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BEFORE THE PUBLIC SERVICE COMMISSION OF UTAH

In the matter of the Application of Milford Wind Corridor Phase I, LLC and Milford Wind Corridor Phase II, LLC for Certificates of Public Convenience and Necessity for Phase I and Phase II of the Milford Wind Power Project	**MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING OR REQUEST FOR RECONSIDERATION OF ORDER ON PETITION FOR REHEARING** **Docket No. 08-2490-01**

Utah Associated Municipal Power Systems ("UAMPS"), by and through its counsel of record, pursuant to Utah Code Ann. § 63-46b-12 and Rule R746-100-11(F) of the Utah Administrative Code, hereby submits this Memorandum in Opposition to Petition for Rehearing or Request for Reconsideration of Order on Petition for Rehearing.

INTRODUCTION

Milford Wind Corridor Phase I and Milford Wind Corridor Phase II ("Milford") have submitted a Petition for Rehearing or Request for Reconsideration of Order on Petition for Rehearing ("Petition"). The Petition is nothing more than an attempt by Milford to resubmit its Motion to Dismiss its application for certificates of public convenience and necessity as to its entire project. Milford seeks to restore the effect of the Public Service Commission's

("Commission") May 16, 2005 Order ("May 16th Order"), and vacate its well reasoned Order on Petition for Rehearing (the "Order").

In support of its position, Milford argues that the Order runs contrary to Senate Bill 202 ("SB 202") and the stated policies of the Public Utilities Act, Utah Code Ann. §§ 54-1-1 *et seq.* (the "Act"), which Milford misconstrues. The stated policies of the Act are to conserve Utah's finite and expensive resources, and to encourage independent energy producers and electric corporations to competitively develop sources of electric energy not otherwise available for Utah businesses, residences, and industries. Milford's attempt to subvert these policies is not persuasive; certification of Milford's 90-mile transmission line is consistent with those stated policies.[1]

Milford also argues that the Order is arbitrary and capricious because it exceeds the Commission's jurisdiction. This, too, is incorrect. The Order is rational, reasonable, and based on a plain reading of the Act. Milford seeks in its Petition to draw the Commission's attention away from the plain language of the Act and create issues and ambiguity where there are none.

For the reasons set forth herein and in UAMPS' Opposition to Dismiss the Application of Milford I and Milford II for Certificates of Public Convenience and Necessity and Notice of Governor's Signing of Senate Bill 202 and Request for Order of Dismissal, filed March 28, 2008 ("Opposition"), UAMPS' Petition for Rehearing, filed June 16, 2008 ("Petition for Rehearing"), and UAMPS' Preliminary Position Statement of Intervenor Utah Associated Municipal Power Systems, filed July 28, 2008, ("Position Statement"), which are incorporated herein by reference, the Commission should deny Milford's Petition, bring finality to Milford's Motion to Dismiss,

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[1] References to "transmission line" or "90-mile transmission line" are equivalent to "interconnection line" to which Milford refers and which is the subject of this Petition.

and proceed with Milford's certificate of public convenience and necessity hearing for its transmission line.

ARGUMENT

I. *The Commission's Interpretation and Application of the Act is Consistent with Legislative Intent*

The Commission is "charged with discharging the duties and exercising the legislative and rule-making powers committed to it by law." Utah Code Ann. § 54-1-1. It is a well settled rule that "[w]hen interpreting statutes, our primary goal is to evince the true intent and purposes of the Legislature." *State v. Tooele County*, 44 P.3d 680, 685 (Utah 2002) (citations omitted). "[T]he plain language of a statute is to be read as a whole, and its provisions interpreted in harmony with other provisions in the same statute and with other statutes under the same and related chapters.'" *State v. Schofield*, 63 P.3d 667, 667-670 (Utah 2002) (citations omitted).

The Order, consistent with the well-reasoned recommendation of the Division of Public Utilities ("Division") and UAMPS' Petition for Rehearing, concludes 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, p. 3, ¶ 2.[2] Milford's Petition seeks to reverse the Order, asserting that the Commission's May 16th Order is consistent with Legislative intent.

As explained in its Opposition and its Petition for Rehearing, Milford's 90-mile transmission line is not exempt from the Commission's jurisdiction pursuant to a plain reading of the language of the Act. Further, such an interpretation of the Act's language is consistent with the Legislature's stated policy and purposes. *See* Opp., pp. 16-17, Pet., pp. 6-9.

As cited by Milford, the stated purpose of SB 202 is as follows:

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[2] UAMPS' Petition for Rehearing and its Opposition further explain why the Division's position is consistent with the plain language of the Act, as amended by SB 202.

> (1) The Legislature declares that **in order to** promote the more rapid development of new sources of electric 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 electric 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); *see also*, Pet. p. 5, FN 4.

In light of the foregoing language, Milford's position is curious. The stated purpose of the Act is to encourage independent energy producers and electrical corporations to "develop energy sources of electric energy **not otherwise available to Utah businesses, residences and industries served by electric corporations**." *Id.* (emphasis added). Milford's transmission line is being built for the express purpose of taking the energy generated at the Milford wind farm site away from "Utah businesses, residences and industries," for delivery to Californians.

Milford appears to rely on the language that pertains to removal of barriers for "energy transactions involving independent energy producers and electrical corporations." *Id.* Milford's reading is incorrect for two reasons. First, it is clear that the Legislature intended to remove barriers as to "energy transactions involving independent energy producers and electrical corporations" to encourage the "develop[ment] [of] sources of electric energy not otherwise available to Utah businesses, residences and industries served by electric corporations"—not to remove barriers for independent energy producers that deliver power outside of Utah. Second, the language on which Milford appears to rely speaks to "energy transactions," not generation facilities or transmission lines. Thus, Milford's reliance on the explicit Legislative policy of the Act is misplaced.

Moreover, notably absent from Milford's Petition is the second stated purpose of the Act—to "conserve our finite and expensive resources." Utah Code Ann. § 54-12-1(2) (emphasis added). The Commission's Order is consistent with that stated objective. The Commission, in deciding whether to grant a certificate of public convenience and necessity must consider whether Milford's proposed 90-mile transmission line is consistent with the requirements of Section 54-4-25 of the Act. One such requirement is that present or future public convenience and necessity does or will require construction of the 90-mile transmission line. Pursuant to Section 54-1-10 of the Act, the Commission must also consider whether Milford's application is consonant with its charge to engage in "long range planning regarding public utility regulatory policy in order to facilitate the well-planned development of utility resources." *See, e.g., In re PacifiCorp for a Certificate of Public Convenience and Necessity Authorizing Construction of the Lake Side Power Project*, Docket No. 04-035-30 (Nov. 20, 2004)(citations omitted). Thus, a determination of whether the 90-mile transmission line is necessary, taking into account long-range planning of Utah resources, is consistent with and advances the policy of the Act—to "conserve our finite and expensive resources." Utah Code Ann. § 54-12-1(2) (emphasis added).

Other arguments propounded by Milford are also unpersuasive. Milford cites the economic vitality the Milford project will bring to Beaver and Millard Counties. But Milford's wind farm site will provide economic vitality to Beaver and Millard Counties regardless of whether the Commission requires Milford to obtain a certificate of public convenience and necessity for its 90-mile transmission line.

Milford also asserts that its 90-mile transmission line is to be paid for without "rate payer or government contribution."[3] Pet., p. 5, § II.A. Nevertheless, by requiring Milford to obtain a

[3] Milford's assertion is misleading. Milford intends to use Utah resources (i.e., transmission corridors) to deliver power to California rate payers. Utah utility providers will thus be deprived of the opportunity to use the

certificate of public convenience and necessity for its 90-mile transmission line the Commission is protecting the Utah rate-paying public by ensuring that Milford's transmission line meets the requirements of Section 54-4-25 of the Act.

Milford further asserts that "Milford's sizable investment will allow for the development of a remote renewable resource that would otherwise not be available." *Id.* This statement seems to suggest that other electric providers would be able to utilize Milford's transmission line in developing remote renewable resources. As explained in UAMPS' Opposition, unless Milford's 90-mile transmission line is considered a "public utility easement," which is a nonexclusive easement that can be used by more than one public utility, there is no guarantee that other electric providers would be able to use Milford's 90-mile transmission line to "develop . . . remote renewable resource[s] that would not otherwise be available," as Milford suggests.

Finally, Milford attempts to mislead the Commission, stating that the effect of the Order "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 . . . , a result that is both bizarre and ironic given the Legislature's clear intention to eliminate, not increase, the regulatory burden on independent power producers and their projects." Pet. p. 6, § II.A. Prior to the enactment of SB 202, the Act did not exempt generation facilities that produced power from renewable sources on the scale Milford proposes.[4] Thus, the Commission's interpretation, and application of the plain language of the statute to exempt Milford's wind generation facilities and not its transmission line, is an issue of first impression. Moreover, contrary to Milford's

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transmission corridor to deliver power to Utah rate payers. Further, Milford's transmission line is to be paid for by tax-exempt revenue bonds issued by the Southern Public Power Association ("SCPPA") a governmental entity. Thus, the transmission line is to be built by "government contribution," contrary to Milford's assertion. As UAMPS pointed out in its Petition for Rehearing and Preliminary Position Statement, this government funding (to the tune of at least $211,000,000) makes SCPPA an indispensible party in this proceeding.

[4] Prior to SB 202, "independent energy producers" meant small power production facilities (i.e., less than 80 MWs). See Utah Code Ann. 54-4-2(13), (14), and (20) (2007).

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assertions, a 90-mile transmission line is not a generation facility that produces energy from renewable sources, *i.e.*, the 90-mile transmission is not "green" *or* renewable as Milford suggests. It is disingenuous for Milford to contend that the Commission's Order somehow changes the regulatory landscape. The regulatory landscape was changed by the Legislature. The Commission's Order applies the new statutory language, and does so in a reasonable and rational manner.

In sum, the plain language of the Act does not exempt Milford's transmission line from Section 54-4-25 of the Act. As explained in this memorandum, in UAMPS' Opposition, and in UAMPS' Petition for Rehearing, Milford should be required to obtain a certificate of public convenience and necessity for its transmission line because such requirement is consonant with the stated purposes of the Act.

II. *The Commission's Order is Rational and Reasonable*

a. The Commission Acted Within Its Jurisdictional Power When it Issued the Order, Did Not Act in An Arbitrary and Capricious Manner, and Did Not Abuse its Discretion

Section 54-7-13 of the Act grants the Commission the express power "at any time, upon notice" to "alter or amend any order or decision made by it," which becomes effective upon service. Further, the Act permits "any party" to petition for a rehearing of an order, and any order issued as a result of such petition shall have the "same force and effect as an original order." Utah Code Ann. § 54-7-15. The Commission's rules further provide that parties may petition the Commission for a rehearing or reconsideration of an order pursuant to Sections 63-46b-12 and 63-46b-13 of the Utah Administrative Procedures Act. Pursuant to the foregoing statutes and rules, UAMPS submitted its Petition for Rehearing, and the Commission reasonably and rationally reversed, in part, its May 16th Order.

Milford contends that the Commission's partial reversal of its May 16th Order is arbitrary and capricious.[5] As grounds for that assertion, Milford cites the Commission's reference to "transmission" lines instead of "interconnection" lines. Contrary to Milford's long-winded and nonsensical assertions otherwise, the Commission's reference to "transmission" instead of "interconnection" lines is of no consequence and certainly does not qualify the Commission's decision as arbitrary and capricious.[6] The Commission reversed its May 16th Order, in part, based on the sound reasoning of the Division and UAMPS' Petiton for Rehearing. In support of its Order, the Commission cites the following reasoning of the Division:

> [T]he definition of "independent power production facility is properly limited to one that 'produces' electric energy' (emphasis added) such that only that portion of the Project that actually produces electricity, i.e., the wind farm facility, is exempt from the requirement to obtain a Certificate of Public Convenience and Necessity ("CPCN") from the Commission. At the hearing and its pre-filed analysis, the Division bolstered this argument by pointing out that subsections (i) and (iii) of UCA 54-2-1)16)(d) both speak to delivery of the commodity or service produced but subsection (ii) of said statute speaks only to the sale of said commodity or service such that transmission should not be viewed as exempted under subsection (ii). As such the Commission may properly conduct certification proceedings for the proposed transmission line.

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[5] Milford states that "[a]lthough 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," citing, *Salt Lake Citizens Congress v. Mountain States States Tel. & Tel. Co*., 846 P.2d 1245 (Utah 1992) and *Williams v. Public Serv. Comm'n*, 754 P.2d 41, 52 (Utah 1988). *Williams* held that the Commission acted rationally and reasonably in construing a definition in a way that was different from its prior rulings. The Court stated that an administrative agency is not "bound in future circumstances by past mistakes." *Id*. at 52-53. Here, just as in *Williams*, the Commission is construing statutory terms, and is not bound by a prior ruling as to newly enacted language. In *Salt Lake Citizens*, the Court reversed and remanded the Commission's decision to dismiss complaints about Mountain Bell's practice of charging ratepayers for their charitable contributions in contravention to the Commission's rule prohibiting that practice, which the Commission had promulgated seven years earlier. *Id*. at 1256. This case is nothing like *Salt Lake Citizens*. Here, the Commission, on an issue of first impression, ruled as to whether the Act, as amended by SB 202, exempted Milford's project. Less than two months later, and upon UAMPS' Petition for Rehearing, it reversed its ruling, in part, holding that the plain language of the Act did not exempt Milford's transmission line. In *Salt Lake Citizens*, however, the Commission failed to observe a rule it had promulgated some seven years earlier, which was adversely affecting Utah ratepayers. *Salt Lake Citizens* is clearly distinguishable from the present matter.

[6] Milford points to Federal law definitions, as it did in oral argument, and the Act's definition of small power production facilities. The Commission made its decision based on the plain language of the Act. The Commission is not required, nor should it, to refer to Federal law in interpreting whether applicable statutory definitions within the Act include transmission or distribution systems.

Order, p. 3. The Commission then concludes that the "plain reading of UCA § 54-2-1(14) includes only production, not transmission, facilities within definition of an independent power production facility." *Id.*[7]

Milford chides the Commission, stating that it is well aware of the difference between transmission lines and interconnection lines. Milford's long-winded explanation regarding the difference between the two terms is nevertheless unconvincing. The difference between transmission lines and interconnection lines, whatever it may be, is not the basis upon which the Commission reversed its May 16th Order. The Commission reversed its order based on the fact that the statutory language exempting independent power production facilities from certification speaks to production, not to delivery or transmission of electricity.

Milford then propounds a litany of arguments, contending that the Commission should look outside the statutory language upon which the Commission based its Order and come to a different conclusion. Milford essentially argues that its project (and transmission line) is the same as a "qualifying facility," as defined under Federal law. Had the Legislature intended that independent power production facilities (and their transmission lines) be treated as "qualifying facilities," it would have drafted the statute accordingly. It did not. Therefore the Commission should deny Milford's Petition, bring finality to this matter, and proceed with the scheduled hearing for Milford's certificate of public convenience and necessity.

In sum, the Commission acted within its statutorily granted powers to interpret and apply the Act on an issue of first impression under a newly amended statutory scheme. Its Order was well reasoned and based upon the plain language of the Act. The Commission's Order is

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[7] The Commission's May 16th Order, however, contains no such reasoned analysis as to why Milford's transmission line should be exempt from the certification process.

"justifie[d] . . . by facts and reasons that demonstrate a fair and rational basis for the inconsistency," unlike its May 16th Order. *See* Pet., p. 11, § II, D. (citations omitted).

b. Other Milford Arguments

In response to all other arguments made by Milford, UAMPS incorporates by reference all arguments made in its Opposition, Petition for Rehearing, Position Statement, and oral argument. Milford has essentially made the same arguments in its Petition as in its Motion to Dismiss, other filings, and at oral argument. All of those arguments have already been properly rejected by the Commission and therefore UAMPS will not restate all its prior responses.

CONCLUSION

Based on the foregoing, UAMPS respectfully requests the Commission deny Milford's Petition and proceed with the hearing for Milford's certificate of public convenience and necessity.

DATED this ____ day of August, 2008.

VAN COTT, BAGLEY, CORNWALL & MC CARTHY, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that I caused true and correct copies of the foregoing **MEMORANDUM IN OPPOSITION TO PETITION FOR REHEARING OR REQUEST FOR RECONSIDERATION OF ORDER ON PETITION FOR REHEARING** to be e-sent to the following as indicated this 6th day of August, 2008:

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