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Summary of the Testimony of

Alan Claus Anderson, Vice-Chair, Polsinelli Energy Practice Group

Before the House Committee on Energy, Utilities and Telecommunications

Regarding House Bill No. 2273

February 18, 2019

My name is Alan Claus Anderson and I am an attorney and the Vice-Chair of the Polsinelli law firm's Energy Practice Group. Polsinelli is a law firm with nearly 900 lawyers with offices across the United States, and we are fortunate to work for clients using all technologies of energy production from oil, gas, and coal, to renewable energies such as wind and solar.

Thank you for allowing me to appear before you today to discuss the many fatal flaws of House Bill No. 2273 (the "Bill"). My testimony includes information on the following:

- **The Bill violates the Kansas Constitution and the County Home Rule Act:** Counties have been granted Home Rule rights to conduct the business uniquely affecting their citizens, and this Bill degrades such recognition of authority.
- **The Bill violates the Kansas Zoning Enabling Act:** Zoning is an action requiring tremendous forethought and knowledge of local conditions, and this Bill flatly disregards the processes and procedural protections afforded to Kansans.
- **The Bill implicates the Federal and State Constitutions:** This Bill tramples upon the goals of essential due process protections for landowners and their property rights.
- **The Bill substitutes local experience and expertise for bureaucratic fiat:** Counties have made choices as to how to zone based on their individual experiences with nearly two decades of operating wind projects. This Bill undermines the value of such knowledge and experience.
- **There is no scientific or engineering basis for the proposed regulations:** This Bill disregards nearly twenty years of precedent data and experience with operating wind projects, instead implementing absurd restrictions and propositions with no basis in fact.
- **The State has no power to preempt the Federal Aviation Administration with regard to navigational lighting:** The FAA has exclusive jurisdiction over lighting requirements. This Bill both fails to recognize this, and proposes a dangerous supplementation of FAA authority.
- **The Bill violates the freedom of contract:** By preemptively restricting confidentiality in future contracts, the Bill creates an impairment to the freedom of individuals to contract.
- **The Bill is so vague as to be unworkable**: Many of the provisions of the Bill are vague to the point of being impossible to competently implement.
- **The Bill would impose enormous costs on counties in the form of an unfunded mandate:** There are Counties that have determined it is not in their best interest to budget for the items that this Bill would require, thus diverting funds from issues that these Counties wish to fund.
- **The Bill creates regulatory uncertainty and harms the State's ability to compete for business.**

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Chairman Seiwert 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. Thank you for allowing me to appear before you today to discuss the many fatal flaws of House Bill No. 2273 (the "Bill").

A. Overview

Polsinelli is a law firm with nearly 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 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.

Currently you have before you House Bill No. 2273. In this testimony I am going to lay bare the technical and legal flaws that make it unworkable, in addition to discussing the intrinsic qualities of this Bill that make it poisonous to this State's long-held support of the United States and Kansas Constitutions, belief in the freedom to contract, support of free market capitalism, the understanding of the benefits of local control of land use, the protection of property rights, and the support of intelligent and competent evidence in our decision making. I also want to be clear that this Bill will cripple the renewable energy industry in our state and usurp the rights of local communities, schools, Kansas businesses, industry employees and property owners.

B. The Bill Violates the Kansas Constitution and the County Home Rule Act

Injury to property rights, and an attack on the free markets, should only be inflicted upon citizens after careful deliberation, and only when justified by indisputable evidence. Fortunately, the Kansas Constitution and Statutes provide us additional 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 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 and values. Even at this local level, 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 property rights.

In direct contrast to the Home Rule policy of Kansas, House Bill No. 2273 would strip away the rights of cities and counties to determine their local affairs and to self-govern in the most fundamental of ways. In addition to trampling on the Constitution, and an open disdain for free market capitalism, this Bill demonstrates an attempt at government overreach into the rights bestowed upon the Counties to determine their own individual procedures for zoning applications, and encroaches upon substantive zoning decisions, such as allowable setbacks.

C. THE BILL VIOLATES THE KANSAS ZONING ENABLING ACT

The Kansas Zoning Enabling Act gives cities and counties the power to enact planning and zoning laws and regulations "for the protection of the public health, safety and welfare."[3] The Zoning Enabling Act also sets forth specific steps for the adoption of zoning regulations. These steps include the creation of a planning commission, the development of a comprehensive plan, the drafting and adoption of subdivision regulations, the drafting and adoption of zoning regulations, and the review and issuance of special use and building permits.[4] These steps require public notice and public hearings before any decisions are made.[5] Such notice and hearings are critical because they facilitate participation and feedback from the individuals directly impacted by the decisions.

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[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).

[3] K.S.A. 12-741(a).

[4] K.S.A. 12-741 *et seq*.

[5] *See, e.g.*, K.S.A. 12-747, 12-749, 12-756.

The statute addressing the comprehensive plan requires that it include incredibly fact-specific considerations:

> (a) The general location, extent and relationship of the use of land for agriculture, residence, business, industry, recreation, education, public buildings and other community facilities, major utility facilities both public and private and any other use deemed necessary; (b) population and building intensity standards and restrictions and the application of the same; (c) public facilities including transportation facilities of all types whether publicly or privately owned which relate to the transportation of persons or goods; (d) public improvement programming based upon a determination of relative urgency; (e) the major sources and expenditure of public revenue including long range financial plans for the financing of public facilities and capital improvements, based upon a projection of the economic and fiscal activity of the community, both public and private; (f) utilization and conservation of natural resources; and (g) any other element deemed necessary to the proper development or redevelopment of the area.[6]

Further, Kansas law requires that the local government review and reconsider the comprehensive plan at least once each year. The proposed Bill not only fails to reference the statutorily-mandated comprehensive plan process, it utterly disregards the critical importance of this localized review process and its role in informing the reasonableness of zoning decisions. Instead, the proposed Bill proposes to circumvent all of the local considerations and regular updates built into the comprehensive plan process.

We must always remember why our great State has had the insight to require comprehensive planning and to require the consideration of significant evidence: because zoning laws affect, and can ultimately injure, the property rights of our citizens. Property rights are protected by the United States and Kansas Constitutions and, for better or worse, zoning interferes with free market capitalism. The action of zoning, which inherently restricts property rights, must be done sparingly and with intense deliberation, neither of which are allowed by House Bill No. 2273. Rather, the Bill prevents property owners from making their own decisions regarding the best and most economic use of their property and usurps the role of local elected officials to evaluate restrictions and conditions on development proposals that are appropriate given the unique characteristics of the project and the county in which it is located.

Specifically, Subsection (d) of the Bill runs afoul of the Zoning Enabling Act because it would allow county commissions the unfettered authority to impose "any other reasonable requirements" on a wind energy facility by resolution of the county commission without the necessary input from the public and substantial evidence required by the Kansas Zoning Enabling Act. This encroaches on the role of the planning commission and the input of the public that would otherwise be obtained from public hearings on zoning regulations and allows for unreasonable and discriminatory zoning decisions. Moreover, for un-zoned counties, the Bill authorizes a process that would result in ad-hoc zoning with no comprehensive plan or generally-applicable zoning ordinances.

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[6] K.S.A. 12-747.

This type of incoherent application of zoning is likely illegal under Kansas law, but it also shows an appalling apathy to the United States and Kansas Constitutions, local control of zoning and the cherished concept of free markets.

D. 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.*"[7]

When a statute or local ordinance is enacted that takes away the ability for a landowner to use his or her property as most economically efficient, 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 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. As discussed further below, the system of localized zoning 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.

House Bill No. 2273 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. There simply is no justifiable basis to intentionally injure the property rights of our citizens when all of us are already protected by local authority and discretion to implement zoning. To pass this Bill is to show utter disregard for the United

[7] The Concise Encyclopedia of Economics, 2008.

States and Kansas Constitutions and to tread upon the principles of free market capitalism that have served our State and nation so well.

E. 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 used zoning regulations to attract businesses, other local communities have used zoning to encourage sustainable development, and yet other local communities have determined that their needs are best served by remaining un-zoned. Some communities have studied and adopted zoning provisions governing wind energy projects that describe setbacks and other restrictions that the local County has determined are reasonable and appropriate for its residents. In each case, the decisions were made based on community involvement and input. The 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 blanket restrictions on land use, and inflict injury on property rights, without any consideration of the unique interests of each 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, House Bill No. 2273 is attempting to take away the right of private citizens to make use of the great wind resource that exists on their land through state-imposed regulations on private property rights. This control over the wind resource, as contained in this Bill, 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.

Since the first Kansas wind project was developed in the late 1990's and constructed in 2001, numerous counties across the State have experienced the significant benefits that wind projects bring and have developed regulatory regimes tailored to the specific needs of their local communities. They have done this based upon real experience instead of discredited, internet-based charlatanism. No fewer than 24 counties across the State are currently directly benefitting from wind projects within their borders, and that number is consistently growing. Many counties, such as Ellsworth, Ford, Gray, Kingman, Lincoln, and others, have decided to host multiple projects within their communities after experiencing first-hand how much the

opportunities of hosting wind energy projects outweigh the costs. Revenues derived from these projects have been used to improve county infrastructure, emergency services, schools, and colleges across the state, and directly bolstered the bottom lines of countless Kansas farms and ranches.

Every county has the right govern land use complimentary to its own community's goals and shared beliefs. This Committee should not allow such local experience and expertise to be undermined by bureaucratic fiat from Topeka, especially when it comes from those who do not have experience in wind energy overriding the deep experience of those who do.

F. THERE IS NO SCIENTIFIC OR ENGINEERING BASIS FOR THE PROPOSED REGULATIONS

As previously stated, 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 "All persons, for injuries suffered in person, reputation or property, shall have remedy by due course of law."

There is simply no legitimate scientific or engineering basis for the proposed setbacks and other restrictions contained in House Bill No. 2273. If you believe we must be cautious when we injure our citizens' property rights, the cavalier and irresponsible terms contained in this Bill will be an affront to your sensibilities. Fortunately, we have nearly two decades of experience with operating wind energy projects in Kansas. The direct evidence of those projects contradicts the rationality of the terms contained in House Bill No. 2273, especially when considering the legally dubious nature of taking rights away from the citizenry. There are so many successful wind energy projects operating in this state, established with rational and scientific-based siting protocol, that this Bill becomes even more malodorous.

G. THE STATE HAS NO POWER TO PREEMPT THE FEDERAL AVIATION ADMINISTRATION WITH REGARD TO NAVIGATIONAL LIGHTING

If there was to be any more glaring provision that shines light upon the recklessness of House Bill No. 2273, and the poorly conceived and drafted terms contained therein, it is Subsection (d)(3). While it is clear that the authors know little or nothing on the topic of wind energy project siting, we must address the actual danger caused by giving consideration to such an ill-conceived piece of legislation.

The Federal Aviation Administration ("FAA") has exclusive jurisdiction over airspace and navigational lighting on structures over 200 feet and certain other structures based on their distance from airports.[8] The FAA has particular expertise with regard to navigational lighting requirements to ensure the safety of aircraft, pilots and all individuals and it is the only governmental body with authority to approve such lighting systems on wind turbines. Neither wind energy developers nor state political bodies have purview over this vital function.

Nevertheless, Subsection (d)(3) of the proposed Bill would impose restrictions on the use of navigational lighting, regardless of the safety requirements directed by the FAA. Instead of

[8] 49 U.S.C. 40103; 14 C.F.R. 77.9.

the FAA-mandated safety protocol, House Bill No. 2273 specifically requires such lighting to only be activated by infrared or other radar technology used to detect nearby aircraft and prohibiting activation absent such technology. The recklessness and danger such a provision represents should not be taken lightly.

This radar based technology is in its infancy and has not been approved by the FAA for broad deployment, and would only be allowed on a case-by-case basis, if at all. Many projects will not qualify for such systems and, to require them, would put people's lives in danger. The FAA alone has the authority to analyze each wind energy project and determine the exact lighting protocol for the specific wind energy project based upon its characteristics. Thus, the proposed Bill is illegal, in addition to reckless. The Bill's impertinent attempt to preempt the FAA's exclusive jurisdiction is striking evidence that the Bill is ill-conceived, and also that it is, quite literally, dangerous.

H. THE BILL VIOLATES THE FREEDOM OF CONTRACT

As recently stated in an article by Professor David Pierce, the preeminent property law and oil and gas professor in the state of Kansas, "[f]reedom of contract is the foundation of the American economy and our capitalist society."[9] 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"[10] and "[t]he paramount public policy is that freedom to contract is not to be interfered with lightly."[11]

If your sensibilities were not shocked enough by this Bill's thorough contempt for the United States and Kansas Constitutions, free market capitalism, local control of land uses, and the safety of our citizens, this Bill also attacks the freedom of contract in Subsection (f). In this subsection, the Bill prohibits non-disclosure of terms contained in a private contract between consenting parties. The inclusion of non-disclosure terms is the right of private, consenting parties. It is also commonplace for the protection of the parties' ability to negotiate future contracts at arms' length. The legality of Subsection (f) is dubious enough, but the fatuity of its inclusion is clear. Any Kansas legislator, with even a modicum of belief in the freedom to contact, cannot be comfortable with a Bill that assaults this basic liberty with such ardor.

I. THE BILL IS VAGUE AND UNWORKABLE

It is a basic principle of Constitutional due process that an enactment of a statute is void for vagueness if its prohibitions are not clearly defined. Subsection (a)(6) of the Bill defines "Residential property" as "any single-family dwelling, multifamily dwelling that contains two or more separate residential dwelling units, rural home site or farm home site that has been used as a residence within the last three years." Subsection (b)(1) then prohibits wind turbines from being located within 12 times the system height or 7,920 feet, whichever is greater, from any "residential property" or "public building." The terms "rural home site," "farm home site" and

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[9] 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.
[10] *Kansas Power & Light Co. v. Mobil Oil Co*., 426 P.2d 60 (Kan. 1967).
[11] *Foltz v. Struxness*, 215 P.2d 133, 139 (Kan. 1950), quoting 12 Am. Jur., Contracts 172, p. 670.

"public building" are all undefined, and therefore the identification and setback calculation cannot be determined.

Additionally, Subsection (b) states that the setbacks shall be "measured from the end of one blade in a horizontal position." This appears to require a measurement from an elevated blade to a structure on the ground, which would be difficult for counties to administer with accuracy.

These basic errors, again, show the slapdash nature of this Bill.

J. THE BILL WOULD IMPOSE ENORMOUS COSTS ON COUNTIES

In addition to the previously discussed disrespect to the United States and Kansas Constitutions, free market capitalism, local authority, and safety of our citizens, the Bill also results in an unfunded mandate by the State. This Bill places a requirement upon every County to create an application to be used by wind energy project developers and then forces every County to have, or hire, the expertise to review a long list of state-imposed requirements, including a detailed site plan that shows all turbines, accessory structures, buildings and setback compliance. The magnitude of the task of verifying each requirement contained in House Bill No. 2273 would necessitate a very real expenditure that the State would mandate on each County. This type of unfunded mandate on each County is ill-conceived and imprudent.

K. THE BILL CREATES REGULATORY UNCERTAINTY AND HARMS THE STATE'S ABILITY TO COMPETE FOR BUSINESS

If House Bill No. 2273 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 above. In the meantime, the ability of the State of Kansas to compete for business would be severely damaged. In addition to wind energy companies fleeing the state, the Bill would incentivize wind 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, 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 indicate 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 resource 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.

L. 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 from our representatives. 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. 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 and even attempts to place their citizens at risk due to the Bill's clumsy attempt to circumvent the Federal Aviation Administration's comprehensive rules. If this Bill were to pass, it would eliminate wind energy projects in Kansas and, therefore, the harvesting of the wind resource 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.