



Since 1894

TESTIMONY

To: Senate Utilities Committee
Senator Jay Emler, Chairman

From: Allie Devine, Vice President and General Counsel
Kansas Livestock Association

Date: February 2, 2005

Re: SB 93, Eminent Domain Powers

The Kansas Livestock Association (KLA), formed in 1894, is a trade association representing over 6,000 members on legislative and regulatory issues. KLA members are involved in many aspects of the livestock industry, including seed stock, cow-calf and stocker production, cattle feeding, grazing land management and diversified farming operations.

Good Morning, my name is Allie Devine, I am Vice President and General Counsel for the Kansas Livestock Association. I am here today representing KLA and asking for your support and passage of SB 93.

KLA requested that SB 93 be introduced after a series of discussions about wind energy among our members. Over the past several years, our members have debated what role the state and our association should play in the development of policy for the advancement of wind energy. As you may already know, we have members who strongly support and those who strongly oppose the development of wind energy.

Last fall, KLA formed a special working group of KLA members to review the recommendations of the Governor's Task Force on Wind Energy and various pending county regulatory proposals. Despite our differences of opinion, KLA members agreed that the power of eminent domain should not be granted to utilities or wind developers to take private property for wind development.

Today, landowners and wind development companies negotiate easements for the placement of towers, and power lines. Easements may also restrict uses of the property so as to not interfere with normal agricultural activities or with wind generation. These easements are VOLUNTARY. The parties negotiate and agree to terms. It is this voluntary siting of wind generation facilities that our members want to preserve. If a

landowner wants wind turbines or wind infrastructure equipment on his/her property then they should be allowed to negotiate for it. If they do not want such equipment, they should not be forced from their land.

The fundamental issue here is preservation of private property rights. The Fifth Amendment (Takings Clause) of the United States Constitution provides that private property shall not be taken or damaged for public use without compensation. The state has the ultimate power of eminent domain but may delegate that authority to other public authorities within Constitutional restraints. In Concerned Citizens, United, Inc. v. Kansas Power and Light Company 215 Kan. 218, 523 P.2d. 755. The Court noted that the legislature "has the inherent power of eminent domain limited only by Constitutional restrictions. Such power may be delegated by the legislature to any public authority to be exercised as directed." (See generally Heim, *Eminent Domain and the Kansas Eminent Domain Procedures Act*, Kansas Legislative Research Department, October 6, 2004)

K.S.A. 17-618 is one of the statutes that delegates the power of eminent domain to various entities for a variety of purposes including the generation of electrical currents. SB 93 proposes to restrict the use of the power of eminent domain for the siting and construction of wind powered electrical generators or turbines; and for the siting or construction of electrical transmission lines to or from any wind powered electrical generator or turbine.

Many citizens believe that wind developers do not have the power of eminent domain, as these entities are generally not classified as utilities. However, K.S.A 66-131 provides that a wind development company may seek a certificate of convenience from the Kansas Corporation Commission. Once granted, the certificate under K.S.A. 17-618, allows the company the power of eminent domain. These certificates are limited to a specific geographic location. This opens the door to the use of eminent domain. We are asking the legislature withdraw this delegation of authority by passing SB 93 and remove the threat of eminent domain from the wind debate.

We look forward to working with you. Thank you for your consideration.

THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

2004.12.20 16:45:59
Kansas Corporation Commission
By Susan K. Duffy

Before Commissioners: Brian J. Moline, Chair
Robert E. Krehbiel, Commissioner
Michael E. Moffet, Commissioner

In the Matter of the Application of Elk River Windfarm, LLC) Docket No.
for a Certificate of Public Convenience to Transact the) 05-ERWE-499-COC
Business of an Electric Public Utility in the State of Kansas.)

CERTIFICATE

NOW, there comes on for consideration and determination by the State Corporation Commission, of the State of Kansas (Commission) the application of Elk River Windfarm, LLC (Applicant) as captioned above, for a Limited Certificate of Convenience and Necessity to construct and operate a wind power project (project) in a portion of Butler County. After giving due consideration to the application and being fully advised in the premises, the Commission finds and concludes that:

1. Although the project planned by Applicant is qualified for exemption under K.S.A. 66-104(e), Applicant, at its option, seeks a limited certificate to operate as an electric public utility.
2. The application in the instant docket was filed with this Commission on the 2nd day of December 2004. There have been no interventions. A public hearing was not held on the instant application.
3. Applicant seeks a limited certificate in this application to operate a wind power project in Butler County near Beaumont, Kansas. The project consists of approximately 100 wind turbines and attendant electric facilities as described and shown on maps and exhibits attached to the application. Applicant requests authority to sell at wholesale the output of electric energy from the project to Empire District Electric Company (Empire). Applicant states it has no current plans to offer retail electric service in Kansas.

4. Applicant requests a limited certificate to transact the business of an electric public utility in the territory and to the extent described as follows:

The property is all of the following tracts or parcels of land, situated in the County of Butler, State of Kansas, more particularly described as follows:

BUTLER COUNTY

- The East 1/2 of Section 32, Township 28 South, Range 8 East;
- All of Section 33, Township 28 South, Range 8 East;
- All of Section 4, Township 29 South, Range 8 East;
- All of Section 5, Township 29 South, Range 8 East;
- The East 1/2 of the Northeast 1/4 and the East 1/2 of the Southeast 1/4 of Section 16, Township 28 South, Range 8 East;
- The South 1/2 of the Southeast 1/4 of Section 29, Township 28 South, Range 8 East;
- All of Section 21, Township 28 South, Range 8 East;
- All of Section 28, Township 28 South, Range 8 East;
- The Southeast 1/4 of Section 17, Township 28 South, Range 8 East;
- Lots fifteen (15), sixteen (16), seventeen (17) and eighteen (18) of Section 31, Township 28 South, Range 8 East;
- Lots one (1), two (2), three (3), four (4) and eighteen (18) of Section 6, Township 29 South, Range 8 East;
- The South 1/2 of the Northeast 1/4 and the Southeast 1/4 of Section 6, Township 29 South, Range 8 East;
- The East 1/2 and Lots one (1), two (2), fifteen (15), sixteen (16), seventeen (17) and eighteen (18) of Section 19, Township 28 South, Range 8 East;
- The Southeast 1/4 of Section 18, Township 28 South, Range 18 East;
- The Southwest 1/4 of Section 17, Township 28 South, Range 8 East;
- All of Section 20, Township 28 South, Range 8 East;
- All of Section 29 (less the South 1/2 of the Southeast 1/4), Township 28 South, Range 8 East;
- The West 1/2 of Section 32, Township 28 South, Range 8 East;
- The East 1/5 of Section 30, Township 28 South, Range 8 East; and
- The East 1/5 of Section 31, Township 28 South, Range 8 East.

In addition, Applicant requests transmission rights only in and along the two optional routes for a 345 KV electric transmission line and other attendant facilities necessary to connect the wind power project with a nearby Kansas Gas and Electric Company 345 KV electric transmission line shown on maps marked as Exhibit B-1 and B-2 of the application herein

5. There are two other electric suppliers certificated in the area described in paragraph 4 above. Westar and Butler have been provided notice of this application and have filed no objection.

6. Increased electricity production would enhance the availability and affordability of power to the benefit of the Kansas public generally. Interconnection with the Kansas electric grid is necessary to achieve such benefit. The issuance of the certificate, including the authorities and obligations associated with it would serve the public convenience and necessity.

7. Because the public convenience will be promoted by permitting Applicant to transact the business of an electric wind power generation utility in the territory and to the extent described in previous findings herein, the application should be granted and a limited certificate issued in accordance with the provisions of K.S.A. 66-131.

IT IS, THEREFORE, BY THE COMMISSION CONSIDERED AND CERTIFIED:

That the application in the instant docket is granted and Elk River Windfarm, LLC is permitted to transact the business of an electric wind power generation utility in the territory described in paragraph 4 above.

A party may file a petition for reconsideration of this order within 15 days of service. If the order is mailed, service is made upon mailing and three (3) days are added to the above time period.

The Commission retains jurisdiction of the subject matter and parties for the purpose of entering such further order or orders as it may deem necessary.

BY THE COMMISSION IT IS SO ORDERED AND CERTIFICATED.

Dated: **DEC 20 2004**

Moline, Chair; Krehbiel, Com.; Moffet, Com.

ORDER MAILED

DEC 21 2004


EXECUTIVE DIRECTOR

Executive
Director

SFAL

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