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Testimony of
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Before the Senate Committee on Local Government
Regarding Senate Bill No. 325

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Chairwoman McGinn and Committee Members,

My name is Alan Claus Anderson and I am a practicing attorney and the Vice-Chair of the Energy Practice Group at Polsinelli, a nationally recognized law firm based in Kansas City, which provides a wide breadth of legal services to both Kansan businesses and the individual residents of Kansas. I am also an adjunct Professor of Law at the University of Kansas School of Law where I teach Renewable Energy Law Practice and Policy. Thank you for allowing me to appear before you today to discuss the many fatal flaws and destructive policies contained in Senate Bill No. 325 (the "Bill").

A. INTRODUCTION

Polsinelli is a law firm with over 900 lawyers with offices across the United States. We are fortunate to work for clients in all areas of energy production, from oil, gas, and coal, to renewable energies such as wind and solar. I also study and teach renewable energy law and the impacts of both good, and bad, policy. I am a proud Kansan and have had the good fortune of working with various Kansas state agencies to attract business to Kansas, and our firm has a long track record of unwavering support for this great State.

B. OVERVIEW

Currently you have before you Senate Bill No. 325, which sets forth numerous expensive and destructive mandates on Kansas counties and thoroughly usurps Kansas citizens' rights to utilize their property without paternalistic government oversite and overreach. On its face, the Bill imposes a number of new mandates for counties and upon Kansas landowners' private contracts. A few of the most onerous requirements include:

- Counties that host wind or solar projects must adopt zoning, and no projects may commence in unzoned counties (*new section* (1)(a)(1)). Therefore, unzoned counties would now be required to go through the statutory and constitutionally required comprehensive zoning process, create a layer of bureaucracy to administer the zoning regulations, and the Bill provides no funding from the state to cover the cost of this zoning mandate;

- Counties must zone parcels hosting wind or solar projects as industrial areas even if the particular county does not want zoning or this zoning classification (*new section* (1)(a)(1));

- Developers must obtain either a conditional use permit or building permit from the county before beginning site preparation or construction activities (*new section* (1)(a)(2)). This new mandate would require a layer of unfunded bureaucracy to process and administer such new requirements;

- By definition, a "Developer" must hold "by lease, easement or otherwise the real property rights necessary for construction of a facility" (*new section* (1)(c)(1));

- A lease or easement for wind or solar resources may not be recorded unless accompanied by a building permit or conditional use permit approved by the county ((*revised* 58-2221(b)(1)(A)). However, an application for a CUP or building permit cannot even be made without filing leases as part of the application. Therefore, this section makes both receiving a CUP and filing leases an impossibility;

- A lease or easement must be recorded within 30 days of the execution of the lease or easement ((*revised* 58-2221(b)(1)(A)). In addition to the impossibility of ever recording a lease, a CUP process takes more than 30 days to finalize and, because filed leases are required to apply for a CUP, this Bill creates additional fatal impossibilities;

- Even though this Bill makes it impossible to record leases or easements, when a lease or easement is not recorded in accordance with these new requirements, the developer shall be prohibited from recording any lease or easement involving wind or solar resources upon such property in the future ((*revised* 58-2221(b)(2));

- Within 90 days of the Board of County Commissioners approving a resolution rezoning any parcel for industrial activities, a petition signed by 10% or more of the qualified electors of such rezoned parcel, or who are contiguous to such rezoned parcels, may be submitted to the county election officer (*new section* (1)(a)(2)). The state of Kansas already has a protest petition statute conflicting with this Bill;

- If such a petition is filed, a proposition to remove the provisions from the resolution relating to the rezoning of such property for industrial activities shall be submitted to the qualified electors at the next regular primary or general county election (*new section* (1)(a)(2));

- If a majority of the qualified electors voting on the question vote in favor thereof, the board shall modify such resolution to remove the provisions from the resolution relating to the rezoning of such property for industrial activities (*new section* (1)(a)(2)); and

- If majority of the qualified electors vote in favor of reversing the rezoning, the board of county commissioners shall not adopt any such resolution for at least four years following the date of the election (*new section* (1)(a)(3)). In addition to the bad policy of not allowing local authorities to make local decisions, the Bill's attempt to bind future legislative bodies from acting runs afoul of settled law.

These proposed provisions contain numerous inconsistencies, impossibilities, unfunded mandates, new layers of unwanted bureaucracy and regulation, and instances of severe governmental overreach into the rights of counties to govern themselves and the rights of landowners to utilize their property without unwarranted governmental interference. As shown below, it specifically creates a number of practical and legal concerns that make it fundamentally unworkable and directly in opposition to core principles of the United States and Kansas Constitutions and an affront to Kansas values.

C. THE BILL IMPLICATES THE KANSAS CONSTITUTION AND THE COUNTY HOME RULE ACT

The decision of whether to enact zoning in a given area is perhaps the most fundamental power granted to Kansas counties. It is reserved for the counties because it is highly dependent upon the will of the constituents of the individual communities and highly dependent upon the character of the uses that are being proposed. This Bill usurps that authority, strips it from the counties, and mandates that all Kansas counties that would host a wind or solar project must adopt zoning and zone such areas for industrial activities. This represents a substantial intrusion of state authority into one of the most foundational responsibilities of county governance.

At its core, zoning represents a governmental decision to interject into individual decisions over how particular parcels can be utilized, and necessarily restricts how landowners can use their property. Restrictions on property rights should only be imposed upon citizens after careful deliberation, and only when justified by substantial and competent evidence. Fortunately, the Kansas Constitution and Statutes provide us specific protections, and established regimented processes, for such deliberation. Our state decided long ago that the counties know their communities better than the distant, and often differing, legislature in Topeka, and it is therefore the Kansas counties that can best address most of the local affairs which uniquely affect their citizenry.

Article 12, Section 5 of the Kansas Constitution provides that "Cities are hereby empowered to determine their local affairs and government." Mirroring this sentiment, the County Home Rule Act provides that county commissions may do "all … acts in relation to the property and concerns of the county, necessary to the exercise of its corporate or administrative powers"

and that "the board of county commissioners may transact all county business and perform all powers of local legislation and administration it deems appropriate …."[1] In recognition of the breadth of the effect of this foundational premise, the Kansas Supreme Court has repeatedly recognized that "home rule powers are to be liberally construed for the purpose of giving to counties the largest measure of self-government."[2]

There is no governmental action more local than land use and zoning. In fact, the well-entrenched policy of Home Rule in Kansas is specifically designed to facilitate local zoning and to grant local communities the authority to decide what uses of property should be allowed, or restricted, based upon the community's own unique goals, values and needs. Even at this local level, government-imposed restrictions of property rights and deviations from the goals of free market capitalism are limited by the Constitution and statute. This is demonstrated most clearly by the Kansas Zoning Enabling Act, which requires the collection and consideration of localized input before restricting private property rights.

In direct contrast to the Home Rule policy of Kansas, Senate Bill No. 325 does not amend the Kansas Home Rule Act and yet it would strip away the rights of cities and counties to determine their local affairs and to self-govern in the most fundamental of ways by mandating that any county hosting a wind or solar project must first adopt zoning. In addition to trampling on the goals of the Constitution, and evidencing an open disdain for free market capitalism, this Bill demonstrates an attempt at government overreach into the rights bestowed upon the Counties and their residents to determine their own individual procedures for land use and zoning applications, and encroaches upon substantive zoning decisions.

D. The Bill Has Fundamental Practical and Logical Flaws that Make this Bill Unable to be Passed

1. <u>The Bill creates an Impossibility for Kansas Landowners to Contract and Use their Property Rights</u>.

The construction of a wind or solar project involves a coordinated effort among landowners, developers, and regulators. The timing and progression of the individual steps in the development process has been honed over decades, and it is important that the steps occur in the correct sequence in order to ensure that regulators have the information that they need in order to conduct the numerous reviews that must be undertaken. This Bill, intentionally or through ignorance of the process, imposes requirements that are impossible to achieve and that would disrupt this process and make it impossible for landowners to lease and use their property rights, and for counties to approve projects where those local communities wish to do so.

[1] K.S.A. 19-101.

[2] *Board of County Comm'rs of Trego County v. Division of Property Valuation*, 261 Kan. 927, 934 (1997); *see also, General Bldg. Contractors v. Board of Shawnee County Comm'rs, Shawnee County* 275 Kan. 525, 536 (2003); *Missouri Pacific Railroad v. Board of Greeley County Comm'rs,* 231 Kan. 225, 227 (1982).

Under the new language, in order to even satisfy the definition of a "Developer" and begin the conditional use review process that the Bill would now mandate, an entity must hold "by lease, easement or otherwise the real property rights necessary for construction of a facility." However, the Bill goes on to restrict the timing of when leases and easements may be signed, stating that they must be recorded within 30 days of their execution, and that recording must also be accompanied by evidence that a conditional use permit and building permit has been approved by the county.

Importantly, the Bill fails to understand the basic land use principle that a CUP is an application by a landowner, and any application for a CUP is by, or on behalf of, a specific landowner. This Bill states that a lease cannot be recorded without a building permit or CUP, yet, both a building permit and CUP require an application on behalf of the landowner that this Bill prohibits because the lease cannot be filed. This Bill is either an intentional, or ignorant, destruction of the ability for landowners to use their land rights to lease for solar or wind development.

To layer on additional impossible terms, this Bill prevents a developer from conducting the studies necessary to move forward with a CUP because it will not be able to lease the land to conduct such studies. A developer cannot enter upon a landowner's property to conduct environmental studies without executing and recording easement agreements. Additionally, a developer cannot provide the required evidence of land rights for interconnection studies without executing and recording lease and easement agreements so the Bill's requirement to have started the interconnection process is also impossible.

However, the Bill does not stop at simply creating a multi-layered morass of impossibility, it then actively punishes the landowner and developer for not being able to satisfy the impossible conditions that the Bill itself has set. Specifically, the Bill states that, if a lease is not filed within 30 days (something that is impossible) or otherwise fails to meet any of the new criteria set forth in the Bill, the developer is then forever barred from recording any subsequent lease or easement involving wind or solar resources on the property. Therefore, this Bill creates an impossible regulatory quagmire that prevents a lease from being recorded and then punishes a landowner that wants to contract with a developer from forever leasing to the developer it already chose.

The proposed requirements of this Bill create an impossible set of circumstances for landowners to lease their land and use their property rights as they deem best. This Bill is the state legislating a complete taking of the wind and solar resource from the landowners of the state of Kansas.

2. <u>This Bill Would Allow Small Minorities to Overturn the Will of Counties and Create Substantial Delays for Legally-Approved and Popular Projects</u>

Setting aside the impossibilities discussed above, the Bill goes on to set forth a mechanism by which, after a project has gone through the CUP process and been approved by a Board of County Commissioners, a small minority (10%) of the qualified electors of such parcels or who are contiguous to such parcels may delay the effectiveness of this approval and subject the decision

of the County Commission to a vote of the general public at the next scheduled primary or general election (so, either in August or November of a given year). If they are successful in such vote, the decision gets overturned. If they are unsuccessful in such vote, the project will have experienced an unnecessary delay of potentially up to 9 months. This process is both extremely ripe for abuse and unnecessary, as similar but more thought-out protections are already provided under the Kansas statutes.

Most importantly, because the author of this Bill wants to mandate zoning on counties that clearly do not want to be zoned, any "election" will likely simply be a rejection of zoning and not related to the renewable energy project. Unzoned counties have already made the affirmative decision to not enact zoning, so any election stemming from this new statutorily-mandated zoning will very likely just reflect the voters' dissatisfaction with these new zoning requirements. Additionally, this Bill provides no funding to the Counties to process this protest and election process. Once again, this government overreach creates an unfunded mandate, leaving counties holding the bill.

If the goal of this new language is to provide extra scrutiny for a project that faces opposition from a vocal minority of constituents, it is vital to note that such protection already exists in the Kansas statutes. K.S.A. 12-757(f) sets forth a mechanism known as a "protest petition." Under this statute, after a planning commission has voted to approve or disapprove a zoning amendment, owners of record of 20% or more of any real property proposed to be rezoned or 20% or more of the total real property within the area required to be notified by the Kansas statutes may file a petition protesting such decision. If such a petition is filed, the threshold for the County Commission to approve such a decision increase from a simple majority to a ¾ vote. Since many county commissions in the Kansas have only 3 members, this has the effect of requiring unanimous support from the county commission.

The protest petition mechanism set forth in K.S.A. 12-757(f) already provides ample protection for minority opposition members that oppose zoning decisions, but the proposed Bill takes this protection and elevates it to abusive levels. Instead of 20% of the owners of record, the Bill reduces the threshold to a mere 10% of the "qualified electors" of such rezoned parcels or who are contiguous to such rezoned parcels. There is no requirement that the qualified electors be the owners of record. Additionally, instead of increasing the level of scrutiny by requiring a ¾ approval of the Board of County Commissioners, this Bill actively overturns and sets aside the decision of the County Commission and subjects the issue to a vote of the general public. Why even require the question to go through the zoning process if a mere 10% of qualified electors around a project can usurp the process once it is completed? The shear disregard that this Bill shows for the zoning and land use processes that have been perfected over the last century is staggering.

Finally, it should be noted that, as drafted, this Bill contains significant vagueness that is ripe for abuse. The language is not clear that a protest must be filed by 10% of qualified electors for the entirety of the project area that was approved for rezoning. An argument could be made that individual parcels or groups of parcels that were rezoned could be cherry-picked from the project as a whole and have protests filed against just those parcels. In that case, a very small

number of individuals opposed to a project, or even a single opposed landowner, could protest specific parcel designations and subject the zoning designation of those parcels to a vote of the general public. For projects that potentially contain a hundred or more parcels, this proposed language has the potential to create an overwhelming number of propositions on general election and primary election ballots, all to provide protections that are already amply covered by K.S.A. 12-757(f).

3. The Bill Substitutes Local Experience and Expertise For Bureaucratic Fiat.

Subject to the protections we are provided in the Kansas Constitution and statutes, every County in the state of Kansas has the right and authority to decide how it will exercise local control over land uses within its boundaries based on the desires of its citizens and the unique characteristics of the County. These local communities can determine their own vision of the community in which they live and work, and endeavor to achieve that vision through the locally elected leadership that knows the communities better than those far away in the Kansas legislature.

Over the decades, local communities all over the State of Kansas have used the Zoning Enabling Act to establish systems of zoning regulations that are best suited to serve their needs. Some local communities have decided to adopt zoning regulations, and some have decided that local landowners do not require the level of governmental oversight that zoning would entail. Both decisions are highly-localized and are best handled by the most local authorities available, the Boards of County Commissioners. This Bill proposes to turn this century-old process of local authority on its head by taking control away from local communities. The Bill would impose a mandate that zoning must be adopted before a wind or solar project will be allowed to be developed in a community. This Committee, and the Kansas Legislature sitting here in Topeka, should not paternalistically overreach its authority into every county in this state, and override the will of these local communities when this authority has long rested with those that know their communities best.

In this case, Senate Bill No. 325 is attempting to take away the right of private citizens to choose their own level of zoning oversight. This overreach into the long-held discretion of county governments should shock any member of the committee that believes in free markets and property rights. In Kansas, consideration of actions that could lead to such an injury to property rights is rightfully left to the local communities instead of the State.

4. The Bill Creates Regulatory Uncertainty and Harms The State's Ability To Compete For Business.

If Senate Bill No. 325 were to be enacted by the Legislature, it would likely be challenged in court and would almost certainly be overturned for one or more of the fatal flaws discussed herein. In the meantime, the ability of the State of Kansas to compete for business would be severely damaged. In addition to wind and solar energy companies fleeing the state, the Bill would incentivize wind and solar energy industry manufacturers and suppliers to strongly consider locating elsewhere. Moreover, an ever-growing number of companies are establishing internal sustainability policies, including Ikea, eBay, Facebook, Ford, General Motors, Google, HP, Mars,

P&G, T-Mobile, Unilever, Wal-Mart, and many others with ties to Kansas and/or the potential to bring business to Kansas. The proposed Bill will signal that Kansas is unfriendly to their goals.

Additionally, and more fundamentally, the Bill would demonstrate a dramatic change in the policy of the State of Kansas, and send a clear signal to the marketplace that Kansas is a bad and erratic business partner. One can only imagine how our competitor states will use the taking of the right of citizens to use their wind and solar resources as a tool to compete against our state to attract businesses. This Bill represents an open attack on free market capitalism that cannot be understated. Combining that reality with an egregious trampling on the rule of law sends a very strong signal to the business community of all industries that Kansas is an unstable legal and business environment.

E. SENATE BILL 325 REPRESENTS AN ATTACK ON THE FREEDOM TO CONTRACT

SB 325 creates an impossible circumstance that renders any solar or wind leases in the State of Kansas unrecordable and therefore ineffective and unable to satisfy their core purpose, creating a defined, discoverable, and enforceable interest in property. By making it impossible to effectuate effective contracts for property rights, the Bill represents a fundamental threat to the freedom of contract. It makes it more burdensome for Kansas landowners to enter into agreements impacting their property, it mandates unnecessary and expensive regulatory requirements and expensive burdens for counties, and it makes it fundamentally impossible for Kansas landowners to execute agreements that would otherwise provide vital revenue streams for Kansas farms.

Professor David Pierce, the preeminent property law and oil and gas professor in the state of Kansas has stated, *"[f]reedom of contract is the foundation of the American economy and our capitalist society*."[3] Likewise, the Kansas Supreme Court has recognized the fundamental importance of freedom of contract, holding that "*[i]t is the ancient legal maxim that contracts freely and fairly made are favorites of the law*"[4] and "*[t]he paramount public policy is that freedom to contract is not to be interfered with lightly*."[5]

As Professor Pierce reminds us, an attack upon the freedom of contract is an attack upon the foundation of the American capitalist system. Professor Armen Alchian, emeritus professor of economics at the University of California, Los Angeles similarly emphasizes the importance of property rights in our economic system, stating "[o]*ne of the most fundamental requirements of a capitalist economic system—and one of the most misunderstood concepts—is a strong system of property rights.*"[6]

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[3] David Pierce, Freedom of Contract and the Kansas Supreme Court, Journal of the Kansas Bar Association (Feb. 2017), *available at* https://cdn.ymaws.com/www.ksbar.org/resource/dynamic/blogs/20170925_094028_30821.pdf.

[4] *Kansas Power & Light Co. v. Mobil Oil Co*., 426 P.2d 60 (Kan. 1967).

[5] *Foltz v. Struxness*, 215 P.2d 133, 139 (Kan. 1950), quoting 12 Am. Jur., Contracts 172, p. 670.

[6] The Concise Encyclopedia of Economics, 2008.

Senate Bill 325 is exactly the type of attack that those that want to protect the foundations of the American economy must reject. Of course, government overreach into the private contracts of citizens is not a new concept, and in fact has been a driving focus of the American political system from its inception. James Madison addressed both the impropriety of retroactive application, and legislative bodies interference with the freedom to contract in Federalist Paper Number 44:

> "Bills of attainder, ex-post facto laws, and **laws impairing the obligations of contracts**, **are contrary to the first principles of the social compact, and to every principle of sound legislation**....**The sober people of America are weary of the fluctuating policy which has directed the public councils. They have seen with regret and indignation that sudden changes and legislative interferences, in cases affecting personal rights,** become jobs in the hands of enterprising and influential speculators, and snares to the more-industrious and less-informed part of the community. **They have seen, too, that one legislative interference is but the first link of a long chain of repetitions, every subsequent interference being naturally produced by the effects of the preceding**."[7]

These comments, first published on January 25, 1788, still ring true today. Indeed, James Madison and the writers of the Federalist Papers could have based these comments upon Senate Bill 325. The result of the bad policy of Senate Bill 325 would be to render voluntarily executed private contracts unrecordable and effectively worthless.

F. CONCLUSION

I appreciate this Committee's time and the opportunity to provide this testimony. The Committee should know that this Bill does not represent Kansas' values. This Bill is neither rationally concocted nor drafted with the level of excellence we should expect. However, the greater problem with this Bill is its assault upon those institutions and values Kansas has long held dear.

This Bill does not respect the United States or Kansas Constitutions and the protections they provide prior to taking of property rights. In fact, this Bill cavalierly injures our citizens' property rights without any regard to that harm. This Bill does not respect the free-market capitalism that has, traditionally, been accepted as beneficial to our state. This Bill does not respect the counties and their ability to comport the land uses to each of their individual goals and values, and instead would require that legislators direct their values on all counties through fiat from Topeka. This Bill adds unfunded mandates on the counties. If this Bill were to pass, it would eliminate wind and solar energy projects in Kansas and, therefore, the harvesting of the wind and solar resources of Kansas. This equates to the state of Kansas taking an economic resource from its citizens.

I hope this is the last we hear of such reckless and improper legislation, but I am grateful to know now every legislator has a full understanding of the values this Bill eschews.

[7] Emphasis added.