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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

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

Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC (collectively "Milford Wind" or "Milford"), by and through their undersigned counsel and pursuant to Rule R746-100-3(H) of the Utah Administrative Code, hereby respectfully submit the following Memorandum in Opposition to the Petition for Rehearing, filed by the Utah Associated Municipal Power Systems ("UAMPS"), requesting rehearing of Decision and Order issued May 16, 2008 ("Decision and Order" or "Order").

ARGUMENT

The Petition for Rehearing (or "Petition") asks the Public Service Commission ("Commission" or "PSC") to vacate its Decision and Order, schedule and conduct a hearing on the issues raised in UAMPS' Petition, including whether SCPPA should be forced to become a party to this docket, and require an evidentiary hearing on Milford Wind's Application for a Certificate of Convenience and Necessity.

The Commission's Decision and Order is sound. Based on Section 54-2-1(13) and (14), as amended by Senate Bill 202 ("SB 202"), the Commission correctly found that "Milford I and II Project is an independent power production facility such that Milford I and II is an independent energy producer with regard to the Project." Decision and Order at 7. The Commission also correctly concluded that the entire Project falls under Section 54-2-1(16)(d)(ii), which exempts independent energy producers from the "jurisdiction and regulation of the commission with respect to an independent power production facility." Id.

UAMPS's Petition for Rehearing raises primarily the same issues that the parties presented to the Commission in their briefs and at oral argument. For reasons which have already been presented to the Commission, and which are summarized again below in response to UAMPS' Petition, the Commission should deny the Petition for Rehearing and let the Decision and Order stand.

I. THE COMMISSION'S ORDER IS CONSISTENT WITH THE LANGUAGE, POLICY AND PURPOSES OF THE ACT.

The question of whether the Commission has correctly interpreted the operative sections of SB 202 is a question of law which would be reviewed for correctness on appeal. State v.

MacGuire, 84 P.3d 1171, 1173 (Utah 2004). The Commission's interpretation is correct because it is consistent with the language of the Act and with the purpose of the Legislature in enacting SB 202.

A. The Commission's Decision is a Reasonable Interpretation of the Language of the Act.

When interpreting a statute, the Commission's goal must be to give effect to Legislative intent. Utah State Tax Comm'n v. Stevenson, 150 P.3d 521, 535 (Utah 2006). That intent is "evidenced by the plain language, in light of the purpose the statute was meant to achieve." *Id*. at 535. When the meaning of language is ambiguous, the Commission may look also to the Legislative history and the purpose of the statute as a whole. Bluffdale Homes, LC v. Bluffdale City, 167 P.3d 1016, 1035 (Utah 2007). In the present case, the Commission correctly interpreted the term "independent power production facilities" to include the interconnection line from the wind farm to the IPP switchyard.

UAMPS contends that because the definitions of "independent energy producer" and "independent power production facility" do not explicitly include "power lines," (only "power production facilities"), the Legislature must have intended statute should be construed to exclude power lines from the definition. Petition for Reh'g at 6-7. That inference is unreasonable in this case because it ignores the fact that every power production facility includes "power lines." There will be power lines connecting Milford's wind turbines, power lines to and from control facilities, power lines to transformers, and power lines interconnecting the generator's output to the grid. Which of these power lines does UAMPS contend the Legislature intended to omit from the term "power production facility?" The definition of independent power production facility implicitly includes "power lines," and every other type of "electric plant" necessary to

produce power and it is unreasonable to infer from the mere absence those words that it does not include them.

UAMPS similarly argues that, because the word "transmission" is included in "electric plant" and not in "power production facility," the latter by inference must exclude "transmission lines." UAMPS mischaracterizes the interconnecting power line as a "transmission," focusing on the length of the line, while ignoring its function. Petition for Reh'g at 4.[1] The meaning of "transmission" under the statute must be viewed in the context of regulated utilities. The Commission was correct to conclude "an interconnection line between an independent power production facility's generator and point of interconnection, which is to be built for the sole purpose of transporting the electricity produced from the wind farm to the interconnection point is reasonably considered an integral part of the independent power production facility." Decision and Order at 8. It should avoid parsing the statute as UAMPS urges.

UAMPS criticized the Commission "for relying on PUHCA's definition of "eligible facility" to reach its decision that the interconnection line is part of the independent power production facility. Petition for Reh'g at 8. In fact, the Commission did not rely on any single definition. If it had, without exception, every state or federal definition cited in this record would compel the conclusion that interconnection facilities are part of generation, not transmission facilities. See Reply Memorandum in Support of Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity ("Reply Memo") at 13-16. By contrast, UAMPS failed to cite a single source that would support the notion that the interconnection line should be characterized as a "transmission" facility. The

[1] UAMPS asks the Commission to consider "whether the Legislature intended to leave *more than 90 miles of transmission* lines uncertified." Petition at 4 (emphasis added).

Commission's decision assumed the commonly-held meanings of the terms "generation" and "transmission," and concluded that "the interconnection line … is reasonably considered an integral part of the independent power production facility." Decision and Order at 8. Its decision is consistent with the language of the Act.

B. The Commission's Decision and Order is Consistent with the Purposes of the Act.

UAMPS contends that the Commission's decision is inconsistent with the Act's purposes to encourage independent energy producers to develop resources, and to protect the welfare of the Utah rate-paying public, and that it would have "unintended consequences." Petition for Reh'g at 8-9. UAMPS' argument is based on a misreading of the statute and a misunderstanding of the Commission's duty to protect the Utah rate-paying public. As discussed below, the Commission's Decision and Order is fully consistent with the purposes of the Act.

1. The Commission's Decision is Consistent with the Legislature's Policy Statement.

The Legislature has stated that it is the policy of Utah to "encourage independent energy producers to competitively develop sources of electrical energy. . . and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations." Utah Code Ann. § 54-12-1.[2] Consistent with that purpose, in 2008, the

[2] The full text of that subsection of Title 54 provides:

> (1) The Legislature declares that in order to promote the more rapid development of new sources of electrical energy, to maintain the economic vitality of the state through the continuing production of goods and the employment of its people, and to promote the efficient utilization and distribution of energy, *it is desirable and necessary to encourage independent energy producers to competitively develop sources of electrical energy not otherwise available to Utah businesses, residences and industries served by electrical corporations, and to remove unnecessary barriers to energy transactions involving independent energy producers and electrical corporations.*

Utah Code Ann. § 54-12-1 (emphasis added).

Legislature created a new definition of "independent power production facility." Utah Code Ann. § 54-2-1(14) (2008). The new definition generally tracks the former definition of "small power production facility," except it removes the 80 megawatt limit on renewable generation facilities, and removes the requirement that the facility be a qualifying small power production facility under federal law. Compare § 54-2-1(20) (2007) with § 54-2-1(14) (2008). It is clear that the Legislature intended to expand the universe of facilities that would qualify as "independent power production facilities" under the statute. Senate Bill 202 furthers the legislative purpose of encouraging new sources of energy and removing barriers to wholesale transactions involving independent energy producers because it exempts owners of independent power production facilities from the requirement of obtaining a certificate for renewable resources when the power is to be sold only to wholesale purchasers. Utah Code Ann. § 54-2-1(13); 54-2-1(16)(d)(ii).

UAMPS urges the Commission to construe the new definition of independent power production facility narrowly to include only electric generation units, not the interconnection lines needed to bring the power to market. It contends that owners of independent power production facilities, although not required to obtain a certificate for their generators, should still be required to obtain certificates for their interconnection facilities. The result of UAMPS interpretation would be to discourage all renewable resource development because interconnection lines are required for every generator, and to leave the regulatory barriers in place – in short, to frustrate the Legislature's stated policy. It is reasonable for the Commission to conclude, therefore, that the Legislature intended to include interconnection facilities in the definition of independent power production facility.

The Legislature's statement of policy sets out three additional objectives: (1) "to encourage the development of independent and qualifying power production and cogeneration facilities," (2) "to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner," and (3) "to conserve our finite and expensive energy resources and provide for their most efficient and economic utilization." Utah Code Ann. § 54-12-1(2).

The Commission's Decision and Order obviously implements the first two objectives of promoting the competitive development of wind power as an economical, sustainable and environmentally acceptable resource. UAMPS contends that the third stated policy, to conserve Utah's "finite and expensive resources," is not fulfilled in the case of Milford I and II because California residents are the recipients of the power generated from the independent power production facilities. Petition at for Reh'g 9. That argument, however, imputes to the Legislature an intention that the resource should be conserved for the use of Utahns only, a notion never expressed in the policy statement. In fact, the Commission may not construe the Legislature's policy statement in a way that precludes generators in Utah from providing wholesale power for consumption outside the state. See Reply Memo at 18-19. The Commission's decision, therefore, is consistent with the only constitutionally permissible interpretation of the Legislative policy statement.

2. Welfare of the Ratepaying Public Not Affected.

Milford and UAMPS evidently agree that the Act is meant to prevent preferences and discrimination and to protect the welfare of the Utah rate-paying public. Petition for Reh'g at 9

(quoting United States Smelting, Refining & M. Co. v. Utah Power & Light Co., 197 P 902, 905 (Utah 1921); Utah Light & Traction Co. v. Pub. Serv. Comm'n, 118 P.2d 683 (Utah 1941)).

UAMPS claims that "the [Commission's] Order will favor citizens served by non-interlocal 'independent power production facilities' over Utah citizens served by interlocal entities." Petition for Reh'g at 9.[3] It does not explain how any Utah ratepayer would be harmed when no Utah ratepayer is at risk for the investment, and none of the power from the Project is currently destined for Utah consumers. Neither the rates of customers of the municipal electric providers or of the investor owned public utilities would be affected by the Project -- whether or not Milford is required to obtain a certificate.

The rates paid by the customers of municipal electric providers are not set by the PSC, but by the municipalities themselves, which have exclusive jurisdiction over electric utility rates and services provided to their residents.[4] The Act does not allow the PSC to review, set, or change those rates or to otherwise "protect the welfare" of those rate payers, whether or not they may be paying higher prices than customers of non-interlocal utilities. The effect on UAMPS' members' citizens of not requiring Milford to obtain a certificate is simply not a matter that the Commission can or should address.

UAMPS has repeatedly complained in this docket that exempting Milford I and II from the Commission's jurisdiction and regulation will somehow "unfairly burden Utah interlocal entities." Petition for Reh'g at 5, 9; 14; Memo in Opp. to Motion to Dismiss at 8; Petition to

[3] Generally, the "citizens" served by interlocals are residents of municipal electric providers, and the "citizens" served by "non-linterlocal entities" are everyone else in the territory of the investor owned public utility. UAMPS contention, therefore, is that the Order will favor ratepayers of investor-owned public utilities over ratepayers of municipal electric utilities.

[4] Although UAMPS' members include a few public utility districts, the vast majority of its members are municipalities located in Utah. See http://www.uamps.com/html/members.html for a list of members.

Intervene at ¶ 3.[5] While it is possible that UAMPS would be required to obtain a certificate to construct similar facilities,[6] SB 202 did not impose that "burden." The requirement, if it exists, has long been in place under Title 11. UAMPS is simply griping that the Legislature did not also revise Title 11 to expressly exempt interlocals from the certification requirements when it enacted SB 202. That is not a problem that UAMPS can remedy in Milford's certification proceeding before the PSC.

UAMPS has not shown, nor can it show, that it or the rate-paying public is harmed by SB 202, or by the Commission's decision in this docket. Because the "public convenience and necessity" is not implicated by construction of the Project (see Motion to Dismiss at 9-11), the purpose of the Act in protecting the welfare of the rate-paying public is not offended by the Commission's decision confirming that the Project is exempt from the requirement of obtaining a certificate.

3. UAMPS' Argument About Unintended Consequences is Irrelevant in this Proceeding.

UAMPS claims that the Commission's Decision and Order will have an "unintended consequence" that should persuade the Commission to reconsider its decision. Petition for Reh'g at 9-10. It suggests a scenario where Rocky Mountain Power ("RMP"), for example, could "hold and own" renewable resources through a "special purpose" entity. Under SB 202, UAMPS says,

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[5] UAMPS has never explained how its members are so "burdened," or why the purported effect of the Project on UAMPS is something the Commission should take cognizance of.

[6] As noted in Milford's Reply Memorandum, it is arguable that an interlocal entity, if it were to meet the definition of "independent energy producers," would be exempt from Commission jurisdiction as to an "independent power production facility" if it also met the requirements of Section 54-2-1(16)(d). The rights of UAMPS in that regard, of course, are not before the Commission in the present docket.

RMP "could avoid regulation or jurisdiction of the Commission as to siting as well as regulation of rates." Petition for Reh'g at 9.

That argument is based on a misunderstanding of Utah's siting requirements. Substantive siting requirements for electric facilities, including generators and power lines, are prescribed by other federal, state and local governmental authorities, not by the Commission. See Reply Memo at 19-22. Any entity constructing an electric facility, including Milford or UAMPS, would be subject to the same siting requirements, whether or not the entity was subject to the Commission's regulation.

In addition, neither RMP nor its affiliate could avoid rate regulation by such a scheme. They would be constrained by federal law and regulations governing wholesale transactions with utility affiliates. Moreover, the Utah Commission would retain jurisdiction to review any power purchase agreement between RMP and its special purpose affiliate before allowing RMP to put the cost of the affiliate's power in consumers' rates.

UAMPS fear of the so-called "unintended consequence" is only warranted if one ignores all of the other regulations that would protect the utility's ratepayers from the risk of the affiliate's investment. Given those protections, one cannot say that the Legislature did not intend the result reached by the Commission. The resulting imaginary harm from the unintended consequence is not reason for the Commission to reconsider its Order exempting Milford I and II from regulation.

4. Preserving Utah's Resources for Use by Utah Residents is Not a Legitimate Purpose of the Act

The Public Service Commission is responsible for regulating public utilities, not preserving Utah's natural resources for use by Utah residents. Utah Code Ann. § 54-1-10; § 54-

4-1; see also Reply Memo at 18-19. UAMPS' melodramatic claim that the Commission's decision "robs Utah individuals, entities and agencies of their resources" is utter nonsense, especially in light of the fact that the PSC does not control siting, land use or environmental permits. It would be a clearly unconstitutional exercise of Commission's authority to designate the wind resource as "belonging" to Utahns when the United States Supreme Court has interpreted the Commerce Clause to prohibit states from reserving their natural resources for the use of their own citizens. Hicklin v. Orbeck, 437 U.S. 518, 532-33 (1978).[7]

In sum, UAMPS has failed to offer one plausible argument that would suggest the Commission's Decision and Order runs contrary to the policies or purposes of the Act. On the other hand, the Commission's decision confirming that Milford is exempt from the need for a certificate serves the explicit purposes of the Act "to encourage independent energy producers to competitively develop sources of electrical energy not otherwise available, … to encourage the development of independent and qualifying power production and cogeneration facilities, ... [and] to promote a diverse array of economical and permanently sustainable energy resources in an environmentally acceptable manner." Utah Code Ann. § 54-12-1(2).

II. THE RECORD IS SUFFICIENT FOR THE PSC TO ISSUE A DETERMINATION ON MILFORD'S MOTION TO DISMISS

UAMPS has not contested the factual statements made in the Milford's Application or in the Decision and Order. Instead, it contends that the record is "inadequate" to support the Commission's Decision because (1) Milford has not disclosed information about the purchasers

[7] See also West v. Kansas Natural Gas, 221 U. S. 229 (1911) (striking down Oklahoma statute that prohibited out-of-state shipment of natural gas found within the state); Pennsylvania v. West Virginia, 262 U. S. 553 (1923) (statute requiring natural gas suppliers to satisfy fuel needs of West Virginia residents before transporting natural gas out of the State held to violate the Commerce Clause). The origin in one state of a resource bound for interstate commerce is not a "basis for preserving the benefits of the resource exclusively or even principally for that State's residents." Id.

of the output of Phase II; and (2) Milford has not submitted an interconnection study to the Commission. Neither fact is necessary to the Commission's decision.

A. There is Sufficient Information About Phase II of the Project to Support the Decision and Order.

The Commission's Decision and Order is based on its interpretation of SB 202 as applied to the statements made in Milford's Verified Application. Application at ¶¶ 5-20; Decision and Order at 1-3. The facts relevant to the decision pertain to whether the Project is an "independent power production facility" under Section 54-2-1(14), and whether the power from the Project will be sold "solely to an electrical corporation or other wholesale purchaser" as required for the exemption under Section 54-2-1(16)(d)(ii).

The determination that the entire facility is an independent power production facility is a matter of statutory interpretation applying the commonly accepted meanings of generation and transmission, not a matter of any contested fact. Milford's Application describes the Project in sufficient detail to show that it will produce electric energy solely by wind power as required under the statute. Utah Code Ann. § 54-2-1 (14)(a). Milford's uncontroverted statements are adequate to support the conclusion that, in light of the Commission's interpretation of the statute, Milford's generation facility is an independent power production facility and Milford is an independent energy producer.

Likewise, contrary to UAMPS assertion, there is adequate, uncontested averment in the record that the power from Phase 2 will be sold solely to an electrical corporation or other wholesale purchaser.[8] As the relevant facts stand uncontested, nothing further is required for the

[8] In its Application, Milford's witness stated that while "there is currently no definitive agreement for the sale of the power from Phase II facilities, … all Phase II sales will be wholesale transactions." Application at ¶ 15.

Commission to conclude that Milford will sell Phase II power only to wholesale purchasers, and thus qualifies for the exemption from Commission regulation and jurisdiction. Id. at § 54-2-1(16)(d)(ii).

B. There is No Need to Take Further Evidence on the Impact of Milford's Interconnection on the Power Grid.

Milford's Application described the possible paths of the interconnection line between the wind farm and the point of interconnection at the IPP substation. Application at ¶¶ 8-11. It noted that the interconnection agreement with the Intermountain Power Authority ("IPA") had not yet been finalized, but it was expected the power from Phase I would be transmitted over the existing 500 KV line to southern California. Application at ¶ 10. On May 13, 2008, Milford submitted supplemental exhibits to the Application demonstrating that the IPA had approved the interconnection agreement with Milford Phase I on March 31, 2008.[9]

UAMPS, as "Exhibit A" to its Petition for Rehearing, has now filed a document which, according to UAMPS' counsel, indicates that the addition of the Milford Project might require IPP to be "'backed down' in direct proportion to the amount Milford's Project is 'ramped up.'" Petition for Reh'g at 10. The Commission should disregard both UAMPS' Exhibit A and counsel's "testimony" about what the document says.[10]

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[9] Submission of Supplemental Exhibit to Application for Certificates of Convenience and Necessity, filed May 13, 2008. It was noted in oral argument that the IPA Coordinating Committee and the IPA Board had both concluded that "the interconnection of the generating project will not have adverse impact on the transmission system." See Transcript of Hearing at 61 (quoting Milford's Exhibit 11 to Application at 3 (Resolution CC-2008-001) and at 6 (Resolution IPA-2008-001)).

[10] Exhibit A to UAMPS' Petition for Rehearing is untimely, not verified, signed, sponsored or otherwise authenticated, there is no backup data for the conclusions stated in the document, the document does not say exactly what UAMPS represents it says, and its tendency to prejudice the trier of fact outweighs its relevance.

Assuming for the sake of argument that the information in Exhibit A is reliable, and that counsel's characterization of it is correct, and further assuming the IPA had not already approved the Interconnection Agreement, the Commission should still decline to consider UAMPS' complaint in this docket. FERC, not the PSC, has jurisdiction to determine disputes over interconnection agreements between wholesale suppliers and transmission providers, wholesale transactions of electric power in interstate commerce, or customer complaints about the reliability of an interstate transmission system. See Reply Memo at 16-18.[11] UAMPS is in the wrong forum to complain about the alleged impact of the Project on the transmission system.

III. SCPPA IS NOT A PROPER PARTY TO THIS PROCEEDING.

UAMPS raises for the first time on Petition for Rehearing the argument that SCPPA is an "indispensable" party to this proceeding. Petition for Reh'g at 11. Having been unsuccessful in convincing the Commission that SCPPA is the "real party in interest" behind the Milford Project (see Decision and Order at 8), it has augmented its rhetoric, offering another absurd argument in an attempt to drag SCPPA into this docket.

Claiming that Milford is a "shill" for SCPPA,[12] UAMPS cites the criteria set out in Rule 19 of the Utah Rules of Civil Procedure ("URCP"), dealing with the joinder of persons needed

[11] See 16 U.S.C.A § 824k (granting FERC authority to order and approve interconnection agreements); id. at § 2621(d)(15) (FERC authority to implement of interconnection standards); id. at § 824(a) (FERC jurisdiction over "the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce"); id. at 824(b) (FERC "jurisdiction over all facilities for such transmission or sale of electric energy"); 16 U.S.C.A § 824j(b) (FERC authority to ensure that reliability standards and guidelines are met in the transmission of electric energy).

[12] A "shill" is defined as "the confederate of a gambler, barker, or peddler, as at a carnival, who pretends to buy something, to make a bet, etc. in order to lure onlookers into participating." Webster's New Universal Unabridged Dictionary (1979). A more pejorative definition may found on a popular Internet dictionary: "one who poses as a satisfied customer or an enthusiastic gambler *to dupe bystanders into participating in a swindle*." www.thefreedictionary.com/Shills, (June 24, 2008) (emphasis added). Under that definition, UAMPS' characterization (which is repeated twice in its Petition (at 3, 12)), is tantamount to an accusation of fraud or conspiracy.

for just adjudication of claims. It criticizes the Commission for failing to undertake the analysis developed by the Utah courts to determine whether SCPPA would be a necessary party under URCP 19.

UAMPS' argument is nonsense. The proper parties to a proceeding before the Commission are defined by the Utah Administrative Procedures Act and the Commission's administrative rules. Utah Code Ann. § 63-46b-2(1)(f); R746-100-2(J); R746-100-7. The Commission is not bound by the Utah Rules of Civil Procedure, and need not allow joinder if it would be unworkable or inappropriate. R746-100-1(C).

UAMPS' argument is also disingenuous. UAMPS has not moved to join SCPPA in this docket, or attempted the analysis that it faults the Commission for omitting, or alleged that the analysis cannot be undertaken for lack of evidence. In its Opposition, UAMPS argued not that SCPPA was a necessary party, but simply that the Commission should require a certificate of Milford because, it contends, one would be required of SCPPA under Title 11 if it were to construct the facility. Petition for Reh'g at 15. UAMPS obviously does not view SCPPA as a "necessary" party as long as it can convince the Commission to require Milford to obtain a certificate.

While the Power Purchase Agreement ("PPA") between Milford and SCPPA is not necessary to the Commission's decision, the entire document has been submitted by UAMPS. As Milford summarized in its Application and explained in its Reply Memo, the PPA requires Milford to construct, operate and maintain the facility at its own risk and expense, and expressly disclaims any principal/agent relationship between the parties. See Application at ¶¶ 1-4,12-14, 25; Exh. 3 to App.; Reply Memo at 24-26 (citations to PPA omitted). If and when SCPPA ever

exercises the option to purchase, the Commission may want to consider whether to require SCPPA to obtain a certificate to operate the plant, although it does not appear that one would be required. The present proceeding is to consider whether a certificate is required to *construct* the facility.[13] Because Milford must bear the sole obligation, risk and expense of construction, it is the real party in interest. See PPA § 5.1 (Milford is responsible, at its sole risk and expense, to "site, permit, develop, finance and construct the Facility," and to "operate" and "maintain" and "own" the Facility "during the Agreement Term").

IV. THE COMMISSION'S ORDER DOES NOT VIOLATE STATE OR FEDERAL CONSTITUTIONS

The constitutional issues raised in this docket are not reason for the Commission to grant rehearing. As discussed below, UAMPS' complaints of unconstitutionality are completely without merit. Even if they were not, the Commission may not rule on the constitutionality of its own statutes. Nebeker v. Utah State Tax Commission, 34 P.2d 180 (Utah 2001).

A. The Order Does not Violate the "Uniform Operation of Laws" Clause of the Utah Constitution.

UAMPS argues in its Petition for Rehearing that SB 202, as interpreted by the Commission, "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.'" Petition for Reh'g at 5. It contends that such "different treatment" is a violation of the Utah Constitution's "uniform operation of laws" clause, which provides that "all laws of a general

[13] An independent energy producer cannot feasibly finance an independent power production facility unless it has a commitment from a wholesale purchaser for some or all of the output of the proposed plant. Even though the output may be committed, as long as the purchaser is a wholesale purchaser, a certificate should not be required because the ratepayers are not at risk for cost recovery. Utah Code Ann. § 54-2-1(16)(d)(ii). If UAMPS' argument is adopted, the purchaser would always be the "real party in interest," there would never be any "independent energy producers," and the revisions of SB 202 would be meaningless.

nature shall have uniform operation." Id. at 4; *quoting* Utah Const. art. I, § 24. As discussed above in this brief and in Milford's Reply Memo, the supposed "burden" on customers of municipal electric providers has not been demonstrated. Reply Memo at 26-27. Even if it had been, however, the Commission's decision still would not run afoul of the uniform operation of laws clause.

The uniform operation of laws clause protects persons similarly situated from different treatment under the law without justification. Anderson v. Provo City Corp., 2005 UT 5, *p18 (2005). To show a violation of the clause, a plaintiff must show that it is "similarly situated with respect to the purpose of the law," yet is treated differently by the law "on the basis of a tenuous justification that has little or no merit.". Id. The clause does not forbid discrimination between different classifications created by statute, but requires that those within the class are treated the same under the law. [14]

Senate Bill 202 did not create the differentiation between independent energy producers and interlocal agencies. Those two types of entities have long existed and have never been "similarly situated" in terms of the regulations imposed on their electric service operations. Indeed, they should be treated differently because the impact of their operations has different consequences for the rate-payers in this state.

In the present case, the Legislature, in conformity with its stated policy, has chosen to exempt independent energy producers selling power at wholesale from the jurisdiction and

[14] In differentiating between classes in relation to the purpose of a statute, the Legislature has wide discretion, and the courts may not second guess the "wisdom or policy of the law." Hansen v. Public Employees' Retirement Sys. Bd. Of Admin., 246 P.2d 591 (Utah 1952); see also State v. J.B. & R.E. Walker, 116 P.2d 766 (Utah 1941) (different treatment is permissible "as long as there is some basis for differentiation between classes … that bears a reasonable relation" to the purposes of the act in question).

regulation of the Commission. Arguably, it has not provided the same exemption to interlocal entities for the primary reason that interlocal members providing electric service are governmental entities instead of private firms. Because the former is funded by taxpayers and the latter by shareholder investment, it would seem the Legislature is justified in requiring more regulatory oversight over the interlocal entities when they propose to invest in new utility construction. UAMPS has not shown why it should be considered "similarly situated" to Milford, or offered a single argument to suggest that the Legislature was not justified in applying the exemption to independent energy producers and (arguably) not to interlocal entities. Neither SB 202 nor the Commission's interpretation of it amounts to a violation of the uniform operation of laws clause.

B. The Order Does Not Violate the Commerce Clause of the United States Constitution.

The Commerce Clause protects interstate commerce from undue restrictions imposed by state government.[15] UAMPS for the first time in its Petition for Rehearing claims that the Commission's Order raises "Commerce Clause concerns" because "excusing Milford from certification requirements may have an uneven and discriminatory effect on Utah utilities and interlocal entities." Petition for Reh'g at 13. That statement is about the effect of the Commission's order on utilities or interlocals operating in the state of Utah. It does not amount to a "commerce clause concern" because it does not pertain to interstate commerce or identify any way that the Commission's order could result in a burden on interstate commerce.

[15] Under the United States Constitution, states cannot regulate in any manner that is unduly burdensome or discriminatory to interstate commerce. See e.g., ACLU v. Johnson, 194 F.3d 1149, 1160 (10th Cir. 1999); Quick Payday, Inc. v. Stork, 509 F. Supp. 2d 974, 977 (D. Kan. 2007).

UAMPS also contends (without citation to authority) that if the Commission were to require Milford to obtain a certificate, it would place no undue burden on Milford but would "serve the legitimate public purpose of protecting the integrity of Utah's natural resources." Petition for Reh'g at 8. UAMPS fails to explain why requiring Milford to obtain a certificate would not be an undue burden, but requiring UAMPS to obtain one under the Interlocal Act would be, as it has consistently alleged in this proceeding. It is contrary to precedent already cited in this case for UAMPS to assert that the state has a legitimate interest in "protecting" Utah's natural resources for use by Utah residents.[16]

UAMPS' commerce clause argument is exactly backwards, and the Commission should disregard it.

C. The Order Does Not Violate the Privileges and Immunities Clause of the United States Constitution.

UAMPS also has asserted a backwards Privileges and Immunities argument. The Privileges and Immunities clause is to protect citizens of one state from discrimination by another state.[17] It only applies to "basic" or "fundamental" rights such as earning a livelihood, owning property, or freely traveling. See Milford's Reply at 6-7.

UAMPS claims that "SB 202 disadvantages an interlocal entity's constituent members and their citizens," who will not have "the same privileges as citizens served by 'independent

[16] See Milford's Reply Memo at 18, n.15 (citing Hicklin v. Orbeck, 437 U.S. 518, 532-33 (1978) (violation of Commerce Clause for Oklahoma to prohibit out-of-state shipment of natural gas); Pennsylvania v. West Virginia, 262 U. S. 553 (1923) (violation of Commerce Clause for West Virginia to require natural gas companies within state to satisfy state's fuel needs before transporting natural gas out of state)). It is clear that preserving "Utah's natural resources" does not justify imposing a burden on the shipment of wind power out of state.

[17] Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371, 383 (1978)(Privileges and Immunities Clause prevents states from imposing unreasonable burdens on citizens of other states); Hague v. Committee for Industrial Organization, 307 U.S. 496, 511 (1939)(Article IV, Section 2 [privileges and immunities] "prevents a state from discriminating against citizens of other states in favor of its own.")

power production facilities' that are not interlocal entites." Petition for Reh'g at 14. Even if UAMPS had standing to raise a claim for injury allegedly suffered by the *citizens* of UAMPS' "constituent members" (which it does not), UAMPS' complaint does not state a Privileges and Immunities claim. UAMPS' explanation of its argument does not even differentiate between the state doing the harm and the citizen of another state who suffer the harm, say nothing of alleging that one state's actions harmed the other state's citizens. UAMPS suggestion that SB 202 would somehow disadvantage UAMPS vis-à-vis some out-of-state interlocal fails to state a Privileges and Immunities claim.

V. UAMPS HAS FAILED TO STATE AN INTEREST IN THE OUTCOME OF THIS PROCEEDING.

UAMPS is asking the Commission to reconsider its order, and to require Milford to obtain a certificate of convenience and necessity to construct the interconnection line, but it has failed to show that it has any substantial interest in the matter. Absent a showing that its legitimate interests are affected by the requirement that Milford obtain a certificate, UAMPS has no right to participate in this proceeding, especially when its contemplated participation (apparently without a legitimate objective) would disrupting the orderly and prompt conduct of the proceedings.

Intervention in Commission proceedings requires UAMPS to submit "a statement of facts demonstrating that [its] legal rights or interests are substantially affected by the formal adjudicative proceeding." Utah Code Ann. § 63-46b-9(1)(c); R746-100-7. The purported statement of facts offered by UAMPS in its Petition to Intervene is as follows:

> UAMPS will be directly affected by the decision in this Proceeding because it is a Utah interlocal entity, and as such UAMPS is required to seek a Certificate of Public Convenience and Necessity

> from the Commission before proceeding with the construction of any electrical generating plant or transmission line. *Utah Code Ann.* § 11-13-304.

Petition to Intervene at ¶ 3. UAMPS' allegation that it is required to seek a certificate for constructing its own facilities, does not state facts demonstrating that its rights or interests are substantially affected by the adjudication of whether *Milford* is required to obtain a certificate.

UAMPS' Petition further states:

> Further, UAMPS' members potentially may be affected by the proposed project because of the transmission lines and the interconnection at the IPP switching station.

Id. It does not state how its members may be affected "because of" the transmission lines and interconnection at IPP. As discussed at length in Milford's Reply Memo, the effect of Milford's interconnection on the transmission system cannot be part of the present formal adjudicative proceeding because the potential effects are within FERC jurisdiction. See Reply Memo at 17-18.

UAMPS also offers the following statement in support of its intervention:

> If Milford Wind is granted the relief it seeks in the above Proceeding, questions and issues related to the constitutional and statutory rights and obligations of UAMPS and its members, to develop and construct generation and transmission facilities pursuant to Section 11-13-304 of the Act, may come before the Commission.

Petition to Intervene at ¶ 5. UAMPS raised those "questions and issues" in its Memo in Opposition to Milford's Motion to Dismiss, but the Commission correctly found it unnecessary to address them. This is, after all, a proceeding to adjudicate Milford's rights and obligations under Title 54, not to determine the rights of UAMPS under Title 11.

Finally, UAMPS claims that:

> In addition, several of UAMPS members may be affected by Milford Wind's proposed transmission facilities and their connection to the IPP switching station. The transmission system in Utah may well be affected by this proposed facility.

Petition to Intervene at ¶ 5. Although UAMPS suggests that its members *may* be affected by the proposed facilities, it has not alleged *that* they will be, or explained how they could be affected. If there is an effect on the transmission system in Utah, the FERC has jurisdiction to deal with it. The Utah PSC is not the appropriate forum in which to seek a remedy.

UAMPS, in its briefs (but not in its Petition to Intervene), claims that "Utah citizens served by interlocal entities" will be harmed by exempting Milford from the requirement of obtaining a certificate. Petition for Reh'g at 9. Even if such harm could be shown, (and UAMPS does not identify a harm), the Commission's jurisdiction constrains it from granting relief to municipal electric rate-payers. Moreover, UAMPS has no standing to assert the interests of its members' resident ratepayers (i.e., customers of municipal electric providers). UAMPS is not such a ratepayer, nor are any of its members. The Commission, therefore, should not countenance an argument that somehow the residents of UAMPS' member-municipalities are harmed by the Commission's Order.

In granting UAMPS intervention, the Commission did not conclude that UAMPS had demonstrated the necessary interest for intervention. Instead, it stated:

> The Commission may condition intervenor participation in these proceedings based upon such factors as whether intervenor is directly and adversely impacted by issues raised in the proceedings; … and how intervenor's participation will affect the just, orderly and prompt conduct of the proceedings.

Order Granting Intervention, at 1 (April 9, 2008). While the Commission has graciously allowed UAMPS to fully participate so far in these proceedings, it need not allow UAMPS to disrupt and prolong them without having shown a legitimate interest in the outcome. It is not enough for UAMPS to allege supposed harm that only the FERC or the municipalities have jurisdiction to remedy.

Milford did not object to UAMPS' intervention, relying in good faith on the vague assertions of interest stated in its Petition to Intervene. Now that UAMPS' case has been fully vetted, however, it is apparent that UAMPS has no legitimate interest in whether or not Milford is required to obtain a certificate of convenience and necessity. Milford remains puzzled, therefore, about the purpose of UAMPS' intervention. UAMPS complained at hearing about SCPPA's authority to "back down" power at IPP, and the effect of SB 202 creating "a horribly uneven playing field" for Utah interlocal entities. Tr. at 40-41.[18] It made similar statements in its briefs about an unfair burden when compared with out-of-state interlocal entities, and claimed that Milford was merely "an agent of SCPPA." Memo in Opposition at 8, 13. It has argued that SCPPA should be brought into this docket and thoroughly investigated, and that Milford, as a surrogate for SCPPA, should be made to undergo a full evidentiary hearing and to obtain a certificate. Petition for Reh'g at 3, 11-13, 14. UAMPS' statements in this case raise a serious

[18] Contrary to UAMPS' comment in its Petition for Rehearing, Milford never stated that UAMPS' interest was "to hustle a competitor." Petition for Reh'g at 4. In fact, UAMPS itself complained of competitive disadvantage when it argued that it should enjoy a "level playing field" with out-of-state public agencies. Tr. at 41. In response, Milford stated only that "leveling 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." Tr. at 63.

concern that its purpose in intervening may be for competitive reasons unrelated to this docket[19] or to litigate the effect of SB 202 on interlocal agencies subject to Title 11.

UAMPS does not appear to have any cognizable interest that would be "directly and adversely" affected by the issues raised in this docket. Milford requests, therefore, that if the Commission is inclined to conduct further proceedings, (which Milford strongly urges are unnecessary), then the Commission should limit or exclude UAMPS' participation unless and until it has clearly demonstrated such an interest.

CONCLUSION

The Commission's Decision and Order is supported by the uncontested facts, consistent with the language and purposes of the Act, and within the bounds of the state and federal constitutions. For the reasons stated above, the Commission should deny rehearing.

DATED this _1st__ day of July, 2008.

/s/ William J. Evans
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[19] If it were the case that UAMPS intervened for competitive reasons unrelated to the docket (e.g., an attempt to gain leverage in an unrelated dispute with SCPPA or Los Angeles), its intervention could be construed as an improper interference with Milford's Power Purchase Agreement and Interconnection Agreement, and an abuse of the Commission's administrative process, all of which would have resulted in significant delay and expense for Milford Wind.

CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of July, 2008, I caused to be sent by electronic mail and/or mailed, first class, postage prepaid, a true and correct copy of the foregoing **MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING** to the following:

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