Re: Testimony before the Senate Utilities Committee
Senate Bill 331
February 9, 2004

Chairman Clark and Members of the Committee:

I appreciate this opportunity to present my testimony before the committee in favor of amending Senate Bill 331 to require the recordation of leases or easements involving wind resources and technology to produce and generate electricity.

I have practiced law for 33 years in Cimarron, Gray County, Kansas. In the last several years on behalf of clients I have reviewed wind generator easements in Gray, Hamilton, Ford, Chase, Butler, and Morris counties in Kansas. Without exception, each of these easements has prohibited the farmer from recording the full easement and has prohibited the farmer from disclosing the contents of the easements to any third party and has required that the easement be maintained as confidential.

I believe that full copies of the wind generator easements should be recorded for several reasons, among which are the following:

1. Public Policy. The reason we have the recording act and maintain in each county an office for the Register of Deeds is so that we will know who owns our lands and the burdens to which they are subject. Occasionally we as a state have departed from this goal; for example, we allow people to transfer real estate by deed to trusts and do not require the recordation of the trust. In my judgment, that has been an unwise decision; trying to determine who is the Trustee and what are the Trustee's powers and when is a purported conveyance from the trust a violation of the trust consume a great deal of time and energy of the lawyers and title companies across the state. We should not repeat that mistake of allowing unrecorded instruments to control the ownership and disposition of Kansas real estate by permitting wind generation easements to go unrecorded.

2. Unfair Advantage. My experience in numerous Kansas counties, and in speaking with lawyers and farmers in Iowa and North Dakota that also have wind farms, has been that the power companies absolutely and totally refuse to negotiate or to bargain over the terms of the easements. Their two favorite ploys in negotiations are to claim first, that the banker/lender will not allow any deviation from the standard form of the contract, or to argue that they have a company policy to the effect that all landowners will receive the same treatment and that no landowner will be preferred or treated better than another, so therefore they must keep all of the easement agreements uniform.

My experience with oil and gas lessees over the years has been that while they make the same sorts of argument, I can go to the courthouse and obtain a copy of all of the leases of all of the neighbors and then go to other counties and obtain copies of all of the leases the company has written in other counties, enabling me to see for myself whether they are treating everyone exactly the same, and I can also see what the competition is doing.

Historically, "secret" deals have not been good for society. I do not see that "secret" wind farm easements will benefit the residents of the state of Kansas.

3. Future Events. Without a recorded easement, future owners and others dealing with the landowner in the future will not be aware of the terms of the unrecorded wind farm easement. This concerns me a great deal, and let me give you but one example of my fears:

Without exception, every one of the wind farm easements I have read contains an indemnification clause. The landowner/farmer agrees to indemnify the owner of the wind generator against anything that occurs on the land as the result of the farmer's actions on the land or the actions of others permitted on the land by the farmer. If the farmer gives permission to someone to hunt pheasants on the real estate and the hunters mistakenly shoot a wind generator rotor, or if the farmer contracts with a custom wheat harvester who inadvertently starts a wheat field fire and the heat warps a rotor, then the farmer is absolutely liable and must reimburse the wind generator owner. There are no exceptions to this clause, and it

is a draconian provision that makes the farmer into an insurer and guarantor of the wind generator owner. In all of the oil and gas leases I have read, and in all of the utility easements I have examined, I have never before come across any provision with such far reaching and potentially catastrophic consequences. Nevertheless, the wind generator owners will not negotiate the removal of this clause and refuse to budge on it.

Fifteen years down the road, when farmer Jones wants to sell the quarter of land where the wind generator is situated, do we really want to create a situation where farmer Smith unknowingly purchases the real estate subject to this kind of unrecorded adhesion clause? It seems to me that as a society, if we are going allow third parties to use a farmer's land only if the farmer agrees to insure, indemnify, and guarantee that no harm will come to the third party on the farmer's land, then the least we should do is require public notice so innocent purchasers in the future can make an knowledgeable decision about whether they wish to assume this kind of liability.

Thank you for considering my remarks.

Very truly yours,

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