- BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH -

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| 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 | ) | DOCKET NO. 08-2490-01<br><br>ORDER GRANTING MOTION TO DISMISS THE APPLICATION OF MILFORD I AND MILFORD II FOR CERTIFICATES OF CONVENIENCE AND NECESSITY |

ISSUED: May 16, 2008

By The Commission:

## I. PROCEDURAL HISTORY AND BACKGROUND

On February 21, 2008, Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC ("Milford I" and "Milford II," respectively, or collectively "Milford I and II"), filed an 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 ("Application") requesting the Commission issue a Certificate of Public Convenience and Necessity ("certificate") for their operations.

The Application states Milford I and II were formed to develop, construct, own and operate a wind-powered electric generation facility in southern Utah. These companies are wholly owned subsidiaries of Milford Wind Corridor, LLC, which is a limited liability company, the majority of which is owned by UPC Wind Partners, LLC ("UPC Wind"). UPC Wind is an American, privately-owned company with its principal place of business in Delaware and with office locations in Massachusetts, New York, Maine, Vermont, California, Oregon, Canada, and

Hawaii. UPC Wind is an independent power producer which, through its subsidiaries, develops, owns and operates wind energy facilities for the production of electricity for sale to wholesale customers through power purchase agreements ("PPAs") or other similar arrangements.

The Project that is the subject of the Application will consist of two primary components: a wind farm located in Beaver and Millard Counties, Utah, and a dedicated interconnection line to transport electricity generated by the wind farm to a point of interconnection at the Intermountain Power Project ("IPP") generating station north of Delta, Utah. Two alternative routes have been proposed for the interconnection line which, in either case, will run approximately 90 miles generally northward from the wind farm through primarily federal land managed by the Bureau of Land Management ("BLM") of the United States Department of the Interior along BLM-designated utility corridors.

When the Project is completed, the wind farm will generate approximately 300 megawatts ("MW") of power (nameplate capacity) from a mix of wind turbines ranging from 1.5 to 2.5 MW each. Milford I will own and operate the initial 200 MW wind farm facility and the interconnection line ("Phase I"). All of the power from Phase I will be sold wholesale from Milford I to the Southern California Public Power Authority ("SCPPA") pursuant to a PPA. Milford II will own and operate the approximately 100 MW expansion of the initial wind farm facility ("Phase II"). There is currently no definitive agreement for the sale of the power from Phase II. It is anticipated that none of the power generated from the facility during Phase I or Phase II of the Project will be sold to Utah-based public utilities, and that none will be available to Utah consumers.

Milford I and II do not believe they are required to obtain certificates to proceed with construction of the Project because Milford I and II will provide power only to wholesale purchasers. However, because time is of the essence with respect to proceeding with the Project, and because it is not absolutely clear that a certificate is not required by Utah's Public Utilities Act under these circumstances, Milford I and II filed the Application. Simultaneously with the Application, Milford I and II filed a Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity ("Motion to Dismiss") based on their belief that no certificate is necessary.

On February 26, 2008, the Commission issued a Scheduling Order Setting Deadline for Filing Responses to Application and Motion setting a March 24, 2008, deadline for said responses.

Also on February 26, 2008, Rocky Mountain Power ("RMP") filed its Motion to Intervene in this proceeding. On March 18, 2008, the Commission issued an Order Granting Intervention to RMP.

On March 20, 2008, the Utah Associated Municipal Power Systems ("UAMPS") filed its Petition to Intervene, which petition was granted by the Commission by Order issued April 9, 2008.

On March 21, 2008, Milford I and II filed a Notice of Governor's Signing of Senate Bill 202 and Request for Order of Dismissal stating their view that Milford I and II are independent energy producers within the meaning of Senate Bill 202 ("SB 202") such that they

are exempt from the jurisdiction of the Commission with respect to the Project and need obtain no certificates from the Commission regarding the Project.

On March 24, 2008, UAMPS, Milford I and II, and RMP filed a Stipulation stating these parties, without objection from the Utah Division of Public Utilities ("Division") or the Utah Committee of Consumer Services, had agreed to extend the March 24, 2008, response deadline to March 31, 2008.

On March 28, 2008, the Division filed a memorandum detailing its review of this matter and recommending the Commission grant a certificate for the transmission facilities associated with the Project, subject to Milford I satisfying certain conditions, such as, demonstrating it has acquired all necessary permits for the proposed transmission facilities, informing the Commission of the final disposition of power output from Milford II, and applying for additional certificates for any expansion of the transmission capacity from the Project area.

Also on March 28, 2008, UAMPS filed a 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 ("Memorandum"). In its Memorandum, UAMPS states Phase I is being developed by Milford I and II in response to a Request for Proposal issued by SCPPA and that the City of Los Angeles Department of Water and Power will act as the project manager of Phase I pursuant to an agency agreement with SCPPA. UAMPS also points out, *inter alia*, that SCPPA has the option to buy Phase I from Milford I within ten years and has indicated it intends to exercise its option. UAMPS argues the Motion to Dismiss should be denied because the Public Utilities Act,

Utah Code Ann. §§ 54-1-1, *et seq*. (the "Act") in effect at the time the Application was filed, and as amended by SB 202, requires a certificate. UAMPS further argues Milford I should be required to obtain a certificate pursuant to Section 11-13-304(1) of the Interlocal Cooperation Act, Utah Code Ann. §§ 11-13-101, *et seq*. (the "Interlocal Act") because, due to its significant involvement in the financing, building, and planned operation of Phase I, SCPPA is an "out-of-state public agency" within the meaning of the Interlocal Act and would be required to obtain a certificate for the Project if it were proceeding with the Project in its own name. Finally, UAMPS argues the Commission should reserve ruling on the Motion to Dismiss with respect to Phase II until the Commission is provided more information as to whether Phase II will similarly benefit and be subject to the ownership interests of an out-of-state public agency.

On March 31, 2008, the Division filed a Response to the Application noting this docket presents the first opportunity for the 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. The Division stated its conclusion that Utah Code Ann. §§ 54-2-1(7), 54-2-1(13), 54-2-1(14), 54-2-1(16)(D), and 54-4-25 allow the Commission to exercise jurisdiction over the transmission portion of the Project. The Division argues a reasonable reading of the SB 202 amendments to Title 54 may permit an exemption from the certificate requirements for a generating facility using renewable energy sources defined in § 54-2-1(14), but the Division does not believe said amendments exempt the Project transmission facilities.

On April 8, 2008, Milford I and II filed a Stipulation in which the parties to this docket agreed to extend the Milford I and II reply deadline from April 10, 2008, to April 17, 2008. On that date, Milford I and II filed their Reply Memorandum arguing that SB 202 expressly provides that independent energy producers like Milford I and II proposing to construct independent power production facilities like the Project are exempt from Commission jurisdiction and regulation.

On May 5, 2008, the Commission issued a Notice of Hearing setting oral argument on the Motion to Dismiss for May 13, 2008. Oral argument thereafter commenced as noticed before the Administrative Law Judge ("ALJ"). Milford I and II were represented by William J. Evans of Parsons Behle & Latimer. UAMPS was represented by Matthew F. McNulty of Vancott, Bagley, Cornwall & McCarthy. Assistant Attorney General Michael L. Ginsberg appeared for the Division. No one appeared on behalf of RMP.

## II. DISCUSSION, DECISION, AND ORDER

As amended by SB 202, Utah Code Ann. § 54-2-1(14) defines a new term, the "independent power production facility," as, in pertinent part, one that "produces electric 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". The Section 54-2-1(13) definition of an "independent energy producer" has likewise been amended to include "every electrical corporation, person, corporation, or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage an independent power production or cogeneration facility." Based on these statutes and the facts presented, the ALJ concludes the

wind farm at the heart of the Milford I and II Project is an independent power production facility such that Milford I and II is an independent energy producer with regard to the Project.

As amended by SB 202, Section 54-2-1(16)(d) exempts independent energy producers from the "jurisdiction and regulations of the commission with respect to an independent power production facility" if

> (i) the commodity or service is produced or delivered, or both, by an independent energy producer solely for the uses exempted in Subsection (7) or for the use of state-owned facilities;
> (ii) the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser; or
> (iii)(A) the commodity or service delivered by the independent energy producer is delivered to an entity which controls, is controlled by, or affiliated with the independent energy producer or to a user located on real property managed by the independent energy producer; and (B) the real property on which the service or commodity is used is contiguous to real property which is owned or controlled by the independent energy producer. Parcels of real property separated solely by public roads or easements for public roads shall be considered as contiguous for purposes of this Subsection (16).

Milford I and II admit their claim for exemption as an independent energy producer is based solely on subsection (ii) above. The Division concludes Milford I and II qualify for exemption from regulation under subsection (ii). Because Milford I and II are independent energy producers with respect to the Project and because the electricity produced by the Project will only be sold on a wholesale basis, the ALJ agrees with the Division and Milford I an d II, concluding Milford I and II are exempt from Commission jurisdiction and regulation with respect to the power production facilities associated with the Project.

However, the Division argues that, because Section 54-2-1(14) limits the definition of an independent power production facility to one that "*produces* electric energy" (emphasis added), only that portion of the Project that actually produces electricity, i.e. the wind farm facility, is exempt from the requirement to obtain a certificate from the Commission. Therefore, the approximately 90 mile line that will be constructed to transmit the electricity to the IPP is subject to Commission jurisdiction and Milford I and II must seek certification of said line. The Division bolsters this argument by pointing out that subsections (i) and (iii) above both speak to *delivery* of the commodity or service produced but subsection (ii) speaks only to the sale of said commodity or service such that transmission is not exempted under subsection (ii).

The ALJ disagrees and concludes on the facts presented in this docket that the interconnection line to be built for the sole purpose of transporting the electricity produced from the wind farm facility to the interconnection point is reasonably considered an integral part of the independent power production facility and that Milford I and II are therefore exempt from Commission jurisdiction and regulation with respect to the entire Project, including the interconnection line.

Furthermore, the ALJ cannot conclude, as urged by UAMPS, that Milford I and II should be viewed as out-of-state public agency actors by virtue of the involvement of SCPPA in the planning, financing, construction, and operation of the Project. Nor is the fact that SCPPA retains an option to purchase the Project at some point in the future dispositive on this issue. Milford I and II are private companies and the real parties in interest in this docket; they cannot properly be viewed as out-of-state public agencies subject to Section 11-13-304.

Wherefore, based upon the foregoing information, and for good cause appearing, the Administrative Law Judge enters this recommended ORDER granting the subject Motion to Dismiss and dismissing 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. As such, the evidentiary hearing previously scheduled to convene in this matter on May 28, 2008, is cancelled.

Dated at Salt Lake City, Utah this 16th day of May, 2008.

/s/ Steven F. Goodwill
Administrative Law Judge

Approved and Confirmed this 16th day of May, 2008, as the Order of the Public Service Commission of Utah.

/s/ Ted Boyer, Chairman

/s/ Ric Campbell, Commissioner

/s/ Ron Allen, Commissioner

Attest:

/s/ Julie Orchard
Commission Secretary
G#57469