of the facilities. The rights to access the state, federal and private property on which the facilities will be situated, the conditional use permits, the zoning permits, and the environmental permits will all be obtained pursuant to the authority of other Utah governmental entities or federal agencies. Whether or not the Commission reviews the

[17] "All powers retained by the PSC are derived from and created by statute. The PSC has no inherent regulatory powers and it can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." Basin Flying Serv. v. Public Serv. Comm'n, 531 P.2d 1303, 1305 (Utah 1975); see also Williams v. Public Serv. Comm'n, 754 P.2d 41, 50 (Utah 1988) ("any reasonable doubt of the existence of any power must be resolved against the exercise thereof.") (citations omitted)).

permits pursuant to an application for a certificate of public convenience and necessity, the interests of the state, counties and localities in siting the facilities are protected through those respective agencies of government.

Even before Senate Bill 202 was enacted, Title 54 provided that independent energy producers were exempt from Commission jurisdiction and regulation. Utah Code Ann. § 54-2-1(15)(d) (2007). There are a number of independent power producers operating in Utah that own a private generation or co-generation facilities, and that are connected to either the public distribution or transmission system. The Commission has never exercised jurisdiction to require those independent generators to show that they have received proper permitting for those facilities from other state agencies. Thus, it has long been the policy of Utah to allow state, county and local authorities to prescribe and enforce siting requirements for such private independent electric facilities without Commission oversight. For utilities that are subject to Commission regulation, the Commission's function is simply to act as a gatekeeper for those permits. Id. at 54-4-25(4). The effect of that statutory scheme is to ensure that the Commission will not, by granting a certificate of convenience and necessity, authorize construction before state, county and local authorities have approved it. The statute does not vest the Commission with any substantive authority to approve or deny the siting for a facility. The public interest identified by the DPU and UAMPS is met without Commission oversight.

2. The Utah Statutes Do Not Authorize the Commission to Require a Certificate for Siting Only.

The primary purpose for requiring a certificate to construct facilities is to protect consumers by ensuring that the public convenience and necessity requires the facilities. Utah Code Ann. § 54-4-25(1). As Milford explained in its Motion to Dismiss, when Utah public

utility customers are in need of improved facilities or additional resources, the certification requirement allows the Commission to protect ratepayers from the cost of duplicating facilities or paying for unnecessary expansion or upgrades, under its authority to ensure that ratepayers receive adequate service at just and reasonable rates. Id. § 54-3-1. Because only "electrical corporations" that are furnishing power for public service within the state impact the rates that the public pays, only they are subject to the requirements of a certificate. Id. § 54-4-25. Although the state clearly has an interest in prescribing siting requirements, the Commission's jurisdiction with respect to siting is dependent on its authority to require a certificate of public convenience and necessity. See Utah Code Ann. § 54-4-25(1), (4) (requiring only applicants for certificates to demonstrate that permits have been obtained). Thus, unless it is an "electrical corporation" that plans to construct, the Commission has no means to require a showing that the proper permits have been or will be obtained. Id.

Both the Division and UAMPS agree that under Senate Bill 202, Milford's generation facility is not subject to Commission jurisdiction or regulation because it is an independent power production facility. They agree that Milford need not obtain a certificate or demonstrate that permits have been obtained for the generation facility. For the same reason, the Commission should conclude that Milford also should not be required to demonstrate that the siting permits are in place for the interconnection line, because it is part of the generation facility.

3. The Commission Should Not Require a Showing that Milford's Facilities Will Not Interfere with the Plant of Another Public Utility

The Division and UAMPS contend that the Commission should require a certificate to ensure that Milford's planned facilities will not interfere with the facilities of an existing certificated public utility. As with other siting requirements, the requirement to show non-

interference is imposed only on electrical corporations that must also show that the construction is required by the public convenience and necessity. Utah Cod Ann. § 54-4-25(4)(b). It does not apply to independent energy producers or their power production facilities, or to entities that are not electrical corporations. In the absence of Commission authority to require a showing of convenience and necessity, there is no separate authority to require a showing of non-interference. In addition, no party has alleged that the construction and operation of Milford's facilities would cause any interference of which the Commission can take cognizance. If interference with a public utility were likely to occur, the Commission could prescribe terms and conditions.[18] In the present case, however, there is no reason to require a certificate merely to accept the Applicant's averment that its facilities would not interfere.

The public interest in citing the physical facilities of Milford's plant, is protected by the requirements of state, county and local authorities to require franchises and permits. The Commission should conclude that it has no separate authority to oversee the issuance and enforcement of those permits.

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[18] Under Section 54-4-25, the Commission may prescribe terms and conditions for the location of a line if it interferes with the facilities of another public utility. That provision states:

> If any *public utility* in constructing or extending its line, plant or system interferes or may interfere with the operation of the line, plant, or system of any other public utility already constructed, the commission, *on complaint of the public utility claiming to be injuriously affected*, may, after a hearing, make an order and prescribe the terms and conditions for the location of the lines, plants, or systems affected as the commission determines are just and reasonable.

Utah Code Ann. § 54-4-25(3) (emphasis added). This authority exists independent of whether the interfering public utility is an applicant for a certificate. *See id.* at 54-4-25(2) (no certificate required for a corporation to extend its line or plant under certain circumstances). By its plain terms, it only applies to "public utilities," and it provides an independent process for the aggrieved utility to seek a remedy. It is therefore not applicable in the present case.

III. THE UTAH INTERLOCAL COOPERATION ACT DOES NOT APPLY

UAMPS argues that because SCPPA is an "out-of-state public agency" under Section 11-13-304 of the Interlocal Act, the Milford Project should be required to obtain a certificate because SCPPA holds a real property interest in Phase I, and because SCPPA's involvement in the Project is "so pervasive" and Milford's "so minimal" that Milford is merely an agent for SCPPA. Opposition at 12-15.

In support of this argument, UAMPS asserts that LADWP, acting as SCPPA's agent, will "operate and maintain Phase I" of the project. Id. at 13 & fn. 7. That assertion is erroneous, as demonstrated by even a cursory review of the contracts referenced by UAMPS in support of this claim, including an exhibit to one of those contracts that UAMPS conveniently failed to include in the otherwise comprehensive (and largely irrelevant) set of business documents it supplied to the Commission.[19]

The controlling contractual provisions are in the Power Purchase Agreement between Milford and SCPPA ("PPA"). See UAMPS Exhibit C. Article VI of the PPA, titled "Operation and Maintenance of the Facility," provides that "Seller [Milford] shall, at its own expense, operate and maintain the Facility[20] in accordance with Prudent Utility Practices." PPA § 6.1. See also PPA § 5.1 ("Seller shall operate and maintain, at its sole risk and expense, the Facility in compliance with all Requirements of Law, Prudent Utility Practices, and applicable

[19] UAMPS included all of the appendices and exhibits to the Power Purchase Agreement between Milford and SCPPA, and the Power Sales Agreement between SCPPA and LADWP, but chose not to include the appendices to the Agency Agreement between SCPPA and LADWP. Because Appendix A to the Agency Agreement contains definitions of the terms in the Agreement, we have included a copy as Exhibit A to this Reply.

[20] "Facility" is defined as "the wind powered electric generating facility, including but not limited to the Facility Premises, the structures, facilities, equipment, fixtures, improvements and associated real and personal property and the other rights and interests, all as described in Appendix B." PPA § 1.1. The description in Appendix B of the PPA is comprehensive and includes the real property interests (leaseholds and right-of-ways) and the wind turbines and interconnection facilities (including the substation and transmission line).

manufacturer's and operator's specifications and recommended procedures" and "Seller shall be responsible, at its sole risk and expense, for . . . . the development and commercial operation of the Facility in accordance with Prudent Utility Practices . . . and seeking and maintaining, complying with and, as necessary, renewing and modifying, from time to time, all permits, certificates or other authorizations which are required.")

The PPA also disposes of the claim that Milford is the agent of SCPPA: "This Agreement shall not be interpreted to create an association, joint venture or partnership between the Parties hereto or to impose any partnership obligation or liability upon either such Party. Neither Party shall have any right, power or authority to enter into any agreement or undertaking for, or act on behalf of, or to act as agent or representative of, the other Party." PPA § 14.17.

In support of its erroneous assertion that LADWP and SCPPA, not Milford, will "operate and Maintain Phase I," UAMPS cites to Sections 5.1 and 7.0 of the Agency Agreement between SCPPA and LADWP. Opposition at 3; Exhibit B to Opposition. Section 5.1 merely appoints LADWP to act as the "Project Manager" with respect to "Agency Work," defined as "the activities to be performed by the Agent pursuant to Section 7 of the Agreement." Section 7 specifies the activities to be performed by LADWP as agent, which do not include operation or maintenance of Milford I.[21] UAMPS assertion that SCPPA or LADWP will operate and maintain Milford I is simply wrong.

UAMPS also argues that because SCPPA has an option to purchase Milford I after ten or twenty years of commercial operation, a certificate must be obtained, apparently by SCPPA,

[21] LADWP is authorized under Section 7.2 to submit various "recommendations" to SCPPA's coordinating committee or board, some related to operation and maintenance of the Facility. If such recommendation are made, presumably SCPPA can pass them on to Milford for its consideration as the operator of Milford I, or, in the event that SCPPA exercises its option to purchase the project in ten or twenty years, can be considered by SCPPA directly.

before the Milford I facilities are constructed. Opposition at 12-13. Nothing in the language of Section 11-13-304 of the Interlocal Act, however, requires such an absurd result. As noted above, the PPA reflects the fact that it is Milford, not SCPPA, which is responsible, at its sole risk and expense, to "site, permit, develop, finance and construct the Facility," and to "operate" and "maintain" and "own" the Facility "during the Agreement Term." PPA § 5.1 The fact that SCPPA has an option to become the owner after ten years and again after 20 years (or the fact that SCPPA will purchase the facility's output under a contract negotiated pursuant to an RFP process) does not somehow transform SCPPA into the entity which is "proceeding with the construction" of the facilities, which is the operative language of UCA Section 1-13-304.

UAMPS cites to no authority for the proposition that the certificate requirement in the Interlocal Act applies to any entity other than the one which is responsible for permitting, developing and constructing, and then owning and operating the facility (here, for at least ten years). The Commission should not read such a requirement into the law.[22]

IV. THE COMMERCE CLAUSE WOULD APPLY IF PSC REGULATION BURDENS THE WHOLESALE TRANSACTION

In its Motion to Dismiss, Milford explained that Utah State regulations requiring a certificate of convenience and necessity could impose a burden on the interstate sales and transmission of power in violation of the commerce clause of the United States Constitution. See Motion at 11-13. The Division does not dispute that the commerce clause might be implicated,

[22] While not directly applicable, the definition of "electrical corporation" suggests that the legislature intended that entities potentially subject to regulation by the Commission besides the electrical corporation itself, if any, would be limited to "lessees, trustees or receivers" who "own, control, operate or manage" an electric plant, not entities which simply hold a security interest, option interest, or other interest which might be characterized as a "real property" interest in the project. See UCA 54-2-1(7).

but argues that the "burden upon Milford is not so great as to be impermissible." Response at 10-11. Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).

In fact, when the interests of the state are weighed against the burden of regulation, any amount of regulation is burdensome because the state has no legitimate interest in imposing regulations under Title 54 upon Milford or the Project. Milford is not proposing to serve Utah ratepayers, they will not pay for the construction or operation of the facilities, and the facilities will not impact the service that any Utah provider gives or any customer receives. While the state may have a legitimate local public interest in siting the facilities, that interest is protected by other governmental agencies. There is simply no public interest in imposing the burden a "public convenience and necessity" requirement on the Project.

UAMPS, incorrectly contends that the commerce clause is not implicated in the present case because the construction of facilities and the "delivery of the Project's power to the IPP switching station" all occur within the State of Utah. Opposition at 20. As discussed above, Federal law unambiguously states that wholesale power is in interstate commerce until it reaches the state in which it is consumed. Clearly there is interstate commerce involved in this case.

UAMPS also contends that in requiring Milford to obtain a certificate, "the Commission is not requiring [Milford] to do anything more than any other Utah utility or interlocal entity is required to do under Sections 54-425, and 11-304." The argument is not relevant to the commerce clause. UAMPS is claiming that if Milford is not required to obtain a certificate, it will obtain an unfair advantage over Utah public utilities and interlocal entities. Because Milford's business is entirely in the wholesale market, UAMPS' argument amounts to nothing more than a complaint about competing with Milford in the market for wholesale energy.

UAMPS claims that by "protecting the integrity of its natural resources," Commission regulation of Milford would "even the playing field by requiring [Milford] to abide by the same rules which apply to Utah utilities." Opposition at 21. Since Milford is not a Utah utility, however, the state has no interest in burdening Milford with utility regulations to force it to play by the same rules. To do so would amount to a commerce clause violation.

V. THE COMMISSION SHOULD DECLINE TO IMPLEMENT THE RECOMMENDATIONS IN THE DIVISION'S ACTION REQUEST RESPONSE WITH RESPECT TO MILFORD'S "TRANSMISSION" FACILITIES

In its Action Request Response, dated March 28, 2008, the Division acknowledged that Senate Bill 202 removed Milford's generating facilities from Commission jurisdiction. Action Request Response at 3. However, the Division believed that the Commission retains authority over the "transmission" line. Id. The Division recommended that the Commission grant the certificate for Milford's interconnection line contingent upon Milford meeting certain conditions enumerated in the Action Request Response. For the reasons stated above, the Commission should find that the interconnection line is part of the generation facility and should conclude that it does not have jurisdiction over Milford or any part of the facilities. In addition, the Commission should decline to implement each of the conditions stated in the Action Request Response for the following reasons, all of which are discussed in detail above in this Reply Memorandum.

1. Milford should not be required to demonstrate to the Commission that it has acquired or applied for all of the necessary permits to construct and complete the proposed transmission facilities because the issuance and enforcement of such permits are controlled by other state, county and local authorities.

2. Milford should not be required to inform the Commission in writing of the final disposition of the power output from Milford II so the Commission can monitor the volume of power placed on the transmission facilities. The line with which Milford interconnects is a private line, not part of the public transmission grid. If there is a complaint about an adverse effect on the transmission system, federal regulations apply.

3. Milford should not be required to inform the Commission of changes in status with regard to the construction schedules and in-service dates for Milford I or Milford II because the power will not be available to Utah customers. There is no consequence of changes in the construction schedule that would affect any public interest concerning which the Commission has powers or duties.

4. Milford should not be required to inform the Commission of any expansions of the Milford I and Milford II or of new projects requiring transmission located within the State of Utah. If a certificate of convenience and necessity would be required to undertake construction of such expansions or new projects, Milford will apply to the Commission for the necessary certificate(s).

5. Milford should not be required to apply for additional certificates for any expansion of the "transmission" capacity from the Milford project area or for any new "transmission" associated with company wind projects in Utah for all of the same reasons that it should not be required to obtain a certificate for the present Project.

The conditions that the Division recommends do not appear to be extraordinarily burdensome. Nevertheless, the Commission may not impose them because Milford is not subject to its jurisdiction or regulation, and should not impose them because neither the public

interest nor the purposes of the Act are served by regulatory oversight of an independent energy producer. Milford respectfully requests, therefore, that the Commission decline to adopt the Division's recommendations, and that it instead dismiss the Application on the ground that Milford is exempt from the Commission's jurisdiction.

CONCLUSION

Milford is exempt from the Commission's jurisdiction and regulation because it is an independent energy producer both with respect to the wind farm and the interconnection line. The entire Project is a generation facility that clearly meets the definition of an independent power production facility under the Act as amended by Senate Bill 202.

Even if the Commission were to determine as the DPU and UAMPS urge, that the interconnection line is not part of the generation plant, Milford's Project still would be a wholesale generator, would not provide services or electric power for public service within the state, and would not affect that rates that any utility customer in Utah pays. While state, county and local authorities may require permits for the construction of the facilities, there is no state interest served by the Commission overseeing the permits, or by requiring a showing that the public convenience and necessity requires construction of the Project. According to both the language and the purpose of the Act, the Project does not fall within the jurisdiction or regulation of the Commission, and thus a certificate is not required.

For the reasons set forth above and in Milford's Motion to Dismiss, Milford respectfully requests that the Commission expeditiously dismiss its Application for a Certificate of Convenience and Necessity and declare that such a certificate is not required.

DATED this 17th day of April, 2008.

/s/ William J. Evans

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CERTIFICATE OF SERVICE

I hereby certify that on this _17th_ day of April, 2008, I caused to be sent by electronic mail and/or mailed, first class, postage prepaid, a true and correct copy of the foregoing **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF CONVENIENCE AND NECESSITY AND RESPONSE TO THE ACTION REQUEST RESPONSE OF THE DIVISION OF PUBLIC UTILITIES** to the following:

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