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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	**PETITION FOR REHEARING OR REQUEST FOR RECONSIDERATION OF ORDER ON 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 Utah Code Ann. §§ 54-7-17 and/or 63-46b-12 and -13, and Rule R746-100-11(F) of the Utah Administrative Code, hereby files with the Public Service Commission ("Commission") this Petition for Rehearing or Request for Reconsideration of the Commission's Order on Petition for Rehearing, issued July 2, 2008.[1] In support of this Petition, Milford Wind states as follows.

[1] This Motion is styled in the alternative because it is not clear whether the Commission's statutes allow a petition for rehearing of an order granted on a petition for rehearing. See Utah Code Ann. § 54-7-15. If so, then this should be considered a Petition for Rehearing. If not, then the Utah Administrative Procedures Act provides an alternative procedure for Commission review. See Id. §§ 63-46b-12 and -13.

I. INTRODUCTION

On May 16, 2008, the Commission issued an Order Granting Motion to Dismiss the Application of Milford I and Milford II for Certificates of Convenience and Necessity (May 16 Order),[2] for the Milford Phase I and Phase II Wind Power Project (collectively "Project"). In the May 16 Order, the Commission concluded 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." May 16 Order at 8. It concluded, therefore, that Milford was "exempt from Commission jurisdiction and regulation with respect to the entire Project, including the interconnection line." Id.

On June 16, 2008, UAMPS filed a Petition for Rehearing arguing, among other things, that the "plain language" of Section 54-2-1(13) and (14) pertains to power production facilities, not to power lines, and that the absence in Section 54-2-1(16)(d)(ii) of any language specifying delivery of power as a requirement for exemption from Commission jurisdiction supports a conclusion that power lines are excluded from the definition of "independent power production facility" in Section 54-2-1(14). Petition for Rehearing at 6-8. Milford responded with a Memorandum in Opposition to Petition for Rehearing ("Opposition to Rehearing") filed on July 1, 2008.

On the following day, July 2, 2008, the Commission issued an Order on Petition for Rehearing ("Order on Rehearing"), concluding that although the wind farm at the heart of the

[2] In the Commission's Order on Petition for Rehearing, it refers to this order as the "May 15 Order." However, because the record reflects that the order was issued on May 16, 2008, Milford will use that designation for the purpose of the present brief.

Project is an independent power production facility exempt from Commission jurisdiction, the 90-mile interconnection line is not.[3] With respect to Milford's interconnection line, therefore, the Order on Rehearing reaches a conclusion exactly opposite to that reached in the Commission's May 16 Order.

The stated basis for the Commission's reversal of its May 16 Order is its acceptance of an argument originally advanced by the Division of Public Utilities in its pre-filed analysis and at oral argument. May 16 Order at 3. That argument consists of two parts. First, that under Section 54-2-1(14) the definition of independent power production facility should be limited to one that "produces electric energy" and should exclude "transmission" facilities. Second, that such a reading of Section 54-2-1(14) is bolstered by the fact that subsections (i) and (iii) of Section 54-2-1(16)(d) both speak to "delivery" of the commodity or service produced by the facility, whereas the exemption under subsection (ii) does not mention "delivery." Based on the absence of the word "delivery" in subsection (ii), the Commission concluded that subsection (ii) supports the argument that Section 54-2-1(14) applies to generation facilities and excludes "transmission" lines. Order on Rehearing at 3.

The Commission should reconsider its Order on Petition for Rehearing and reinstate its order dismissing Milford's Application because the Commission's interpretation of the relevant statutes in the Order on Rehearing is an irrational interpretation of the plain language, because it countermands the Legislature's clear intent in enacting SB 202 and its stated policies under the Public Utilities Act ("Act"), because it is arbitrary and capricious, because it exceeds the

[3] The May 16 Order refers to the 90-mile line as "transmission." However, because that designation is at the heart of one of the issues in this Petition for Rehearing, Milford will refer to the line throughout this brief as the "interconnection" line unless referring to the Commission's characterization of it in its May 16 Order.

Commission's jurisdiction, and because it is an unconstitutional application of the law under the Utah Constitution and the United States Constitution.

II. ARGUMENT

A. The Commission's Interpretation of the Applicable Statutes in its Order on Petition for Rehearing is Contrary to the Legislative Purposes of SB 202 and Title 54.

When interpreting a statute, the Commission's primary 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). The plain language of the applicable statutes in the present case is not sufficiently clear that the Commission was able to avoid reversing its own previous interpretation. Yet, the Commission's Order on Rehearing failed to consider the legislative intent. The Commission should reconsider its interpretation of the statutes in question, looking not only to their language, but also to the legislative intent and the purposes of the Act.

The purposes of the Act and the Legislature's intent in enacting Senate Bill 202 ("SB 202") are clear. It is the stated policy of the legislature "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.[4] Likewise, the amendments to Title 54 in SB 202 clearly demonstrate the Legislature's intent to reduce carbon emissions by, among other things, encouraging the construction of renewable energy resources. To that end, and in harmony with the policies of the Act, the Legislature expanded the class of facilities that would qualify under the Act as independent power production facilities, thus freeing the development of new wholesale generators from the delay and barriers imposed by the requirement of obtaining a certificate (or submitting to other Commission regulation). Utah Code Ann. § 54-2-1(14); 54-2-1(16); 54-2-1(7); 54-4-25.

Milford's is exactly the kind of Project that the Act and SB 202 are meant to encourage – the development of a new renewable resource that contributes to the economic vitality to Millard and Beaver Counties. The wind farm and interconnection line are to be constructed without ratepayer or government contribution. Especially with respect to the interconnection line, Milford's sizable investment will allow for the development of a remote renewable resource that would not otherwise be available. The Commission must interpret the statutes in light of the stated goal to promote precisely this kind of development and to remove barriers to Milford's ability to generate and deliver power to electrical corporations. Id. at § 54-12-1(1). If there is an ambiguity in the language of one of the applicable statutes, it must be resolved in favor of those policy goals.

[4] Section 54-12-1 provides as follows:

> (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.

In its Order on Rehearing, the Commission entirely avoided any consideration of legislative intent and instead applied the new statutes in a way that effectively rescinds SB 202's amendment to Title 54. The Commission's decision exempting the wind farm but regulating the interconnection line is squarely contrary to the legislative intent. Rather than promoting rapid development and removing barriers, the decision requires Milford to undergo nearly the same expense, delay and regulatory boondoggle that it would encounter in obtaining a certificate for the entire Project. Moreover, as discussed below, the effect of the Commission's decision, if evenly applied to all independent energy producers, would create *new* regulatory barriers to renewable development that did not exist before the Commission's Order on Rehearing, a result both bizarre and ironic given the Legislature's clear intention to eliminate, not increase, the regulatory burden on independent power producers and their projects.

Milford respectfully requests that the Commission re-examine its interpretation of the applicable statutes in light of the Legislative intent and reinstate its order dismissing the Application.

B. The Commission's Designation of Milford's Interconnection Line as "Transmission" is Arbitrary and Capricious, an Abuse of Discretion, and Inconsistent with Prior Commission Practice.

Although the Commission is not constrained by prior precedent in exactly the same way a court might be, the Commission may not arbitrarily or capriciously reverse itself. Salt Lake Citizens Congress v. Mountain States Tel. & Tel. Co., 846 P.2d 1245 (Utah 1992); Williams v. Public Serv. Comm'n, 754 P.2d 41, 52 (Utah 1988). Adherence to precedent is an essential component in establishing the rule of law in the arena of administrative law, and an agency must

have a reasonable basis grounded in the public interest for departing from prior practice. Salt Lake Citizens Congress, 754 P.2d at 1252 -53.

The Commission's Order on Rehearing is arbitrary and capricious and an abuse of discretion in designating Milford's interconnection line as "transmission" instead of part of the generation facility. The Commission is well aware of the difference between interconnection lines, transmission lines and distribution lines. While "transmission" may sometimes be used in the generic sense of any line that transmits power, those terms have separate, more specialized meaning in the industry, and each receives different regulatory treatment under both state and federal laws. Milford's line interconnects the generator to the point of the wholesale sale at a transmission provider's system. Such lines are classified under federal law, the law of other states, the FERC's and the Commission's own ratemaking orders, and in the Commission's prior practice as part of generation facilities, not transmission facilities.[5] The parties have argued this issue in their briefs and Milford reasserts those arguments here. See Milford's Reply Memorandum at 13-16; Opposition to Reh'g at 6.

In its May 16 Order, the Commission correctly concluded that "the *interconnection* line … from the wind farm facility to the interconnection point is reasonably considered an integral part of the independent power production facility." May 16 Order at 8 (emphasis added). Yet, in

[5] Title 54 defines a "qualifying power production facility" as one that meets the requirements of federal law for designation as a "qualifying small power production facility." Utah Code Ann. § 54-2-1(14); 54-2-1(19). Under the corresponding federal law (referred to in the requirements of the Utah statute), a "qualifying small power production facility" includes the "transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment)." 18 C.F.R. § 292.101(b)(1)(i) (2007). See also Oregon Admin. R. § 860-082-0010 (38) ("Small Generator Facility" means the equipment used … to generate, or store, electricity … and may include a PV array or a prime mover and electric generator and the Interconnection Equipment required to safely interconnect with the T&D System); 15 U.S.C.A. § 79z-5a (a)(B)(under federal regulations applicable to exempt wholesale generators, a "generation" facility "includes interconnecting transmission facilities necessary to effect a sale of electric energy at wholesale." (emphasis added). As indicated in the citations above in the note, the term "power production" is synonymous with "generation."

its Order on Rehearing, without further explanation than to state that it had "reconsidered" its May 16 Order, the Commission reversed itself and decided that “the proposed 90-mile *transmission* line is not excluded from Commission jurisdiction.” Order on Rehearing at 3 (emphasis added). The obvious implication of the Commission's orders is that while the “interconnection” line in the May 16 Order was part of the power production facility, the “transmission” line in the Order on Rehearing is not. The Commission's Order on Rehearing thus reaches the opposite result regarding the same power line simply by re-characterizing “interconnection” as “transmission.” While the Commission's expertise in utility matters may entitle it to some deference when technical meanings must be ascribed to its statutes, its Order on Rehearing is an abuse of that discretion.

The Commission's Order on Petition for Rehearing designating Milford's line as transmission instead of generation does not expressly rely on the fact that Milford's interconnection line is 90 miles long. Indeed, the Commission did not identify any basis for the designation. Clearly, the statutes do not provide a basis for distinguishing between transmission and generation based on the length of an interconnection line and, to the extent the length of the line carried any weight with the Commission in designating it as transmission, or requiring a certificate for it, the decision is erroneous. Because Commission does not have siting authority, the path of the line, no matter how long, cannot provide a basis for requiring a certificate. Additionally, because the Commission does not have jurisdiction over the interconnection at IPP, the movement of power in interstate commerce, or the effect of Milford's connection on the

transmission grid, nothing about the line or the length of it is relevant to any matter that the Commission has authority to regulate.[6]

Milford requests that the Commission reconsider its designation of the line as "transmission," and find that it is an interconnection line and part of the generation facility, exempt from Commission jurisdiction.

C. The Commission's Interpretation And Application of Section 54-2-1(16)(d) is Incorrect, Arbitrary and Capricious and an Abuse of Discretion.

The Order on Rehearing relies on the Division's suggestion that an interpretation of the definition of "independent power production facility" that excludes facilities carrying power to the point of interconnection is "bolstered" by the fact that "subsections (i) and (iii) of *UCA* § 54-2-1(16)(d) both speak to delivery of the commodity or service such that transmission should not be viewed as exempted under subsection (ii)." Order on Rehearing at 3. Without citing any precedent, and without any discussion or analysis, or any appeal to legislative intent or policy, the Commission concluded, "As such, the Commission may properly conduct certification proceedings for the proposed transmission line." Id. The Commission's reliance on the Division's reading of Section 54-2-1(16)(d) has led the Commission to an arbitrary and incorrect interpretation of the statute.

Section 54-2-1(16)(d) consists of three exemptions from the jurisdiction and regulation of the Commission for independent energy producers (or "IEPs") based on how the IEP provides services or disposes of its power. The exceptions under subsections (i) are based on whether the

[6] These matters, if subject to regulation at all, would be subject to FERC regulation, not that of the Utah Commission. See 16 U.S.C.A. § 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).

"commodity or service is produced or delivered" to specified persons for consumption. The exemption is subsection (iii) is based on whether the commodity or service is delivered to an affiliate of the producer or a user on contiguous property. The controlling factor of the exemptions under subsections (i) and (iii) is the status of those who *use* the energy delivered by the independent power production facility. In other words, subsection (i) and (ii) provide exemptions based on the delivery of energy or services to the *consumer*.[7] The associated facilities over which power is delivered to consumers are distribution facilities.

Subsection (ii) provides an exemption when "the commodity or service is sold by an independent energy producer solely to an electrical corporation or other wholesale purchaser." 54-2-1(16)(d). That exemption is based on the nature of the wholesale transaction – not on the class of consumer. While "delivery" under subsections (i) and (iii), is downstream to the end user through distribution facilities; the delivery of power under subsection (ii) is upstream to a point of interconnection with transmission facilities. Subsections (i) and (iii) are end use through distribution facilities, subsection (ii) is a wholesale sale at the point of interconnection with transmission facilities. It is irrational to interpret the absence of a word referring to distribution facilities to exclude interconnection facilities.

In addition, it is worth noting that subsection (iii) (providing the exemption for affiliates) does not contain the word "produced." Under the Commission's logic, an IEP providing power to an affiliate would be exempt from certification requirements for its distribution facilities but

[7] Doubtless, the Legislature chose the word "delivery" instead of "sale" because it is not just a "sale" of power to consumers that otherwise would invoke the jurisdiction of the Commission. See 54-2-1(16)(a) (defining public utility as an electrical corporation where the commodity "is delivered to" the public generally, or "furnished" to consumers). In other words, it is the "delivery" or "furnishing," not necessarily the "sale" of power that makes one a public utility.

not for its production facilities. The Commission's interpretation of Section 54-2-1(16)(d) produces an absurd result.

The purpose of requiring a certificate of convenience and necessity is to protect customers of monopoly utility providers from constructing unnecessary facilities at the ratepayers expense. *See, e.g., Utah Light & Traction Co. v. Pub. Serv. Comm'n*, 118 P.2d 683 (Utah 1941)(for the purpose of the Act is to protect the welfare of the Utah rate-paying public.) See discussion below in section E(3) of this brief and in Milford's Motion to Dismiss (the relevant portion of which is herby incorporated herein). Those purposes are not served by exempting part of an IEPs generation facility and requiring a certificate for another part.

Neither a rational interpretation of the language of Section 54-2-1(16)(d), nor the purposes of the Act provides any support for the notion that interconnection facilities should be excluded from the exemption in subsection (ii).

D. The Commission's Interpretation of the Applicable Statutes is Incorrect, Arbitrary and Inconsistent with Prior Commission Practice.

The Commission may not interpret or apply a statute arbitrarily, or in a way that is inconsistent with its prior practice unless the Commission "justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency." Utah Code Ann. § 63G-4-403(c)(4)(h)(iii) – (iv) (2008); Even if a certain practice of the Commission's is not a result of any formal decision or rule, the Commission may not interpret or apply a statute in a way that is inconsistent with its prior practice without justifying the inconsistency. Pickett v. Utah Dept. of Commerce, 858 P.2d 187, 190-92 (Utah 1993); see also Salt Lake Citizen's Congress, 754 P.2d at 1252 (*stare decicis* is an essential component in establishing the rule of law in the arena of administrative law).

1. The Commission's Interpretation and Application of Section 54-2-1(14) is Incorrect and Inconsistent with Prior Commission Practice

The Commission's Order on Rehearing determined that "a plain reading of UCA §54-2-1(14) includes only production, not transmission, facilities within the definition of an independent power production facility." Order on Rehearing at 3. As discussed above, the designation of the line as "transmission" is merely a tautology, meant to facilitate an incorrect interpretation of the statute. In excluding power lines that connect a generation device to the transmission system, the Commission has incorrectly interpreted the statute and has unjustifiably broken with its prior practice in disregard of legislative intent and public policy.

Under the version of the Act in effect prior to SB 202, "independent energy producers" meant entities that own, control or manage *small* power production facilities or cogeneration facilities. 54-2-1(13) (2007). "Small" power production facilities were, essentially, renewables smaller than 80 megawatts that are also "qualifying facilities" under federal law ("QFs").[8] Under the post-SB 202 statute, "independent energy producer means entities that own, control or manage *independent* power production facilities or cogeneration facilities. 54-2-1(14) (2008).[9] That includes not only QFs, but also entities that own, control or manage renewable facilities larger than 80 megawatts and that are not QFs under federal law. Utah Code Ann. §54-2-1(14).

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[8] A "small power production facility" was defined as

> a facility that (a) produces electric energy solely by the use, as a primary resource, of biomass, waste, renewable resources, geothermal resources, or any combination of them; (b) has a power production capacity that, together with any other facilities located at the same site, is not greater than 80 megawatts; and 3) is a qualifying small power production facility under federal law.

Utah Code Ann. § 54-2-1(20) (2007) (emphasis added).

[9] Section 54-2-1(14) provides:

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

Utah Code Ann. § 54-2-1(14) (2008) (emphasis added).

QFs are considered independent power production facilities under the new statute just as they were under the old statute, without any change other than their designation as "qualifying" instead of "small." Id. at §54-2-1(19). Thus, the net effect of SB 202 was to expand the class of independent power production facilities that are exempt from Commission jurisdiction by removing the 80 megawatt limit and the QF requirement from renewable generators. Id. at § 54-2-1(14)(a). The legislative intent in doing so is explicit in the Commission's statutes,[10] and obvious through the inclusion of the amendment to Title 54 in SB 202.[11] In the interest of reducing carbon emissions, the new Section 54-2-1(14) promotes the development of larger renewable generators by putting them on the same regulatory footing as QFs when it comes to obtaining exemptions from the requirement to obtain certificates for their generation facilities.

Before the present case, as far as Milford is aware, the Commission never attempted to distinguish between the part of a QF's generator that "produces" the power and the part that "transmits" the power to the point of interconnection, and never required a certificate to construct one part but not the other.[12] The fact that the Legislature has now included (along with QFs) large renewable generators within the definition of independent power production facilities does not present any rational basis for now making the distinction. The Commission's arbitrary designation of Milford's interconnection line as "transmission," and its conclusion that "as such,"

[10] The Act should be interpreted "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 … 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.

[11] Entitled: "Energy Resource and Carbon Emission Reduction Initiative."

[12] In fact, Federal law prohibits such a result. See 18 C.F.R. § 292.101(b)(1)(i) (a "qualifying small power production facility" includes the "transmission lines and other equipment used for interconnection purposes (including transformers and switchyard equipment)").

it is not part of the independent power production facility is an unjustified departure from its prior practice.

The plain language of the statute certainly does not support such a result. If there is an ambiguity in the statute — and it is not apparent that there is — the same ambiguity existed for QFs long before SB 202. Even if an ambiguity has just now become noticeable to the Commission, the Commission may not arbitrarily interpret the statute to reach a different result in Milford's case than it has done for every other QF in Utah. It must look to legislative history and policy and, in that light, justify the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the decision. The Commission's Order on Rehearing did not even attempt the inquiry.

The Commission should reconsider its departure from prior precedent, interpret and apply Section 54-2-1(14) fairly and rationally, and reinstate the dismissal of Milford's Application.

2. The Commission's Interpretation and Application of Section 54-2-1(16)(d) is Incorrect and Inconsistent with Prior Commission Practice.

As discussed above in Section C of this brief, Section 54-2-1(16)(d) provides certain exemptions from Commission jurisdiction and regulation for independent energy producers. Those exemptions are potentially available to all IEPs – those who attained that status by owning or operating QFs ("small" power production facilities under the old statute), or independent energy producers operating large power production facilities under the current law. Compare 54-2-1(15)(d) (2007) with 54-2-1(16)(d) (2008). There is no basis in the plain language of the statute for applying Section 54-2-1(16)(d) differently to QFs than for large independent energy producers.

The Commission has interpreted the statutes in the present case to mean that Milford, as an owner of independent power production facility claiming an exemption from jurisdiction under subsection (ii) of Section 54-2-1(16)(d), is exempt from regulation as to its power production facilities, but not as to its interconnection lines. If the Commission's Order on Rehearing were consistent with prior orders and practice, all IEPs, including QFs, would have been required to obtain certificates for their interconnection lines. Clearly, that is not how the Commission has ever interpreted its statutes — until the present case involving Milford Wind.

Two projects are presently under construction in Utah that illustrate the Commission's arbitrary application of the statute to Milford Wind. There is a wind facility presently under construction Utah County. The facility is under the 80 megawatt limit, presumably QF under Section 54-2-1(19), and an independent power production facility under Section 54-2-1(14). Another IEP has recently begun construction on a geothermal plant near Beaver, Utah.[13] That facility will be a federal QF status and thus an independent power production facility as well. Each of them apparently could claim exemption under subsection (ii),[14] and apparently have (tacitly) done so, since neither has approached the Commission for a certificate.[15]

As it pertains to their right to an exemption under 54-2-1(16)(d), these Utah wind and geothermal projects are in no different position than Milford Wind. If the Order on Petition for Rehearing were applied fairly to all similarly situated IEPs, both of these QFs should be required

[13] Groundbreaking for construction of the Raser facility took place on May 8, 2008. http://www.rasertech.com/media/movies/html/geothermal_groundbreaking.html

[14] The QF status of these plants does not exempt them from regulation under 54-2-1(16)(d), unless they also fit into one of the subsections. Wasatch Wind has negotiated wholesale contracts for its output, and it would be expected that Raser has done the same.

[15] See also In The Matter of the Petition of Pioneer Ridge LLC & Mountain Wind For Approval of a Contract For the Sale of Capacity and Energy from its Existing and Proposed of Facilities, Docket No. 05-035-09, Application at ¶ 4 (alleged QF requesting approval of wholesale contract so that construction on wind facility could begin, but not requesting certificate of convenience and necessity); Id., Report and Order (May 19, 2006) (Commission ordering pricing provisions but not requiring certificate of convenience and necessity).

to obtain certificates for their lines that connect their power production facilities to the grid. Yet, each of them is right now enjoying the benefit of the (apparently claimed) exemption as to both their generation facilities and their interconnection lines.

In ruling in the present case that only the part of Milford's facility that produces power is exempt, the Commission has arbitrarily applied the law differently to Milford than to other similarly situated independent energy producers who are selling the output of their generators to an electrical corporation. The Commission should reconsider its Order on Rehearing and grant Milford the same exemptions as these other IEPs.

E. The Commission Has Acted Beyond the Jurisdiction Conferred by Statute by Requiring Milford to Obtain a Certificate for its Interconnection Facilities.

Beginning with Milford's Memorandum in Support of its Motion to Dismiss, and throughout this proceeding, Milford has contended that the Commission does not have jurisdiction over Milford or any of its facilities. When Milford filed its Application, it did so without acquiescing to the Commission's jurisdiction. The Commission, upon granting Milford's Motion to Dismiss, effectively declined jurisdiction. Now that the Commission has issued its Order on Rehearing, asserting authority to regulate the interconnection line, Milford again raises its challenge to jurisdiction, and reasserts and incorporates herein the arguments against Commission jurisdiction that are set out in its Motion to Dismiss, its Reply Memorandum in Support of Motion to Dismiss and its Opposition to Motion for Rehearing. Rather than reiterate in full those arguments in this Brief, Milford summarizes them as follows.

1. The Commission's Jurisdiction Extends Only to Entities that Provide Utility Services or Commodities to the Utah Public.

The Commission's jurisdiction is limited to the manifest purposes of the Act to regulate monopoly providers of utility services and commodities for the purpose of protecting the welfare of the Utah rate-paying public.[16] The authority of the Commission may not be exercised unless the purposes of the Act in protecting consumers of utility services and commodities are clearly served.[17] That authority over public utilities,[18] extends to certain "electrical corporations" that own or operate electric facilities or deliver electric power for public service within the state.[19] However, "if the business or concern is not a public service, where the public has not a legal right to the use of it, where the business or operation is not open to an indefinite public, it is not subject to the jurisdiction or regulation of the commission." *State v. Nelson,* 238 P. 237 (Utah 1925); Utah Code Ann. § 54-2-1(7); 54-2-1(15).

Milford is not an entity that will provide services or commodities to the public. It will have generation facilities located within the state, but the power will be sold wholesale only, and will not be used for public service within the state. See Motion to Dismiss at 5-7. To require a

[16] See Milford's Motion to Dismiss at 5-7; citing, e.g., Utah Light & Traction Co. v. Pub. Serv. Comm'n, 118 P.2d 683 (Utah 1941).

[17] The Utah Supreme Court has stated that "where a 'specific power is conferred by statute upon a tribunal, board or commission with limited powers, the powers are limited to such as are specifically mentioned.'" Williams v. Public Serv. Comm'n, 754 P.2d 41, 50 (Utah 1988) (quoting Union Pac. R.R. Co. v. Public Serv. Comm'n, 134 P.2d 469, 474 (Utah 1943) (citation omitted). "The PSC has no inherent regulatory powers and can only assert those which are expressly granted or clearly implied as necessary to the discharge of the duties and responsibilities imposed upon it." Williams, 754 P.2d at 50. If there is "any reasonable doubt of the existence of any power," it "must be resolved against the exercise thereof." Id. (quoting Public Serv. Comm'n v. Formal Complaint of WWZ Co., 641 P.2d 183, 186 (Wyo. 1982).

[18] A public utility "includes every … electrical corporation … where the service is performed for or the commodity delivered to, the public generally ... or to any member or consumers within the state for domestic, commercial or industrial use." Utah Code Ann. § 54-2-1(14) (emphasis added).

[19] The Commission also has authority over certain other entities providing electric commodity, services and facilities to the public. Utah Code Ann. §§ 54-4-1; § 54-2-1(7) (emphasis added); 17B-2a-406; 11-13-102, -304; 54-9-1 et seq.

certificate for any part of Milford's generation facility is to extend the Commission's jurisdiction beyond the limit allowed under the Act.

2. Milford is Not an "Electrical Corporation" Within the Meaning of the Public Utilities Act.

When Milford filed its Motion to Dismiss, SB 202 had not passed the Legislature. With the enactment of SB 202, Milford has become an independent energy producer under the new definition in Section 54-2-1(14). While Commission's Order on Rehearing misconstrued the statute and granted an exemption under 54-2-1(16)(d) for Milford's wind farm only, the Commission entirely failed to address Milford's original contention that it is not an electrical corporation under 54-2-1(7). [20] Even if the Commission's interpretation of 54-2-1(16)(d) is correct (which it is not), section 54-2-1(7) provides an independent grounds for exemption from the requirement of obtaining a certificate for Milford's interconnection line as well as the wind farm.

Although the plain language of Section 54-2-1(7) is arguably ambiguous, a review of the legislative history of that section demonstrates that the legislature never intended to extend the reach of the statute and the Commission's jurisdiction to entities that do not serve the public. See Motion to Dismiss at 7-9 and Appendix 1 thereto, (which are incorporated herein by reference). Nothing in history of that section or the amendments to it can be read to support the

[20] The Commission's Order on Rehearing is based solely on its (erroneous) interpretation of 54-2-1(16)(d). It failed to address Milford's claim of exemption under Section 54-2-1(7) which provides as follows:

> "Electrical corporation" includes every corporation, cooperative association, and person, their lessees, trustees, and receivers, owning, controlling, operating, or managing any electric plant, or in any way furnishing electric power for public service or to its consumers or members for domestic, commercial, or industrial use, within this state except independent energy producers, and except where electricity is generated on or distributed by the producer solely for the producer's own use, or for the use of the producer's tenants, or for the us of members of an association of unit owners formed under Title 57, Chapter 8, Condominium Ownership Act, and not for sale to the public generally.. . . .

Utah Code Ann. § 54-2-1(7) (emphasis added).

notion that the Commission's jurisdiction should extend to entities that own or operate electric plant that is merely located within the state when there is no commodity or service delivered to the public. Because under the Act, the requirement of obtaining a certificate of convenience and necessity is imposed only on "electrical corporations," (Utah Code Ann. § 54-4-25(1)), and because Milford (which provides no service or commodity to the public) does not fall within the definition of "electrical corporation," Milford is not required to obtain a certificate for any of its facilities. Utah Code Ann. § 54-2-1(7).

In addition, the definition of "electrical corporation" expressly excludes independent energy producers from the definition of "electrical corporations." Id. With the enactment of SB 202, Milford has become an independent energy producer. Unlike Section 54-2-1(16)(d), which exempts an IEP only with respect to its independent power production facilities, the exemption under Section 54-2-1(7) applies more broadly, exempting an IEP with respect to "any electric plant." Even if it were a correct reading of the law for the Commission to conclude that under 54-2-1(16) Milford is exempt from all Commission jurisdiction respect to the wind farm but not the interconnection line (which it is not), Milford is still exempt under 54-2-1(7) from obtaining a certificate for its any of its facilities.

Neither the language of Section 54-2-1(7) nor the purposes of the Act support a conclusion that Milford is an electrical corporation with respect to any part of its plant. Because only electrical corporations are required to obtain certificates of convenience and necessity, Milford is not required to obtain a certificate for the wind farm or the interconnection line.

3. The Purpose of the Act in Requiring a Certificate of Convenience and Necessity is Not Applicable to Milford's Interconnection Line

The purpose of requiring a certificate is to ensure that "that present or future public convenience and necessity does or will require the construction" of any proposed "line, route, plant or system."[21] Id. "Convenience and necessity" means "a definite need of the general public for such service where no reasonably adequate service exists, … look[ing] to the future as well as the present." Id. Requiring a certificate allows the Commission to oversee a public utility's selection of the type of resource, the bidding process, the review of other possible least cost alternatives, and the ultimate cost and timing of the construction to ensure that ratepayers are protected from an otherwise unsupervised monopoly constructing facilities that may not be necessary, convenient or cost effective for the public.

None of the purposes for requiring a certificate obtain in the present case. Milford's facility is not constructed for public service; all of the power carried over the interconnection line is entirely committed to the wholesale market; and the public will not pay for the construction or receive services from the line. The question of whether construction of the interconnection line is necessary to, or serves the public convenience is simply not a relevant inquiry for the Commission to undertake in this docket. See Motion to Dismiss at 9-11 (incorporated herein by reference.)

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[21] The provision requiring a certificate of convenience and necessity states in relevant part:

> Except as provided in Section 11-13-304, a gas corporation, electric corporation, telephone corporation, heat corporation, water corporation, or sewerage corporation may not establish, or begin construction or operation of a line, route, plant, or system or of any extension of a line, route, plant, or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require the construction.

Utah Code Ann. § 54-4-25(1) (emphasis added).

While the Commission has authority under Section 54-4-25 to ensure that other governmental authorities have issued the proper permits for the construction of utility facilities, that authority is dependent upon the Commission's authority to require a certificate to demonstrate that the facilities are needed to serve the public. Id. at §54-4-25. The Commission has no siting authority and no authority to oversee permitting except through the certification process, which in this case should not be required of Milford for the reasons stated above.[22]

The Commission should reconsider its Order on Rehearing and reinstate its dismissal of the Application. In the absence of authority to require a showing that the public convenience requires the construction, neither the purpose of the Act nor the public interest is advanced by requiring Milford to obtain a certificate for the interconnection line.

F. The Commission's Order on Rehearing is Unconstitutional

Section 54-2-1(14) and 54-2-1(16)(d) on which the Commission's action is based is unconstitutional as applied.

1. The Order on Petition for Rehearing Violates the Uniform Application of Laws Clause of the Utah Constitution

The Uniform Operation of Laws Clause protects persons similarly situated from different treatment under the law without justification. Utah Const. art. I, § 24; Anderson v. Provo City Corp., 2005 UT 5, *p18 (2005). A violation of the clause occurs when persons are "similarly

[22] The Commission has recently stated:

> The Commission desires to clarify the purpose of this proceeding. This proceeding is not about the location or siting of the Transmission if it is built. The Commission does not have jurisdiction over the siting of transmission lines. This proceeding is to determine if present or future public convenience and necessity does or will require construction of a transmission line.

In the Matter of the Application of Rocky Mountain Power for Certificate of Convenience and Necessity Authorizing Construction of the Populus-to-Terminal 345 kV Transmission Line Project, Docket No. 08-035-42 (Utah P.S.C., May 20, 2008), Scheduling Order at 1 (emphasis added).

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.[23]

The Commission's interpretation of Section 54-2-1(13), (14) and (16)(d) has resulted in different treatment of Milford than other independent energy producers. As discussed above, the Commission has never interpreted or applied these statutes in a way that would require a QF to obtain a certificate for its interconnection line. Under the statutes as amended by SB 202, Milford is similarly situated to any other independent energy producer, including QFs, when it comes to applying the exemptions from Commission jurisdiction. Requiring a certificate of Milford is an unconstitutional application of those sections in violation of the Uniform Application of Laws clause.

Although the Commission did not rest any part of its decision on the definition of "electrical corporation" in Section 54-2-1(7), the result of the Order on Rehearing is also a violation of the Uniform Application of Laws clause to the extent that QFs or other IEPs are exempt from obtaining a certificate because they are not "electrical corporations."

2. The Order on Petition for Rehearing Violates the Commerce Clause of the United States Constitution

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). Whether or not the Act as interpreted by the Commission constitutes an unreasonable and undue burden on interstate commerce is determined by balancing the interest of the State of Utah

[23] 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. Hansen v. Public Employees' Retirement Sys. Bd. Of Admin., 246 P.2d 591 (Utah 1952); State v. J.B. & R.E. Walker, 116 P.2d 766 (Utah 1941).

in requiring a certificate of convenience and necessity against the burden that such regulatory action would place on the ability of Milford to engage in its interstate sales and transmission of power. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970) (emphasis added).[24]

All of the sales of power from the Project will be wholesale transactions in interstate commerce. Milford will not provide services or electric power for public service within the state; the electric power from the Project will not be consumed by Utah rate payers; and neither the service that Utah residents receive nor the rates they pay for electric power will be affected by the Project. The Project will not impact the facilities or service of any Utah provider, or infringe on the exclusivity granted to any local utility. The federal, state and local interest in the physical placement of the wind farm and the interconnection line are the purview of other governmental authorities. In sum, the state does not have a legitimate local public interest in ensuring that the "public convenience and necessity" requires the Project's construction.

To be weighed against the state's interest in requiring Milford to obtain a certificate is the burden imposed upon interstate commerce by requiring it to demonstrate, in the face of opposition, that the public convenience and necessity requires construction of the Project facilities. Milford argued in its Motion to Dismiss that a denial of a certificate would be an unfair, unnecessary and unconstitutional restraint on interstate commerce. That remains the case. However, now that this proceeding has become contested, Milford is facing not only the delay occasioned by an obstreperous intervener (which argued that a certificate is required and then opposed the grant of the certificate), but the burden of litigation against that intervener (whose motives appear to include precisely the kind of delay the Commission has occasioned by

[24] Milford raised this argument in its Motion to Dismiss at 11-13, which is incorporated herein by reference.

reversing its Order of dismissal). Weighed against a virtually non-existent state interest in requiring a certificate of public convenience and necessity for the interconnection line, the Commission's erroneous application of the law in this case has resulted in a significant impediment to Milford's ability to engage in interstate commerce. *See New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982) (state commission restrictions on out-of-state sale of hydroelectric power held to be a violation of Commerce Clause).

Because there is no legitimate local interest in requiring Milford to show that the public convenience and necessity requires construction of the Project, and because the state's legitimate local public interest is protected by other state and local agencies, the burden of requiring a certificate is excessive in relation to the putative local benefits. To avoid an unconstitutional application of the Act, therefore, the Commission should conclude that no certificate is necessary for the Milford Project and should reinstate the dismissal of Milford's Application.

III. CONCLUSION

Milford simultaneously submitted its Application to the Commission and moved for dismissal in order to expedite a resolution of the important questions of whether it was subject to the Commission's jurisdiction and whether there was a need for it to obtain a certificate of convenience and necessity before commencing construction on the Project. With the enactment of SB-202, those questions were fully addressed legislatively. Yet, despite the simplicity of the resolution through SB-202, the Commission, by giving heed to an intervener (which has not yet identified any legitimate interest in the outcome of this proceeding), has now turned this into a full-blown, contested application for a certificate of convenience and necessity.

The Commissioner's Order on Rehearing will not withstand judicial scrutiny. It ignores the legislative intent of the Act and SB 202, arbitrarily interprets and applies the statutes, and departs from prior practice without justification. The Order on Rehearing is thus incorrect, arbitrary and capricious, and an abuse of the Commission's discretion. Instead of interpreting and applying the statutes in accordance with the legislative intent to ease the regulatory burden and facilitate the construction of new renewable resources, the Commission's decision has effectively countermanded SB 202, stymied Milford's Project, and increased its regulatory burden.

The Order on Rehearing not only requires Milford to undergo these now fully contested proceedings, but it introduces confusion about the effect of the Commission's order in the remainder of this docket and in future dockets. Following the Order on Rehearing, QFs and IEPs who sell their entire output to electrical corporations will not know whether they will be required to obtain a certificate, or what proofs they must present to satisfy the requirement of showing the "public convenience and necessity." The Commission's decision thus creates greater uncertainty along with the increased regulatory burden.

The Commission has before it, in Milford Wind, an IEP willing to make extraordinary investment to develop a remote renewable resource and to bring the power to market without the use of governmental, ratepayer or taxpayer funds. The Commission also has a clear statement from the Legislature that such entities proposing such projects are to be encouraged with favorable regulatory treatment. The Commission should reconsider its Order on Rehearing, interpret and apply the statutes giving effect to the clear legislative intent, and dismiss the Application for lack of jurisdiction.

DATED this _____ day of July, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on this __ 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 **PETITION FOR REHEARING OR REQUEST FOR RECONSIDERATION OF ORDER ON PETITION FOR REHEARING** to the following:

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