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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Public Convenience and Necessity for Phase I and Phase II of the Milford Wind Power Project	**PETITION FOR REHEARING** **Docket No. 08-2490-01**

Utah Associated Municipal Power Systems ("UAMPS"), pursuant to Utah Code Ann. §§ 54-7-15 and 63-46b-12, and Utah Admin. Code R746-100-11(F), respectfully submits this Petition for Rehearing of the Order Granting Motion to Dismiss the Petition of Milford I and Milford II for Certificates of Convenience and Necessity, issued on May 16, 2008 (the "Order"). UAMPS requests that the Commission schedule a hearing before the Public Service Commission ("Commission") to consider the issues raised herein, vacate the Order, and to conduct an evidentiary hearing on the Application of Milford Wind Corridor Phase I, LLC and Milford

Wind Corridor Phase II, LLC for Certificate of Convenience and Necessity for Phase I and Phase II of the Milford Wind Power Project ("Application"). [1]

INTRODUCTION

On May 13, 2008, Administrative Law Judge for the Commission, Steve Goodwill ("ALJ"), held a hearing on the Milford Wind Corridor Phase I, LLC ("Milford I") and Milford Wind Corridor Phase II, LLC ("Milford II," collectively "Milford") Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity. The ALJ concluded that Milford is exempt from regulation under subsection (ii) of Utah Code Ann. § 54-2-1(16)(d), as amended by the 2008 Utah Senate Bill 202 ("SB 202"), because "the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser." Order at 7 (quoting § 54-2-1(16)(d)(ii)).

The Order defied the well-reasoned recommendation of the Division of Public Utilities ("Division"), which had concluded that although the SB 202 amendments to Title 54 may permit an exemption from the certificate requirements for a *generating* facility using renewable energy sources,[2] the project's *transmission* lines are not exempt. The Division pointed out that because § 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 Division argued, the approximately 90-mile line

[1] UAMPS' 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, filed March 28, 2008 ("Opposition Memo"), is incorporated herein by reference.

[2] As defined in § 54-2-1(14).

of poles and wires[3] that will be constructed to transmit electricity from the wind farm to the Intermountain Power Project ("IPP") is subject to the Commission's jurisdiction and Milford must obtain certificates. In response, the ALJ simply concluded without analysis 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.

Order at 8.[4]

In addition, the ALJ rejected UAMPS' argument that Milford is a shill for the Southern California Public Power Authority ("SCPPA"), an out-of-state public agency, without having determined the level of involvement SCPPA has and will continue to have regarding the planning, financing, construction, and operation of the project. The ALJ also discounted SCPPA's contractual option to purchase the project in the future and failed to take any evidence on SCPPA's status as a real party in interest.

The Milford project presents the Commission's first opportunity to interpret its role with respect to certification of a renewable power source whose output will be transmitted to non-Utah consumers via in-state transmission lines. Whether the Legislature intentionally included only electric generation facilities—to the exclusion of transmission facilities—in SB 202 is a matter of first impression. Whether the Legislature intended to leave more than 90 miles of

[3] The transmission line will cross private land, as well as land owned by the State of Utah and the Bureau of Land Management. *See* Tr. at 5.

[4] Milford submitted, as part of its "Appendix for Hearing on Motion to Dismiss Milford Wind – 08-2490-01," a definition excerpted from the Public Utility Holding Company Act of 1935. The issues here are governed by Utah law, and therefore the definition introduced by Milford has no relevancy or bearing on the issues in this proceeding.

transmission lines uncertified is an issue that warrants rehearing. And whether the record was sufficiently developed to support the ALJ's conclusions is an issue deserving of the full Commission's consideration.

Contrary to Milford's thinly-veiled suggestions during the May 13 hearing, UAMPS' intervention in this proceeding is motivated not by an attempt to hustle a competitor, SCPPA, but to ensure uniform and fair application of Utah laws. UAMPS and Utah citizens alike have a compelling interest in the predictability and regularity of the requirements and process for siting generation and transmission within the State.

ARGUMENT

I. THE ORDER RUNS AFOUL OF THE UTAH STATE CONSTITUTION

Article I, § 24 of the Utah Constitution requires that "[a]ll laws of a general nature shall have uniform operation." UTAH CONST. ART. I, § 24. "In order for a law to be constitutional under the uniform operation of laws provision, 'it is not enough that it be uniform on its face. What is critical is that the operation of the law be uniform.'" *Gallivan v. Walker*, 2002 UT 89 (2002) at *P36 (internal citations omitted).

> The "essence" of the uniform operation of laws provision of the Utah Constitution is that a legislative body must not "classify[] persons in such a manner that those who are similarly situated with respect to the purpose of the law are treated differently by that law, to the detriment of some of those so classified." The provision forbids "singling out one person or group of persons from among the larger class [of those similarly situated] on the basis of a tenuous justification that has little or no merit."

Anderson v. Provo City Corp., 2005 UT 5 (2005) at *P18 (internal citations omitted). Under § 24, a two-part test is necessary to ensure the uniform operation of laws: "First, a law must apply equally to all persons within a class. Second, the statutory classifications and the different

treatment given the classes must be based on differences that have a reasonable tendency to further the objectives of the statute." *Malan v. Lewis*, 693 P.2d 661, 670 (Utah 1984) (citations omitted).

As interpreted in the Order and as applied, SB 202 will burden Utah interlocal entities and the rate-paying consumers who are served by them, while benefiting in-state and out-of-state "independent power production facilities." The members of interlocal entities, like UAMPS, are public agencies that represent and act for their citizens. Under the Interlocal Cooperation Act, Utah Code Ann. §§ 11-13-101, *et seq*. (the "Interlocal Act"), Utah interlocal entities and utilities are required to obtain certificates of public convenience and necessity before constructing an electrical generating plant or transmission line, whether such projects harness renewable or non-renewable energy sources. Utah Code Ann. § 11-13-304(1). If interlocal entities are required to fulfill certification requirements under § 11-13-304 before building any electrical generating plant or transmission line—even one that falls under the definition of "independent power production facility"—the citizens of that interlocal entity's members will be arbitrarily burdened, while citizens served by in-state or out-of-state "independent power production facilities" will not. It is difficult to imagine how this differential treatment of Utah citizens serves the purpose of SB 202 or the Act. *See, e.g., Utah Associated Municipal Power Systems v. Public Service Commission*, 789 P.2d 298 (Utah 1990) (holding that UAMPS was required under the Act to obtain a certificate before constructing a transmission line outside the municipal boundaries of its members because the transmission line involved environmental concerns and could negatively affect Utah Power & Light rate-payers).

II. THE ALJ'S CONSTRUCTION OF SB 202 CONFLICTS WITH CANONS OF STATUTORY CONSTRUCTION, THE PURPOSE OF THE ACT, AND SOUND PUBLIC POLICY

A. SB 202 Does Not Exempt Milford's Power Line

The ALJ's conclusory determination that Milford's 90-mile transmission line is exempt from the Commission's jurisdiction is without support and runs contrary to the plain language of SB 202.

It is a well settled rule that "[w]hen interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature." *State v. Tooele County,* 44 P.3d 680, 685 (Utah 2002) (internal citations omitted). The first step of statutory interpretation is to evaluate the 'best evidence' of legislative intent, the plain language of the statute itself." *Id.* (internal citations omitted). "'[T]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony' with other provisions in the same statute and with other statutes under the same and related chapters.'" *State v. Schofield,* 63 P.3d 667, 669-670 (Utah 2002) (internal citations omitted).

The plain language of the definitions of "independent energy producer" and "independent power production facility" does not include transmission or interconnection lines. Those definitions provide, in relevant part:

> (13) "Independent energy producer" means every electrical corporation, person, corporation, or government entity, their lessees, trustees, or receivers, that own, operate, control, or manage, an <u>independent power production or cogeneration facility</u>.
>
> (14) "Independent power production facility" means <u>a facility</u> that:
>
> (a) <u>produces</u> electric energy solely by the use, as a primary energy source, of biomass waste, a renewable resource, a geothermal recourse, or any combination of the preceding sources.

SB 202, amending Utah Code Ann. § 54-2-1 (13) and (14) (emphasis added). There is no reference in the above definitions to power lines, only to energy production facilities. Therefore the ALJ's conclusory finding that Milford's 90-mile power line "is reasonably considered an integral part of the independent power production facility", Order at 8, ignores the plain language of the statute and reads the definition of "independent power production facility" far too broadly.

The ALJ's finding is also inconsistent with the maxim *expressio unius est exclusio alterius* or the inclusion of one thing implies the exclusion of the alternative. *See Field v. Boyer Co.*, 952 P.2d 1078, 1086-87 (Utah 1998); 2A Norman J. Singer, *Statutes and Statutory Construction* §§ 47:23-25 (2000); *Black's Law Dictionary* 602 (7th ed. 1999). The Legislature, under the Act, defined "electric plant" as follows:

> all real estate, fixtures, and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power.

Utah Code Ann. § 54-2-1 (8) (emphasis added). The Legislature chose to define "independent energy producer" and "independent power production facility" with reference to a "facility" and to that facility's production of energy from a renewable source. The Legislature did not define "independent energy producer" and "independent power production facility" by including the broad term "electric plant", which would have included transmission facilities. Also, the Legislature tracked some of the language from the term "electric plant", but chose not to include language from that definition concerning "transmission" or "delivery". Utah Code Ann. § 54-2-1(8). The definitions of "electric plant" and "electrical corporation", Utah Code Ann. § 54-2-

1(7) (defining "electrical corporation" using the term "electric plant"), clearly demonstrate that the Legislature has the capacity to include transmission lines and "electric plant" in the Act's definitions. Therefore, under the maxim of *expression unious est exclusion alterius,* the Legislature must have intended to exclude transmission lines from the definitions of "independent power producer" and "independent production facility."[5]

Finally, it was improper for the ALJ to rely on the definition of "eligible facility" in Section 32 [79z-5a] of the PUHCA, which was handed up by Milford's counsel at oral argument, for the proposition that a generation facility includes transmission facilities. That definition, which has since been repealed, albeit resurrected in part by the Energy Policy Act of 2005, is entirely irrelevant and inadequate to support the Order. The Federal Energy Policy Act of 2005 does not apply here and whatever definitions it may provide for "eligible facility" should not exempt 90-miles of power lines from the Commission's jurisdiction.

B. The Order Runs Contrary to the Policy and Purpose of the Act

The ALJ's findings are inconsistent with the Legislature's stated purpose of the Act as it relates to independent energy producers.[6] *See* Utah Code Ann. § 54-12-1, as amended by SB

[5] Because the Milford power lines do not fall within the definitions of "independent energy producer" or "independent power production facility", they are not, as Milford contends, exempt from the Commission's jurisdiction under subsection (ii) of Utah Code Ann. § 54-2-1(16)(d) (exempting from the Commission's jurisdiction energy sold by an independent energy producer to a wholesale purchaser).

[6] While there may be important and valid reasons to incentivize the development of 'green' power and renewable energy sources, it cannot be the Utah Legislature's intent to deregulate all 'green' power as Milford suggests, *see* Tr. at 59-60. A recent article in London's *The Guardian* newspaper reported on a looming energy crisis in Europe, due in part to "green-influenced legislation" and poor planning by utility companies and regulators. In the article, Johannes Teyssen, Vice-Chairman of the World Energy Council – Europe, noted that utility companies eager to invest in renewable energy projects were ignoring "planning applications," such as transmission lines. Teyssen urged the EU to avoid putting all its eggs into the renewables basket, arguing that they could cause more harm than good if national and cross-border grids were incapable of meeting the growth in their use. "You need a broader picture; you can't just say green is good," he said. David Gow & Will Woodward, *Green Laws and Regulation Risk Energy Crisis, Say Europe's Power Companies*, THE GUARDIAN, Feb. 7, 2008, at Financial: 29, *available at http://www.guardian.co.uk/environment/2008/feb/07/energy.renewableenergy*.

202. The express intent of the Legislature is to "encourage independent energy producers to competitively develop sources of electric energy not otherwise available to Utah businesses, residences, and industries". *Id*. The express intent of the Legislature is also to "conserve our finite and expensive resources." *Id*. (emphasis added). Here, however, the ALJ's findings will permit Milford to deliver power using Utah's "finite and expensive resources" to "[California] businesses, residences, and industries", which is not consonant with the Legislature's stated purpose.

Further, in accordance with the Act, the Commission is obligated to protect ratepayers by "prevent[ing] preferences and discriminations respecting the rates charged or received by public utilities for services rendered or received." *United States Smelting, Refining & M. Co. v. Utah Power & Light Co.*, 197 P. 902, 905 (Utah 1921). The Commission is charged with protecting "the welfare of the Utah rate-paying public." *Utah Light & Traction Co. v. Public Serv. Comm'n*, 118 P. 2d 683 (Utah 1941). As discussed below, the Order will favor citizens served by non-interlocal "independent power production facilities" over Utah citizens served by interlocal entities, and will unfairly burden Utah interlocal entities. In addition, the Order robs Utah individuals, entities, and agencies of their resources. Utah land may be vast, but it is finite, and the 13,000 acres in Milford's cross-hairs have been identified as ideal for harvesting wind. *See* Ex. D. to Opposition Memo.

Lastly, unintended consequences follow from the statutory construction endorsed by Milford and adopted in the Order. A public utility such as Rocky Mountain Power—which is an electrical corporation subject to the Commission's jurisdiction—may hold and own electric

plants fueled by renewable sources. But according to the Order, if Rocky Mountain Power did so through special-purpose entities rather than in its own name, it could avoid regulation or the jurisdiction of the Commission as to siting as well as regulation of rates. The Commission should reconsider whether this is what the Legislature intended.

III. THE RECORD IS INCOMPLETE AND DOES NOT SUFFICIENTLY SUPPORT THE ORDER

At a minimum, the Commission should reexamine the Order and conduct an evidentiary hearing to scrutinize the record for support of the ALJ's conclusions.

A. Secrecy Surrounding the Subsequent Phases of the Project is Detrimental and Prohibited Development of a Record

Milford has provided the Commission—and the public—with precious little information about its project. Most of UAMPS' knowledge has been developed not from the scant documents Milford deigned to file with the Commission, but from publicly-available information, including documents independently discovered online. Milford's disclosures are largely limited to Phase I; virtually no information regarding the purchasers, location, transmission lines, or financing of Phase II of the project has been disclosed. To the extent the Order constitutes a ruling on Phase II of the project, it is wholly unsupported by the record.

Moreover, Milford has not submitted a study of Phase I's impact on IPP and any impact it may on the Utah power grid to which IPP is connected. UAMPS has nonetheless become aware of the "Milford Valley Wind Project Interconnection at Intermountain – Impact Study" (the "Study"), which purports that "no problem" would result from normal system conditions. However, according to a study performed by Intermountain Consumer Professional Engineers,

Inc. ("ICPE") at the request of UAMPS, the Study's "no problem" determination is valid *only* if IPP is "backed down" in direct proportion to the amount Milford's Project is "ramped up." *See* **Exhibit A** at 1-2 (true and correct copy of "ICPE's Review/Comments on 'Milford Valley Wind Project Interconnection at Intermountain – System Impact Study,'" dated March 12, 2007). ICPE observed that the Study concluded there would be no transmission line overloading because it assumed there would be no net generation increase. For example, the Study concluded there would be no overloading if Milford generated 200 megawatts *as long as* IPP was backed down by 200 megawatts. *Id.* Milford's "no problem" assurance is unsupported, and it is hardly reassuring.

B. SCPPA's Status as an Indispensable Party Must be the Subject of an Evidentiary Hearing

Whether a person is indispensable to a proceeding depends on a number of factors, all "varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests. *Provident Tradesmens B. & T. Co. v. Patterson*, 390 U.S. 102, 119 (1968). Generally, a two-part inquiry is involved: "a court must first determine whether an absent party has sufficient interest in the action to make it a necessary party." *Seftel v. Capital City Bank*, 767 P.2d 941, 945 (Utah Ct. App. 1989) (internal citations omitted). Second, the court must consider:

> (1) to what extent a judgment rendered in the person's absence will prejudice him or her or those already parties; (2) the likelihood of reducing or avoiding prejudice by protective measures or provisions in the judgment: (3) the adequacy of the judgment which might be entered in the person's absence; and (4) the adequacy of the plaintiff's remedy if the action is dismissed for nonjoinder.

Id. (citations omitted). *See also* Utah R. Civ. P. 19(a). The Order contains no such analysis. It is well-settled that conclusory statements that a person is or is not a party, absent the foregoing analysis, does not comply with Rule 19 and are of no value. *Seftel*, at 945.

Milford argued that SCPPA is not a real party in interest in constructing the Project facilities because

> 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 power purchase agreement with Milford to construct the first phase of the project.
>
> Milford is not an agent of SCPPA
>
> . . . . .
>
> SCPPA has an 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 also taking the entire output of Phase I also doesn't make SCPPA the real party in interest.

Tr. at 68-69. In fact, Phase I of the Project is being built, operated, financed, and owned pursuant to SCPPA's and the Los Angeles Department of Water and Power's ("LADWP") request, design, and plan. Without employing Milford as their shill, SCPPA and LADWP, which are out-of-state public agencies, would be required to obtain a certificate of public convenience and necessity pursuant to § 11-13-304 of the Act. Milford I is merely the developer of Phase I. LADWP's September 2007 letter to the Board of Water and Power Commissioners unambiguously states

> SCPPA and its members have an interest in the ultimate ownership of renewable energy facilities. [The Project] will ensure a stable priced long-

> term supply rather than power purchase contracts that must be periodically renegotiated with uncertainty of future availability or price. Accordingly, the provisions [of the Power Purchase Agreement] allow SCPPA to buy the project from the developer at the end of the tenth year of operation, or at the end of the twentieth year of operation.

Ex. A to Opposition Memo. Under Utah law, SCPPA has a property interest in the project. *See Knight v. Chamberlain*, 315 P.2d 273, 275 (Utah 1957) (stating "logic seems to impel the conclusion that a valid option to purchase is an interest in real estate…."). There can be no doubt that an adverse decision in this proceeding would negatively affect SCPPA, but the full extent of SCPPA's role is unknown because the ALJ, without record support, determined that SCPPA is not a necessary party. In so doing, the ALJ foreclosed Utah's ability to investigate the full ramifications of the project; as a result, the full ramifications of allowing Milford to surpass public convenience and necessity certification may not be known for years.

IV. THE ORDER RUNS AFOUL OF THE UNITED STATES CONSTITUTION

A. Commerce Clause

As the Commission is well aware, the Commerce Clause of the United States Constitution limits the power of the States to impede interstate trade. *See* U.S. CONST. ART. I, § 8; *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Those activities and elements of the project that occur within Utah—such as the generation facilities, transmission corridor, and delivery of power to the IPP switching station—do not trigger Commerce Clause concerns. However, the ALJ's Order excusing Milford from certification requirements may have an uneven and discriminatory effect on Utah utilities and interlocal entities in violation of the Commerce Clause.

The Commission's assertion of jurisdiction over Milford, by contrast, will not offend the Commerce Clause because it places no undue burden on Milford. Moreover, requiring Milford to obtain a certificate of public convenience and necessity serves the legitimate public purpose of protecting the integrity of Utah's natural resources. *See* Opposition Memo at 20-22.

B. Privileges and Immunities Clause

As set forth in the Opposition Memo, SB 202 as applied in some instances raises serious questions under the Privileges and Immunities Clause of Article IV of the United States Constitution, which states "[t]he Citizens of each state shall be entitled to all Privileges and Immunities of citizens in the several states." U.S. CONST. ART. IV. On its face, SB 202 treats Utah and non-Utah entities equally to the extent "independent power production facilities," which includes both Utah and non-Utah entities, are exempt from obtaining a certificate of public convenience necessity. However, SB 202 does not amend the Interlocal Act, which requires each Utah interlocal entity—including UAMPS—to obtain a certificate of public convenience and necessity before constructing an electrical generating plant or transmission line. *See* Utah Code Ann. § 11-13-304(1). As applied, SB 202 disadvantages an interlocal entity's constituent members and their citizens, who will not be afforded the same privileges as citizens served by "independent power production facilities" that are not interlocal entities. *See* Opposition Memo at 7-8.

CONCLUSION

For the foregoing reasons, UAMPS respectfully requests that the Commission schedule a hearing before the full Commission to consider the issues raised herein, vacate the Order, and to conduct an evidentiary hearing on the Application.

DATED this ___ day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing **PETITION FOR REHEARING** regarding Docket No. 08-2490-01 to be e-mailed and mailed by first class mail, postage prepaid, this 16TH day of June, 2008 to the following:

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