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Testimony of
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Before the Senate Committee on Utilities
Regarding Senate Bill No. 324

January 27, 2022

Chairman Thompson 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. 324 (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. 324. In this testimony I am going to lay bare the technical and legal flaws that make it unworkable, and will discuss the intrinsic qualities of this Bill that make it poisonous to this State's long-held support of the principles underlying the United States and Kansas Constitutions, belief in the freedom to contract, support of free market capitalism, commitment to local control of land use, protection of property rights, and support for intelligent and competent evidence in our decision making.

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On its face, this Bill imposes a number of new government-imposed mandates upon Kansas landowners' private contracts and unfunded mandates on Kansas Counties. A few of the most onerous requirements include:

- Regardless of the wishes of the parties to the agreements, wind and solar leases are made void if a "certificate of site compatibility" or conditional use permit is not issued within 5 years of the lease or easement commencing;

- Wind and solar leases will be made void if there is not a transmission interconnection request in process within 5 years of the lease or easement commencing, regardless of the wishes of the parties to these private leases;

- Wind and solar leases are presumed to be abandoned if there is no construction or operation of a wind or solar project for a period of 36 consecutive months; and

    - If the holder of the lease or easement does not file a plan with the board of county commissioners outlining the steps and schedule for continuing such construction or operation within such 36-month period, the Bill establishes a process for the property owner to record a termination of the lease or easement.

- Mandates Kansas Counties expend funds and resources to establish bureaucratic layers in order to create and process newly created "certificates of compatibility" and to review undefined "plans" that Boards of County Commissioners must now require and review. There is no further guidance or funds allocated to counties to handle these new mandates.

- There is no language in the proposed amendment that would grandfather in existing leases, so it is presumed that the intent is to void and terminate leases that are currently effective.

These requirements are not designed to be reasonable or rational constraints on wind and solar leases. They are designed to help facilitate an end to the renewable energy industry in our state by granting state legislators the authority to dictate the terms of privately negotiated contracts impacting Kansas landowners' rights to utilize their private property. Such requirements demonstrate a disregard for private property rights, a lack of trust in the intelligence of our rural citizens, an attack on the freedom to contract, a rejection of our capitalist economic system, and a taking of a natural resource from property owners. The authors of this Bill know exactly what this Bill will do. It is designed to kill wind and solar energy in the State of Kansas.

As some of you are aware, Kansas has a twenty-year history of renewable energy. Over the past two decades, numerous counties and participating Kansas landowners have shown that they know how to make their own decisions. However, there are always individuals that have only recently been exposed to wind projects and who raise concerns that have already been fully identified, vetted, and debunked by private landowners and communities across the state, and

occasionally such unfounded concerns percolate to the top. While the reality is that these projects have been successfully and safely sited and landowners have successfully reached agreements that have netted Kansas farms hundreds of millions of dollars of supplemental income, today we are faced with a series of destructive Bills that propose a variety of encroachments upon common sense, property rights, and basic civics, all to address problems that do not exist.

C. SENATE BILL 324 IS AN ATTACK ON THE FREEDOM TO CONTRACT

Fundamentally, SB 324 is an attack on 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 unilaterally voids 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*."[1] 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*"[2] and "*[t]he paramount public policy is that freedom to contract is not to be interfered with lightly*."[3]

As Professor Pierce reminds us, an attack upon the freedom of contract is an attack upon the foundation of the American capitalist system. Senate Bill 324 is exactly the type of attack that those that want to protect the foundations of the American economy must reject. When we so blatantly attack the freedom to contract and let the State dictate how private citizens can contract to use their land, we are also telling them that those in the Legislature are smarter than they are and must step in and paternalistically dictate how Kansas landowners can use their land.

D. SENATE BILL 324 AND THE BAD POLICY OF RETROACTIVE IMPLICATION

SB 324 amends and replaces K.S.A. 58-2272, a statute that has served the state well for over a decade. Section 1(c) of SB 324 requires that all leases after July 1, 2011 meet certain requirements of the statute, but SB 324 contains no language stating that the terms of this statute only apply prospectively. This means that SB 324 could be read as to have retroactive application to leases that have already been negotiated and executed, with both parties already having received consideration for the contract.

However, because of the absurd terms contained in this Bill, the proposed language would cause the immediate cancellation of thousands of private contracts. To pass this Bill would be a

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[1] 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.

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

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

choice to cancel thousands of private contracts made voluntarily by Kansas landowners, without any legal justification, and without these landowners' desire to have the contracts cancelled. This is a fatal assault on the freedom of contract and our capitalist system. Moreover, every person already has legal remedies if there are improprieties relating to the contracting process.

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**."[4]

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 324.

E. SENATE BILL 324 REPLACES KANSAS CITIZENS' FREEDOM TO CONTRACT WITH MANDATES FROM LEGISLATORS IN TOPEKA

Section 1(d)(1) of the replaced statute states that any lease or easement involving wind or solar resources would be void after five years if the lease or easement does not have a certificate of site compatibility or conditional use permit issued and a transmission interconnection request that is in process. To begin, a "certificate of site compatibility" is a fiction of the author's mind and does not exist as a requirement for Kansas counties anywhere else in the Kansas statutes. Setting aside the fatal vagueness of the language of this section, it appears that the goal of this Bill is to add a State-imposed unfunded mandate that requires counties to create a layer of bureaucracy and regulatory processes for the issuance of "certificates of site compatibility."

Many Kansas counties have chosen not to be zoned and to not impose county-level requirements on their citizens. This Bill would mandate that layers of bureaucracy be created at the particular County's own expense. As this vague "certificate of site compatibility" would impair the property rights of those with land in these counties, such counties will need to heed the dictates of the Kansas and United States Constitutional protections of due process when taking away property rights. This process would necessarily be significant and create new associated costs for counties.

[4] Emphasis added.

Adding to the confusion and demonstrating little knowledge of land use law or how energy projects are permitted, the proposed language also states that the lease will be presumed abandoned if, after just 36 months, there is no construction or operation of a generation facility. This proposed requirement either shows a lack of understanding of the intense and time-consuming study and review processes that renewable energy projects are required to undertake, or is intended to impose a "poison pill" legislative requirement for renewable energy projects in Kansas. In this case, it is likely both.

In short, the interconnection and environmental studies that renewable projects are required to conduct both require developers to obtain rights to the property to conduct the studies and can take longer than 36 months. As a result, if this provision is adopted, developers will not be able to secure the land necessary to conduct the studies that are required to determine the viability of a project. Without being able to begin these studies, there can be no project. Thus, this proposed language would place Kansas landowners and renewable projects in an impossible loop of legislative requirements, and would make further development an impossibility.

Additionally, adding to the unnecessary bureaucratic mandates from Topeka and additional layers of requirements on the counties, this Bill requires that a plan be filed with the Board of County Commissioners outlining the steps and schedule for continuing construction or operation of the facility. Once again, this Bill appears to be intended to create layers of Topeka-based bureaucracy for counties and landowners that have specifically chosen to avoid this type of interference with private contracts and property rights. If counties wanted these types of mandates, they already have the right to establish zoning and tailor the zoning regulations to their communities' unique needs.

The result of the bad policy of Senate Bill 324 would be to have voluntarily executed private contracts become void as a matter of law, or due to the ill-conceived mandates placed upon the counties and landowners. This statute would have this Legislature tell the residents of counties across the state, such as Gray County, Ford County, Kingman County, and Republic County, that they cannot voluntarily enter into a wind or solar lease because they can't be trusted to make their own decisions.

F. THE BILL IMPLICATES THE FEDERAL AND STATE CONSTITUTIONS AND TRAMPLES UPON THE GOALS OF ESSENTIAL DUE PROCESS PROTECTIONS FOR LANDOWNERS

Professor Armen Alchian, emeritus professor of economics at the University of California, Los Angeles has stated that, "*One of the most fundamental requirements of a capitalist economic system—and one of the most misunderstood concepts—is a strong system of property rights.*"[5]

When a statute or local ordinance is enacted that takes away the ability for a landowner to use his or her property in the most economically efficient manner, we create great harm to that person. Any action that we know harms the citizens of our State by injuring their property rights must only

[5] The Concise Encyclopedia of Economics, 2008.

be taken sparingly, honestly and after legitimate due process in which justifications and impacts of the law have been subjected to an in-depth and reasoned investigation and analysis. In particular, our government bodies must be cautious with any proposed action that would impose blanket regulations restricting the manner in which our citizens can use their property, as such an action can too easily harm the free market system. I am confident that this body has no interest in taking such action recklessly, as this Bill would require of you.

Fortunately, the United States and Kansas Constitutions provide us strictures that prevent the injury to property rights, and the attendant disdain for free market capitalism, inherent to this Bill. The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law…." Likewise, Section 18 of Kansas Bill of Rights provides that "[a]ll persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law."

This foundational concept of due process requires careful and reasoned deliberation whenever a governmental body proposes to restrict the rights of individuals to utilize their property as the individuals deem appropriate and beneficial. We already have a system of localized zoning that was enacted on the premise of facilitating careful and reasoned deliberation by placing authority over land use decisions in the hands of local elected officials and members of zoning boards who are most familiar with the needs of the local community and the landowners. Local zoning authorities are charged with basing their decisions on substantial, competent evidence and within the context of a comprehensive plan, which require careful and thoughtful review at the ground level in the locus to which they pertain.

G. CONCLUSION

Senate Bill No. 324 neither attempts to understand the needs of local communities nor is it remotely based upon substantial, competent evidence. Instead, the Bill appears to be an ill-conceived attack on one particular industry. Otherwise, these same terms would apply to other contracts such as oil and gas or agricultural leases. There simply is no justifiable basis to intentionally injure the property rights of our citizens when all of us are already protected by basic contract law and the local authority and discretion to implement zoning. To pass this Bill is to show utter disregard for the United States and Kansas Constitutions and to tread upon the principles of free market capitalism that have served our State and nation so well.