BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:	)	
	)	Docket No.
The Application of Milford	)	08-2490-01
Wind Corridor Phase I, LLC,	)	
and Milford Wind Corridor	)	
Phase II, LLC, for Certificates	)	Administrative
of Convenience and Necessity for	)	Law Judge:
the Milford Phase I and Phase II	)	Steve Goodwill
Wind Power Projects	)	

HEARING

TAKEN AT:	Public Service Commission 160 East 300 South, Suite 451 Salt Lake City, Utah
DATE:	May 13, 2008
TIME:	1:37 p.m.
REPORTED BY:	Kelly L. Wilburn, CSR, RPR

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MAY 13, 2008 1:37 P.M.

P R O C E E D I N G S

THE COURT: This is a Public Service Commission hearing 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. Public Service Commission Docket No. 08-2490-01.

I'm Steve Goodwill, the Administrative Law Judge for the Commission, and I've been assigned by the Commission to hear this matter. We're here today for oral argument on the motion by Milford Wind to dismiss this application for lack of Commission jurisdiction.

Let's go ahead and take appearances. We'll start with Milford Wind.

MR. EVANS: I'm Williams Evans of the law firm Parsons, Behle & Latimer, here for Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC.

MR. McNULTY: Your Honor, my name is Matthew McNulty. I am from VanCott, Bagley, Cornwall, & McCarthy. I am counsel also for the Utah Associated Municipal Power Systems. And we have filed some

documents opposing the requested relief from our friends at Milford.

MR. GINSBERG: My name is Michael Ginsberg. I'm an attorney with the Attorney General's Office, representing the Division of Public Utilities.

THE COURT: Okay. We had some brief discussion before going on the record just about how we'd proceed this afternoon. It appears we had no need to go with any formal time limits or anything on the argument. And we'll go ahead and just start with you, Mr. Evans.

MR. EVANS: Thank you, your Honor. The Milford Wind project, as a little background, is a planned wind farm and interconnecting line located in Beaver and Millard Counties. It can be seen on the map that Mr. Ginsberg handed around, which is Exhibit 1 to Milford's application.

For the purposes of argument today I'd like to refer to both LLCs, that is Milford Phase I and Phase II, as "Milford" collectively. If there's a reason for us to distinguish between Phase I and Phase II we'll make that distinction when it comes.

I'd also like to refer to the wind farm and all the facilities that go with it as "The Project." And that includes the interconnecting line.

The power is generated on -- in Millard and Beaver County at the wind energy facility that you see on Exhibit 1 to the application. There will be approximately a hundred wind turbines in Phase I. It will be stepped up by transform -- transformers located at the wind farm and carried over this set of poles and wires to the IPP substation, which is about 90 miles away.

As you can see on the map, there are two planned routes: One in blue and one in red. Both those routes are under consideration, and it will be largely up to the BLM which one ultimately is approved. I note that both routes are, for the most part, over BLM land. Both routes also cross, however, some state lands and some private lands on their way to the IPP substation.

Presently it's anticipated that Phase I will go into operation at the end of March 2009. That's the hope, at least. And Phase II will follow quickly, with construction beginning early in 2009, as soon as the necessary approvals are in place from the county and local authorities.

Milford filed its application for a certificate for this project out of an abundance of caution. As I will discuss in a little greater detail

in a minute, the law seemed a little unclear about whether it was required to come in for a certificate to build this generation facility.

Given the substantial investment in these facilities and future phases of the facility, the only way Milford could get the certainty it needed was to come in for a ruling by the Commission that either a certificate was required, and to grant one, or that the certificate was not required and to dismiss the application.

At the same time we filed the application, therefore, we filed this motion to dismiss for which we're here today on oral argument. The motion to dismiss is based on the grounds that because of the nature of this generation facility and the, the market for the power, a certificate isn't necessary.

UAMPS has intervened. The Division and UAMPS both responded to the motion to dismiss with UAMPS' opposition and the Division's response. In the meantime, just before these responses were filed, the Utah legislature passed Senate Bill 202.

Senate Bill 202 changed the nature of this, this case, and especially the motion to dismiss, and so we have had to go back and brief Senate Bill 202 in our responsive pleadings. But Senate Bill 202 is not

reflected in the initial motion. And we'll talk through the difference in just a minute about those -- what Senate Bill 202 did.

But the result of that legislation is that there are now two grounds for dismissing this case: The initial grounds that were articulated in Milford's initial motion to dismiss, and a separate ground that has arisen because of the enactment of Senate Bill 202.

Both of them together, or either one separately, would be grounds for the Commission to dismiss this application on the basis that a certificate is not required. I've handed out an appendix which contains certain statutes that we're gonna be discussing today.

And to begin the discussion I think it would be useful to look at Section 54-425. That's found on page 5 of your appendix. And it is the statute that addresses the Certificate of Convenience and Necessity as a prerequisite to construction.

In our initial motion to dismiss, this statute was the basis for the motion. And Milford's interpretation of it of course demonstrated that the Commission cannot require, should not require, Milford to come in for certificate.

Section 1 provides as follows: That electric corporations -- I won't read it, but let me just highlight it as you read through.

"Except as provided in 11-13-304," which is the interlocal statutes, "electric corporations may not establish or begin construction or operation of a line until -- without having first obtained a Commission certificate that present or future public convenience and necessity does or will require the construction."

The only kind of electric generators that are required to obtain a certificate, therefore, are those that are electric corporations under the Act. Electric corporation is defined in 54-2-1. And if you turn over to page 1 you'll find the language there. It's under subsection 7. And it states that:

"An electrical corporation is a corporation" -- and some other entities -- "owning, controlling, operating or managing any electric plant" -- then there's a comma -- "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."

Milford contends this language is ambiguous. You cannot tell from reading it which words "within this state" modify. Do they modify furnishing electric power? Do they modify any electric plant within this state? Or do they modify both? Because it's arguable that this could be interpreted to mean any electric plant within the state, Milford thought it would be prudent to come in and make the application and then move to dismiss.

Milford's interpretation, of course, is that the owner of electric plant or the furnisher of electric power is not an electric corporation unless the plant is used for public service within the state. Under the electrical corporation definition on page 1 of the appendix is a copy of the original 1917 version of this same statute. And it provides this:

"The term electrical corporation when used in this Act includes every person or corporation" -- and then some other kinds of entities -- "owning, controlling, operating, or managing any electric plant or in any wise furnishing electric power for public service within

this state."

In the original statute then the words "for public service within this state" were not separated. They were together, as one requirement, applying to the two phrases that are set off in commas. The way you interpret a statute like that is that what follows the commas applies to both the phrase between the commas and the phrase before.

So that what this statute clearly meant was owning or operating electric plant for public service within this state, or furnishing electric power for public service within this state. Through a series of amendments over the years some language got inserted in between "for public service" and "within this state" to create the ambiguity that now exists.

But it's Milford's position -- and I think a clear reading of the statute require's this interpretation -- that the definition of electrical corporation under today's statute must be read to require public service within the state both as to the facilities and as to the furnishing of electric power.

To be an electrical corporation you need to be either an owner of electric plant for public service within the state, or furnishing electric power for public service within this state. Now, the

history of the way the statute evolved suggests that that's the way it should be read.

There are two other guides that your Honor can use to determine how this statute ought to be interpreted. The first is it needs to be interpreted consistent with the jurisdiction of the Commission to implement. Section 54-4-1, which appears on page 4 of the appendix, sets out the Commission's general jurisdiction:

> "Commission's vested with power and jurisdiction to supervise and regulate every public utility within the state."

And public utility is defined on the preceding page, page 3, as:

> "Every electrical corporation" -- then I'm skipping down -- "where the service is performed for or the commodity delivered to the public generally. Or, in the case of a gas or electric corporation, where the gas or electricity is sold or furnished to any member or consumers within this state for domestic, commercial, or industrial use."

So that unless there is service or power

provided to consumers within the state, it's not a public utility. The Commission's jurisdiction doesn't clearly extend beyond that. Although there's certain kinds, arguably, of electric corporations that may not be providing that sort of public service.

But electrical corporations carry the same kind of requirement that is contained in this public utility statute. And that is that the power must be furnished to members or consumers within the state for domestic, commercial, or industrial use.

So in order to interpret the definition of electrical corporation consistent with the jurisdiction of the Commission, you have to decide that the electric plant is built for public service within the state or for the furnishing of electric power to consumers within the state.

The third way that the -- that your Honor can determine the correct interpretation of electrical corporation is to look at the purposes of the Act. Purposes of the Act are to regulate monopoly providers of utility services and commodities for the protection of the public that has to take service from the monopoly provider.

This is protection for -- in terms of nondiscriminatory rates, just and reasonable rates,

adequate service, reliability. All of those things that consumers depend upon are the basis for regulation.

If a utility is to construct facilities, the Commission has authority to oversee the selection of the resource, the type of the resource, the timing of its construction. And to ensure that construction is necessary when the facility is built. Because these costs are gonna go into rates, and the Commission and the utility need to justify the ratepayers having to pick up the cost.

Therefore the statutes require that the Commission investigate whether the con -- the public convenience and necessity requires the struc -- the construction of those facilities. When the construction of an electric plant is not for the purpose of serving the public, the purposes of the Act are implicated.

It's not a matter of public convenience and necessity that Milford should build this wind farm. The output of this Phase I, as far as we know, is not going to wind up at any consumer's meter in the state of Utah. It's power for the wholesale market in renewables.

And for that reason there's no need to

protect the ratepayers from excessive charges for unnecessary plant or for excessive costs or delays in the construction of this plant. It simply does not figure into the customers' rates.

The purpose of the Act, then, in protecting these customers from the overreaching or excessive costs of construction is not implicated here. So the purposes of the Act are not served by requiring a certificate.

You have raised an interesting argument that I will address at this point, and maybe I'll leave the rest of rebuttal for later. But UAMPS says in its brief that because the power is delivered at IPP that this is a transaction that occurs within the state, and that therefore the power is delivered within the state of Utah.

The argument is wrong, in our view, for two reasons. One is that the definition of electrical corporation doesn't talk about the delivery of power, it talks about the use of power. And use of power is in California, not at the IPP substation.

The second reason is that the federal law dealing with the transmission of electric power in interstate commerce -- it's found on page 13 of your appendix. Actually this one is on 14. It's 16 USC

Section 824. And it's C, it appears at the top of page 14. Specifically says that:

> "Electric energy is transmitted into interstate commerce if it's transmitted from a state and consumed at any point outside thereof."

That means that the power at the IPP substation is an interstate commerce. It isn't delivered there. So even if you could determine the delivery of power is used within the state somehow, the power isn't delivered there. It's an interstate commerce until it arrives at the point of consumption.

So the bottom line is, there is no power from this plant furnished to any consumer for use within the state. The plant isn't for public service. It's not mandated by the public convenience or necessity. It will not affect the quality of service or the rates that Utah customers pay for power.

For that -- for all of those reasons it isn't the policy of the State, nor the purposes of the Act, that this kind of generation facility ought to be regulated. It shouldn't be subsumed under the definition of electrical corporation. So in our initial motion to dismiss the argument was three-fold:

One, the language clearly says that this

needs to be for public service within the state. Two, the Commission's jurisdiction only extends to those kinds of facilities and transactions. And three, the purposes of the Act only go to service to consumers within the state.

The application should be dismissed on that basis alone. That Milford is not an electrical corporation under that definition, and therefore isn't required to come in for a certificate under 54-4-25. That's still the case, even after Senate Bill 202.

Senate Bill 202 has changed the complexion of this case in a way that provides another separate and I think stronger grounds for dismissing the application. The -- Senate Bill 202 was an effort to encourage renewable energy production and to reduce carbon emissions from natural gas and coal fire generators.

Among it's provisions are some amendments to Title 54. Specifically, a new definition of independent power production facility and a corresponding amendment to the definition of independent energy producer. The new definition of this type of -- this new category of generator is found at 54-2-1. And it's on page 2 of your appendix.

I think before we read that maybe we ought to

take a look at what appears under it. That is from the 2007 version of the Act, defining what a small power production facility is.

It produces electric energy by use of primary resource biomass waste, renewable resources, geothermal, or any combination of them, has power production capacity together with any other facilities located at the same site that is not greater than 80 megawatts, and is a qualified power production facility under federal law.

Now, that provision still remains in the law. Section 14 of the 2008 Act, which appears above it, is a new category of generator. It's an independent power production facility. It means:

> "A facility 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 resources."

No end, no size limitation. That's it. Or it's a qualifying power production facility, which is still defined in the Act as it was before. There is no restriction on the size. There is no restriction as to whether or not it's a qualified facility.

Anything that uses a renewable resource is an independent power production facility. And an independent energy producer is an electrical corporation, person, corporation, or government entity that owns or operates one of these things.

That is a perfect description of Milford Wind. We are an independent energy producer because we operate a renewable resource. The effect can be -- of this change in the law can be seen if you follow the thread through to two other sections of the statute that use the term "independent power production facility" or "independent energy producer."

The first one is back on page 1. It's our definition of electric corporation. It hasn't changed. Now, in our initial motion we were relying on this language that says "for public service within this state" to exempt ourselves, exempt Milford out of the definition of electric corporation.

With Senate Bill 202 we are expressly exempt. What follows the words "within this state" are the words "except independent energy producers." That's us. So whereas before we had to rely on this interpretation of electrical corporation to avoid being deemed one by the Commission, now it is expressed. We are one.

The second place that this has an effect on Milford's motion to dismiss is over on page 3 of the appendix, under the definition of public utility. You can see that I've excerpted this out. Sixteen D says -- and this hasn't changed from the earlier -- it has changed, and I'll explain how in a minute.

> "An independent energy producer" -- if it weren't clear enough already, this says -- "it is exempt from the jurisdiction and regulations of the Commission with respect to an independent power production facility if it meets the requirements that follow in subsections 1, 2, or 3."

And No. 2 describes Milford:

> "The commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser."

So we are now exempt expressly from being an electrical corporation. The only kinds of generators that are required to obtain a certificate are electric corporations; hence, Milford doesn't need a certificate. And as if there were any question, we are now expressly exempt from, very broadly, the

jurisdiction and regulations of the Commission with respect to this facility.

Now, UAMPS has argued that Senate Bill 202 should not be retroactively applied to, to this case because it was enacted during -- while the case was pending after it was filed. We've briefed that. I think the law is clear that when com -- when jurisdiction is withdrawn from the Commission, that the Commission no longer has authority to consider the matter before it.

We cited a couple of cases where, when the jurisdiction was withdrawn as to certain telecommunications frequencies, the Commission actually had to dismiss the certificates of entities that were before it.

There is no authority left for the Commission to grant a certificate, whether or not this proceeding was filed before the law was enacted. So the -- with Senate Bill 202 it seems clear that the Commission should dismiss this application as an independent energy producer not subject to Commission jurisdiction.

Both the Division and the -- and UAMPS have resisted that result. And they've both done it on the basis of trying to distinguish between the poles and

the wires that interconnect the wind farm with the IPP substation, and the generation facility that is that square lying on the border of Beaver and Millard Counties.

This is probably due to an unfortunate choice of words in our motion and in the way our documents have been filed. We have called this -- that is, Milford's application and exhibits call it "transmission." A transmission line.

And we have referred to that as transmission in the generic sense, not the legal sense. Because this line carries electricity. It's a, it transmits electricity. But it's not transmission facilities, and Milford is not a transmission provider.

Milford will -- this line won't carry anything but Milford's wind power. It's not required to file an open access tariff. It's not required to carry the power of other energy producers. It is not a transmission line in any sense of the word that you think of when you think of interstate transmission lines and FERC jurisdiction over those. And what happens on the electric grid.

This is a dedicated interconnection line, interconnecting the generation turbines with a transmission provider. We -- to sort of I think

illustrate what this is, generation includes more than just turbines. Generation is -- and that is an independent power production facility.

It's more than just the wind turbines. It's the lines that connect the wind turbines together. It's the transformer that steps up the voltage. It's the real property. It's everything that you can see in electric plant, all -- which is also, if you want to refer to it, defined on page 1. It includes all of those kinds of facilities:

> "All real estate, fixtures, and personal property owned, controlled, or operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, furnishing of electricity."

This is generation. And all of those things that are given examples apply to generation. Conduits, ducts, other devices, conductors, carrying conductors to be used for the transmission of electric energy, all of those are parts of a generation facility.

The Utah statutes -- so the thinking that has kind of distracted us from immediately dismissing this case upon enactment of Senate Bill 202 is that we're

thinking of this as transmission, this line between the wind farm and IPP as transmission, when in fact it's generation.

Where is that line? Where is the line between transmission/generation? The Utah statutes don't specifically say anything about where that line should be drawn, but other regulations do. On page 10 of your appendix I've included a section of the CFR that pertains to qualifying -- qualified facilities. And at the bottom of the second column on page 10 you'll see:

> "A qualifying facility may include transmission lines and other equipment used for interconnecting purposes, including transformers and switchyard equipment" -- and then there's an "if" that goes onto there, which doesn't necessarily apply because we're not a QF, but -- "if such lines and equipment are used to supply power output to directly and indirectly interconnected electric utilities."

That describes what this line is. It's an interconnection line. On page 12 you'll see an excerpt from the Public Utilities Regulatory Holding

Company Act -- Public Utilities Holding Company Act, I'm sorry.

It describes exempt wholesale generators, of which we are one. And although we haven't been certified yet, when the facility is built we expect to be. This is an exempt wholesale generator under federal law. The term -- I'm reading under Section 79-Z-5-A, A-1:

> "The term 'exempt wholesale generator' means any person determined by the FERC to be engaged directly or indirectly through one or more affiliates" -- as defined in this section, okay -- "exclusively in the business of owning or operating, or both owning and operating, all or part of one or more eligible facilities."

And then you can see eligible facility down below, in Subsection 2, as defined in 1:

> "Which is either used for the generation of electric energy exclusively to sell wholesale."

That's us. That's Milford. That's why we are an exempt wholesale generator. And then if you follow down in Subsection B. And look at the

paragraph that actually isn't numbered but appears between B and No. 3. It says that:

"Such term shall not include any facility for which consent is required, if such consent" -- okay. "Such term includes interconnecting transmission facilities necessary to effect the sale of electric energy at wholesale."

This is the eligible generation facility. Includes the interconnecting transmission facilities necessary to carry the power to the point where a sale can be effected.

Wholesale generators are responsible for getting their power to the market. The only way they can do it is find a transmission provider close by and run a line over there so that they can make the sale of energy.

Unfortunately, Milford is in a position where it's a long, long ways from the nearest transmission provider that can get that energy where it needs to be. And so it has been forced in the position of building this extraordinarily long line to IPP 3.

It doesn't change the nature of the business. It doesn't change the characterization of this as generation facilities. It doesn't mean it becomes

transmission. It just means that it's a long interconnection line, which is part of the generator.

For private firms that operate cogeneration facilities and other kinds of generators, the situation is the same. The line that connects the generator to a transmission provider or to a utility system is part of the generator's facilities.

The generator pays for it. Not the transmission provider. Not the public utility. If it's a private firm generator, the generator pays to put in that line, to obtain the clearances to run that line across land to where it needs go, and to operate and maintain that line.

It's part of a customer's generation facilities, not transmission facilities. For Rocky Mountain Power and other investor-owned utilities, the demarcation between FERC jurisdiction and State jurisdiction for the purpose of rate making is at the point of interconnection of the generator to the transmission facilities.

The poles and the wires that go from the generator are at State rates. And the transmission line is in FERC rates. If the connection line is part of the generator, the transmission line is part of transmission. Under every convention that you can

think of, the interconnection line is part of the generation facility.

Recently there has been news that the governor's office is contemplating cooperation in a Western Governor's Conference to investigate how to build transmission to serve remote renewable energy sites where there is no transmission close by.

It's a good idea, because it gets transmission to where the facilities need to be. You can't always pick where the best site is for renewables. But the question is, who pays? Who pays for that line if the State decides to authorize a transmission corridor to access remote part of -- remote parts of the state to pick up renewable resources?

Very likely, ratepayers pay for those lines. As part some of utility or transmission provider system they get figured into the local rates and the ratepayer pays. And in that case it's entirely appropriate that whoever constructs that line come into the Commission and get a certificate.

In the case of Milford, who pays for that line? Not any ratepayer anywhere. Milford pays for the cost of connecting its generation to the transmission provider. We've been sidetrack on this

issue by calling it a transmission line. And by being distracted about how long the line is.

I can't think that if that line were 300 yards, or a mile, that we'd even be here. Both the Division and UAMPS would just say, Yeah, it's part of an independent power production facility that isn't subject to Commission regulation.

The fact that we've got an extra long line has everybody troubled, but legally it's the same. The Commission, just like it doesn't have jurisdiction over the wind turbine, doesn't have jurisdiction over that interconnection line because it's part of the generation facilities.

For that reason, Senate Bill 202 requires that the Commission dismiss this application. Not just as to the wind farm, as the division and UAMPS suggest, but to the entire facility. Because the entire facility is expressly exempt following the enactment of Senate Bill 202.

I think I will save the rest of the argument for rebuttal, if your Honor pleases. And let me make, let me make one more comment before I do that, because I don't think it's gonna be the subject of much argument today. And it shouldn't be.

In its initial application and again in its

reply memorandum Milford raises the specter of the violation of the Commerce Clause. That if the State imposes burdensome requirements on Milford, who is transmitting power in interstate commerce, that it could result in an impermissible violation of the Commerce Clause.

The Commission -- well, let me back up. In UAMPS' brief in opposition -- and I won't make their argument for them -- but they have raised the issue of privileges and immunities. Which we think is backwards and we've briefed that in our reply memorandum.

These issues have been raised before the Commission, but I don't think the Commission has authority to determine issues of constitutionality. And so they've been raised and preserved for appeal if we need them. But I won't make any further comment unless it's in rebuttal on those.

And with that, I will conclude my initial remarks. Thank you.

THE COURT: Okay, thanks. Mr. McNulty?

MR. McNULTY: Thank you, your Honor. Your Honor, I had -- I admit to being a bit confused about some of the arguments. And that's, I'm certain, my fault, not anyone else's.

Let me indicate to your Honor that it seems to me that one of the main points about these certificate issues and as it relates to wind is that if it is green, it therefore must be good. That if it is a renewable resource, then we can wander away or wander around statutory or constitutional construction and we can move on. Because it must be good because it is green.

Regardless of how I think of that application or how I view that as a conclusion, that is not necessarily always the truth. It is our position -- and this is UAMPS' position -- that Milford is subject to the certificate siting requirements found under 54-4-25, regardless of whether SB 202 applies.

Milford is required to obtain a Certificate of Public Convenience and Necessity because -- and we cannot have it both ways. We are not allowed to have it as a generation facility, as opposed to a transmission facility, as opposed to -- and I have not heard this word used yet, but I'm sure we will later -- and that is, is it a distribution facility?

Phase I involves a wind generation facility and transmission line originating at the wind generation facility or where the towers are maintained. It ends at the IPP switchyard.

Now Phase II, which it's unclear, and we will, we will concede that it is unclear what Phase II involves. Because you can read more on the website about Phase II than you can in any filing that has been made by our very, very able opponents in this matter.

Milford suggests the entire project is exempted from certificate requirements because Phase I and Phase II -- we want them to be together for this purpose but not for the next purpose -- constitute an independent power production facilities.

And that as a result, they are independent power producers which are excluded from electric corporation as defined by the new statute or by the modified statute. Milford construes this, we believe, far, far too broadly.

The definition of independent energy provider -- or producer, forgive me. An independent produ -- power production facility refer to facilities that produce electricity by using renewable resources. And we will concede that there is a tremendous benefit and a tremendous movement in the public today to protect and -- on the one hand protect, but on the other hand move forward with green projects.

But those definitions do not refer to

transmission lines. These transmission lines extend 90 miles through private, state, and federal lands. And may cross or interfere with existing transmission lines or existing right of ways.

It is our position that the PSC should determine that the exemption or the exception for independent energy providers as defined under the new statute only applies to the project's wind generation facility and not, in fact, the entire facility as being defined by our friends at Milford.

Phase I, we believe, should be subject to the siting requirements, just like a bunch of municipal utilities are. Or county facilities, if they were ever to be built. Or some of our friends at Rocky Mountain. 11-13-304, and I over speak when I say 11-13-304 applies to Rocky Mountain or to the county. Those are municipal groups or a group gaggle of municipal groups.

> "Before proceeding with the construction of any electrical generation plant or transmission line" -- I'm quoting now -- "each interlocal entity" -- that's my client, UAMPS -- "and each out-of-state public agency shall first obtain from the

Public Service Commission a certificate that public convenience and necessity requires this construction."

This is very ironic to us, because some years ago -- not so long ago that I can't remember it -- but some years ago UAMPS, its members, were stuck with the idea of we are going to build something that we refer to as the Nebo Power Plant.

The Nebo Power Plant was going to serve, not only the city of Payson, but members of UAMPS all over the West. So the question was raised, do we need to present ourselves to the Public Service Commission and submit to jurisdiction about siting of, No. 1, the facility itself?

If it was designed for service and construction within one city and only one city, then we think we know the answer to that. What is unclear, and has remained unclear since some litigation that took place years ago, is what about that facility that serves outside city or municipal boundaries and serves outside of an Interlocal Act boundaries.

Unclear. But if you're going to bond, if you're going to be about the business of spending taxpayer money or relying upon taxpayer money, then you better get it right. You better get it at least

the most safe way.

I could pretty well guarantee that the insurance company that talks to my, my law firm really wants us to get it correct the first time. So the answer is, you go and you get a certificate of convenience and necessity.

And you avoid an argument with the Public Service Commission, you avoid an argument with the Division and with the Committee For Consumers Services about whether there is jurisdiction to be had based on siting as to either transmission or as to location of a facility.

This is the standard that we, a bunch of municipalities, believe they are currently governed by. There is no question that our friends at SCPPA -- and these are the real beneficiaries of this Milford line. And that's the Southern California Public Power Agencies, or Los Angeles to put in a different tone.

These are out-of-state public agencies. Because SCPPA's involvement in Milford I is so pervasive, and Milford's is so very minimal, the PSC should at a minimum, we believe, recognize Milford for what it is. It's an agent of SCPPA.

It's an agent for Los Angeles, or the other municipal groups in California. But because it is

green there is a tendency, or a desire, or at least a request by these folks to make it so. Defer to it. Make our friends in California have jurisdiction. Or in fact have some sort of authority to regulate what goes on in this state, by this Public Service Commission, by these county groups, because -- these are Planning Commission groups -- because it is green, it must be good.

That dismisses our authority. That dismisses and gives a lie to the, to the suggestion that we have responsibility for our citizens. That is inappropriate.

Now, SCPPA issued a RFP. And the RFP resulted in the construction of this wind site. SCPPA is making a guaranteed pay -- prepayment of almost $211 million as to Phase I. The lease for the 13,000 acres in Beaver and Millard County is assignable to one entity, SCPPA.

In the event Phase I defaults as to the power sales agreement, Phase I's leasehold interest will be transferred or inured to the benefit of SCPPA. There's a first deed of trust held by SCPPA. All Phase I power, whether it works out based upon the wind projections or not, that has already been sold to SCPPA.

Which it then turned around and sold to the Los Angeles Department of Water and Power, Burbank and Pasadena. The PSC, we believe, has an obligation to question whether SCPPA is, in fact, a necessary party to these proceedings. They would tell you, Oh, we're not involved.

They are the very reason that this exists. We believe the PSC should, in its own way, reserve any sort of action before it determines whether SCPPA is really the party in interest here, not our friends from Milford.

Milford's only response to this question which we raised was to argue that Milford is only subject to the provisions of 11-13-304 of the Interlocal Act. And since LADWP, Los Angeles, will not be operating the project, that they are no longer subject or they are not subject to the Public Service Commission's jurisdiction.

We think this is a shell. Precious little more. SCPPA ignores and appears to concede, in our mind, the agency relationship that they have and they are bound by as it relates to Milford. Milford -- perhaps not intentionally -- but nevertheless states, in a disingenuous fashion, that UAMPS has con -- has conveniently failed to include, in its otherwise

comprehensive documents, stuff that was provided to the PSC.

We will acknowledge that we have not provided just about everything that we could find as to the Milford project. What's remarkable is that the stuff that is and the material that is available on the website and on the Internet is so much more comprehensive as provided by potential investors that Milford is seeking. Phase I and Phase II is so much more comprehensive than anything that they bothered to provide to the Commission.

So on the one hand we have not caught or provided as much information as is available there. On the other hand, we are criticized for that. This is not a new tactic. It is the same tactic that says to our Public Service Commission, they're different players, but it's the same stunt if you will.

It is the same conduct that says you, Public Service Commission of Utah, do not need to worry about what goes on here because this really relies on or it impacts what's going on in the Oregon Public Utility Commission. Or it's impact on what's going on in the California Public Utility Commission.

And I'm sure I'm using the wrong terms there, and I apologize. But the reality is we cannot be held

to a standard or criticized about a standard that, on the one hand one day the information that is available for the folks at Milford, and is not provided for the Public Utility Commission, the Public Service Commission, or the fact -- or our friends at the CCS.

They are not -- they do not have the proper material, but investors or potential investors can. Milford has completely failed, in any of its filings, what role LADWP plans to play in the Milford project, or any position that they may have as it relates to the agency agreement between the two.

The purpose of the Act, the PSC's Act is only served if a Certificate of Convenience and Necessity is required first as to the entire project. But if you're of a mind -- or the PSC is of a mind to parse it, to move the two things separately, then there is nothing in SB 202, there is nothing in the provisions that they are relying on, that separates out a generation facility as opposed to a transmission facility.

This is about -- or so we would say -- an attempt to protect Utah ratepayers. Requiring Milford to obtain a Certificate of Convenience and Necessity serves the purpose of the Act because these building -- this building pro -- process, even though

it is green, will have an impact on potential ratepayers in not only Utah but across the West.

Phase I intends to use the switchyard to convert AC, or alternate -- alternating current, transmitted from the wind farm into DC, or direct current. That could result in power disruption. There is no reference to that in the application.

How do we handle that if we're Milford? We say, Let FERC handle it. That's tantamount to saying, Let Oregon help deal with it. That's, that's not our role here. Phase I has submitted -- or the group for Phase I has submitted no studies as to whether there would be any adverse effect on Utah's power grid.

And when we use the term Utah power grid we really -- I don't know what else to call it quite frankly, your Honor, because it is a national power grid at this point. The IPP generation, how do they respond to the question about, Well, do you add something over here, to generation, as to our power plant or as to transmission with the wind?

They respond by saying, Well, what we'll do is, if there is an impact, we'll just go ahead and back down or reduce what's going on at IPP. So we will reduce our IPP generation. Which, again, is owned by and relied upon by people from SCPPA. We

acknowledge that.

The debt is related to people from SCPPA. It is also related to a number of cities and municipalities in Utah. So what we're gonna do is we are gonna unilaterally decide to back that power down.

And who has that authority? SCPPA. Who has that authority as to our friends at Milford? SCPPA. So they will back power down. Generation, coal production, coal mining, coal movement across the West, as it relates to IPP. And that will protect and move and protect our green project as it relates to Milford.

And that's, that's a perfectly wonderful goal, but it's not been discussed and it's not been dealt with. Phase I, we would submit, takes precious Utah resources. And what does it do? It benefits California ratepayers.

Again, a laudable goal, but not a Utah goal. It has no regard whatsoever for Phase I's potential adverse effects on Utah resources. We would submit to your Honor that the motion to dismiss is not in any way consistent with the purpose of the Act.

Nor would we suggest that it is consistent with the Commission's charge as provided by our Utah legislature, as to long-range planning, and as to

protection for our citizens. If the PSC were to accept our friends at Milford's reading of SB 202 it will, in effect, acknowledge that out-of-state entities are in effect unregulated, while in-state entities are regulated.

That cannot be what our legislature intended, because SB 202 does not amend the Interlocal Act. The result of such a reading would be to create a horribly uneven playing field and result in a discriminatory effect as to the Interlocal Act entities that are attempting to provide power to its citizens.

Now, let me acknowledge, UAMPS is not known for running into the Public Service Commission and seeking protection or seeking regulatory treatment. So we're here sort of with one foot in and one foot out.

Saying on the one hand, you should not necessarily treat these characters -- and I apologize for the use of that term -- but these applicants as if they were providing protection to the State of Utah and to -- providing protection for the ratepayers.

When in fact UAMPS many times would say the very same thing. That regulations, because of the Ripper Clause or because of the, the Public Service Commission's own Organic Act, does not apply to

municipal corporations or interlo -- Interlocal Act entities.

We acknowledge that. But in this case we are deferring -- we're being asked to defer complete jurisdiction as to any out-of-state entity that carefully crafts -- to its credit -- its request so as to not have any jurisdiction or a jurisdictional review as it relates to generation or transmission.

And if pushed hard on it enough it will say, Well, that's okay, because FERC will take care of it. That's not an acceptable result. That is not enough protection for the citizens of the State of Utah. I, too, will go ahead and leave the Commerce Clause issue a bit with a pregnant pause. Because the reality is, we don't really know what the Commerce Clause issue is here.

If the Commission does not require a Certificate of Convenience and Necessity the result, as I stated before -- perhaps poorly -- that there is an uneven and disproportionate effect for municipalities. And that simply cannot be the result that SB 202 was designed to create. Thank you, your Honor.

THE COURT: Thanks. Mr. Ginsberg?

MR. GINSBERG: Thank you. First, there's no

doubt about it that this is an unusual proceeding. Not only on how to evaluate a certificate for a non-traditional source such as Milford, but more importantly it's the first time the Commission's been asked to look at what its role is with respect to granting certificates or authorizing the construction of generating plants, transmission lines, of a wholesale electric provider such as Milford, or other types of facilities that are built throughout this state.

In the other room a proceeding on a transmission line is pending for a UP&L transmission line that transverse from Idaho into Utah. Within that proceeding are two alternative routes. And numerous public comments have been received as to which route should be selected.

If that line had been built, that UP&L line had been built by UAMPS, a Certificate of Convenience and Necessity would be required for a non-rate regulated entity.

If it was being built by a wholesale electric provider such as DG&T, who is not rate regulated, a certificate would be required. If it was built by an REA in the state, whose rates are not traditionally regulated, like UP&L's -- like Rocky Mountain Power's,

a certificate would be required.

We handed out the map of the transmission line for the purpose to show that this was a major transmission line traversing hundreds of -- 100 miles in the state. And are there legitimate interests to be served by State overview of the construction of a facility such like this, where the legislature would have left jurisdiction of some type within the Public Service Commission in order to address whether or not a transmission line or, in the absence of SB 202, a generating plant such as Milford or other types of wholesale generating plants should be reviewed by some authority at the State level.

Mr. McNulty indicated that it was not clear whether or not entities such as UAMPS or interlocal agencies needed to come to the Commission, and actually referred to old litigation. And there was actually a Supreme Court case, UAMPS versus Public Service Commission, in which the Court said that there are legitimate State interests when entities -- local, such as a city -- decide to build transmission lines or generating plants that traverse hundreds of miles across the state, that allow the legislature to pass legislation authorizing review by an entity such as the Public Service Commission.

So I think the question that's before you is whether or not the legislation that's been passed with SB 202 -- and I'd like to focus on that a little bit, SB 202 -- has left jurisdiction within the Commission to review transmission lines.

Milford would like to call its transmission line an interconnection facility. The definition, if you look at the definitions again that Milford referred to if we could. The term "interconnection facilities" are not used within the definition of a electric plant.

Electric plant clearly distinguishes between generation, distribution, and transmission. It doesn't define interconnection as being the point -- generation being including some amount of transmission, but distinguishes transmission as being:

> "Any device, apparatus, or property that's used for the transmission of electricity for light, heat, or power."

That seems to be clearly what this line is doing. If you look at the definition of an independent power production facility it uses the term every -- that:

> "An independent power production facility that produces electric energy."

No, no doubt about it that the generate produce -- facility produces energy. The question is whether or not when they passed this they were intending to also allow a transmission line to be included.

If this line was being built by IPA or by an interlocal cooperative agency from the IPA plant to Milford, a certificate would be required. Is it where the point of sale occurs that distinguishes if something is a transmission line or interconnection facility? Or is it actually the physical apparatus that is being built that defines whether something is a transmission line or an interconnect -- or part of a generation facility?

I think it becomes a little clearer that the legislature intended to try and make a distinction between transmission and production. If we look at the exemption that is included in D, where independent power production facilities are exempted from the definition of public utility if they meet certain criteria.

Why would they include an exemption if they didn't think that an independent power production facility was an electric corporation or could be a public utility? Why did they need to create an

exemption with three criteria, potentially leaving some type of facilities out of the exemption?

They could have exempted everything, but they didn't. They specifically defined what is exempted in 1, 2, and 3. And I think the key, in my mind, is Milford places itself under paragraph 2, which uses the term: "The commodity or services sold by an independent energy producer."

If we look at paragraph 1, it says: "The commodity or services produced or delivered." Which means the delivery of the power is also exempt from regulation, but it has to be used for a State facility or the uses that are defined in paragraph 7.

If you look at paragraph 3, the commodity or services sold by an independent solely to an electric corporation or other -- I'm sorry. Two, it's used, sold, or delivered to an affiliate of an independent energy producer.

And if you go on, it is one that is located basically on the same property as an independent energy producer. So the two distinctions for delivery of power are defined in paragraph 1 and paragraph 2, and not in -- paragraph 1 and paragraph 3, and not in paragraph 2.

So I think they left open an argument that an

independent energy producer that is building a renewable facility, that the generating facilities are not covered by the statute. But that if they build transmission lines such as this one, that traverse hundreds of miles across the state, that could have public impact on the citizens where they're passing by, could have impact on other transmission providers in the state, is subject to a review by the Public Service Commission to determine that such a line should be built.

So I think there are legitimate public interest purposes to be served by reviewing a transmission line such as this that is being built that go well beyond whether or not we rate regulate Milford. We don't regulate UAMPS. We don't rate regulate Deseret Generation & Transmission.

Mr. Evans referred to a number of federal regulations and rules that relate to exempt wholesale providers, qualifying facilities. I didn't see anything in any of the federal regulations that preempted the State's legitimate interest in siting transmission lines, reviewing the transmission lines' effect on other providers of the state.

So the federal regulations are -- have to be read I think not as a preemption of any type of State

action, but only can be read consistent with legitimate State interests that are -- Mr., Mr. Evans doesn't dispute in his petition that there are legitimate State interests in them building a transmission line in this state.

He says that those legitimate State interests include local zoning, local permitting, environmental impacts, other local impacts. There is nothing to say that local impacts that are -- Mr. Evans acknowledges -- cannot also be impacts that are legitimately reviewed by the Public Service Commission if the legislature left the authority within the Public Service Commission to review those types of impacts.

And I would assert that the definitions of the independent energy production facility and the exemptions that have been written into an independent energy producer leave open review by the Public Service Commission of a transmission line such as this.

Finally I'd like to just make a few brief comments on the definition of an electric corporation, which was his first argument. That it's exempt because, because of past amendments that have occurred in the original definition of electric corporation.

And misplaced commas and intervening phrases have made it confusing as to whether or not -- what was intended by those.

We have no idea what was intended by that language. Of the amendments that occurred. The intervening phrases. Whether they're in any way intended to somehow make it so that you had to be offering your electric generation or transmission for public sale, as opposed to just being built in the state.

It seems, from the reading of the definition of electric corporation, just the easy reading of it, that that comma has a meaning. And that plants that are built in the state for -- that are generation or transmission plants have -- where they are having an impact on the public -- such as a transmission line such as this, such as a wholesale generating plant that might be built in the state, other than a renewable -- could have an impact on the state where the legislature could -- we don't know what the intervening phrases meant -- but have the intent of leaving a review of those projects with the Public Service Commission. Thank you.

THE COURT: Mr. Ginsberg, just a couple quick questions. Just to be clear then, I take it the

Division accepts -- or does the Division accept that SB 202 applies with respect to the wind energy facility -- the generating facility, we'll call it -- such that the dispute over electrical corporation and electric plant that was first raised in the motion to dismiss is moot here?

MR. GINSBERG: Yeah, we accepted that the renewable generating plant would be exempt under the statute.

THE COURT: Now, with respect to treatment of the, the line then, whether we call it transmission or interconnection, does the Division -- would the Division look at it -- the line differently, and the Commission's jurisdiction over the line, if it were 1 mile as opposed to 90 miles? Or --

MR. GINSBERG: That's a good, good question, because nothing in the statute helps you make that decision. And nothing in the definitions help you to make that distinction. If you read the definitions narrowly, I think probably anytime after the generating plant is -- upgrades the -- whatever they -- steps up the power.

I think there's a facility that does that. Steps up the power to the transmission level capacity, whatever that is -- 345 I think this line is -- that a

distinction could be made between the interconnection, the generation, and the transmission.

I notice the, the rules of the Commission, R-746-401, provide some guidance as to when the Commission thinks that, if a utility or someone is building a transmission line, it needs to come in and file a report with the Commission that it is building a transmission line.

And that was -- for a large entity it had to be 138 KV or above and 10 miles long. But I don't have an exact answer to that. If the Commission found that there was a distinction between the interconnection, the generation, and the transmission, like we're urging, then they could -- might adopt rules that would create where that distinction lay.

I don't, I don't have an answer where that distinction is. But it seems to me that is there any limit to when we can call a -- that 100 miles of line, such as Milford is being built, as something that is just part of a generation facility and that no review is, is required?

THE COURT: So if the, if the Commission were to adopt the Division's position, I guess the outcome would be granting the motion with expect -- with respect to the wind energy facility and denying the

motion with respect to the line, the transmission line?

MR. GINSBERG: Yes. Although I didn't think we -- I don't think we phrased it that way. I thought -- I think we just would have denied the motion. But the certificate would have been more limited to just the transmission line.

THE COURT: Well -- and then any hearing held regarding whether to issue that certificate would be limited in scope to the line itself?

MR. GINSBERG: Yes.

THE COURT: And the public interest surrounding that line?

MR. GINSBERG: Yes.

THE COURT: Okay. Mr. Evans, you had some rebuttal?

MR. EVANS: Yes, thank you.

MR. McNULTY: But your Honor --

THE COURT: Mr. McNulty?

MR. McNULTY: I apologize. May we take a five minutes recess? I --

THE COURT: Sure, let's do that. Let's take five minutes.

(A recess was taken from 3:02 to 3:13 p.m.)

THE COURT: Mr. Evans, rebuttal?

MR. EVANS: Thank you, your Honor. As I, as I sat here and listened to arguments of UAMPS and the Division of Public Utilities it struck me that the attempt was pretty difficult to determine why this legislation would have passed with regard to generation, but that the legislature somehow intended that it not apply to transmission?

Counsel's arguments in, in reading the definition of public utilities I think were fairly strained to find the word "delivery" in two and not in the third and say that, for that reason, the legislature somehow did not intend this to apply to transmission.

That is, that Milford should be exempt from using 40 acres of land in Millard and Beaver counties to put up its wind farm, and the legislature doesn't care. Willing to grant an exemption, that both the Division and UAMPS conceded, but for some reason they think that the Commission should retain jurisdiction over that interconnection line.

Well, that's absurd. The same result would be true if this -- I'm sorry, I misspoke. Forty acres of -- I don't know what I said. Forty acres of wind farm. The same would be true under the Division's theory if that transmission line were 300 yards.

What they're calling transmission, if it hooked up to a transmission line of a transmission provider going next door, then the result that the Division is urging upon you would be no need to regulate and no jurisdiction over the 40 acre wind farm, but you must require a certificate for the 300 feet of line.

The problem is here that the distinction cannot be made between 10 feet of interconnection line and 100 miles of it. There is none. I didn't hear either counsel articulate any legitimate reason that the State has for regulating 300 feet of line. Or, for that matter, for 100 miles of line.

What is the legitimate interest that the state has in this? No one has said so. We are, whether or not the Commission asserts jurisdiction to require a certificate, we are subject to siting requirements already.

The application contains Exhibit 8, that has a list of permits and authorizations that are required of Milford before it can begin construction on those facilities. Bureau of Land Management requires it. They regulate us. Army Corps of Engineers, we're required to get a permit or authorization from them.

The Federal Aviation Administration, Utah

Department of Environmental Quality, Utah Department of Transportation --

THE COURT: Mr. Evans, I'm sorry, I don't know if you turned your microphone off or it just stopped working.

MR. EVANS: Okay, I'm sorry.

THE COURT: Thank you.

MR. EVANS: Utah DOT, Beaver County, Millard County, county commissions, local siting authorities. The State's interest is manifest through a whole long list of permits and authorizations that Milford needs to receive.

Why the Commission -- let's look for just a minute at what the Commission's role in this, what jurisdiction the Commission has in these siting requirements. And if you want to look at the appendix at page 5, it's 54-4-25.

What the cert -- what the certificate statute says is that the applicant is required to show -- and I'm reading under 54-4-25 subsection 4:

> "Each applicant for a certificate shall file in the office of the Commission evidence as required by the Commission to show that the applicant 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."

So the question is, how does the Commission's oversight that these permits are in place add anything to the -- to protecting the public interest that is not already covered by the BLM, the Army Corps of Engineers, the State Department of Environmental Quality, the DOT, Beaver County, and Millard County?

What is it that the Commission will do in terms of siting that will protect the public interest? We submit nothing. They are only required to assure that the company desiring to build the facilities is square with the State and local authorities. They're just a gatekeeper for these. They add nothing to the siting requirements.

I'd like to go back and take a look for just a second at the definition of public utility. Somehow Mr. Ginsberg contends that under 54-2-1-16-D, which is found on page 3 of the appendix, Subsection 1 and 3 would not permit the Commission to exert certification requirements over transmission, but Subsection 2 would.

And the reason he says so is because the word

"delivered" or "delivery" is in those sections. It seems irrational to me -- no -- all due respect to Mr. Ginsberg, who I think presented fine argument -- that the legislature would think that by including the word "delivered" there it was meant to divest the Commission of jurisdiction over interconnection facilities. And omitting the word "delivered" from Subsection 2 was meant to have the Commission retain jurisdiction over interconnection facilities. When, under Subsection D, the language is clear that an independent energy producer is exempt from the jurisdiction and regulations of the Commission with respect to an independent power production facility.

That requires a determination, before you even talk about the subsections, as to what comprises the independent power production facility. Mr. Ginsberg is correct that Milford does not refer to federal law as somehow preemptive of state law. But it is illustrative of how the law treats that piece of line running between the turbine and the transmission provider.

And in every case it's generation. Regardless of how long the line is, it's generation. That's the point. So this is not like the transmission proceeding in the other room. This is

not anything like that, when we're talking about a piece of line between Milford's wind farm and IPP 3.

This is not like DG&T, or UAMPS, or UP&L. All of whom have transmission lines that wield anyone's power who wants to put power on there. And all of whom wield power that is delivered to Utah residents for consumption. That's the difference.

We're not. This is not a transmission line in that sense. There is a legitimate State interest, we agree, in regulating where this line is placed and how it's built. But a legitimate State interest is not equivalent to jurisdiction in the Commission.

You can't just say, like Mr. McNulty did, Well, this is something that should be regulated. When the legislature has, not more than four months ago, withdrawn it from regulation. The Commission needs to be really mindful about why they did that. About, in this time of skyrocketing fuel prices, dirty air, the aversion to even build the next coal fired plant. The problem with CO2 emissions on natural gas plants.

The legislature has spoken. We're gonna deregulate. We are gonna deregulate renewable energy. And we don't care how big it is, we don't care how large the generator is, we want it deregulated. It

goes to the -- as I've said and would reiterate, I don't see any reason that the Commission -- that the legislature would intend deregulation of the turbine and not the interconnection line. It just is not a rational way to interpret statute.

Let me make a couple of comments on things that Mr. McNulty said. First, UAMPS contends there's some adverse effect on the grid because of our interconnection -- because Milford's interconnection at IPP. And refers to documents that are available publicly and that our friends at UAMPS kindly introduced into the record here.

We didn't feel it was necessary to introduce those until there was a certification proceeding or until the Division asked for them. It never did. The Division has made recommendations without seeing those documents. And our, our contention is that the case should be dismissed without regard to those documents.

We disagree with the way UAMPS has characterized them. They speak for themselves. They're in the record. If there is a legitimate issue, we can ferret it out of the documents. But there doesn't seem to be.

He complains about backing down the generation at IPP. There isn't anything in this

record that says anything about backing down, as far as I know. The interconnection agreement hasn't been filed. What has been filed is the IPA's approval of the interconnection agreement. And the -- a statement about the result of the interconnection study that concludes:

> "The interconnection of the generating project will not have adverse impact on the transmission systems."

Now, I don't know what Mr. McNulty has for information otherwise, but I would submit that it's not relevant since IPA has already approved the interconnection agreement and it will occur. Any adverse impact of the grid he likes to pooh-pooh the fact that Milford wants to run to FERC with that problem.

Well, it is a FERC problem. And we've submitted statutes in the appendix that show that FERC has authority over interconnection, over wheeling, over system reliability as a result of interconnection. Even if UAMPS had a legitimate complaint about the impact on the system, this isn't the place that UAMPS should go to to have it addressed.

In other words, an adverse effect on the

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grid, even if it were to occur, is not reason for the Commission to require UAMPS to come in for a certificate. It makes no sense. Moreover, it makes even less sense when you think that the generator that's putting the power out on the grid doesn't have to come in but the transmission line does. Moreover, the transmission line wouldn't have to come in if it were only 10 or 15 feet long, but because it's 90 miles long you have to come in. That is just not a rational way to apply Senate Bill 202.

I also want to make a comment about the protection of Utah ratepayers. Both UAMPS and the Division have said we need to -- we need the Commission's regulation here. We need the Commission to require a certificate for the protection of Utah customers. Of Utah residents.

But I've heard not one argument where the protection of Utah residents would be advanced by the Commission requiring a certificate. Even if you look at the -- what the Division has recommended should be required in order to grant the certificate, there is nothing there that will protect Utah residents.

Mr. McNulty complains about SCPPA being the real party in interest here. That somehow under the Interlocal Act the Commission should require Milford

to get a certificate because if it were SCPPA, SCPPA might be required to get a certificate. And somehow that would level the playing field between SCPPA and UAMPS.

This is not about competition between SCPPA and UAMPS. The authority to construct facilities is about the public convenience and necessity, not about who gets access to Southern California markets. Levelling the playing field between UAMPS and SCPPA for the generation and delivery of power to Southern California is not what this Commission should be about. And not what the certification proceedings should be about either.

This is the first opportunity that the Commission will have to apply SB 202 in this context. And it is an odd one. We submit, however, that the reason that the legislature withdrew this kind of generation facility from the requirement of obtaining a certificate is to encourage the construction of these kinds of facilities.

Milford is jumping into this with both feet. Phase I is going to California. Phase II, maybe not. Phase III and beyond, as we've detailed in our application, is not yet committed. And this is a potential resource for electric consumers throughout

the west.

Milford's willing to come in and foot the cost of this line. Place its wind farm in a remote location, without any help from a transmission provider in getting it to market. And willing to build the line and eat the cost of it. That is what the legislature intended.

If you burden this by requiring them to come in for a certificate, to fight with potential competitors, go through discovery, make a public spectacle of the application, you engage in a regulatory process that is inimical to what the legislature intended. They wanted to make this easy. And in two places in the statute they have expressly exempted independent energy producers from the requirement of obtaining a certificate.

Let me point out one final thing, and then I'll quit. Siting requirements, as I said before, are covered by other agencies. The Commission merely acts as a gatekeeper. Even if that were not the case and the Commission wanted to make sure, for example, that this line didn't cross the line of someone else, it has no --

The only way the Commission can look at siting is to require -- look at 54-4-25 again. It's

on page 4. No, I'm sorry. It's on page 5 of the appendix. Under Subsection 4. That's, I think, what is being referred to as siting requirements and siting oversight by the Commission.

> "Each applicant for a certificate shall file in the office."

Well, who is an applicant?

> "An applicant is one electric corporation who must come in and show that the public convenience and necessity does or will require the construction."

That's on -- under Subsection 1. In other words, the Commission's authority to be the gatekeeper at -- of siting requirements is dependent upon the Commission's authority to require the applicant to show the public convenience and necessity.

You have to be here for a certificate in the first place. And the requirements are, at bottom, that the future public convenience and necessity does or will require the construction. It does not in this case as it does in other cases.

Now, the Division has in its recommendations stated how this is in the public interest. And we agree. We've stated as much as well. But this is not

a situation where the public necessity requires that we build wind power. This is an entirely independent investment. We have anchored SCPPA as our first customer on PPA to get this job done.

Mr. McNulty would have you think that somehow that is a sham transaction. Which he's free to make that argument, but it's certainly not the case. There'll be other capacity built that has nothing to do with SCPPA. But the convenience and necessity does not require that this be built.

Because Milford is exempt from that requirement, it should also be exempt from siting. It must be, because the Commission has no other hook for jurisdiction to get into regulating siting. Let me point out one more thing that's interesting about this statute.

Subsection 3 does not make reference to any applicant. This is different than everything else in the certification statute because it does not refer to an applicant. It says:

> "If any public utility constructing or extending its line interferes or may interfere, the Commission, on complaint of the public utility claiming to be injuriously affected may, after hearing,

make an order and prescribe terms and conditions for the location of lines, plants, or systems affected."

Arguably, this is the case whether or not a certificate is required. If Milford's construction of that transmission line interferes with the line, plant, or system of the public utility, the public utility should be in here before the Commission complaining about it. No one is.

But the Commission doesn't have to require a certificate to take jurisdiction should someone complain that Milford is interfering with the lines of a public utility. So everything that UAMPS and the Division say is required to protect the public interest is protected otherwise, without requiring the certificate.

Moreover, the only way to really give effect to what the legislature intended is to encourage the development and independent investment in renewable energy plants. And dismiss this application, because a certificate is not required. Thank you.

THE COURT: Mr. Evans, the -- and I don't want to look to any sort of trying to level the playing field between SCPPA and UAMPS. But I'd like you to address why, given the nature of SCPPA's

involvement in Milford Wind, this project, the Commission shouldn't treat is it as an out-of-state public agency within the meaning of 11-13-304.

MR. EVANS: Well, I suppose if SCPPA were in here applying for the certificate the Commission should treat it as an out-of-state agency under Title 11. I don't have any argument with that. What we have argument with is that somehow the notion that SCPPA is the real party in interest in constructing these facilities. SCPPA is not.

We've addressed it in our brief. And I'd be glad to refer to you the place. What, what this argument is, is UAMPS' characterization of the purchase power agreement. And saying that it virtually gives total control over this project to SCPPA.

Not the case. Not the case. Let me find it. Here's how UAMPS has argued this. They contend that SCPPA has pervasive control of the project. That's how they're claiming it. And that they're the real party in interest.

SCPPA doesn't operate this plant. SCPPA doesn't maintain it. SCPPA doesn't have responsibility for constructing it. SCPPA has simply entered into a purchase power agreement with Milford

to construct the first phase of the project.

Milford is not an agent of SCPPA. The agreement at paragraph -- the purchase power agreement at paragraph 14.17 expressly disclaims any agency relationship between the two. UAMPS may have an option to buy the plant. It does have an option to buy the plant at a ten-year period.

THE COURT: SCPPA you mean?

MR. EVANS: SCPPA, I'm sorry. You wish UAMPS had it. SCPPA has a option to purchase this plant after 10 years, and again at 20 years. That's not an interest in the facility that the Commission can take cognizance of in a proceeding to, to determine whether construction requires certification.

It's an inchoate future interest in land that may or may not be exercised. That may or may not ever come to fruition. And it doesn't make SCPPA the real party in interest. The fact that SCPPA is taking the entire output of Phase I also doesn't make SCPPA the real party in interest.

Milford is responsible for the planning, siting, operation, maintenance of that line, until something different happens. Until there's an option exercised. And, let me just let me point this out. UAMPS' argument is very clever, because what it does

is negates what the legislature did in Senate Bill 202. Not just for Milford Wind, but for any other renewable developer that wants to have a purchase -- power purchase agreement in place before they begin construction of their facilities.

For every one, if there's a buyer on the other end, according to Mr. McNulty's argument, the buyer should be in here looking for a certificate. That's not what the legislature intended. That's not how the Commission ought to rule.

THE COURT: Okay, thanks. We'll give you the last word, but given my questions and your rebuttal, I want to see if -- Mr. McNulty, do you have any brief comments you'd like to make, further argument?

MR. McNULTY: I am so very tempted, but I'm going to be still. For once in my life, I'm going to be still.

THE COURT: Okay, thank you. Mr. Ginsberg?

MR GINSBERG: No.

THE COURT: Okay. Given that, I guess Mr. Evans you have had the last word.

MR. EVANS: May I correct? I misspoke on the record.

THE COURT: Okay, go ahead.

MR. EVANS: My partner just tells me that

when I've been referring to this wind farm I referred to it as 40 acres. It's 40 square miles. That's the part that the Commission won't regulate.

THE COURT: Sure. And thanks for the clarification. One final point -- of course we'll take this under advisement and the Commission will issue its order.

We do have hearing in this matter scheduled for the 28th. Is that something that is realistic if the Commission were to deny the motion either in part or in whole?

MR. EVANS: Your Honor, if the Commission grants the motion, dismisses the case, there obviously would be no hearing. We -- if the Commission can quickly get to an order on the motion we think we can probably prepare for hearing in that time.

I'll leave it to the other parties to give their...

MR. McNULTY: The -- as much as UAMPS would like to accommodate that schedule, we have a problem with our general manager/executive director. And he's not available for that period. Which will require some testimony from him. And so I owe Mr. Evans a letter and the Commission a letter about that.

THE COURT: Okay.

MR. McNULTY: So I'm not sure that that day is available for us.

THE COURT: Okay. Division, any comment on the scheduling?

MR. GINSBERG: We already filed our recommendation, so I think we would be prepared on that date. But, you know.

THE COURT: Okay.

MR. GINSBERG: I think we're available that date.

THE COURT: I was just curious. We'll see what the Commission does with respect to the motion itself. And then anything, Mr. McNulty, that you might file regarding scheduling. And we'll go ahead and adjourn. Thanks.

(The hearing was concluded at 3:42 p.m.)

C E R T I F I C A T E

STATE OF UTAH)
) ss.
COUNTY OF SALT LAKE)

This is to certify that the foregoing proceedings were taken before me, KELLY L. WILBURN, a Registered Professional Reporter and Notary Public in and for the State of Utah.

That the proceedings were reported by me in stenotype and thereafter caused by me to be transcribed into typewriting. And that a full, true, and correct transcription of said proceedings so taken and transcribed is set forth in the foregoing pages, numbered 1 through 72, inclusive.

I further certify that I am not of kin or otherwise associated with any of the parties to said cause of action, and that I am not interested in the event thereof.

WITNESS MY HAND AND OFFICIAL SEAL AT KEARNS, UTAH THIS 19th DAY OF May, 2008.

_____
Kelly L. Wilburn, CSR, RPR
My Commission Expires:
May 16, 2009